CHAPTER I: INTRODUCTION

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A. Need for Action

Victims of child abuse and neglect come before magistrate judges for protection from further harm and for timely decision-making regarding their future. In response, judges make critical legal decisions and oversee social service efforts to rehabilitate and maintain families, or to provide permanent alternative care for child victims. These oversight responsibilities require a large portion of the court's attention, workload and resources as the reported number of child abuse and neglect cases grows each year.

Public awareness of the tragedy of physical and sexual abuse of children has led to a recent explosion in court referrals. The problem has been exacerbated by poverty, the impact of drug-exposed mothers and infants, HIV Syndrome, the continuing dissolution of the family unit, and the growing recognition that child victims are often found in violent families. Throughout the United States, child abuse and neglect proceedings in the juvenile and family courts have been transformed by new demands placed upon the courts. These demands have included escalating judicial caseloads, increasingly difficult cases, and a significant new role assigned to juvenile and family courts in abuse and neglect cases.

In the 1970s, juvenile and family courts were expected only to determine whether a child had been abused or neglected and, if so, whether the child needed to be removed from home or placed under court or agency supervision. At present, however, courts are expected to make sure a safe, permanent, and stable home is secured for each abused or neglected child. This change has been brought about by major federal foster care reform legislation, the Adoption Assistance and Child Welfare Act of 1980 and major revisions in state laws.

As a result of recent changes in federal law such as the enactment of the Adoption and Safe Families Act[1], and significant revisions in Idaho's Child Protection Act[2], Idaho courts must take a more active role in decision-making in abuse and neglect cases. More complex issues are now decided in each case, more hearings are held, and many more persons are involved. To perform their expanded oversight role, courts need to understand how IDHW operates and what services are available in the community for endangered children and their families.

[1] Pub. L. 105-89, Nov. 19, 1997, 111 Stat. 2115.
[2] Idaho Code § 16-1601 *et seq.*

B. Key Principles

In response to the emerging crisis in the area of child protection, the Idaho Supreme Court convened the Committee to Reduce Delay for Children in Foster Care – now called the Child Protection Committee. The committee, under the leadership of the Honorable Bryan Murray, is studying the best way to improve Idaho court processes in the child protection area. The committee is comprised of diverse membership including representatives from the courts, prosecutors, public defenders, private attorneys, health and welfare, private social workers, juvenile corrections, and legal education.

With the support of federal court improvement funding, the committee conducted an extensive study of the child protection system in Idaho. Surveys were sent to large groups of stakeholders and live focus group meetings were held in a number of locations throughout the state. A consultant was hired to evaluate the data that was gathered and to make recommendations to the courts based on the study results. In addition, the committee has examined the child protection system in other states. The committee continues to monitor the child protection system throughout the state by reviewing pilot projects and through committee representation form every judicial district in the state.

The work of the Idaho Supreme Court has been informed by the requirements of the federal Adoption and Safe Families Act, and also by resolutions of the Conference of Chief Justices and the Conference of State Court Administrators.[3]

The committee's work has been guided by the following principles.

1. Avoid Unnecessary Separation of Children and Families

Consistent with child safety, families should be preserved, reunified, and strengthened so they can successfully rear their children. Judges must use their legal authority to ensure that social and protective services are immediately available to families whose children have been placed at risk of abuse or neglect so that parents have a fair opportunity to become competent and safe caretakers. The services should be easily accessible, adequate, appropriate and delivered in a culturally competent framework. The child's family, barring insurmountable safety issues, is usually the first choice for permanency.

2. Make Timely Decisions in Child Abuse and Neglect Cases

For children, the prolonged uncertainty of not knowing whether they will be removed from home, whether and when they will return home, when they might be moved to another foster home, or whether and when they may be placed in a new permanent home is frightening. This uncertainty can seriously and permanently damage a child's development of trust and security. Courts must use tight case flow management practices, including full and complete knowledge at the earliest possible point in the court proceeding. This is often referred to as "front-loading" the system and includes practices such as early identification and

[3] The Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution at their annual meeting in August, 2001 encouraging the use of the Adoption and Permanency Guidelines proposed by the National Council of Family and Juvenile Court Judges. This manual has been substantially adapted from the NCJFCJ Guidelines, with their permission.

involvement of fathers and other relatives, as well as early voluntary involvement of the family in remedial services. Other important caseflow management practices include credible court dates with tight control over continuances and rapid distribution of the court's orders to all parties. These practices avoid unnecessary delays in the court process.

3. Implement Procedures to Identify and Comply with Indian Child Welfare Act

Delays for children can often be cause because the child is not identified as an Indian child, Indian Child Welfare Act[4] requirements are not complied with and collaboration and consultation with the Indian child's tribe does not occur. Throughout this manual ICWA requirements are discussed. A thorough overview of ICWA is provided in Chapter XI.

4. Provide Close Judicial Oversight of Abuse and Neglect Cases and Practice One Family/One Judge

The best practice is that one judge preside over the entire child protection case from the shelter care hearing through permanency, including, where appropriate, adoption. Following a case from start to finish offers the judge an opportunity to see the impact decisions have made on the child, creates the best possibility of ensuring that case plans relate to the specific needs of the child and family, and allows for development of perspective about cases. Judicial monitoring must continue until a permanent home is finalized and the court can close its case. Judges must use the full extent of their authority to protect children and to keep children and other family members safe. Judges must hold all participants in the proceedings, including state and local agencies, accountable to provide reasonable and necessary services to children and families.

In many of Idaho's smaller counties one family/one judge is a necessary reality! The 2001 revisions to the Child Protection Act requiring the filing of petitions to terminate parental rights as a motion in the child protection case is designed to further ensure that our courts move toward the one family /one judge concept. The revisions are aimed at ensuring that the same judge that hears the CPA case will also hear the termination case.

5. Provide Competent and Adequately Compensated Representation

All parties in child welfare proceedings should be adequately represented by well-trained, culturally competent, and adequately compensated attorneys or guardians *ad litem*. Such representation should be available at the earliest opportunity, preferably at the first hearing, but no later than the second hearing after the petition is filed.

6. Implement Systems to Gather, Analyze, and Use Information to Improve Court and Child Welfare Processes

Courts must understand how they are managing their caseloads in terms of numbers, time lines and outcomes for abused and neglected children. They must use technology to create management information systems that can ensure compliance with statutory time limits, track overall compliance with goals, analyze trends, and evaluate the effectiveness of programs and policies. Such systems not only provide important research and evaluative information to help the court improve outcomes for children, but also provide information to

[4] 25 U.S.C. §§1901, *et seq*.

justify increased resources when needed.

7. Engage in Judicial Leadership

Judges must ensure that their courts provide efficient and timely justice for children and their families. They must ensure that their juvenile and family court system has the capacity to collect, analyze, and report aggregate data relating to judicial performance, including the timely processing of cases to achieve permanency for children under court jurisdiction. Judges must convene and engage the community in meaningful partnerships to promote safety and permanence for children.

8. Promote Collaboration with Child Welfare Professionals and the Community

The court must encourage and promote collaboration and mutual respect among all participants in the child welfare system, including social service agencies, prosecuting attorneys, attorneys for parents, guardians *ad litem*, tribal representatives and staff, community members, court staff, Court Appointed Special Advocate (CASA) volunteers, citizen reviewers, foster parents, and any other relevant participants. Judges must also help the community to understand that child protection is a community responsibility. By regularly convening child welfare professionals, and by regularly appearing in the community to inform the community about the child welfare system and to encourage volunteer participation, judges can set a tone of cooperation and mutual responsibility throughout the professional and private communities in their jurisdictions.

9. Recognize Prioritized Preferences for Permanency

It is critical for judges to understand that foster care is a temporary setting and not a place for children to grow up. If the safety of the child precludes the preferred option for permanency – reunification with the biological parents – is not possible, continuation of foster care is rarely an acceptable alternative. Nor is a living situation with a relative that is not legally secure or permanent an acceptable alternative. When reunification is not appropriate, the next preferred option is adoption by a family with whom the child has a positive existing relationship, such as a relative, foster parent, or adopting family of a sibling. The next preferred option is adoption by a family recruited for the child. A court should consider permanent custody or permanent guardianship as a permanent plan only when adoption has been ruled out or under other exceptional circumstances. In order to meet the definition of permanency, custody or guardianship must provide certain legally secure components.

10. Ensure Timely Decision-Making and Placement Stability

Timely decision-making at all stages of the child protection process, from shelter care through the reunification or implementation of the permanency plan, must be ensured by the courts. The clock is ticking for these children and everything possible must be done to either speed reunification or to provide them with a new permanent home as quickly as possible. Examples of methods to reduce unnecessary delays include:

> **Concurrent Planning –** Idaho law requires IDHW to engage in concurrent planning.[5] Such planning is crucial to reduce delays in achieving a child's

[5] Idaho Code § 16-1617(c). Concurrent planning is defined as "a planning model that prepares for and implements different outcomes at the same time." Idaho Code § 16-1602(n).

permanency should reunification efforts fail. It is the responsibility of the court to ensure that IDHW is pursuing concurrent planning.

Alternative Dispute Resolution Techniques – The court should have alternative dispute resolution processes available to the parties so that trials can be avoided whenever possible and appropriate. Such systems should include family group conferencing, mediation and settlement conferences. These systems expedite sound decision-making and avoid lengthy appeals because they often produce full or partial agreement of the parties.

11. Believe in the Adoptability of All Children

Judges should not use the concern that an adoptive home may not be found for a child as a reason not to move forward with termination of parental rights. Failure to proceed with termination of parental rights in most cases when a child cannot be safely reunified practically ensures that the child will not achieve permanency.

12. Consider Adoption with Contact

This term describes a variety of arrangements that involve the birth family, other individuals who were a positive part of a child's life before entering an adopting home, and the child who now resides with adopting parents. This contact occurs both prior to and after the adoption is finalized. It can range from sending birthday cards to the child or providing pictures to the biological parents (directly or through neutral third parties) to regular visitation. The determining factor as to whether adoption with contact is appropriate must always be the best interests of the child, not the desires of the adults. Adoption with contact recognizes that many children who move into new families through adoption are old enough to have established strong relationships with biological parents, siblings and others and that completely severing these relationships may not be in the child's best interests.

13. Provide Expedited Appeals

An expedited appeals process for cases involving termination of parental rights and adoption is crucial to permanency. Whether accomplished by court rule or by legislation, appellate courts at all levels should give the highest priority to hearing these appeals and issuing final decisions. Idaho Appellate Rule 12.1, adopted by the Idaho Supreme Court in 2002, provides for an immediate permissive appeal to the Idaho Supreme Court from the Magistrate Court in cases involving the custody of a minor, termination of parental rights or adoption if such an appeal is in the best interests of the child.

14. Ensure Frequent Review after Termination of Parental Rights to Achieve Timely Adoptive Placements and Timely Adoption Finalizations

When parental rights have been terminated, the court must commit to frequent review of the case until the child has been placed in an adoptive home and the adoption has been finalized. For the group of children for whom adoptive homes require intensive recruitment, these reviews are critical. Judges must move out of the courtroom and into the community, raising community awareness that these are our children who need new families. Judges must engage the community in the effort to find a permanent home for every child.

15. Understand the Need for Post-Adoptive Subsidies and Services
The availability of post-adoptive subsidies and services can be the determining factor in the long-term success of many adoptions of children with special needs. Judges should have a vested interest in the quality, quantity, and accessibility of post-adoptive services available to families who adopt children with special needs.

If the court and child welfare systems are working effectively and following these key principles, children will be less damaged by the uncertainty of their existence and by multiple moves at the point they are legally freed for adoption. The lives of these children will be significantly improved and the number of children who find themselves with parental rights terminated but no new permanent home in sight will be significantly reduced over time.

C. Case Management

1. Judicial Leadership

The Magistrate has the responsibility to protect the rights of parties before the court and ensure safe, permanent homes for abused and neglected children. Among the most pressing judicial concerns in abuse and neglect cases are the principles of treatment, rehabilitation, family preservation, and permanency planning. Child protection agencies, service providers, guardians *ad litem* and attorneys all play critical roles in child abuse and neglect cases. For the child welfare system to function in the best interests of children, it is essential that all these major participants discharge their responsibilities in an effective and responsible manner. Ultimately, however, children are placed pursuant to court orders. Therefore, the court has the responsibility to hold the entire system accountable. To discharge this responsibility, the court in child protection cases must have authority commensurate with the task assigned.

The following are some of the possible bases for a court to revise or overturn agency decisions concerning services, case plans, child placement, interagency disputes, or visitation:

- Agency action is contrary to law.
- Agency recommendations are not in accord with the evidence presented at the hearing. The proposed disposition will not adequately address the abuse or neglect that the court found the parents to have committed.
- Evidence before the court demonstrates the futility or inappropriateness of action proposed by the agency.

The court must insist that the proposed plan or disposition is complete and, when it is not, must direct the agency to respond. The court's oversight role also includes the application of sanctions against parties, who fail to appropriately respond to court orders.

Judicial responsibility for impartiality does not preclude judicial leadership. Judges handling child protection cases can be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families. Judges can be active in the development of policies, laws, rules, and standards by which the courts and their allied agencies and systems function. Judges can inform the community of the unique and diverse needs of troubled children and their families. The very nature of the office mandates that the judge act as an advocate and convenor to assure that needed services for children and

families are available and accessible. Judges should encourage the continuing education of all who serve in the juvenile and family court system, including themselves. Professional training topics should encompass cultural competence and gender fairness, as well as interdisciplinary education among all court-related disciplines.

Judges must have the authority by statute or court rule to order, enforce, and review delivery of services and treatment for children and families. The judge must be prepared to hold all participants accountable for fulfilling their roles in the court process and the delivery of services. The judge must oversee the process of determining what services are to be provided to abused and neglected children and their families. The judge must also oversee the determination of where foster children are to be placed, the terms of agency case plans, the resolution of disputes between different public agencies, and the terms of visitation.

2. Case Flow Management

Court administrators recently have developed new techniques to reduce litigation delays, collectively known as "case flow management." Effective case flow management is essential in abuse and neglect cases because it is essential to successful permanency planning. Permanency planning means achieving permanent placements for abused or neglected children within a relatively short period of time, either through their safe return home, or their placement in a new, legally secure permanent home. Sound case flow management by juvenile and family courts is needed to ensure that delays in the court process do not interfere with the timely achievement of permanency. Case flow management also helps the court monitor the agency to make sure the case is being moved diligently and decisively toward completion.[6]

The following are the basic tools of case flow management:

- judicial leadership and commitment;
- standards and goals;
- a monitoring and information system;
- scheduling for credible trial dates; and
- judicial control of continuances.

An additional key characteristic of case flow management in child abuse and neglect cases is the use of direct calendaring.

Time standards implemented through ISTARS (the Idaho Court system's administrative computing system) for tracking CPA and termination cases are in the process of being re-evaluated. Time standards, although imposed by statute and court rule, are not currently tracked by ISTARS in CPA cases after the order taking jurisdiction of the case. Time standards for post adjudication are being considered. Standards for the handling and joint scheduling of CPA and termination cases are also being considered. In the absence of time standards for post adjudication it is incumbent upon the individual judge to ensure the timely processing of cases.

[6] *See* M. SOLOMON AND D. SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE (1987); AMERICAN BAR ASSOCIATION, DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM (1986)

a) Judicial Commitment and Leadership

The court must demonstrate an unmistakably strong commitment to timely decisions in child abuse and neglect cases. It must communicate to its own employees, the attorneys practicing before it, and the child welfare agency that timely decisions are a top priority. It must conduct and participate in educational programs concerning the elimination of delays. The court also must make necessary organizational adjustments related to delays, in cooperation with court and agency staff. The court must design explicit processes to ensure timely hearings and must make sure all judges and administrative staff implement them.

b) Standards and Goals

Specific and detailed timetables for the different stages of litigation are essential to an effective delay-reduction program. There must be explicit deadlines for shelter care, adjudication, planning, review, and permanency hearings. This manual makes specific recommendations as to each of these hearings. There must be specific deadlines for the initiation and completion of termination of parental rights proceedings. These limits should be incorporated into court rules and made legally binding upon the court. The court should ensure that IDHW staff are informed of the judicial and statutory deadlines for the filing of reports. Serious breaches of court deadlines must be brought to the attention of the administrative judge.

Court staff should operate a computerized data system capable of spotting cases that have been seriously delayed, and capable of measuring court progress in case flow management. This information system should maintain statistics on the length of time from case filing to case closure. The system should also monitor the length of key steps in the litigation, such as petition to adjudication, petition to disposition, and termination of parental rights petition to final written findings of fact and conclusions of law. These statistics should be periodically reported and used to evaluate the effectiveness of case flow management.

c) Scheduling for Credible Court Dates

In the great majority of cases, the court should hold hearings on the date that they are originally scheduled. To make this possible, attorneys and parties must understand that trial dates are firm. Pretrial conferences should be routinely scheduled prior to contested hearings to resolve preliminary issues and to arrive at a time estimate for the hearing. Such a pretrial is required by Idaho law, prior to the adjudicatory hearing.[7] There should be no major interruptions in contested hearings. It should be unusual for a contested hearing to be reset to be completed at a later date. The early appointment of counsel and other representation is another important factor in scheduling firm trial dates. Attorneys for parents and children must be present and actively involved in the very first court hearing and all hearings thereafter.

Another way to keep hearings on schedule is to set hearing dates in open court with parties and advocates present to receive a written court order specifying the date and time of the next hearing. The order should also specify actions to be taken by each party, including

[7] Idaho Code § 16-1615(b). *See* discussion of the Adjudicatory Pretrial and the Adjudicatory Hearing in Chapter V of this Manual.

social service personnel, and list appropriate timelines. The order should be written in easily understandable language so that all parents and other non-lawyers understand clearly what actions are required before the next hearing.

d) Court Control of Continuances

The court must have a firm and effective policy on continuances. Continuances should not be allowed because hearing dates prove inconvenient for attorneys and parties. Continuances should be granted only when attorneys or parties are ill, essential witnesses cannot be located, or service of process has not yet been completed. Neither should continuances be granted based upon the stipulation of the parties. Administrative personnel should not be authorized to grant continuances. The reason for any continuance should be included in the court record. As the result of these procedures, it should be difficult or impossible to avoid court continuance policies.

One of the results of a firm policy discouraging continuances is better use of judicial resources. With strong policies discouraging continuances, and with pretrial conferences and calendar calls in contested matters, few hearings should need to be rescheduled at the last minute. With a strict policy against continuances and an adequate number of judges, all hearings can be set for a time certain. This includes even the most routine matters such as case review hearings. When cases are set for a time certain, typical waiting time can be less than 20 minutes, with hearings occasionally being delayed up to an hour or more. Reduction of waiting time for agency caseworkers and other witnesses can result in major reductions in government expenditures.[8]

D. Access to Competent Representation

The Magistrate Judge in a child protection case should take active steps to ensure that the parties have access to competent representation. Attorneys and other advocates determine, to a large extent, what information is presented to a judge. Each party must be competently and diligently represented in order for juvenile and family courts to function effectively.

1. Attorneys

Attorneys present information to the court through opening statements, questions, and answers. A judge must receive complete and accurate information in order to make a well-informed decision. This will not occur unless attorneys are competent and diligent. Counsel must thoroughly investigate the case and prepare a list of issues and questions in advance of court hearings to ensure that the judge has complete and accurate information. Much of the initiative for decisions and actions comes from attorneys in the form of motions and petitions. If attorneys fail to take timely action to correct errors or to resolve cases, the quality and time lines of the court's decision-making suffers.

Throughout the United States, there is an extraordinary range in the quality of counsel in child abuse and neglect cases. Even within the State of Idaho, the quality of representation varies greatly. The quality of counsel ranges from the worst inactivity and incompetence

[8] *See* MARK HARDIN, HOW TO WORK WITH YOUR COURT: A GUIDE FOR CHILD WELFARE AGENCY ADMINISTRATORS (1993).

(e.g., attorneys who meet their clients only shortly before hearings) to attorneys with a high degree of dedication and skill. Courts have a great ability to positively influence the quality of counsel. Courts can set prerequisites for appointments, including requirements for experience and training. Some courts require attorneys to attend training and "second chair" cases before taking an appointment to a child abuse or neglect case. Some courts have implemented video taped training sessions to speed the eligibility of attorneys for appointments. Courts also can set specific standards for how parents and children should be represented, including the obligation to continue representation through all stages of the case. Courts can impose sanctions for violation of their standards, which might include the termination of an attorney's appointment to represent a specific client, the denial of further appointments, or even fines or referral to the Bar committee for professional responsibility.

The court can play an important role in training attorneys in child abuse and neglect cases. Judges and judicial officers can volunteer to provide training and publications for continuing legal education seminars. Before becoming involved in an abuse and neglect case, attorneys should have the opportunity to assist more experienced attorneys in their jurisdiction. They should also be trained in, or familiar with:

- legislation and case law on abuse and neglect,
- foster care, termination of parental rights, and adoption of children with special needs,
- the causes and available treatment for child abuse and neglect,
- the child welfare and family preservation services available in the community and the problems they are designed to address,
- the structure and functioning of the child welfare agency and court systems,
- the services for which the agency will routinely pay; and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.

Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in the home must be available.

After attorneys are assigned or retained on an abuse and neglect case, they should do the following:

- Actively participate in every critical stage of the proceedings, including but not limited to hearings on adjudication, disposition, periodic case review, permanency planning, termination of parental rights, and adoption.
- When necessary to protect the interests of the client, the attorney should introduce and cross examine witnesses, file and argue motions, develop dispositional proposals for the court, and file appeals.
- Thoroughly investigate the case at every stage of the proceedings. Attorneys should know, among other things, the family's prior contacts with the child welfare agency; who made the decision to bring the case to court; the basis for state intervention, including the specific harm state intervention is supposed to prevent; and what alternatives, including voluntary in-home services and placement with relatives, were considered prior to initiating court proceedings.

- If the child has been removed from the home, determine what contacts the agency has since made with the parents and the child, and what efforts were made to reunify the family prior to the preliminary protective hearing.
- Conduct a full interview with the client to determine what involvement, if any, the child welfare agency has had with the parent or child; what progress the parents and child have made; and what services the client (parent or age-appropriate child) believes would be helpful. In preparation for such proceedings as adjudication, disposition, periodic review, and termination of parental rights proceedings, interview key witnesses including child welfare agency personnel, key service providers to the child and family, representatives of other key agencies, and others with knowledge of the case.
- Review all documents that have been submitted to the court.
- Review the agency's file and any pertinent law enforcement agency reports to evaluate the case and to ensure that the agency has complied with its own procedures and regulations.
- Obtain or subpoena necessary records, such as school reports, medical records and case records.
- When necessary arrange for independent evaluations of children or parents.
- Stay in regular contact with clients, writing letters and making telephone calls when necessary and using tickler files.
- Continue to remain in contact with the agency and monitor case progress between court hearings.

2. Guardians *ad Litem*/Court Appointed Special Advocates (GALs/CASAs)

Recent legislative developments have recognized children's need for independent representation in dependency proceedings. The Child Abuse Prevention and Treatment Act of 1974 required states receiving federal funds for the prevention of child abuse and neglect to provide a guardian *ad litem* (GAL) for every child involved in such proceedings. Idaho law requires that a guardian *ad litem* be appointed for the child in a child protection case.[9] The court must also appoint an attorney for the guardian. If no guardian is available, Idaho law requires that an attorney be appointed for the child. Most counties in Idaho appoint trained citizen volunteers as GALs, through the Court Appointed Special Advocates ("CASA") program. CASAs are specially screened and trained volunteer guardians *ad litem* (GALs) appointed by the court to speak up for the best interests of abused and neglected children. They review records, research information, and talk to everyone involved in the child's case. They make recommendations to the court as to what is best for the child and monitor the case until it is resolved. Both trained volunteers and attorneys must play a significant role in providing GAL representation for children. In jurisdictions where there is role conflict and confusion, there should be joint efforts to clarify and define mutual responsibilities. Juvenile and family courts must continue to examine methods of using both volunteers and attorneys to improve the representation of children involved in dependency proceedings.[10]

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[9] Idaho Code § 16-1612

[10] Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L. Q. 127 (1993).

E. Voluntary Agreements for Services and/or Care

Idaho law allows parents to enter into voluntary agreements with IDHW for the temporary placement of a child in foster care or for the delivery of services to the family and the child while the child remains in the home. These agreements, which are entered into prior to court involvement, are often referred to as voluntary agreements for care or for services. Voluntary agreements can serve useful purposes. They can provide a way for the department to deliver early intervention services to a family in an effort to avoid removing a child from the home. In cases where a short-term placement is necessary for a defined purpose, such as when a parent enters inpatient hospital care, a voluntary agreement can allow the temporary placement of a child without unnecessarily involving the court and expending its scarce resources. Voluntary agreements can provide a method of immediately placing children in foster care with parental consent prior to initiating court involvement. This can avoid the need for emergency removal.

Voluntary agreements, however, can be misused. Without proper safeguards on voluntary agreements, agencies can place children for extended periods without court involvement, thus circumventing court review of agency efforts. Voluntary agreements also can be misused to place children in foster care under circumstances where the agency lacks sufficient cause to seek court-ordered placement of the child. To prevent misuse of voluntary agreements, IDHW regulations provide that a voluntary agreement for out-of-home-placement should not last more than 180 days. Voluntary agreements should be used judiciously, and all voluntary agreements should be time limited. The agreements should automatically expire after a short, defined period of time, and should be extended only with the agreement of all parties to the agreement. Voluntary agreements should be used only when it is apparent that each involved parent was a full and able participant in the agreement process.

A voluntary agreement should always be in writing and on the appropriate IDHW form that explains the parents' rights: the right to reasonable visitation with the child; the right to be consulted on decisions regarding the child's care and placement; and the right to revoke the agreement upon proper notice to the agency. IDHW’s regulations require it to prepare a service plan whenever a child is placed pursuant to a voluntary agreement. The case plan should provide, at a minimum, each treatment goal that must be achieved for during the course of the agreement including, the commitments to be made by the family, the services to be provided, and the terms of contact and/or visitation. If the goals of the plan are not met within 180 days, a child protection action should be initiated. To prevent misuse of voluntary agreements, judges should review each agreement when cases involving them become active with the court. If a judge notices a pattern of misuse of voluntary agreements, he or she can seek corrective action by bringing the problem to the attention of appropriate administrators within IDHW. If a child has been placed inappropriately pursuant to a voluntary agreement, a judge may find (when appropriate) that the agency failed to make reasonable efforts to prevent or eliminate the need for placement of the child.

F. Emergency Orders

Idaho law allows the removal of an allegedly abused or neglected child prior to issuance of a court order.[11] The provision is applicable in emergency situations where it may be necessary to take steps to protect a child at or even before the beginning of litigation. It may be necessary to immediately remove a child from home or to expel from the home a parent who is alleged to have abused or neglected the child. While quick and decisive action is sometimes necessary for the protection of the child, it can have a drastic impact on the family. Precipitous and unplanned removal of a child from home or forcible removal of a parent is always traumatic. Once such action is taken, it is difficult to reverse. First, the court must act quickly to ensure protection of the child. Second, the court must provide prompt procedural protection for parents, consistent with the safety of the child. Third, it must move proceedings forward as quickly as possible. Fourth, the court must make as careful and considered a decision as emergency circumstances allow.

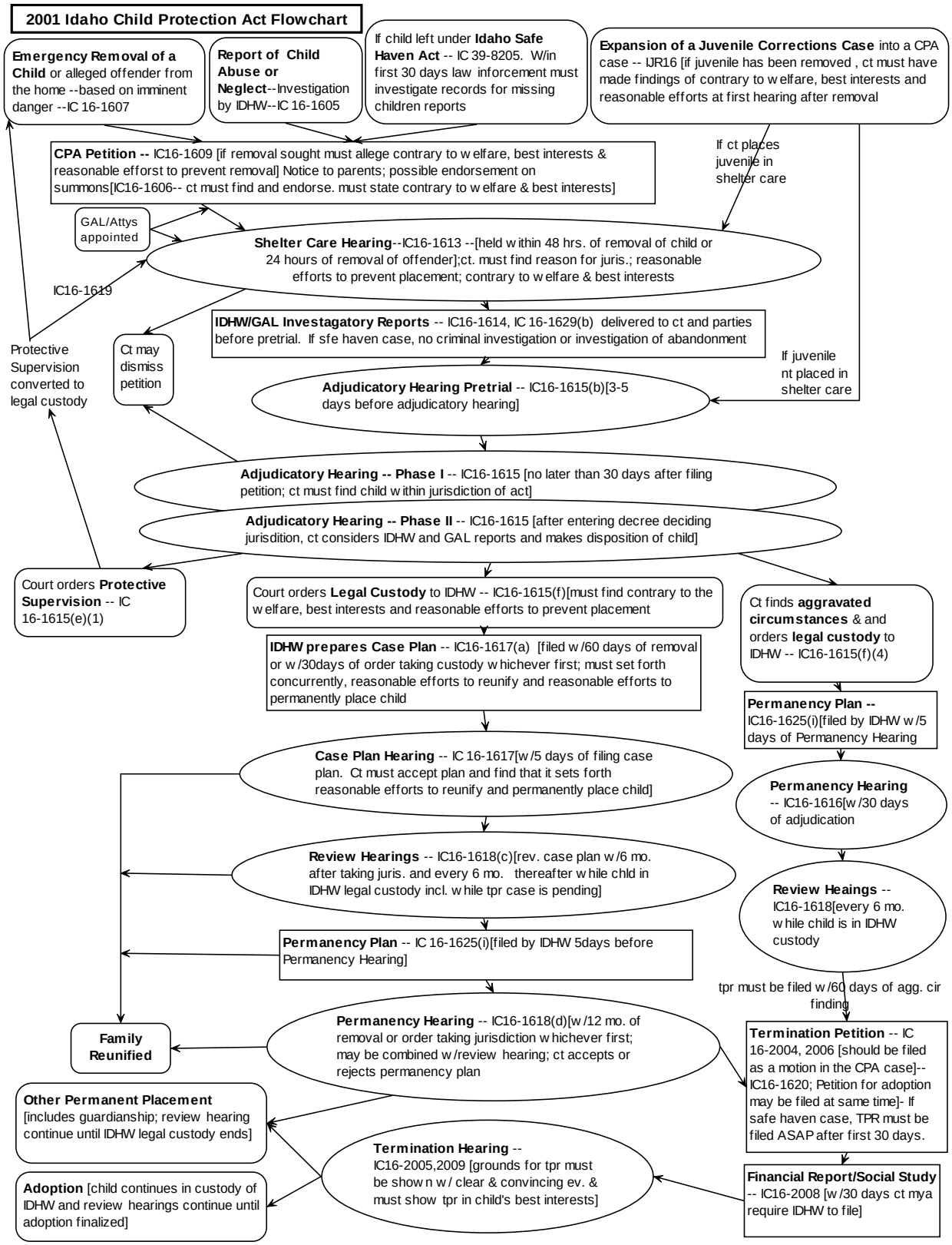
When a child is removed because law enforcement officials have determined that the child is in imminent danger, a notice of police action is left at the child's home and/or with the child's parents. This notice should provide information to the parents about how to contact the court, and, where possible, should contain information about the shelter care hearing schedule and the parent's right to counsel.

Idaho law requires that a shelter care hearing be held within 24 hours of the removal of an offender from the home and within 48 hours of the removal of a child.

G. Overview of Idaho Child Protective Act Case

The following flowcharts and discussion provide an overview of a child protection case in Idaho from start to finish. Each step in the case process is detailed in the chapters of this manual, complete with recommended hearing scripts, forms, and checklists. If at any point in the process, the court determines that the child is an Indian Child under ICWA, the separate flowchart for ICWA cases should be followed.

[11] Idaho Code § 16-1607(2).


2001 Idaho Child Protection Act Flowchart
Emergency Removal of a Child or alleged offender from the home --based on imminent danger --IC 16-1607
Report of Child Abuse or Neglect--Investigation by IDHW--IC 16-1605
If child left under Idaho Safe Haven Act -- IC 39-8205. W/in first 30 days law inforcement must investigate records for missing children reports
Expansion of a Juvenile Corrections Case into a CPA case -- IJR16 [if juvenile has been removed , ct must have made findings of contrary to welfare, best interests and reasonable efforts at first hearing after removal
CPA Petition -- IC16-1609 [if removal sought must allege contrary to welfare, best interests & reasonable efforst to prevent removal] Notice to parents; possible endorsement on summons[IC16-1606-- ct must find and endorse. must state contrary to welfare & best interests]
If ct places juvenile in shelter care
GAL/Attys appointed
Shelter Care Hearing--IC16-1613 --[held within 48 hrs. of removal of child or 24 hours of removal of offender];ct. must find reason for juris.; reasonable efforts to prevent placement; contrary to welfare & best interests
IC16-1619
IDHW/GAL Investagatory Reports -- IC16-1614, IC 16-1629(b) delivered to ct and parties before pretrial. If sfe haven case, no criminal investigation or investigation of abandonment
Protective Supervision converted to legal custody
Ct may dismiss petition
If juvenile nt placed in shelter care
Adjudicatory Hearing Pretrial -- IC16-1615(b)[3-5 days before adjudicatory hearing]
Adjudicatory Hearing -- Phase I -- IC16-1615 [no later than 30 days after filing petition; ct must find child within jurisdiction of act]
Adjudicatory Hearing -- Phase II -- IC16-1615 [after entering decree deciding jurisdition, ct considers IDHW and GAL reports and makes disposition of child]
Court orders Protective Supervision -- IC 16-1615(e)(1)
Court orders Legal Custody to IDHW -- IC16-1615(f)[must find contrary to the welfare, best interests and reasonable efforts to prevent placement
Ct finds aggravated circumstances & and orders legal custody to IDHW -- IC16-1615(f)(4)
IDHW prepares Case Plan -- IC16-1617(a) [filed w/60 days of removal or w/30days of order taking custody whichever first; must set forth concurrently, reasonable efforts to reunify and reasonable efforts to permanently place child
Permanency Plan -- IC16-1625(i)[filed by IDHW w/5 days of Permanency Hearing
Case Plan Hearing -- IC 16-1617[w/5 days of filing case plan. Ct must accept plan and find that it sets forth reasonable efforts to reunify and permanently place child]
Permanency Hearing -- IC16-1616[w/30 days of adjudication
Review Hearings -- IC16-1618(c)[rev. case plan w/6 mo. after taking juris. and every 6 mo. thereafter while chld in IDHW legal custody incl. while tpr case is pending]
Review Heaings -- IC16-1618[every 6 mo. while child is in IDHW custody
Permanency Plan -- IC 16-1625(i)[filed by IDHW 5days before Permanency Hearing]
tpr must be filed w/60 days of agg. cir finding
Permanency Hearing -- IC16-1618(d)[w/12 mo. of removal or order taking jurisdiction whichever first; may be combined w/review hearing; ct accepts or rejects permanency plan
Family Reunified
Termination Petition -- IC 16-2004, 2006 [should be filed as a motion in the CPA case]-- IC16-1620; Petition for adoption may be filed at same time]- If safe haven case, TPR must be filed ASAP after first 30 days.
Other Permanent Placement [includes guardianship; review hearing continue until IDHW legal custody ends]
Termination Hearing -- IC16-2005,2009 [grounds for tpr must be shown w/ clear & convincing ev. & must show tpr in child's best interests]
Financial Report/Social Study -- IC16-2008 [w/30 days ct mya require IDHW to file]
Adoption [child continues in custody of IDHW and review hearings continue until adoption finalized]

1. Reporting and Investigation

A child protective act case can be initiated several different ways in Idaho. A report of child abuse or neglect may be made to the local law enforcement officials or the Department of Health and Welfare. When this happens, generally an investigation is initiated by IDHW pursuant to Idaho Code § 16-1605. Law enforcement officials may remove a child from her or his home on an emergency basis while investigating a criminal complaint because they determine that the child is in imminent danger. Idaho Code § 16-1607. A child protection case also begins when a child is abandoned under the Idaho Safe Haven Act. Idaho Code §§ 39-8202 to 8207.

A child protection case may also be initiated when a Juvenile Corrections Act proceeding is expanded by the judge pursuant to Idaho Juvenile Rule 16.

Chapter II of this manual deals with the reporting and investigation stages of a CPA case. The chapter outlines the approach taken by IDHW in investigating a CPA case and reviews the protocols and instruments used by IDHW in evaluating a case. The chapter also reviews the law enforcement materials relating to law enforcement response to allegations of abuse and neglect and law enforcement investigations of abuse and neglect.

2. Initiating the Case

In cases involving emergency removal or investigation of a report of abuse, the case is immediately referred to the local prosecutor's office or to the deputy attorney general assigned in some counties to handle child welfare issues and a petition and summons are prepared pursuant to Idaho Code §§ 16-1609 and 16-1610. Such a referral also occurs when a child is abandoned pursuant to the Safe Haven Act. The petition must allege:

- the facts which bring the child within the jurisdiction of the act – that the child has been the victim of abuse or neglect, is homeless, or is residing in an unstable home environment;
- the name, birthdate, sex, and residence of the child;
- the names, birthdates, sex, and residences of all the other children living at or having custodial visitation at the home where the alleged injury to the child occurred;
- the names and addresses of the child's parents, guardians, or other custodians;
- if the parents, guardians, or custodians cannot be found in the state of Idaho, the names and addresses of any adult relative of the child found within the state;
- the existence of any legal document such as a divorce decree, custody decree, stipulation, or parenting agreement controlling the custodial status of the child, the terms of the child's custodial status as well as whether parent(s) having custody under such a decree or order have been notified of the child's placement;
- whether the child is in shelter care and the facts and circumstances of that care.

If the child has been or will be removed from the home, pursuant to Idaho Code § 16-1609(b)(9), the petition must also contain the following allegations:

- that remaining in the home was contrary to the welfare of the child;
- that vesting custody of the child with IDHW would be in the child's best interests; and

- that reasonable efforts have been made to prevent removal of the child from her home or that reasonable efforts to prevent placement were not required because the parent subjected the child to aggravated circumstances.

If relevant to the particular case, pursuant to Idaho Code § 16-1615(f)(4), the petition should also contain allegations of aggravated circumstances:

- that the parent subjected the child to abandonment, torture, chronic abuse, sexual abuse;
- that the parent committed murder or voluntary manslaughter; that the parent aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter;
- that the parent committed a felony assault that resulted in serious bodily injury to a child of the parent; or
- that the parental rights of the parent to a sibling have been involuntarily terminated.

Three types of relief can be sought in the petition: protective supervision, legal custody in IDHW, or legal custody in IDHW after a finding of aggravating circumstances.

If the child has not yet been removed from the home pursuant to the emergency removal provisions of the act, but remaining in the home is determined to be contrary to the child's welfare and removal is in the child's best interest, an endorsement may be placed on the summons permitting the removal of the child from the home pursuant to Idaho Code § 16-1610(d). In ordering an endorsement on the summons, the court must find and the endorsement must state that (1) continuation of the child in her or his present condition or surroundings is contrary to the welfare of the child, and (2) that custody with IDHW would be in the child's best interests.

Chapter III of this manual deals with initiating a CPA case. In addition to covering the petition and endorsement on summons, Chapter III also covers service of process, notice, the initial role and appointment of the Court Appointed Special Advocate (CASA) and/or attorney for the child, and appointment of attorneys for indigent parents.

As mentioned earlier a child protective act action may be initiated under Rule 16 of the Idaho Juvenile Rules, when a court sitting in a Juvenile Corrections Act case grants a motion expanding the case to a child protection action. Chapter II will also cover the Rule 16 expansion process.

3. Shelter Care

Where the child has been abandoned pursuant to the Safe Haven Act or has been removed from the home pursuant to the emergency removal provisions of the CPA act, pursuant to an endorsement on the summons, or pursuant to the court's order under I.J.R. 16, the case must proceed to a shelter care hearing pursuant to Idaho Code § 16-1613. In addition, where an offending parent has been removed from the home, the case must also proceed to the shelter care hearing. This hearing must be held within 48 hours of the removal of an of the child from the home and within 24 hours of the removal of an offender from the home.

If GALs and attorneys have not been appointed, such appointments will be made at the

shelter care hearing.

At the shelter care hearing, the court may order that the child remain in the temporary legal custody of IDHW, if it finds that:

- a petition has been filed;
- there is reason to believe the child comes within the jurisdiction of the act;
- reasonable efforts to prevent placement of the child in shelter care could not be provided because of immediate danger to the child or reasonable efforts to prevent placement of the child were made and were unsuccessful;
- the child could not be placed in temporary sole custody of a parent having joint legal or physical custody;
- it is contrary to the welfare of the child to remain in the home;
- it is in the best interests of the child to remain in the temporary custody of IDHW pending the adjudicatory hearing;
- reasonable efforts to prevent placement could be affected by a protective order safeguarding the child's welfare and maintaining the child in her present surroundings.

If the evidence does not support the finding that temporary legal custody should be placed in IDHW, the court may dismiss the petition or permit the case to go forward but allow the child to remain in her home.

Chapter IV of this manual will cover the shelter care hearing and the roles of the judge, attorneys and GALs at that hearing. It will also cover issues regarding voluntary stipulations.

4. Adjudication

Within thirty days after the filing of the petition the court must hold an adjudicatory hearing. Three to five days before the adjudicatory hearing, a pretrial out of the presence of the court is held. Idaho Code § 16-1615.

During the days leading up to the adjudicatory hearing pretrial, the CASA and IDHW prepare investigatory reports. Those reports must be filed with the court and delivered to the parties before the pretrial. Idaho Code §§ 16-1614, 16-1629.

The adjudicatory hearing is a two phase process. In Phase 1 of the adjudicatory hearing, the court must first determine that the child comes within the jurisdiction of the act. This finding must be based on a preponderance of the evidence that the child is abandoned, neglected, or abused by her parents, guardian or other legal custodian; that the child is homeless; or that the child's parent or other legal custodian has failed to provide a stable home environment. The court's findings and the facts upon which they are based must be made on the record.

If the court does not find that it has jurisdiction, the petition is dismissed. If, however, the court finds that jurisdiction exists, the court should proceed to the second phase of the adjudicatory hearing to consider information relevant to the disposition of the child including the investigatory reports of the CASA and IDHW.

In considering the disposition of the child, the court may order that the child remain in the home under the protective supervision of IDHW, or it may order that legal custody be vested in IDHW.

Finally, in considering the disposition of the child, the court may find that reasonable efforts to prevent placement of the child in foster care are not required based on the courts finding of aggravating circumstances.

The adjudication and disposition process, including the investigatory reports by the CASA and IDHW, the adjudicatory pretrial and the hearing itself will be discussed in Chapter V of this manual.

5. The Planning Hearing

Once the adjudication is completed, the case plan serves as the roadmap for the case. It is through the case plan that concurrent planning for the child will be carried out. The plan must detail both the reasonable efforts that will be made to reunify the child with her family and the reasonable efforts that will be made to achieve a permanent placement for the child. Idaho Code § 16-1617.

Idaho Code § 16-1617(a) requires that the plan must be filed with the court within sixty days of the child's removal from the home or within 30 days of the court's order taking custody of the child, whichever comes first. Within five days of filing the plan with the court, the court must hold a planning hearing. At the planning hearing, the court must decide whether to accept, reject, or modify the case plan. Idaho Code § 16-1617(d). Once the case plan is approved by the court, it is entered into the record of the case as the court's order.

While the child is in the custody of IDHW, the court must conduct a review of the case plan and the progress made toward both reunification and permanency every six months.

Chapter VI of this manual will discuss the case plan, the planning hearing, and the review hearings.

6. The Permanency Plan and Hearing

The Court must hold a hearing twelve months from the date the child is removed from the home or the date of the court's order taking jurisdiction, whichever occurs first. Idaho Code § 16-1618. Five days prior to the permanency hearing, the department must file its permanency plan. Idaho Code § 16-1625(i).

If the court finds that the child was subjected to aggravated circumstances, no case plan is required. The court must instead hole a permanency hearing within 60 days pursuant to Idaho Code §16-1616

The permanency plan is the document containing the department's final recommendations regarding the possibility of reunifying the child with the family and regarding the department's recommended permanent placement of the child.

Generally, if the department's recommendation is against reunification, a petition to terminate parental rights will be filed in the case at this time. The Idaho Code provides a rebuttable presumption that if the child has been placed in out-of-the-home care for more than fifteen of the last twenty-two months, the department must initiate an action to terminate parental rights. The presumption may only be rebutted by establishing that termination would not be in the child's best interests or by showing that reasonable efforts have not been made toward reunification. Idaho Code § 16-1625(i).

The permanency plan and hearing will be discussed in Chapter VII of this manual. Chapter VII will also discuss permanency options such as adoption, guardianship, long-term foster care, kinship care and independent living.

7. Review Hearings

While the child is in the legal custody of IDHW, review hearings must be held every six months. Idaho Code § 16-1618(c). Chapter VIII covers these review hearings.

8. Termination of Parental Rights

One of the overriding goals of the Child Protection Act is permanency for children. Generally, once a court determines that reasonable efforts to achieve reunification have been made and have failed, the process to terminate parental rights and move to a permanent placement should be made. The termination petition must be filed as motion in the child protective act proceeding. Idaho Code § 16-1620. If an infant has been abandoned or if the court has made a finding that reasonable efforts to reunify the family are not required because of aggravated circumstances, the petition to terminate parental rights should be initiated within 60 days of the abandonment or of the finding of aggravated circumstances.

The termination of parental rights process will be covered in Chapter IX of this manual.

9. Adoption

A number of issue surrounding adoption arise in the context of child protection. Chapter X of this manual will discuss multiethnic placement, adoption recruitment, instate jurisdiction, adoption assistance, post-adoptive subsidies and adoption assistance agreements.

CHAPTER II: Referral & Investigation

Revised June 5, 2007
Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter.

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A. Social Worker's Perspective

1. Reporting of Child Abuse, Abandonment or Neglect

There are several ways in which a child protection case may be reported or an investigation of alleged abuse and neglect of a child may be initiated. A report may be made to local law enforcement officials that a child is endangered in her or his surroundings and should be removed in order to prevent serious physical or mental injury.[1] A report of potential child abuse or neglect may be made to local law enforcement officials or to the IDHW either voluntarily or pursuant to Idaho's mandatory reporting provision.[2] Idaho's child's abuse reporting statute requires any physician, resident on a hospital staff, intern, nurse, coroner, school teacher, day care personnel, social worker or other person who has reason to believe that a child has been abused, abandoned or neglected or who observes the child being subjected to conditions that would reasonable result in abuse, abandonment or neglect, shall report that information to the proper law enforcement agency or the department. If an individual covered by the statute fails to report child abuse, she or he could be charged with a misdemeanor.[3] Reporting parties are immune from liability unless the report is made in bad faith or with malice.[4] A child protection case also begins when a child is abandoned pursuant to Idaho's Safe Haven Act.[5] Or, finally, a juvenile court judge may expand a case that began as a juvenile matter into a child protection case pursuant to Idaho Juvenile Rule 16.

Law enforcement officers often encounter children at risk during routine activities such as serving search warrants or responding to domestic violence complaints. At other times the presence of law enforcement officials is requested to accompany an IDHW worker on a referral. Police officers may declare a child in imminent danger and may remove the child from his or her

[1] Idaho Code § 16-1612(1)
[2] Idaho Code § 16-1605(1)
[3] Idaho Code § 16-1606
[4] Idaho Code § 16-1607
[5] Idaho Code §§ 39-8201-39-8207. This statute is intended to provide an option for a parent of a very young infant who might otherwise abandon the infant under circumstances that would jeopardize the health and safety of the infant.

home and place the child in shelter care.[6] Often law enforcement officials have information from criminal investigations that is valuable for child protection investigations. The social worker, the prosecutor and the guardian *ad litem* should try to determine if any such information is available in each case.

No matter how the initial report is made, IDHW is charged by Idaho law as the official child protection agency of state government and has the duty to intervene in situations of child abuse and neglect.[7] The division of IDHW having primary responsibility in the child protection area is Family and Community Services (FACS).

a. Receiving/recording reports

Regulations adopted by IDHW to implement its responsibility in the area of child protection require it to maintain a regional system for receiving and responding to reports and complaints twenty four hours a day, seven days a week. These regulations also require that each IDHW region publish the phone number of Child Protective Services throughout the region and ensure the accurate recording of as many facts as possible at the time of the report.[8]

b. Responding to reports

IDHW has established a formal protocol for responding to reports of child abuse and neglect. Pursuant to this protocol, reports are initially categorized three ways: 1) reports not within the power of FACS and where safety is not an issue; 2) those reports not within the power of FACS but where there may be safety issues; and 3) those within FACS jurisdiction.

i. Information and Referral.

If the initial referral is a request for information or services not within Family and Community Service's ("FACS") mandates and no safety issues are present, the Protocol requires that a brief information and referral service be provided to the caller. This information and referral may include a referral to an appropriate agency or community resource. This type of referral is then closed and designated "Information and Referral" in the FOCUS[9] Information System.

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[6] Such removals may occur pursuant to Idaho's emergency removal provision, Idaho Code § 16-1608, pursuant to and endorsement on summons, Idaho Code §16-1611(5), or pursuant to the court's findings at a shelter care or adjudicatory hearing, Idaho Code §§ 16-1615 & 16-1619. The emergency removal and endorsement on summons provisions are discussed in detail in Chapter III of this Manual. The shelter care hearing is discussed in detail in Chapter IV of this Manual and the adjudicatory hearing is discussed in Chapter V of this Manual.

[7] *See* Idaho Code §§16-1602(5),(14) and 16-1629. *See also* Idaho Code §§56-204A, 56-204B, 16-2001, and IDAPA 16.06.01.550

[8] IDAPA 16.06.02.552

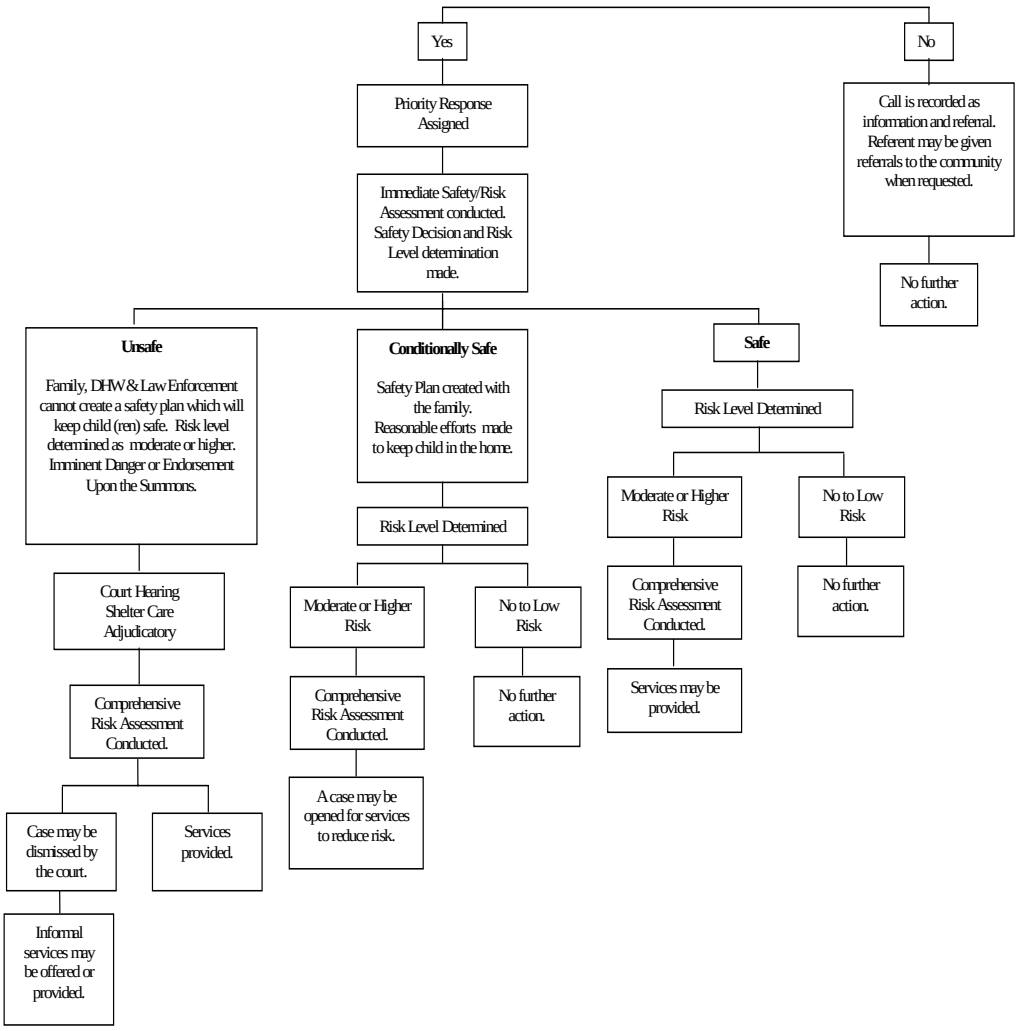
[9] FOCUS is the administrative computing system used by IDHW.

ii. Safety Issues Indicated but not within FACS mandates.

For all emergency situations which appear to be of an immediate life threatening nature, the Protocol requires that the IDHW worker obtain crucial information and immediately notify the appropriate emergency response agency (*e.g.* 911, law enforcement) and the supervisor. When safety issues are present, the worker's responsibility is to direct the caller to appropriate resources regardless of whether the issue falls within FACS authority. The presence of safety issues may mean that the worker should personally notify the responsible agency of the referral.

IDHW Initial Referral Decision Process For Referrals of Child Abuse and Neglect

1. Is there a safety issue? 2. Is it within FACS mandates?



iii. Safety Issues Indicated within FACS mandates.

If the initial referral appears to fall within IDHW authority and safety issues are present, the Protocol requires the worker to do the following:

- ✓ Request additional information from the caller regarding both the caller and the family that is the subject of the call.
- ✓ Search agency records to determine whether other relevant reports regarding the family have been received and their status;
- ✓ Refer the report for action according to the Priority Response Standards adopted by IDHW;
- ✓ Document the report and accompanying information in FOCUS Information System;
- ✓ Fax referral information to local law enforcement.

c. Priority response standards

When a case is within FACS authority, the agency has developed priority response standards.[10] These standards establish time lines for initiating Risk Assessment/Risk Reduction for all safety issues within FACS mandates, based on the information gathered through the initial referral. The priority and scale of IDHW's response is determined by the immediacy of risk of severe physical or psychological harm to the child. Based on available information and professional judgment, a referral may be considered a higher or lower priority than suggested by the standards. Reasons for designating a referral at a lower priority than suggested by the standards must be documented as a variance from the standards by the worker's supervisor.

The FACS worker's response must also be consistent with the local child abuse and neglect multidisciplinary team's protocol. This protocol established by local MDTs, will specify the role of Health and Welfare, law enforcement and the prosecuting attorney's office, as well as the procedures to be followed to assess the risks to the child and the criteria and procedures to be followed to ensure the child's safety.

d. Indian Child Welfare Act considerations

The Indian Child Welfare Act, requires notice to the appropriate tribal authorities whenever an Indian child may be involved in a child protection case.[11] In order to implement the provisions of ICWA, That section provides:

Possible abuse, abandonment, or neglect of a child who is known or suspected to be Indian shall be reported to appropriate tribal authorities immediately. If the reported incident occurs off a reservation, the Department shall perform the investigation. The Department shall also investigate incidents reported on a reservation if requested to do so by appropriate authorities of the tribe. A record of any response shall be maintained in the case record and written documentation shall be provided to the appropriate tribal authorities.[12]

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[10] IDAPA 16-06.01.554 ("The Department shall use the following statewide standards for responding to allegations of abuse, neglect or abandonment, using the determination of risk to the child as the primary criterion. Any variance from these response standards shall be documented in the family's case file with a description of action taken, which shall be reviewed and signed by the Child Protective Supervisor.")

[11] 25 U.S.C. § 1911. ICWA is discussed in detail in Chapter XI of this Manual

[12] The IDHW has adopted IDAPA 16.06.01.556 Reports Involving Indian Children.

e. Priority Guidelines

The Department's Priority Response Guidelines are set forth in Appendix A at the end of this chapter.

2. Child Protection Risk Assessment

Whenever a report of child abuse or neglect is made to IDHW, the department conducts an immediate risk/safety assessment. It has adopted regulations dealing with the risk assessment process.

a. Immediate risk/safety assessment

Pursuant to the IDHW Guidelines and Rules, an immediate risk/safety assessment must be completed within five (5) days of seeing the child. Based on seventeen (17) immediate risk factors, a determination must be made as to the child's safety. The child's safety will be categorized in one of three ways: safe, conditionally safe, or unsafe. A child is considered to be "safe" within the meaning of IDHW's Guidelines when an assessment of available in-formation leads to the conclusion that no children are likely to be at immediate risk of harm at this time.

In a "conditionally safe" situation, a plan is being implemented to resolve identified safety. In a conditionally safe situation, often, IDHW provides reasonable efforts (services) to the family intended to prevent removal of the child from the family. Conditional safety may also include a situation in which there is a credible/feasible plan the family formulates and can implement to keep the child(ren) safe without removal from home. The safety plan is not expected to provide rehabilitation or to permanently change behaviors or conditions. The safety plan controls and manages the situation until a more complete risk assessment can take place and a case plan can be developed with the family.

A child is considered to be "unsafe" if the child is in imminent danger and thus requires removal from home to protect him/her from immediate harm.

b. Overall level of risk.

In addition to making a safety decision, the immediate safety/risk assessment includes a determination of the overall level of risk. This determination represents the level of risk if Family and Children's Services were to discontinue involvement with the family. Overall levels of risk include: (1) no risk to low risk OR (2) moderate risk or higher.

c. Comprehensive Risk Assessment.

In situations where the overall risk is moderate risk or higher and the case remains open, a Comprehensive Risk Assessment must be completed.[13] A copy of the Comprehensive Risk Assessment Standard developed by IDHW is included in this chapter in Appendix C.

3. Dispositioning Reports

Once IDHW completes the comprehensive risk assessment, within five days, it must, according to is regulations, complete a "Dispositioning Report". In this report, the department must evaluate the report of child abuse or neglect and categorize it within one of two categories:

[13] IDAPA 16.06.01.559.04

substantiated or unsubstantiated. The criteria for each of these categories is set forth in the department's regulations.

In addition when a report is determined to be "substantiated," the department's regulations require that information must be entered into the Department Central Registry for the reporting of child abuse, abandonment and neglect.[14]

4. Importance of Using A Multidisciplinary Team Approach

Cases of child abuse, neglect, or abandonment are best handled by using a multidisciplinary team approach (MDT). MDT's are a statutory requirement.

The purpose of using a multi disciplinary team (MDT) approach in cases involving child abuse and neglect is to increase safety for children through improved information sharing, evaluation, and decision making by those agencies who have a legal responsibility to be involved in the investigation and dispositional activities.

a. Additional advantages of the multidisciplinary approach:

- ✓ Positive outcomes in civil and criminal court including lessened likelihood of intimidating court room procedures for children;
- ✓ Reduction in contamination of evidence;
- ✓ Fewer interviews of the child and family members;
- ✓ Improved assessment with more complete and accurate data;
- ✓ Cross training of all systems in the dynamics of child abuse;
- ✓ Shared decision-making, support and responsibility;
- ✓ Reduced role confusion among disciplines;
- ✓ Effective management of difficult cases;
- ✓ Minimizes likelihood of conflicts among agencies; and
- ✓ More comprehensive identification and access to services for the family.

b. Primary role/responsibilities of the prosecuting attorney

- ✓ Provide consultation during child abuse investigations;
- ✓ Initiate of civil and criminal legal proceedings;
- ✓ Determine what specific charges to file;
- ✓ Make decisions regarding plea agreements; and
- ✓ Work closely with the victim-witness coordinator

c. Primary role/responsibilities of law enforcement

- ✓ Gather evidence to support criminal prosecution or civil child protection action;
- ✓ Investigate allegations of child abuse, abandonment or neglect;
- ✓ Enforcement of laws;
- ✓ Ability to remove perpetrator from the family home in child protection cases;
- ✓ Take custody of a child where a child is endangered and prompt removal from his or her surroundings is necessary to prevent serious physical or mental injury to the child;
- ✓ Interview alleged perpetrator; and
- ✓ May interview child victim.

[14] *See* IDAPA 10.06.01.561.

d. Primary role/responsibilities of Department social workers:

- ✓ Make reasonable efforts to prevent the placement of a child when it is safe to do so;
- ✓ Conduct family risk assessment;
- ✓ May petition court for consideration of Endorsement Upon Summons;
- ✓ Child placement responsibility, explore kinship placements;
- ✓ Link family with resources;
- ✓ Develop service plan with family;
- ✓ May interview child victims; and
- ✓ Monitor family's progress and report to the court.

5. Making Reasonable Efforts to Prevent Placement Out of Home

When a child first comes to the attention of an agency as a potentially abused or neglected child, and it appears to the agency that the child may have to be removed for his or her safety, the agency worker should assess, before removing the child, whether there are any goods or services that would likely allow the child to remain safely at home.

In deciding whether to remove a child rather than keep the child at home with services, and in deciding what services to provide, the worker should consider each family individually and do at the least the following:

- ✓ Assess the family situation to determine the likelihood of protecting the child effectively in the home. The worker should identify the specific issues, if any, that place the child at imminent risk of serious harm.
- ✓ Determine whether any available services might effectively address the family's or child's specific issues.
- ✓ Consider alternative ways of addressing the family's needs - short of removal - that would allow the child to be safe when the services regularly provided by the agency appear unlikely to meet the family's needs or have inappropriately long waiting lists.
- ✓ Inform the family about available services that might address the family's or child's issues.
- ✓ Offer the family those services that the agency considers most likely to address the issue creating the risk of the child's removal.
- ✓ Give the family an opportunity to request other services not offered by the agency that the family believes might mitigate the risk of removal.

The department has developed Family Preservation Standards to inform its decisions. Those standards are included in Appendix D.

6. Removal of a Child from His/Her Home

A child may be taken into custody by a peace officer without an order only where the child is endangered in his surroundings and prompt removal is necessary to present serious physical or mental injury to the child. The child may only remain in custody for forty-eight (48) hours without a shelter care hearing.[15]

[15] *See* Idaho Code §§16-1608 & 16-1615. See also Chapters III & IV of this manual.

A child may also be removed from their home based on an Order to Remove the Child.[16] In such a case, an Affidavit in Support of an Order to Remove the Child is filed with the prosecuting attorney or deputy attorney general identifying the issues and the efforts made to eliminate or prevent the removal of the child and why it is unsafe for the child to remain in the home. The prosecutor may then file a Petition and a Motion for an Order to Remove the Child with the court. The court may issue an Order to Remove the Child which is placed on the Summons and which triggers removal of the child from their home and a Shelter Care Hearing must be held within 48 hours of removal.[17]

7. Abandonment of a Child under Idaho's Safe Haven Act

If a child is abandoned pursuant to Idaho's Safe Haven Act, IDHW is does not undertake an investigation of a claim of abandonment unless a conflicting claim of parental rights is made and the court orders the investigation.[18] A copy of IDHW's flow chart for safe haven cases is included in this chapter in Appendix B.

B. Law Enforcement Perspective[19]

1. Introduction

Law enforcement officers tend to view child abuse and neglect not as a social problem, but rather in the context of criminal law.[20] In most States, all or most all forms of reportable child abuse or child neglect are also crimes. As a result, officers generally focus their energy on preservation and collection of evidence for criminal prosecution. Unless they have been trained in the philosophy of child protection, law enforcement officers generally see little importance in family preservation. Many officers believe a parent who abuses or neglects a child has abdicated parental responsibilities and does not deserve to care for the maltreated child. Often officers consider incarceration of the persons responsible for the child's condition as the desirable outcome. As officers gain experience in cases of child maltreatment, they often begin to appreciate the civil protection alternatives FACS offers, the value of casework intervention, and the need for efforts to protect children without resorting to out-of-home placement.

Child abuse and neglect cases represent a departure from more traditional law enforcement cases. Most crime reports can be accepted as generally factual. That is, if Mrs. Jones reports her house has been burglarized, the responding officers can enter the case with the presumption that a crime has occurred and set out to find the person responsible. In child maltreatment cases, however, the officer must first establish that a crime has occurred. He or she cannot assume, in the absence of other evidence, that the injury or sexual assault reported has occurred, and that the child's condition is the result of an individual's actions or willful inaction. In fact, while the research suggests that there are few intentionally false reports of abuse, over half the cases of child abuse or neglect reported to child protective services across the nation do not present

[16] Idaho Code §16-1611(4)
[17] Idaho Code § 16-1615
[18] Idaho Code § 39-8205(2)
[19] This section of materials is taken from the Idaho Peace Officer Standards and Training Materials and is reproduced here by permission. They were originally based on DONNA PENCE & CHARLES WILSON, THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT (1992).
[20] AMERICAN BAR ASSOCIATION, ET AL., LAW ENFORCEMENT/CHILD PROTECTION COOPERATION IN HANDLING OF CHILD ABUSE CASES 10 (1989)

adequate evidence to be substantiated.[21] (Law enforcement officers can expect to see a somewhat higher rate of substantiated cases due to the nature of the cases with which they typically get revolved.) The role of the law enforcement officer and the IDHW social worker, as well, is first to determine if abuse or neglect has occurred, and if so, who is responsible, then decide what actions, if any, are necessary to protect the child. Only then can the officer really focus on collecting the evidence necessary for a criminal prosecution.

2. Specialized Knowledge and Skills

The crimes of child abuse and neglect also present some other unique issues. First, the victim is always a child, and some are very young. The officer's ability to communicate with children is dependent upon his/her understanding of cognitive and language development of children. The crime victims in child abuse and neglect cases are sometimes at a disadvantage in any subsequent legal proceedings because of their age and perceive immaturity. Second, many forms of abuse resemble non-abusive conditions. Inflicted traumatic injuries can resemble injuries from accidents. Some medical conditions may also be initially misdiagnosed as maltreatment, even by trained medical professionals. The situation is especially sensitive when it involves child death. Complicating the investigation further is the fact that child abuse and neglect generally occurs in private places and the victims, for a number of reasons, may actively try to hide the evidence of maltreatment and deny its existence even when approached by an investigator. Therefore, the officer must consider all reasonable alternative explanations for the child's condition.

Law enforcement officers assigned to child abuse investigations must possess special skills. The investigators chosen for this type of work should be able to communicate and empathize not only with the victim but also with the family and the perpetrator. Also, knowledge of the patterns and types of child maltreatment is a necessity for the investigator. In many instances, if the investigator understands the context of child maltreatment and if s/he can talk effectively with the offender, s/he can obtain useful information to support the social worker's report and/or the criminal investigation of the case.

Investigators who work with child abuse cases must receive special training. Specialized knowledge and skills eliminate much of the guesswork on the part of the investigator. Any law enforcement training provided to investigators must focus on the special needs of the victim. It is important for the investigator to realize that the victims of child abuse may suffer both psychological and physiological trauma. Immediate attention to psychological wounds assures greater possibility of successful treatment just as immediate attention to physical wounds assures greater probability of successful medical treatment. Investigators must also be able to share authority with professionals in other disciplines and work in a team environment with child protective services officials if a positive outcome is to be achieved for the child.

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[21] U.S. Dept. of Health and Human Services, National Center on Child Abuse and Neglect, *Study Findings: Study of National Incidence and Prevalence of Child Abuse and Neglect* 6 (1988). *See also How Often Do Children's Reports of Abuse Turn Out to Be False?*, the Leadership Council, http://www.leadershipcouncil.org/1/res/csa-acc.html (2005); *Transfer of Responsibility for Child Protective Investigations to Law Enforcement in Florida: A Supplemental Study*, Penn Social Policy & Practice: Center for Research on Youth and Social Policy, http://www.sp2.upenn.edu/crysp/reports/nij_supplement/index.html (visited 5/11/2006)

3. Law Enforcement Roles

Law enforcement officers play many roles in the community's response to child abuse and neglect.

a. Prevention/advocacy

Because law enforcement officers are seen as a symbol of public safety, they are in an excellent position to raise community awareness about child abuse and neglect. Their perspective on the issue will carry significant weight with the media and the public at large. Because of this, many law enforcement agencies actively participate in community education efforts designed to reduce the risk of child abuse and neglect and encourage reporting. The most common prevention programs are held in school settings and target extra-familial sexual abuse. Officers conducting such programs must balance their presentations with material on abuse by relatives and caregivers if programs are to be effective for most potential victims.

b. Reporting

Because of their presence in the community, law enforcement officers often encounter situations that appear to involve child maltreatment. or example, on domestic calls or during drug arrests the officer may see evidence of harm to a child. Police are, in fact, legally mandated to report any suspected abuse and neglect in all but three States.[22] Nationally, law enforcement makes about sixteen (16) percent of all reports of suspected maltreatment to child protective services.[23]

c. Support to Child Protective Services

It is increasingly important for CPS and law enforcement to work together. One area of cooperation involves law enforcement support to CPS. Sometimes CPS social workers must visit isolated, dangerous locations and deal with mentally unstable, violent, and/or substance controlled individuals. Social workers generally do not have on-site communication (radio, cell phone, etc.), weapons, or special training in self-protection. Because of this and the stabilizing effect that law enforcement personnel have on many people it is often necessary for law enforcement personnel to accompany CPS social workers to conduct their investigations.

Law enforcement officers may accompany CPS social workers based on the location of investigation, the time of night, or history of the subjects involved. Failure to have proper backup has unfortunately resulted in the deaths of several CPS social workers and injuries to many others.[24]

Law enforcement's authority is also much more widely accepted than the CPS authority. Many times CPS social workers are denied access to alleged victims of maltreatment while law enforcement's requests to see the child are honored. The officer with the power of arrest is also in an excellent position to enforce any standing orders of the court. For example, in states such as Idaho that allow warrantless arrests of those violating civil protection orders (upon complaint by the party with the order),[25] the officer may be able to remove an offender from the home who

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[22] LAW ENFORCEMENT/CHILD PROTECTION COOPERATION, *supra* note 19 at 20

[23] *Study of National Incidence and Prevalence of Child Abuse and Neglect, supra* noe 20 at 6-17.

[24] *See, e.g.*, Benjamin Shors, *Man Killed by Deputy After Attack on Worker: CPS Worker Treated in Hospital After Man Attacked Her with a Machete*, Spokesman Rev. February 17. 2005 at B1

[25] Idaho Code § 19-603(6)

has previously been placed under restrictions by the court. In some circumstances, this may avoid the need to remove a child from his/her home.

When it is necessary to remove children from their home, law enforcement officers are often called upon for assistance. Law enforcement has general authority to take custody of children.[26] Although prior Idaho authorized personnel of the Department of Health and Welfare to take custody of children, that authority was rarely used. In 2001, the provision authorizing removal of a child by IDHW personnel was removed from the CPA.[27]

d. Immediate response

Law enforcement is often able to react to emergency situations faster than CPS. If officials learn that a child is being seriously abused or the perpetrator is trying to flee the jurisdiction of the court with a child in state custody, a patrol unit can generally get to the scene much faster than CPS and stabilize the situation until CPS and/or law enforcement investigators can arrive. Law enforcement is also available 24 hours a day while the CPS after hour response is limited in some communities.

e. Investigative role

Law enforcement is the criminal investigative agency in the community and often must investigate the same incident, involving the same people, as CPS. In many communities this involves a parallel investigation where CPS and law enforcement must avoid working at cross proposes. To avoid potential conflict and to improve investigative outcomes, a team approach with CPS and law enforcement working collaboratively is desirable.

There are, however, cases of maltreatment where law enforcement personnel generally work alone or take the lead role. These include child homicides, particularly where no other children are in the home; out-of-home care abuse (in many states); commercial child pornography (these cases often involve law enforcement teams with postal inspectors and the FBI); and organized sexual exploitation of minors (again involving the FBI if state lines were crossed).

f. Victim support

In communities where no victim witness services are available, the law enforcement officer may be called upon to help prepare and support the child victim through the experience of prosecution. This may include taking the child to the courtroom prior to trial to see where everyone sits and explain what each person's role is; it may simply mean being available to a child who wants to talk about what is happening during the trial.

4. The Team Investigation

Increasingly, professionals involved in child abuse and neglect investigations recognize the need to eliminate unnecessary duplication of effort, to promote proper and expeditious collection and preservation of evidence, and to develop a coordinated system for identifying and investigating appropriate cases.[28] This is best accomplished through a team approach, where both CPS and

[26] Idaho Code § 16-1608
[27] 2005 Idaho Sess. Laws 1263.
[28] DAVID J. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 3 (1988)

law enforcement work collaboratively, sharing information, assigning investigative tasks, and participating in a shared decision-making process.[29] As a result of a team effort, the victim is less likely to be further traumatized by the investigation and a positive outcome for all investigative parties is enhanced.

The Tennessee Child Sexual Abuse Task Force found in 1986:

> The team representatives of each discipline (law enforcement, child protective services, and in some cases prosecutors and mental health) bring their various expertise to be utilized as part of the total investigative process. By applying their expertise as part of a coordinated effort the Team members can work more efficiently and effectively. The independent goals of each discipline are still met with the only difference being thin the investigative process will be coordinated through the Team. All Team members will not actually work all aspects of the investigation, but all will actively coordinate the total process drawing from the resources available through all involved disciplines and other disciplines as needed.[30]

Law enforcement brings to the team "expertise in the collection and preservation of evidence, in crime scene examination, and in taking statements and confessions."[31] Law enforcement can also make arrests and present the criminal case in a lawsuit through obtaining warrants, presenting the case at a preliminary hearing or grand jury and in criminal court. CPS social workers often have greater experience in interviewing children (victims and siblings), in assessing the risk of further abuse, in arranging for medical or psychological exams and services, and in working with the protective alternatives of juvenile or family court. Law enforcement can take children into custody, but the CPS agency must provide foster care services.

Other members of an investigative team might include the prosecutor or agency attorney who assesses the evidence as it is collected and then formally prosecutes the case. The prosecutor can assist in preparing search warrants, preparing witnesses, advising on legal issues involved in the investigation, and providing general direction and guidance. Mental health professionals also provide consultation to investigators on the clinical needs of the victim and others involved in the investigation, help interpret psychological information secured, and offer guidance on interviewing strategies with children and adults. To facilitate team operation, Idaho law provides for multi-disciplinary teams.[32] As the participants in a national consensus building conference on CPS/law enforcement cooperation concluded, the protocol should include:

- ✓ statement of purpose;
- ✓ discussion of joint and respective missions and organizational responsibilities;
- ✓ types of cases covered (e.g., sexual abuse and serious or potentially serious cases of physical abuse);
- ✓ procedures for handling cases, including special investigative techniques;
- ✓ criteria for child's removal;

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[29] ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 13 (1984)
[30] TENNESSEE DEPARTMENT OF HUMAN SERVICES, CHILD SEXUAL ABUSE TASK FORCE: CHILD SEXUAL ABUSE STATE PLAN (1986)
[31] LAW ENFORCEMENT/CHILD PROTECTION COOPERATION, *supra* note 19 at 31.
[32] Idaho Code § 16-1617

- ✓ criteria for arrest of suspects;
- ✓ criteria for law enforcement referral to the CPS agency;
- ✓ criteria for CPS referral to the law enforcement agency;
- ✓ procedures to assist the CPS agency;
- ✓ criteria and/or procedures for joint investigations, including timing, determining who has prime decision-making authority, and concurrent prosecutions;
- ✓ provisions for joint training;
- ✓ provisions for multi-disciplinary consultation; and
- ✓ criteria and/or procedures for cooperation/coordination with/among agencies. [33]

Effective collaboration is based on mutual understanding of the unique perspective of each discipline. interagency collaboration does not blend the disciplines into a homogeneous mix where the police are indistinguishable from CPS social workers. Rather a multidisciplinary team seeks to create a final product that retains the flavor and integrity of each ingredient. By understanding why other professionals believe and act as they do, team members are better able to accept, if not always agree with, the action of a fellow team member.[34]

a. Problems In Working Together

The CPS social workers approach the job from a different perspective than most police officers. CPS social workers have a dual role, one part of which may appear to conflict with the other. The dual role is mandated by law in most States and is integrated throughout social work literature and training. CPS is charged with the responsibility of protecting children from further abuse and neglect. This is a difficult task involving assessing not only what has happened but also predicting if it will ever happen again. As with police, the basic investigative questions for CPS are: Did the child suffer harm or is the child likely to suffer harm? Did the parent or caretaker cause the harm? What is the likelihood of the child being harmed in the future? What steps are necessary to protect the child? It is the last question that brings into play the second role of CPS: to make all reasonable efforts to preserve the family. The CPS agency is obligated to attempt to keep the family together or, once separated, to work toward family reunification. It is this role that becomes a major source of conflict on many teams. Many officers see permanent removal of the child, termination of parental rights, and adoption of the child as the only route available for the child to grow up in a "normal" setting. Officers may not understand the CPS philosophy that if his/her safety can be assured, the child's own family is the preferred place for him/her. Also, officers may not be aware of the problems and realities of foster care or the legal difficulties in terminating parental rights.

The decision-making processes of the two systems differ in many ways. Law enforcement officers are accustomed to making rapid life and death decisions in the field without supervisory consultation or approval. Many CPS agencies have procedures that involve "shared decision making" on critical issues such as the emergency removal of a child. Police find the CPS need to consult with supervisors frustrating, time consuming, and an example of bureaucracy at its worst. CPS social workers find that consultation reduces inappropriate actions based on the emotions of the moment.

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[33] LAW ENFORCEMENT/CHILD PROTECTION COOPERATION, *supra* note 19 at 40.
[34] Donna Pence & Charles Wilson, *The Uneasy Alliance*, ADVISOR 1(1989)

Visitation between the child in foster care and his/her parents is another source of conflict. Laws, court decisions, and agency procedures, encourage visitation between a child and his/her parents once in foster care. Visitation is considered vital to the child's sense of continuity and belonging even when removed from an abusive home. It is, after all, the only home the child has known and even abusive parents represent some degree of security and attachment for the child. This visitation, generally supervised in cases of sexual abuse or severe physical abuse, is usually therapeutic for the child and is essential if the child is to return home. However, law enforcement may view visitation as undermining the criminal prosecution. Police often believe that the parents are using the time to directly or subtly pressure the child to recant (and often they are right). Many police and prosecutors would prefer to suspend visits pending the outcome of a criminal case. CPS typically disagrees and emphasizes that isolating the child from the family for an extended period can also lead to recantation of any allegations.

Recommendations for disposition of the offender after the conclusion of the investigation often emphasizes the differences in philosophies of law enforcement and CPS. In intra-familial cases, recommendation for treatment outside of the correctional system has been a fairly common procedure for CPS staff. The vast majority of law enforcement officers are extremely skeptical about the efficacy of most treatment programs and, indeed, about the expertise of most therapists. They perceive that many of the offenders are just "going through the motions" in treatment to comply with court orders, and they see therapists, aided and abetted by CPS social workers, helping manipulative offenders escape the punishment they so justly deserve.

When lack of coordination or other factors lead the CPS social worker to initiate the investigation alone or to interview any of the principals without law enforcement, the danger exists that they will unwittingly tamper with or destroy physical evidence or lead others to do so. But once familiar with the value of physical evidence collection, CPS staff can become frustrated with a law enforcement officer who does not pursue a timely search warrant where appropriate.

These conflicts must be minimized and properly dealt with if the investigative goals of all patties are to be achieved and the secondary trauma to the victim limited. These issues can be addressed on two levels, the systems level and the individual level.

b. Systems level recommendations

Community service delivery systems should:

- ✓ Establish formal teams. Idaho law requires the use of multidisciplinary teams. If teams are not functioning in a particular area, the participants in the process need to address the problems and work together.
- ✓ Establish investigative protocols. Protocols that clearly lay out the roles and responsibilities of both police and child protection standardize practice and enhance collaboration. Protocols can be developed even where no team agreement exists. Protocols enhance investigations by limiting conflict and clarifying expectations.
- ✓ Provide adequate personnel to both agencies. The sources of conflict are amplified when a disparity exists in the personnel resources available to the two agencies. When CPS staff committed to the team are disproportionate to police staff, conflict is inevitable as CPS feels compelled to proceed even though law enforcement is unavailable to

participate. Disparity in resources also may affect the individual level of commitment to the team concept, with resulting conflict.

- ✓ Joint training. This is one of the keys to collaboration once the team concept is realized. Training provides all parties with an opportunity to hear the same information and to learn skills together. It also provides an opportunity to acquaint the other discipline with the philosophical perspectives and unique concerns of others.

c. Individual level recommendations

Individual professionals should:

- ✓ Reach out to the other discipline. This should bc done in informal, non-threatening ways. It can take many forms, from suggesting that team members meet in a non-work setting to inviting other disciplines to a staffing or case consultation. It is important for team members to know that they ate professionally and personally valued.
- ✓ Share professional information. Even when joint training is not available, individuals can share research articles, procedure manuals, or other materials of mutual interest. Each contact helps build the sense of trust and breaks down the barriers to effective team work, particularly if the material shared relates to an area of conflict.
- ✓ Keep communication open. Even when the system does not provide for a close team approach, individuals can keep their counterparts informed on the status of individual cases through notes or telephone calls.
- ✓ Confront the conflicts openly. Areas of professional or personal conflict should be confronted in a non-threatening and open manner. Discussion can put the issues on the table and sort them out. Some issues can be resolved; on others, the parties may agree to disagree.

The conflicts inherent in the relationship between CPS and law enforcement are serious but do not have to present road blocks to working together effectively. Communicating and formalizing the relationship where possible can break down barriers to effective team work. Dissonance can be reduced, and conflicts can be minimized. When the team concept works, it works for all: the police, CPS, and most importantly the child and family.[35]

C. Prosecutor's Perspective

1. Investigators Should Seek Complete Information When Investigating CPA Cases

Often, the perspective of the IDHW social worker and the prosecutor or deputy attorney general who will prosecute the case are slightly different. Investigators must obtain the information necessary to support a decision to file a child protection case in a form that is admissible as evidence. This information includes:

- ✓ Children's names, sexes and ages.
- ✓ Children's address and the names of all persons who live at that address.
- ✓ Parent's names, date of birth and addresses.
- ✓ Proof of paternity may need to be established through testing or acknowledgments.
- ✓ Parent's current or prior marital status.
- ✓ Existence of a divorce or custody decree and identity of the court in which the decree is filed.

[35] *Id.*

- ✓ Whether or not the children are Indian children.
- ✓ Date, time and place the children were declared in imminent danger.
- ✓ The name of the person/officer who declared imminent danger and his/her agency (IDHW, ISP, county, or city police).
- ✓ Prior referrals or court cases.
- ✓ Facts that bring the case under the CPA. (i.e. the condition of the home, whether or not drug use is involved, the level, type and duration of abuse or neglect, etc.) Focus on the child protection concerns, not just any criminal activities. The report should explain why the children need to be protected.
- ✓ What reasonable efforts have been made to prevent removal, if any.
- ✓ Presence of aggravated circumstances.

The Prosecutor will review the evidence of abuse and neglect provided by the social worker with a view to whether such evidence can be admitted in court to prove the state's authority to take custody of the child. The prosecutor cannot rely on hearsay to prove the case. In addition, the prosecutor may not be able to obtain the testimony of witnesses who would incriminate themselves by testifying.

Attempts to locate non-custodial parents and putative fathers should also be made.

2. Input from Multidisciplinary Teams (MDTs)

Idaho law requires each county prosecuting attorney's office to develop an interagency multidisciplinary team for their county.[36] The team must include law enforcement personnel, IDHW child protection staff, and a representative from the prosecutor's office. The team should also include a representative from the local guardian *ad litem* program, and any other person necessary because of special training (such as medical personnel or mental health workers).

The role of the MDT is to develop protocols for the investigation of child abuse cases and for interviewing child victims of abuse and neglect.[37] IN addition the MDT should work out agreements for inter-agency operations and collaboration.

MDT team members are to be trained in risk assessment and child abuse investigatory and interviewing techniques. The MDTs are charged with providing an independent review of investigation procedures. Such reviews should provide for independent citizen input.[38] As part of this process, MDTs may review particular cases and provide input and direction to other persons involved in a potential child protection case.

3. What Justifies Filing a Child Protection Case?

The court has jurisdiction over any child who is:

- ✓ living or found within the state, and
- ✓ neglected, abused, or abandoned, by his parents or guardian, or who is homeless or whose parents fail to or are unable to provide a stable home environment OR

[36] Idaho Code § 16-1617
[37] Idaho Code § 16-1617(2)
[38] Idaho Code § 16-1617(3)-(5)

- ✓ living or having custodial visitation in the same household as another child who the court has jurisdiction over and the child has been exposed to or is at risk of being a victim of abuse, neglect or abandonment.

Abuse consists of conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition is not justifiably explained, or where the history given is not consistent with the degree or type of injury or the circumstances indicate that the injury may not be the product of an accident. Abuse also includes sexual molestation or exploitation.[39]

Abandonment means failing to establish and/or maintain a normal parental relationship with the child including reasonable support or regular personal contact. Failure to maintain this relationship for one year is prima facie evidence of abandonment. However, the period of time for abandonment may be substantially less than one year. For instance, abandonment might exist where a parent drops the children off at the police station and says: "Here are my kids, I can't handle them anymore. I don't want them. They are the state's responsibility now."[40]

Neglected means a child who is without proper parental care or control, or subsistence, education, medical or other care necessary for his well-being because of the conduct or omission of his parents or guardian. Neglect includes the situation where a parent cannot provide for his or her child due to incarceration, hospitalization or other physical or mental impairment.[41]

Homelessness is not defined in the Idaho Code, but presumably common sense applies. If a family is homeless, but they are willing to go to a place of shelter, a child protective case may not be necessary unless there are other concerns such as abuse or neglect.

Unstable Home Environment is also not defined. Common sense also should apply here. A good example of an unstable home environment might be a home in which drug deals are constantly made, people come and go at all hours, various different people are living in the home for a few days at a time, etc. Also, an unstable home environment could be a home in which the children are not abused, but they witness domestic violence between adults. The whole situation should be looked at in determining whether or not the home is "unstable." One factor by itself may not be determinative, but the combination of everything may rise to the level that the child needs to be removed or protected.

4. Should a Child Protection Case Be Filed?

Once the prosecutor is contacted by IDHW and/or law enforcement she or he must decide whether to file a child protection case based on the information presented by the investigators. In deciding whether to file, the prosecutor should consider the following things:

- ✓ Can the case be proved in court?
- ✓ Are there witnesses to the conduct/conditions who can testify?

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[39] Idaho Code § 16-1602(1)

[40] Idaho Code § 16-1602(2). Note: The Idaho Safe Haven Act , Idaho Code §§ 39-8202 to -8207, was enacted in 2001. Under certain circumstances, this act allows parents to anonymously abandon infants under thirty (30) days old without risk of criminal charges.

[41] Idaho Code § 16-1602(21).

- ✓ Are there photographs or medical records?
- ✓ What do we seek to accomplish by filing the case? If the same goals can be accomplished by another method, such as a voluntary agreement, opt for the voluntary agreement.
- ✓ If the goals are accomplished, will the child be in a better situation?

Prosecutors should coordinate with the social worker to develop the proof necessary to estaglish a case if possible..

5. When is Shelter Care Justified?

To remove a child from his or her home due to imminent danger, the child must be endangered in his surroundings, and prompt removal is necessary to prevent serious physical or mental injury to the child. This is very significant action, which should not be undertaken without first considering other alternatives.

Alternatives to removal of the child:

- ✓ Removal of an alleged offender from the home.[42]
- ✓ Voluntary agreements by the parents. Placement with other relatives either permanently or temporarily may eliminate the need for shelter care.
- ✓ If a child is presently safe, but there is concern that he will be removed from safety by a parent, a protection order can be sought by the prosecutor. This order would bar the removal of the child pending a hearing. This is most often used where a child has been living with a stable relative, such as grandparents, but the abusive or neglectful parent is threatening to come get the child.[43]
- ✓ Protective Supervision -- filing a petition without removing a child can allow IDHW to provide supervision and services to the family in the home. Consider whether the child can safely remain in the home while the DHW monitors the situation.[44]

D. Emergency Medical Treatment.

In cases where the parents/guardians of a child cannot or will not give consent for medical treatment, the court can order the necessary treatment.[45] (This can also be used if a parent cannot be found to give consent.) This only applies if the child's health would be greatly endangered and the parent fails or refuses to consent to treatment. A CPA petition does not need to be filed to get this court order. Example: A child needs a blood transfusion or she may die. Her parents are good parents, but for religious reasons, they will not consent to a blood transfusion. The court can order the transfusion, if a doctor states that the child's health will be greatly endangered without it. Usually, this will need to be a very expedited process and would involve calling the on-call prosecutor and getting a judge available as soon as possible.

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[42] *See* Idaho Code § 16-1609(2)
[43] *See* Idaho Code § 16-1611(5).
[44] *See* Idaho Code § 16-1619(5)(a)
[45] *See* Idaho Code § 16-1627.

E. Appendix A: Idaho Department of Health & Welfare Priority Guidelines

PRIORITY GUIDELINES
Definitions

1. FACS worker
   FACS workers are direct service personnel in the regional Family and Children's Services offices including, social workers, clinicians, counselors and psychologists. FACS staff also include individuals with whom the regional Family and Children's Services programs have contracted to provide services.

2. Response
   Any earnest and persistent documented effort to place in motion actions to assess the allegations of a referral and/or protect the child in question.

3. Documented
   If the Priority Standards are not followed, documentation in the case record will indicate the variance and reasons for such deviation. Supervisors will review and sign the variances.

4. Seeing the Child
   Face-to-face contact with the child by the FACS worker which may or may not be in the family home. Response time for seeing the child begins when the referral is received by the Department.

5. Third Party
   Refers to someone outside the parental home who is not a primary care taker or legal custodian of the child and who no longer has access to the child.

6. Variances
   A child may not be seen within designated response times. The rationale behind the delay must be thoroughly documented and reviewed by the supervisor. Circumstances that might warrant a variance include:
   a. Geographical constraints
   b. Weather hazard
   c. Good Practice Decisions or Professional Judgment
   d. Law enforcement has already sheltered the child
   e. Worker safety
   f. Law enforcement is unable to accompany a DHW worker and worker safety issues are identified in the referral.
   g. Other (child has left the area, unable to locate, etc.)

7. Reasonable Efforts to Locate
   Reasonable efforts to locate a family and see a child may include:
   - Re-contacting the referral source to verify the address.

- Contacting the family after regular office hours through the assistance of an on-call social worker.
- checking with landlords and/or neighbors, utility companies, a family's self reliance specialist, child support's parent locator service, local schools and law enforcement for a current address or any knowledge of the family's whereabouts.

Before a case is closed because a family cannot be located, the case must be reviewed by the worker's supervisor and/or team.

PRIORITY GUIDELINES

The following Priority Response Standards establish the requirements for evaluating safety issues within FACS mandates. Use the Standards to determine the immediacy of the response required and follow regional protocols to assure assessment and reduction of safety/risk issues in accordance with state and regional standards.

FACS does not respond to every referral. Since FACS initiated contact with families may be intrusive there must be reason to believe that the presenting issue in the initial referral requires FACS mandated service in order to initiate the immediate safety/risk assessment process.

In cases where the facts related are questionable or unclear, it is appropriate to corroborate and consider facts presented by the referent prior to making a decision about whether the Department should initiate direct contact with the family.

Although these guidelines establish a response standard, a referral may be considered a higher or lower priority than suggested by the standards. Reasons for making a referral a lower priority than suggested by the standards must be documented as variances by the supervisor in the case record.

PRIORITY 1
Immediately notify your supervisor of all Priority 1 cases.

A CHILD IS IN IMMEDIATE DANGER involving a life-threatening and/or emergency situation; the Department shall respond immediately. Law enforcement must be notified and requested to respond or to accompany FACS worker. The child must be seen by a FACS worker immediately unless written
regional protocol agreements direct otherwise. The child shall be seen by medical personnel when deemed appropriate by law enforcement and/or FACS
worker. Every attempt should be made to coordinate the Department's assessment with law enforcement's investigation.
Reasons for variances must be documented in the case record.

Death of a Child
Minor siblings remaining in the family home, when death of a child is alleged to be due to physical abuse or neglect by the child's parents, guardian, or caretaker.

Dangerousness or Risk of Physical Harm due to Mental Illness
Referrals involving immediate life threatening danger of children to self or others due to mental illness and/or grave disability. Response should be an evaluation process that will reduce risk by assisting parents with appropriate referrals and/or assessing the child to determine eligibility for services through the Department.

Life Threatening Physical Abuse
Severely physically abused children with observable injuries or symptoms that are, or could be, life threatening. Some examples of severe injuries or situations include, but are not limited to:

head injury with loss of consciousness or vomiting;
unusual or severe bleeding;
multiple injuries (battering);
fractures in non-ambulatory child (usually an infant or toddler;
shaken baby syndrome;
all allegations of physical abuse of a child through age 6 should be considered under priority one unless there is reason to believe that the child is not in immediate danger.

Life Threatening Medical Neglect
Physically ill children who are medically neglected in a way that is life-threatening. Includes abrupt and significant (10%) weight loss in a child under three (3) years of age.

Life Threatening Physical Neglect
Children who appear-to be in immediate danger because the caretakers are physically absent and/or are unable to provide adequate care. This would include neglect of children through age 6 unless there is reason to believe that the child is not in immediate danger.

Withholding Medically Indicated Treatment in Severely Disabled Infants with Life Threatening Conditions

For guidance on how to respond to allegations of withholding medically indicated treatment in severely disabled infants with life threatening conditions, please see the **Idaho Health and Welfare Guide to Policy and Procedures for Assessment and Disposition of Medical Neglect of Handicapped Infants.**

Infants Testing Positive for Drugs at Birth
The Department will assess the risk to the infant and the family's ability to care for the needs of the infant. Response should be an evaluation process that will reduce risk by assisting parents with appropriate referrals and/or assessing the health and safety of the child.

Mothers who Test Positive for Drugs at the Birth of their Baby
In situations when the mother tests positive for illegal drugs but the baby either tests negative or was not tested for illegal drugs, the Department will respond to assess the safety of the infant by

determining how the use of an illegal substance may impact the parent's ability to care for the needs of the newborn child.

Preservation of Information/Risk of Family Leaving Area
Abuse or neglect cases in which critical information is likely to be lost if not gathered immediately, or there is a history of the family leaving the area to avoid intervention.

Sexual Abuse
Children who are in immediate danger of being sexually abused by parents, guardians, relatives, or other caretakers, or situations in which abuse occurred because of lack of protection on the part of the caretakers from the alleged abuser. A referral is considered a priority I response if the alleged offender has immediate unrestricted access to the child and circumstances indicate immediate response.

Sexual Exploration
In reports of sexual exploration, parents will be encouraged to supervise their children more closely. Referrals involving children under eighteen years of age will not be considered sexual abuse unless the parent/caregiver is unable to ensure the child's(ren's) future safety.

PRIORITY II

A CHILD IS NOT IN IMMEDIATE DANGER, but allegations of abuse, or serious physical or medical neglect, are clearly defined in the referral; response shall be within twenty-four (24) hours. The Child must be seen by a FACS worker within forty-eight hours of the Department's receipt of the referral unless written regional protocol agreements direct otherwise. The child shall be seen by medical personnel when deemed appropriate by law enforcement and/or FACS worker. *Law enforcement must be notified within twenty-four (24) hours of receipt of all Priority II referrals which involve issues of abuse or neglect*. If possible, attempts should be made to coordinate the Department's assessment with law enforcement's investigation.
Reasons for variances must be documented in the case record.

Non Life-Threatening Physical Abuse
(All allegations of physical abuse of a child through age 6 should be considered under priority one unless there is reason to believe that the child is not in immediate danger.) Physical abuse of a child over age six (6) with observable, non life-threatening injuries.

Bruises on children often occur as a result of child play. Before being assigned for risk assessment, a referral should contain reason to believe that physical abuse has occurred. Consideration should be given to the following factors?

- Age and developmental stage of the child.
- Location and size/shape of the bruise.
- Plausibility of the explanation of the bruise.
- Disclosure of the child.
- Witness.

Corporal punishment is not considered abuse as long as the spanking or hitting does not leave marks or bruises.

Non Life-Threatening Physical or Medical Neglect
Physical or medical neglect that is dangerous and poses health hazards to the child, and that may result in physical injury or impairment of the bodily function. Includes growth rate below the third percentile or chronic untreated infections.

Sexual Abuse
Children whose immediate safety needs are currently addressed, as verified, but where the children were allegedly sexually abused by parents, guardians, relatives, or other caretakers or situations in which abuse occurred because of lack of protection on the part of the caretaker(s) from the alleged abuser and the children are not in immediate danger.

Disabilities
Children who are severely disabled and/or unable to communicate are generally more vulnerable for abuse and/or neglect. When receiving a referral regarding a child with a severe disability, social workers should consult with persons knowledgeable about disability issues. They should ensure that services are in place that will minimize risk to the child and promote family preservation.

PRIORITY III

A CHILD IS NOT IN IMMEDIATE DANGER, but allegations of abuse or neglect are clearly defined in the referral as a result of the parent or caregiver failing to meet the age appropriate needs of the child. The Department shall respond
within three (3) calendar days. Child must be seen by the Department FACS worker within five (5) calendar days of the Department's receipt of the referral. **Reasons for variances must be documented in the case record.**

Inadequate Supervision
If children are unsupervised issues to determine response are:

- Age of the child.

Is the child developmentally delayed or disabled?
How long has the child been alone?
What happens as a result?
Have prior arrangements and commitments been made for others to help in an emergency?
Are there factors which interfere with a parent's ability to supervise a child (i.e., substance abuse, mental illness, etc.)?
Has there been a pattern of lack of supervision?

If the parent/caregiver arranges for a sibling or another child to baby-sit, consider the babysitter's ability to provide care. Some factors to review include:

- Age of the babysitter.
- Age of the children he/she is required to watch.

- Number of children.
- Maturity of the babysitter.

A presenting issue should be assigned for a safety/risk assessment depending on the age and developmental level of the child, how long the child has been alone, and failure of the parent/caregiver to plan for the child's care.

Home Health and Safety

A physical environment that is a health or a safety hazard which may directly affect the health of a child. If there are no health and safety factors as they relate to the children in the home, the Department will not be directly involved.

Issues to determine response are:

- Weight loss as a result of the care provider not providing food or drink to the child for prolonged periods.
- No housing or emergency shelter; Harsh weather or other conditions exit that place child in danger.
- Exposed wiring or other safety hazards.
- Evidence of human or animal waste throughout living quarters.
- Perishable food that has rotted and may cause illness.
- Serious illness or significant injury has occurred due to living conditions and these conditions still exist.

Home environments that are cluttered or do not meet community standards of cleanliness are not considered for Priority III assignment unless health and safety factors are clearly identified in the referral. Referrals regarding head lice and lack of immunizations are not considered safety issues and will not be assigned for risk assessment.

Moderate Medical Neglect

Caregiver does not seek treatment for child's moderate medical condition(s) or does not follow prescribed treatment for such condition. It may also include a pattern of excessive medical care.
Issues to determine response are:

- Verification, by a medical personnel, of the medical condition and required treatment prior to assigning the presenting issue for further assessment.

2. Domestic Violence

Caregiver may be a victim of family violence which affects caretaker's ability to care for and/or protect child(ren) from immediate harm.
Issues to determine response are:

- Child has been injured during an episode of domestic violence.
- Child has been used as a shield during an episode of domestic violence.
- Child's basic needs have been seriously neglected because adult victim was incapacitated by domestic violence.

Situations that may impact a child's safety include:

- Batterer has used or threatened to use a weapon during domestic violence assault.

- Batterer has continued a pattern of partner abuse after a court order/restraining order.
- Batterer has stalked partner and/or children.
- Batterer has caused injuries serious enough to require medical attention or hospitalization.
- Batterer has threatened homicide or suicide.
- Frequency and/or type of violence have been escalating.

Although the DHW recognizes the emotional impact of domestic violence on children, due to capacity we can only respond to referrals of domestic violence that involve a child's safety. Referrals alleging that a child is witnessing their parent/caregiver being hurt will be referred to law enforcement for their consideration. Additionally, referents will be given referrals to community resources.

Substance Abuse

The DHW will respond only to referrals involving substance abuse where the use of drugs or alcohol seriously affects the caregiver's ability to supervise, protect, or care for their child(ren).
Issues to determine response are referrals alleging:

- Child has been exposed to parent/caregiver manufacturing drugs.
- Child's basic needs for adequate clothing, food, shelter, supervision or medical care have been neglected while caregiver may have been obtaining and/or using drugs/alcohol.
- Child has found and ingested drugs/alcohol while unsupervised.
- Parent/caregiver or alleged offender may have given drugs (not prescribed by a physician) or alcohol to infants or young children to sedate them or control their behavior.

If the referent can not define or describe how the use of drugs or alcohol is posing a safety issue for children, the referral will be entered as information only and will not be assigned for risk assessment.

Educational Neglect

The DHW encourages school districts to work with their school resource officers and local prosecutors around issues of educational neglect. School districts are encouraged to send reports of excessive absences to the county prosecutor for further consideration.

- Home Schooling – Referents with reports involving home schooling may be referred to the regional representative of the home school association. The DHW will not monitor home schooling.

Historic Reports of Physical Abuse or Neglect:

The DHW will not respond to referrals of physical abuse or neglect where the situation has resolved or physical evidence is no longer available.
Examples may include:

- Report of bruising or marks that may have been observed in the past but are no longer present.
- A landlord reporting unsanitary conditions in his/her rental after the family has moved to another house.

Exceptions may be made in cases of infants or small children. For example, a referral would be assigned with a report of a caregiver shaking or hitting an infant, even though no medical or physical evidence has initially been established.

History of Referrals

Issues to consider in determining a response:

- What is the frequency of referrals? How much time has passed with the family having no referrals?
- What is the disposition of past referrals?
- Who is making the referrals?
- Is it the same referent with issues that have been explored but not validated?

Multiple Reports Involving Issues of Child Custody

Issues to consider in determining a response:

- Have the issues been explored in a previous risk assessment containing the same or similar referral reasons?
- Has the parent filed a protection order on behalf of the child?
- Has the case been staffed with the multidisciplinary team? What is the direction of law enforcement and the prosecutor?

If a safety/risk assessment has been conducted, prior to assigning subsequent referrals containing the same referral reasons, it is recommended to staff the case with law enforcement and/or the prosecutor to avoid duplicating or contaminating the interview process. Subsequent referrals containing the same issue may be assigned only upon supervisory and/or regional management approval.

Third Party Abuse/Neglect (Recorded as I&R)

Third party referrals are those referrals where:

- the child's parent/guardian has taken action to protect the child from abuse/neglect;
- the parent/guardian is not the alleged offender; and
- the alleged offender no longer has access to the child.

When all information indicates that the child is protected, the referral will be prioritized for Information and Referral and forwarded to law enforcement for investigation. Due to high caseloads, the Department of Health and Welfare may not provide assistance to law enforcement in interviewing children involved in third party referrals. (Forensic interviewing training is available for local police officers through a Department of Health and Welfare contract with Police Office Standards and Training.)

Third Party Reports of Child Abuse or Neglect by a Day Care Provider or Others in a Day Care Setting.

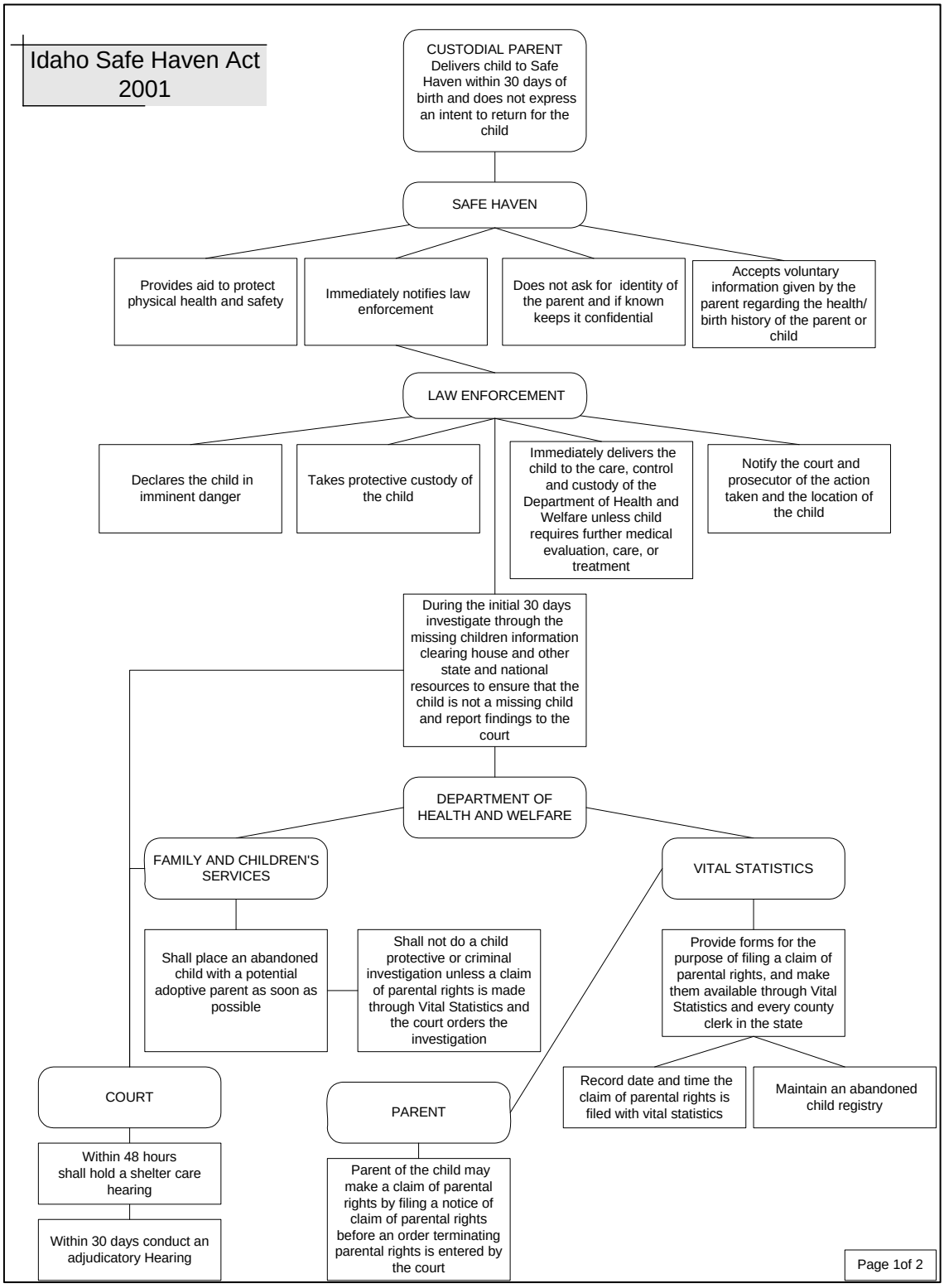
A referral of child abuse/neglect in a day care setting is considered to be a third party report if the parents of the child of concern are protecting the child. All information contained in the referral will be forwarded to law enforcement with notification that Children and Family Services will not be responding to the report.

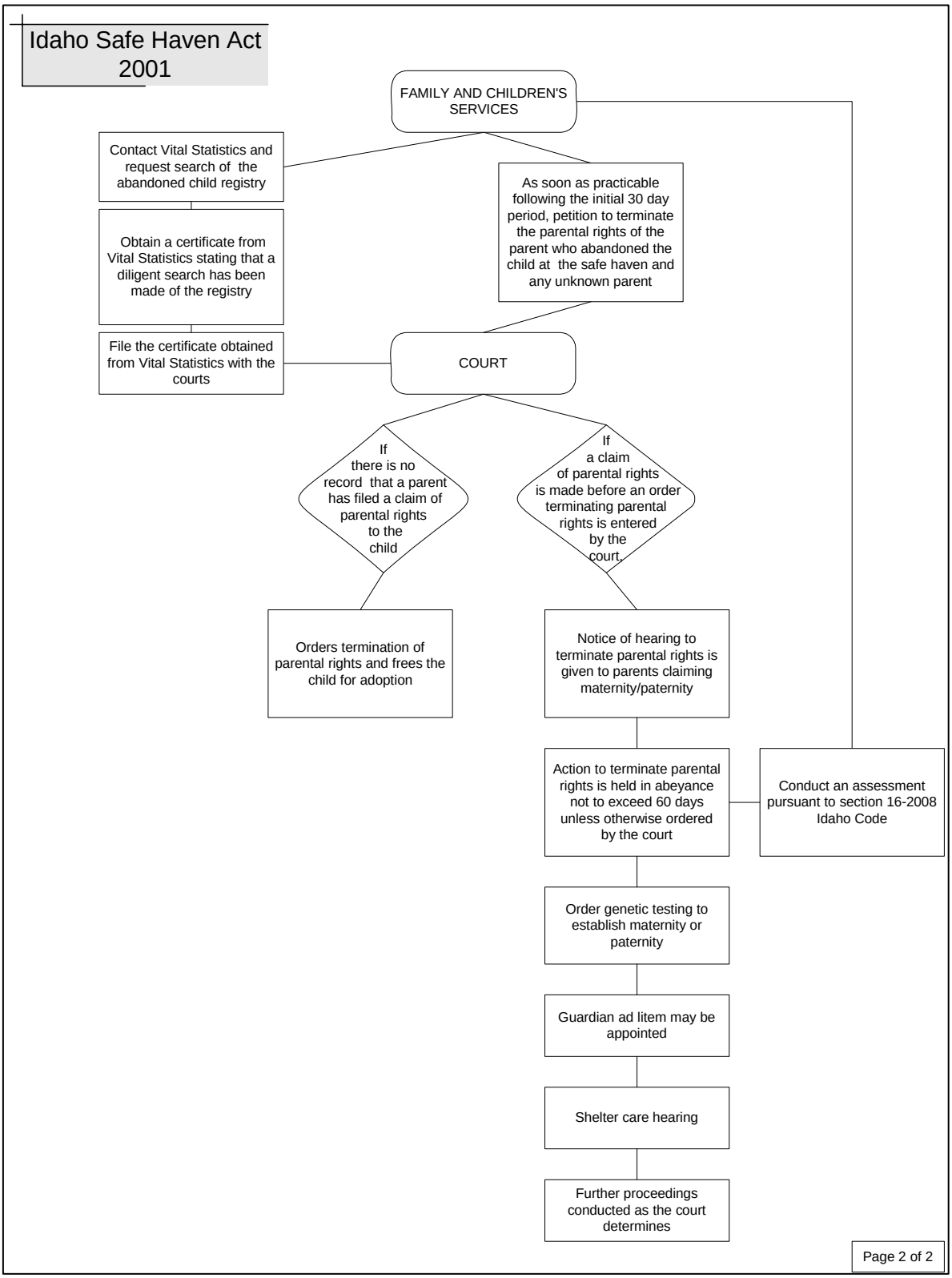
If the day care provider is licensed by the Department of Health and Welfare, Department staff must follow-up with law enforcement to determine if the results of their investigation would affect the status of the day care license.

If the referral alleges that parents are not protecting their child from abuse/neglect, the referral does not meet the definition of a third party referral. Such referrals must be prioritized according to the Priority Response Guidelines and the Department must conduct a safety assessment.

Reports of concerns related to day care providers that do not fall within the definitions of child abuse or neglect in the Child Protective Act should be referred to health districts, fire departments, or other agencies, as indicated. Examples of this type of report would be the staff to child ratio or unsafe well water.

F. Appendix B: Idaho Safe Haven Act Flow Chart




Idaho Safe Haven Act 2001
FAMILY AND CHILDREN'S SERVICES
Contact Vital Statistics and request search of the abandoned child registry
As soon as practicable following the initial 30 day period, petition to terminate the parental rights of the parent who abandoned the child at the safe haven and any unknown parent
Obtain a certificate from Vital Statistics stating that a diligent search has been made of the registry
File the certificate obtained from Vital Statistics with the courts
COURT
If there is no record that a parent has filed a claim of parental rights to the child
If a claim of parental rights is made before an order terminating parental rights is entered by the court.
Orders termination of parental rights and frees the child for adoption
Notice of hearing to terminate parental rights is given to parents claiming maternity/paternity
Action to terminate parental rights is held in abeyance not to exceed 60 days unless otherwise ordered by the court
Conduct an assessment pursuant to section 16-2008 Idaho Code
Order genetic testing to establish maternity or paternity
Guardian ad litem may be appointed
Shelter care hearing
Further proceedings conducted as the court determines
Page 2 of 2

G. Appendix C: Comprehensive Assessment Standards

STANDARD: IMMEDIATE SAFETY, COMPREHENSIVE, AND ONGOING ASSESSMENT

PURPOSE

The purpose of this standard is to provide direction and guidance to the Children and Family Services (CFS) programs regarding Immediate Safety Assessment, Comprehensive Risk Assessment, Reassessment, and ongoing assessment services. This standard is intended to achieve statewide consistency in the development and application of CFS core services and will be implemented in the context of all-applicable laws, rules and policies. The standards will also provide a measurement for program accountability.

INTRODUCTION

Although safety is a central concern of child protection services and foster care practice, considerable confusion exits throughout child welfare practice as to when a child is safe or unsafe. The terms safety and risk are often used interchangeably. However safety and risk are not the same. All child protection referrals assigned a priority response are assessed for safety. A comprehensive assessment of risk may follow. Safety assessment is an analysis of the threats of serious harm, the parent/caregiver's protective capacities, and the child's vulnerability. The immediate safety assessment process should involve the family's own perceptions and other significant case circumstances that may impact family functioning. The analysis of immediate safety helps evaluate the likelihood that a child may be in present danger.

A Comprehensive Assessment is a more thorough analysis of safety and risk that helps evaluate the likelihood that a child may be abused or maltreated in the future. It guides the service plan to focus directly on the problem areas that cause a child to be unsafe and/or which contribute to future risk of abuse/neglect. The assessment driven service plan also establishes essential child well-being needs. Additionally, it establishes a baseline of risk. Reviewing previous risk assessments allows social workers to assess change over time and assists CFS staff in communicating their decision making to others. The Immediate Safety Assessment, Comprehensive Assessment, and Reassessment instruments are designed to document a social worker's observations, interviews, findings and guide them in making critical case decisions.

This standard will assist CFS staff in differentiating safety from risk, safety plans from service plans, and understand the purpose and process for using each of the instruments.

STANDARD

Assessment of safety is to be completed timely according to the Department’s Priority Response Guidelines and Department administrative rule. Every effort should be made to engage the family and involve them in all stages of the assessment process. In conducting assessments, a family-centered approach should be used. This means that at all times, CFS staff should treat

family members with respect, reinforce strengths of each member of the family and the family as a whole, focus attention on the needs of all family members, and listen to each family member's description of their circumstances and their needs. Consistent with a family-centered approach, families should be encouraged to identify solutions as well as natural supports in their environment.

Definitions:

Comprehensive Assessment: an assessment of safety, permanency, and well-being, using the Department's Comprehensive Assessment tool. It assists the social worker/clinician in understanding family connections, capacities, social adjustments, strengths, and history that affect a family's ability to resolve the concerns that led to their involvement with CFS. The focus of the Comprehensive Assessment is a review of child safety as well as longer term risk. It should be completed within thirty (30) days of a referral of child abuse or neglect if the immediate safety assessment indicates the need for intervention and/or services. The Comprehensive Assessment provides a basis for re-assessing child safety, including the nature of any active safety threats, determining risk over time, identifying family strengths and capabilities, evaluating underlying conditions and contributing factors that lead to maltreatment, assessing parental capacity to protect, and identifying service needs to be included in the service plan.

Contributing factors: social problems or conditions such as substance abuse, domestic violence, mental illness and unemployment that can increase the likelihood of child maltreatment or its severity, but may not be directly causal to them.

Danger: the likelihood of serious harm precipitated by one or more currently active safety threats and/or arising from insufficient parent/caregiver protective capacities.

Emerging Danger: the likelihood of serious harm that is not immediate, but safety threats are starting to surface or escalating in intensity, pervasiveness, duration and/or frequency and/or parent/caregiver capacities are weakening or unknown. Emerging danger is often seen as "red flags."

Present Danger: the likelihood of immediate and serious harm to a vulnerable child precipitated by one or more safety threats and/or missing or insufficient parent/caregiver protective capacities.

Signs of Danger: observable indicators of danger. Seventeen signs of danger appear as factors on Idaho's Immediate Safety Assessment instrument.

Immediate Safety Assessment: an examination of present and emerging danger, using the Department's Immediate Safety Assessment tool. The assessment should be completed no later than five (5) working days after first seeing the child. It is used to guide and document decision making related to child safety and formulate a child safety plan (when needed).

Ongoing Assessment: an ongoing formulation process conducted by the social worker throughout the life of a case. Working with families is a constantly changing process that calls for frequent and flexible decision-making as new information becomes available. Each time a social worker/clinician meets with a family or child, he/she is gathering and evaluating information to determine the child's current safety and the family's progress in enhancing their protective capacities and/or reducing safety threats. Assessment begins with the first contact with a family and does not end until a case is closed.

Reassessment: a re-examination of safety and risk at a point in time after the Comprehensive Assessment, using the Department's Reassessment tool. Reassessment is to be completed by the social worker/clinician at key decision points in a case to guide and document case decisions. The reassessment tool shall be completed prior to reunification, termination of parental rights, and case closure. Social workers and clinicians shall also use the reassessment tool to assess a family's progress when there have been significant changes in the family's circumstances or dynamics.

Risk: the likelihood of harm to a child in the future. Although risk of future harm or the level of future harm cannot be totally predicted, study and experience have provided identifiable risk factors that are present in situations where children have been abused or neglected. Risk factors can be chronic or exist when certain situations reoccur, such as a parent's relapse into drug or alcohol abuse. Risk factors appear on the Comprehensive Assessment Instrument.

Risk Finding: the level of risk at the time the risk of harm to the child is assessed, prior to interventions from CFS or family members.

Safety: a child has, or is likely in the near future, to be seriously harmed. The four aspects that contribute to child safety are immediacy, threats of serious harm, vulnerability of the child, and protective capacities of the parent/caregiver.

(1) Immediacy: a time period related to the safety of an individual, at that moment or in the very near future, if an intervention is not put into place;

(2) Threats of Serious Harm: the degree of harm that could mean a threat to the child's health or life, impairment to his/her physical well-being, or severe developmental impairment or disfigurement if there is no intervention.

(3) Vulnerability of the Child(ren): the degree to which a child can avoid, negate or modify the impact of safety threats or compensate for a parent/caregiver's lack of protective capacities. The following should be considered in assessing a child's vulnerability:

- The child's ability to protect him/herself, including the child's age and ability to communicate;
- The likely severity of harm, given the child's developmental level;
- Visibility of the child to others/child's access to individuals who can and will protect the child;

- Family composition and the child's role in the family;
- The child's physical and emotional health/social functioning;
- The child's physical size and robustness;
- The child's understanding of appropriate treatment (does the child normalize the alleged abuse?);
- Prior victimization of the child; and
- The child's temperament and physical appearance.

Factors that affect the child's ability to self-protect include age, disabilities, ability to communicate, problem-solving skills and capacities, ability to physically resist or escape from potential harm and accessibility to others. A child's provocativeness must also be considered in relation to the caretaker's capacity for patience, tolerance, and coping strategies.

(4) Protective Capacities of the parent(s)/caregiver: family strengths or resources that reduce, control and/or prevent threats of serious harm from occurring or having a negative impact on a child. Protective capacities are strengths that are specifically relevant to child safety. A parent's relationships with others may be a form of protective capacity. Other protective capacities may include:

- Intellectual skills;
- Physical care skills;
- Motivations to protect;
- Positive attachments;
- Parenting skills;
- Social connections; and
- Resources such as income, employment or housing.

A child may also possess some protective capacities that would make the child less vulnerable. For example, an older child may know the circumstances whereby a caregiver's mental health requires outside intervention.

Safety Factors: a set of specific signs of present danger that combine with a child's vulnerability and may directly impact a child's safety status unless offset or mitigated by sufficient protective capacities. Seventeen safety factors, representing signs of danger are found on Idaho's Immediate Safety Assessment instrument.

Safety Threat: acts or conditions that have the capacity to seriously harm a child(ren).

Safe Child: when there are no immediate threats of serious harm present or the protective capacities of the family can manage any identified threats to a child.

Conditionally Safe: When safety issues exist and a safety plan is being implemented to control the threats of serious harm identified at the present time until the safety threat can be resolved or sufficiently diminished.

Unsafe Child: parent/caregiver's actions or inactions present immediate threats of serious harm to a vulnerable child and the family's accessible protective capacities are insufficient to prevent these actions or inactions.

Safety Plan: a specific and concrete strategy for controlling threats of serious harm, or augmenting protective capacities implemented immediately when a family's own protective capacities are not presently sufficient to manage immediate and serious threats of harm.

Underlying Conditions: the needs of the individual family members, perceptions, beliefs, values, feelings, cultural practices and/or previous life experiences that influence the maltreatment dynamics within a family system.

PROCEDURE FOR IMMEDIATE SAFETY ASSESSMENT:

Regional Jurisdiction:

When a Child Protection referral involves the alleged abuse, neglect, or abandonment occurring within the geographic boundaries of one Region and the child is living or physically located in another Region, the Region where the alleged abuse, neglect, or abandonment allegedly occurred will be assigned the referral and is responsible for the completion of the immediate safety assessment. The Region in which the child is physically located may be asked to see the child, interview the child, gather pertinent data, etc. and report back to the Region responsible for completing the safety assessment. When a Region is asked to assist, that Region must comply with required assessment timeframes in responding to the request by the Region with primary responsibility. The primary Region must give the assisting Region as much notice as possible to allow that Region adequate time to respond.

After completion of the safety assessment, it may be most appropriate to transfer the referral or case to the Region in which the child resides or has primary residence.

CFS field program managers from different regions may agree to modify the aforementioned process especially when regional offices are in close proximity with offices in another Region.

Initiation of the Immediate/Safety Assessment:

- A referral is assigned to a social worker/clinician.
  The social worker/clinician reviews the intake information, keeping an open mind that the information in the referral may or may not be accurate.

- The social worker/clinician reviews prior history and other case records for relevant information to determine how the severity and type of current allegations compares to those in prior reports as well as the results of previous safety assessments and interventions.

- If information in the referral does not indicate that the child is in immediate danger and should be seen immediately, the social worker/clinician should obtain any additional information from staff who previously worked with the family.

- If there is information that the family has been involved with child protection in another state, the social worker/clinician should contact the child welfare agency in that state to obtain the prior history.

- The social worker/clinician should re-contact the referring party if they have questions or need additional information about the referral.

Involvement of Law Enforcement

- The social worker/clinician shall involve law enforcement in the safety assessment process according to local multidisciplinary team protocols.

- Law enforcement must be contacted on all referrals prioritized as I and II according to Priority Guidelines. This provides an opportunity for law enforcement to accompany the social worker/clinician or intervene if a family member(s) is part of an on-going criminal investigation. Law enforcement officers may also have knowledge of dangerous home environments that may compromise a worker's safety.

- At all times, safety of the social worker/clinician is a top priority. If there is reason to believe that safety is an issue, the social worker/clinician should contact law enforcement and enlist their help in assessing the safety of the child. If a social worker/clinician discovers the safety issues while he/she is already in the home (such as a meth lab), the social worker/clinician should leave the area as soon as possible, immediately staff the case with his/her supervisor and contact law enforcement.

Seeing the Child(ren)

- A CFS social worker/clinician must have face-to-face contact with all children who are identified as a child of concern in a referral of physical abuse, sexual abuse, or neglect within the timeframes stated in the Priority Response Guidelines. Additionally, the CFS social worker/clinician should speak with the parents/caregivers and visit the family home to assess whether the home environment poses an immediate danger to the children. Whenever possible, the child should be seen and interviewed prior to interviewing the parent/caretaker.

Interviewing the Child(ren)

- The social worker/clinician shall conduct separate interviews with the child(ren) and parent/caregiver to obtain each child's account and explanation of the allegations. A child’s school or day care is usually a non-threatening environment for an interview. If the interview with the child(ren) takes place in the family’s home, explain to the parent(s) that their child(ren) must be interviewed privately in order to conduct a thorough and objective assessment.

- If access to children suspected of being at risk of child abuse or neglect is denied, the social worker/clinician should leave the residence, confer with their supervisor, and seek remedies such as involving law enforcement or obtaining a court order.

- If a social worker/clinician goes to the child's home to see the child but no adult is present, the social worker/clinician must not enter the residence. The social worker/clinician should talk to the child outside the home or through the door. If very young children are home alone, call law enforcement and wait outside the residence for law enforcement to arrive to assist in obtaining access to the child(ren).

- According to Idaho Code 16-1609B (CPA), "Unless otherwise demonstrated by good cause, all investigative or risk assessment interviews of alleged victims of child abuse will be documented by audio or video taping." The rationale for not taping an interview must be provided in those cases where no recording is made.

- Unless law enforcement declares the child in imminent danger or the parent(s) gives permission and accompanies the child, **do not transport** the child to another location or take custody of the child in any manner.

- The social worker/clinician clinician must consider the possibility that the parent(s) may retaliate against the child who may have divulged information during the interview process. In cases where parents may retaliate, protective measures must be put in place during an immediate safety assessment. For example, the social worker/clinician may need to contact the school the next day and/or see the child again to assess and ensure his/her safety. In some cases, the child may not be safe at home after making a disclosure and efforts must be taken to remove the child(ren) under a declaration of imminent danger by law enforcement.

Interviews With Children Involving Allegations Of Physical Abuse

- Ask the child(ren) if he or she has any physical injuries. If the child has physical injuries, ask the child to explain to you how he/she received them.

- Take pictures of any injuries on areas of a child's body that are normally unclothed. Whenever possible, have another adult present when taking photographs of a child's injuries. Documentation should include who was present at the time the pictures were taken. Although it is permissible to photograph the buttocks of young children, respect should be shown to the child in all cases. Do not photograph "private parts" of latency age or adolescent children. Enlist the assistance of a school nurse or physician to document any injuries. Document a description of the size, shape, type and location of all injuries.

- In the immediate safety assessment process, if it is determined that a child needs to see a doctor due to serious injuries or medical condition, and the child has not been declared in imminent danger, arrange for immediate medical assistance for the child by having the parent/caretaker take the child to a doctor. The CFS worker must either accompany the child for medical treatment or follow-up with the medical provider to assure that the child

received treatment. If the child has been declared in imminent danger, a social worker or resource parent can initiate medical care for the child with a medical consent form signed by a parent. Reasonable efforts must be made to secure a medical consent form from the parent(s) at the time of removal. However, if the child needs emergency treatment and the parent can not be located or refuses to sign for treatment, the needs of the child must come first. A Department representative may sign (a resource parent must not sign) for treatment. In situations where the authorization of emergency medical treatment may be in question, the court may authorize medical or surgical care for a child, according to 16-1616 of the Child Protective Act.

- In many cases, a medical professional's findings concerning the most likely cause of the injury will be needed to confirm whether the injury is consistent with the explanation provided by the caretaker or alleged offender.

- Separately, interview all children in the family who are identified as being at risk of physical or sexual abuse. Interviews with siblings can be extremely helpful in gathering more information regarding family functioning and collaborating or refuting the information provided by the child of concern.

Interviews With Children Involving Allegations of Sexual Abuse

- Social worker/clinician should collaborate forensic interviews with law enforcement according to local multidisciplinary protocols.

- Since physical evidence is not always present in cases of sexual abuse, a forensic interview is often the foundation of the case. Therefore, child sexual abuse interviews should be conducted by a person who has been trained to ask questions objectively to determine the child's safety while preserving evidence for potential criminal charges. It is important to interview the child separately from the parent/caregiver and other siblings. Make certain the interview with the child is recorded.

- If a child discloses that he/she has been sexually abused within the last 48 hours, contact law enforcement and/or the prosecutor to determine if the child should be seen by a medical professional to gather physical evidence. The interview may also contain information that would prompt law enforcement to seek a search warrant.

- A child protection social worker/clinician may interview the alleged offender in cases of physical abuse or neglect.

- In cases of sexual abuse, the interview with the alleged offender should be conducted by law enforcement or personnel from a specialized interview unit such as CARES. It is important for the social worker/clinician to coordinate the sexual abuse assessment with law enforcement and/or specialized interview personnel.

Interviews With Children Involving Allegations Of Neglect

- Idaho's Child Protective Act states that interviews of "alleged victims of child abuse will be documented by audio or video taping." While the statute does not mandate a taped

interview with other children in the home who may or may not be potential victims, it is important to see and talk with all children in the home who are identified as being at risk, to assess their safety and allow them to disclose any concerns they may have. All children should be interviewed separately from their parent/caregivers.

Home Visit

- Using a family-centered, objective, respectful, nonjudgmental approach, the social worker/clinician should contact the parent/caregiver as soon as possible after seeing the child of concern. If the contact must be made with the parent at his/her work, protect the family's confidentiality by identifying yourself only to the parent. If a receptionist asks who is calling, give your name and state you are calling about the employee's child. Give as little information as necessary to anyone except the child's parent.

- Upon the first contact with the family, federal and state rules mandate that the social worker/clinician explain the purpose and nature of the assessment, including the allegations or concerns that have been made regarding the child/family. The explanation should include the general nature of the referral rather than specific details that could supply information to the alleged offender and impede any criminal investigation. If a criminal investigation is pending, disclosure of any details should be coordinated with law enforcement.

For example, *"I am here today because someone reported concerns regarding bruises on Johnny"* ***or*** *"I am here today because someone reported that Johnny is being left, unsupervised"* ***or*** *"I am here today because there are concerns that Johnny may have been sexually abused."* No further details need be supplied.

- During the course of the assessment, the name of the person making the referral must not be divulged.

- During the initial contact the social worker/clinician assigned the referral shall give the family their name, work phone number and the name of their supervisor

- To maintain confidentiality, **business cards or notes must not be left on the door** of a residence unless they are secured in an envelope, addressed to the parent(s). Do not use an envelope with the IDHW return address.

Interviews With Parents, Caregivers, and Alleged Offenders

- An interview, by the social worker/clinician, of the child's immediate family is mandatory. In referrals involving physical abuse or lack of supervision, each parent/caregiver or alleged offender (except in cases of severe abuse where law enforcement is taking the lead in the investigation) is to be interviewed separately. Interviews should gather the family's perspective on the allegations, including where they were at the time of the alleged incident, their explanation of the incident and allegations, identification of others who might have been present at the time of the alleged incident and anyone else with knowledge about the allegations, and whether the information provided is consistent with the child's account and assessment of the child's condition.

- In allegations of child sexual abuse, the social worker/clinician will interview the non-offending spouse/caregiver unless otherwise directed by law enforcement.

- In allegations of child sexual abuse, law enforcement will conduct the interview with the alleged perpetrator.

- In referrals alleging unhealthy or unsanitary home environments, parent/caregivers are not always interviewed separately. However, professional discretion should be used and parent/caregivers should be interviewed separately if there is reason to believe issues such as domestic violence may be present.

Home Environment

- On referrals alleging neglect or unsafe home conditions, the social worker/clinician shall visit/view all rooms in the home to determine if the environment poses a threat of harm to the child(ren). Some regions may use qualified contracted resources to assist in evaluating the home environment.

The social worker/clinician must assess the following:

  - Utilities are turned on and functioning;
  - Adequate and functioning plumbing;
  - Adequate supply of food;
  - Adequate sleeping arrangements;
  - Unsanitary conditions such as rotting food or feces, drugs, caustic cleaning supplies or hypodermic needles within a child's reach;
  - Firearms which may be within the reach of young children;
  - Exposed electrical wires;
  - Leaking gas;
  - Broken windows or glass;
  - Peeling paint;
  - Fire hazards such as cardboard boxes or other flammable materials next to a furnace; and
  - Presence of functioning smoke alarms.

- The social worker/clinician must determine whether the parent/caregiver is aware of any potential safety hazards, assess the parent/caregiver's motivation and efforts to address any unsafe home conditions, and assess resources or lack of resources that may affect the home condition.

Interviews with Collateral Contacts

- Any assessment of an abuse or neglect report will include at least one collateral interview with a person who is familiar with the circumstances of the child or children involved and who has knowledge of the family's functioning. Collateral interviews will be conducted with discretion and preferably with the parent's permission. Collateral contacts may include relatives, neighbors, family friends, doctors, school personnel, day care providers, service providers or others who may clarify and supplement information about the child's

condition and family functioning. A collateral contact should be an individual who is not the referent of the child protection concern. Although law enforcement officers may provide important information regarding the family's criminal history, any criminal history should be considered a safety assessment factor rather than a collateral contact. Collateral contacts may be made through phone calls, face-to-face interviews, and through written correspondence. Information from collateral contacts should include a description of how long each collateral contact has known the child and/or family, their assessment of the child's behavior and well-being, family functioning, and the family's interaction with the child. If the collateral contact is aware of the allegations involving abuse or neglect, ask the collateral contact for their understanding and explanation of the incident or allegations.

Use of the Immediate Safety/Risk Assessment to Document Observations, Interviews and Decision- Making

- The findings of the safety assessment will be documented on the"Immediate Safety Assessment" tool within five (5) working days after first seeing the child. The assessment will include all children in the family whose safety may be in jeopardy. Each safety factor is answered for the child(ren) who is the alleged victim (child of concern) or, any other child in the family where the specific factor relates to their immediate safety. If a referent does not specifically name all the children in the family, but other children's safety needs to be evaluated, those children too must be considered in the safety assessment.

For example: A school teacher reports that an 8 year old child has bruises on his face and arms that were allegedly inflicted by his mom who often appears out of control. When the social worker/clinician visits the home he/she also sees a 4 year old and a 2 year old who could be at risk of physical abuse. Vulnerability of each child should be considered so the factors should be answered for all three children.

However, the instructions on the immediate safety assessment do not mean that all children in the family are included in the assessment process in every instance. There are times a home environment or lack of supervision would necessitate a safety assessment for a two year old, but not a 17 year old. Professional judgment is required in deciding how many children in the family require an immediate safety assessment.

Immediate Safety Assessment Summary

The purpose of the immediate safety assessment summary is to provide a brief synopsis of what has occurred in the case to this point in time. The summary is not intended to include all case narratives. The following are guidelines for preparing the summary:

- **First paragraph**: A summary of the concerns reported in the initial referral.

- **Second paragraph:** A summary and process of what the social worker/clinician did to address the concerns and how the safety concern was reduced or eliminated.

The Part A summary and narratives addressing the safety assessment factors should be written in complete sentences and organized in a sequence to demonstrate what happened during the safety assessment process.

Immediate Safety Factors

- The immediate safety factors are assessed based upon the information that is available when the immediate safety assessment is being completed. A social worker/clinician is not expected to have the depth of information he/she would have after completing Part B of the Comprehensive Assessment. The purpose of the immediate safety assessment is to guide decision making and provide a written record of any decisions made; i.e. children are safe right now and will remain safe in the immediate future.

- The social worker/clinician shall identify each of the 18 factors on the assessment by checking “yes” when the information currently available indicates a clear presence of the immediate safety factor, “no” when the information currently available does not indicate presence of the immediate safety factor, or “inconclusive” when the information currently available is insufficient or contradictory. If a social worker/clinician finds it necessary to respond to several safety factors with the response choice of “inconclusive,” this indicates the need for further assessment. This may occur when family members or collateral contacts will not share information, are avoiding the social worker/clinician, the family appears to be hiding information or intentionally misleading the social worker/clinician. If a social worker/clinician does all he/she can to gather information and the result is still “inconclusive,” these uncertain responses may increase the likelihood that one or more of the children are at immediate danger of serious harm.

- If a factor is checked “yes” or “inconclusive,” the social worker/clinician should provide a nonjudgmental, behaviorally specific narrative that supports that finding. If a behavior or condition applies to two factors, fully document the information on the first factor, check the second factor “yes” and type in “see explanation under Factor # __.”

- The social worker/clinician shall record "no" when there is no clear presence or cause for concern, based on the information available, that an incident or condition covered by this factor has or is occurring. For example, a parent shows no indication of being "out of control" and comments from collateral contacts do not indicate this factor is an issue. It is not necessary to enter narrative for factors checked "no", however, narrative can be provided if it furnishes additional clarification.

- When assessing the presence or absence of these factors, the social worker/clinician shall consider how recently the behavior or condition was demonstrated. For example, ask yourself whether the safety factor is present now, will likely occur in the immediate future or has occurred in the recent past. Use this time criterion unless the factor is specifically related to historical events.

Child Characteristics

Document the following for each child identified as being at risk of serious harm or emerging danger:

Vulnerability/Lack of Self-Protection Skills/Special Needs

- Consider the age of the child(ren), noting that children 6 years of age or younger are generally most vulnerable.
- Assess the child's exposure to community oversight (e.g. school, day care)
- Determine any special needs that may make the child more vulnerable. Consider such characteristics as medical conditions, mobility, vision, intellectual functioning, mental health, and developmental delays.

Behavior Problems/ Emotional Temperament

- Identify behaviors, personality traits or family roles that the may precipitate or provoke abusive or neglectful reactions by parents/caregivers or other household members.
- Identify child behaviors that are disruptive, dangerous, or abusive toward others.

Previously been placed outside the home

- Document whether any child has previously been placed (prior to this particular referral) out-of-home, either via a relative (kinship) placement, an informal placement, or the child has been removed from their parent's custody through legal actions.

Safety Decision

- Based on the assessment of the immediate safety factors and any other key information known about the case, the social worker/clinician shall determine whether the child is safe, conditionally safe, or unsafe. This decision is made by weighing the short term danger posed by the safety factors, and a child's vulnerability, offset by any relevant protective capacities or mitigating circumstances. The social worker/clinician may find that different safety decisions apply to different children in the family; (i.e. young children vs. older children).

Safety Plan

- A safety plan is not expected to provide rehabilitation or to permanently change behaviors or conditions that led or may lead to maltreatment. Those safety threats are addressed in the service plan. The purpose of the safety plan is to control those behaviors or conditions that pose a present danger to any child and to supplement insufficient protective capacities to protect the child at the present time.

- An effective safety plan will serve to immediately protect the child while a more complete assessment is undertaken and a service plan to resolve or diminish all active safety threats is established and implemented.

  "Safe" – A child is considered to be safe when an assessment of available information leads to the conclusion that there are no immediate threats of serious harm present or the protective capacities of the family can manage any identified threats to a child at this time.

"Conditionally Safe" – Safety issues exist and a safety plan is being implemented to resolve the threats of serious harm identified at the present time until the safety threat can be resolved or sufficiently diminished. For example,
a child is considered conditionally safe in a dangerously unsanitary house where the family has a plan to clean the house and the children can stay with a relative until the unsanitary conditions no longer exist.

"Unsafe" – A child is considered "unsafe" if he/she is in imminent danger and thus requires removal from the parent/caretaker to protect him/her from immediate and serious harm. The parent/caretaker's actions or inactions present immediate threats of serious harm to a vulnerable child and an in-home plan can not be developed or is insufficient to control the present danger.

- In all instances where a child is considered "conditionally safe" or "unsafe," a safety plan must be developed to document what the family, the social worker/clinician, and others have done or will do to ensure the child's safety.

- A safety plan for the family is to be developed with involvement from the family. Family group decision making meetings can be helpful in identifying strengths, protective capacities, family resources, and solutions that can assist in crafting the safety plan.

- Safety plans will incorporate the least restrictive alternative for protecting the child. The social worker/clinician will make every effort to engage the family and make reasonable efforts to prevent placement of the child outside the home. All reasonable efforts to engage the family, and the family's response, will be documented on the assessment.

- If a child can be made "conditionally safe," the safety plan will identify specifically how the involved parties will control the signs of present danger. The plan must include how the plan will be monitored and must take into consideration the parents' willingness and ability to follow through with the plan. A contingency plan should also be discussed in the event the primary safety plan proves to be unviable.

- The social worker/clinician shall make certain everyone involved understands the safety plan and their respective responsibilities. After the safety plan is developed, it must be implemented immediately to provide adequate protection to the child(ren). The safety plan is only as effective as the completion of all the tasks necessary to make sure the child is protected.

Determining Whether a Case Should Be Opened For Services

If the child is found to be "safe" the case does not have to be opened for services. The referral will be dispositioned and the presenting issue can be closed with supervisory approval.

- If the child is "conditionally safe", a safety plan shall be developed and a Comprehensive Assessment (Part B) completed.

- If any child is assessed to be "unsafe," the standard for "imminent danger" has been met and out-of-home placement is necessary. A Comprehensive Assessment (Part B) will be completed and the case must remain open pending court and/or criminal disposition.

- If no child appears to be in immediate danger of serious harm and a safety plan is not needed, but the safety assessment identified emerging or prospective danger concerns or insufficient information to assess child safety, a Comprehensive Assessment (Part B) will be completed.

- When safety factors, the child(ren)'s vulnerability, and/or parental protective capacities indicate a child may be maltreated in the near future but the safety concerns do not meet the standard of "imminent danger," efforts should be made to engage the family and services should be offered according to the CFS Standard for Family Preservation In-Home Cases.

Determining when the Safety Plan is Discontinued

A safety plan is maintained as long as the family's own protective capacities are assessed to be insufficient to protect their child from serious harm without CFS involvement. Once the family can assure the safety of their own child, a safety plan can be discontinued. The purpose of a safety plan is to prevent serious harm to a child caused by an active safety threat. The purpose of the service plan is to resolve or diminish the safety threat to the degree that safety responsibility is returned to the family. Once this progress has been completed, the safety plan should be formally discontinued. This may be appropriate even in circumstances where other future risk and/or child well-being needs still exist. In that circumstance, the safety plan is discontinued, but a revised service plan may still be necessary. The timeframes for safety plan completion cannot be predicted. However, it is child centered and family focused best practice to review the child's vulnerability, the parental or caregiver's progress made to reduce safety threats, and the enhancement of parental protective capacities throughout the life of the case so the child is always protected in the safest, yet least restrictive manner possible.

Conducting a Comprehensive Assessment Part B

A comprehensive assessment usually requires more than one visit to the home because the assessment addresses the nature of the safety threat and the broader needs of a family that are impacting the safety, permanence, and well-being of the child(ren). The focus of a Comprehensive Assessment is not simply on the presenting issues, but also on the contributing factors such as domestic violence, substance abuse, mental health, poverty and other potential factors which may contribute to child maltreatment. Also important is the identification of underlying conditions that influence the dynamics of child maltreatment within a family system. These conditions may include the needs of individual family members, perceptions, beliefs, values, feelings, cultural practices, and previous life experiences. The Comprehensive Assessment also includes identifying family strengths and protective capacities that can support the family's ability to meet its needs and protect its children.

The purpose of the Comprehensive Assessment is to identify the family needs that will impact the safety, permanence, and well-being of the child. These needs, identified in the

Comprehensive Assessment, should be reflected in case planning and decision-making and lead directly to the identification of the specific individualized services that are needed to resolve present safety threats and reduce the risk of child remaltreatment.

Using the Comprehensive Assessment "Part B" to Document Observations, Interviews, and Decision Making

- When conducting the Comprehensive Assessment, the social worker/clinician shall look at the specific factors identified as being problematic and contributing to the likelihood of child maltreatment.

- The social worker/clinician shall answer factors (yes/no) based on behaviors, interactions, or circumstances that were present before an intervention or placement, and/or which are based on recent parent-child visitations or any other opportunities to accurately assess current functioning.

- For cases with multiple children or parents/caregivers, each person's name should be entered in the spaces provided and each assessment factor should be determined for each individual.

- The comprehensive assessment is used to guide and document the following decisions:
    - What needs to happen over time to reduce and/or eliminate the threats of serious harm, future risks, and meet the child's permanency and well-being needs?
    - Which are the contributing factors and underlying conditions that need to be addressed to accomplish this?
    - How can information about particular factors for a given family help in designing a service plan?
    - How much resolution of safety threats is needed and over what period of time before the child is considered safe?
    - If children are removed from home - when, where, how frequently and for how long should contact between the children and parent occur?
    -

Case Risk Findings

The case risk finding reflects the likelihood of future child maltreatment.

- The "risk finding" is the level of risk at the time the Comprehensive Assessment is completed. It represents the level of risk if CFS were to discontinue involvement with the family. The "risk finding" helps to focus the interventions/services on reduction/remediation of the particular safety threats and/or other risks that endanger the child(ren) and provides a baseline to compare change in the level of risk over time.

- The case "risk finding" requires the professional judgment of the social worker/clinician in consultation with his/her supervisor about the overall level of risk based on a synthesis of all safety and risk information and an analysis of those findings.

Dispositioning the Referral

Within five (5) days following completion of the Immediate Safety Assessment or the Comprehensive Assessment, the social worker/clinician will determine whether a report is substantiated or unsubstantiated for child abuse or neglect. The validity of reports will be determined using the following definitions with consideration given to the age of the child, extenuating circumstances, prior history, parental attitude toward discipline, and severity of abuse or neglect (IDAPA 16.06.01.560). In assigning a substantiated disposition, the social worker/clinician should ultimately consider,
"Is the injury or situation a result of child abuse or neglect?"

Substantiated Reports

Child abuse and neglect reports are confirmed by one (1) or more of the following:

- Witnessed by a social worker/clinician **(i.e. child found on the canal bank)**
- Determined or evaluated by a court;
- A confession (i.e. parent indicates that they are responsible for the injury to or neglect of the child);
- Validated through the presence of significant evidence that establishes a clear factual foundation for the determination of "substantiated." Example: Injuries consistent with abuse and alleged perpetrator was the only person with the child at the time the child sustained the injuries).

Unsubstantiated Report

Child abuse and neglect reports that cannot be found substantiated due to:

- Insufficient evidence; or
- Facts indicate that the report is erroneous or otherwise unfounded.

The social worker/clinician will generate a letter from FOCUS, signed by his/her supervisor, to be sent to the alleged perpetrator of a substantiated child abuse/neglect referral. When a substantiated disposition is entered in FOCUS, the individual's name is automatically entered into the Department's Central Registry for Child Abuse and Neglect.
If it is determined through the Immediate Safety or Comprehensive Assessment that a report is "unsubstantiated," the family will also be advised (IDAPA 16.066.01.563) and the family's name will not be placed on the Child Abuse Central Registry.

Notify the Referent When the Immediate/Safety and Comprehensive Risk Assessment are Complete

According to IDAPA 16.16.01.559.06, the referent (person who made the report) will be notified when the assessment has been completed. Notification should protect the confidentiality of the family and will not include details regarding the assessment or disposition of the referral. Notification can be made by letter. (A sample letter is attached as an addendum to this standard).

Conducting a Re-Assessment

- A re-assessment will be conducted in all cases in which a social worker/clinician is deciding whether to reunify children or close a case that has been opened for services. The re-assessment can often be effectively completed in the context of a family meeting or family conference.

- A re-assessment may also be completed to assist in decision making around termination of parental rights or to gauge the progress or lack of progress in a case over time. It should also be completed if there are any significant changes in the family's situation or circumstances.

- The results of the re-assessment should be compared with previous immediate safety and comprehensive assessments to assess the family's progress toward protecting and meeting the child's needs. It will indicate whether the family's situation has improved, worsened, or has remained the same.

Using the Re-Assessment Instrument to Document Observations, Interviews and Decision Making

- A social worker/clinician should clearly indicate the reason he/she is reassessing the family. For reunification and case closures, simply check the appropriate box in the "completed for assessment" section. When reassessing for any other reason, check the "other significant events" and provide an explanation for the reassessment in the "Rationale for Risk Findings and Case Status" section.

- The reassessment should reflect only information gathered since the last assessment of the family. It should not repeat information recorded on any previous assessments.

- Historic Immediate/Comprehensive Factors are those relating to prior events that would not be expected to improve or are unchangeable. These factors are grouped together under Section 2. If no new information has been discovered that would change the earlier rating, the historic factors do not require a new rating. If no new information has been discovered on any of the factors since any prior assessments, simply check the "no" box in the section header and skip the section. If your current assessment of any historic factors has changed, check "yes" and note the new information under the relevant factor(s).

Decisions in the re-assessment process include:

- Has progress been made towards reducing the safety threat and the underlying factors contributing to maltreatment? If not, are the safety threats increasing and/or do other interventions need to be made? If progress is being made, can some interventions be eliminated or reduced in intensity without increasing the threat of serious harm to the child?
- Has the parent/caregiver made significant changes that have increased his/her protective capacities?
- Was emerging danger identified in the previous assessment and if so, is this danger still present?
- Under what conditions is it safe to reunify the child(ren) with their family?
- When is it safe to close a case?

Documentation

- When recording a description of a particular assessment factor, use specific examples, whenever possible, and avoid judgmental statements and generalizations. The information should be both informative and serve to justify the assessment factor response or rating. All documentation should provide specific detail that is described in objective behavioral terms.

Example: Item 12. Caregiver or alleged offender's alleged or observed drug or alcohol use may seriously affect his/her ability to supervise, protect or care for the child. Mrs. Palmer indicates that she has used Vicodin since a car accident 8 years ago. She is currently taking 15-20 tablets per day. She has 4 different physicians who prescribe Vicodin for her and she also purchases Vicodin off the Internet. Her husband left a month ago. There is no food in the house, the children haven't bathed or washed their hair for 10 days, and the children haven't been to school for a week. Mrs. Palmer appears intoxicated and is unable to focus long enough to answer any questions.

- All fields and factors on the Immediate Safety/Risk Assessment should be documented in FOCUS according to the criteria set forth in this standard and within the required time frames.

SPECIAL CIRCUMSTANCES

Court Ordered Child Protection Risk Assessment

During the course of a court hearing involving issues other than child protection; i.e. child custody, the court may order the Department to investigate/assess the circumstances of a child and his/her family and submit a report to the court. Upon being assigned an order for a child protective assessment, the social worker or clinician will respond according to the urgency defined in the Court's order, and initiate the assessment process. The assessment should be documented on the Immediate Safety/Risk and Comprehensive Assessment instruments within thirty (30) days unless the court has specified a shorter time frame. Upon completion, a written report or the assessment tools with a cover sheet should be filed with the court.

Rule 16. Expanding a Juvenile Corrections Act proceeding to a Child Protective Act Proceeding (Juvenile Correction Act)

If at any stage of a Juvenile Correction Act proceeding, the court has reasonable cause to believe that a juvenile living or found within the state is neglected, abused, abandoned, homeless, or whose parent(s) or other legal custodian fails or is unable to provide a stable home environment, as set forth in I.C. Section 16-1603, the court may order the proceeding expanded to a proceeding under the Child Protective Act or direct the Department of Health and Welfare to investigate the circumstances of the juvenile and his or her family and report to the court as provided in I.C. 16-1609. Any order expanding the proceeding to a CPA proceeding must be in writing and contain the factual basis found by the court to support its order. The order will direct that copies of all court documents, studies, reports, evaluations, and other records in the court files, probation files and juvenile correction files relating to the juvenile/child be made available to IDHW upon request. The Immediate Safety Assessment and Comprehensive Assessment should be used to conduct the assessment. Prompt initiation of the assessment process may assist in identifying a safety plan that could offer alternatives to foster care.

Safe Haven Referrals

An Immediate Safety and Comprehensive assessment should not be conducted nor a disposition made when a parent relinquishes their infant within the first thirty (30) days following birth according to the Safe Haven Act, Section 39.8102 Idaho Code. However, a judge may order a child protection assessment if a parent comes forth to reclaim the child.

Infants Who Are Born Drug Exposed

The Department will assess the immediate safety of the infant and the family's ability to care for the needs of the infant. Response should be an assessment process that will identify and address the threats of serious harm by creating a safety plan with the family, making appropriate referrals, and assessing the health and safety of the child.

New Presenting Issues on the Same Family

Presenting issues that are reported by different referents, within close time frames of each other (one week) and contain identical referral information, will be combined with the original presenting issue. The new referral will be documented as information and referral and will state that the concerns are being addressed in "presenting issue number ___". Verification must be made with the social worker/clinician assigned to the case so that the information in the new referral was or will be assessed when he/she has seen the child, the parent/caregiver, and the home.

If a subsequent presenting issue contains new information, not originally recorded in the existing presenting issue, a new presenting issue will be entered into FOCUS and the social worker/clinician must respond according to the Department's Priority Response Guidelines.

All new presenting issues that contain new information require an Immediate Safety Assessment. Although an Immediate Safety Assessment should be completed for each new presenting issue, multiple presenting issues can be included in the Comprehensive Assessment if the presenting issues fall within thirty days of the Comprehensive Assessment.

Unable To Locate A Family

Diligent efforts must be made to locate a family. Those efforts include the following:

- Recontacting the referral source to verify the address;
- Contacting the family after regular office hours either by a contact from the assigned social worker/clinician or through the assistance of an on-call social worker or clinician; and
- Checking with landlords and/or neighbors, known relatives, utility companies, a family's self reliance specialist, local schools and law enforcement for a current address or any information as to the family's whereabouts.

If a family cannot be located, the case must be reviewed by the worker's supervisor prior to closing the presenting issue. If the family and/or child cannot be located, click on the "unable to contact" indicator on the Presenting Issue program screen in FOCUS.

NOTE: When you click on the "unable to contact" indicator, you will no longer have the option of conducting an Immediate Safety or Comprehensive Assessment in FOCUS.

The supervisor will determine when the presenting issue can be closed. If the "unable to contact" indicator is checked, with agreement from the supervisor, the presenting issue can be dispositioned as "unsubstantiated, insufficient evidence" and closed.

Inability to Follow Standards or Rules Related to Assessment

If circumstances exist that do not allow a social worker/clinician to follow the standards or rules pertaining to any aspect of assessment, including response timeliness, the worker shall contact their supervisor before a deadline has passed and request a supervisor's variance. The reason for the variance must be documented in a narrative in FOCUS by either the social worker or the supervisor.

For example, in a high profile criminal investigation, law enforcement may take the lead and instruct CFS not to respond. If the variance pertains to adherence to the Priority Response Guidelines and the date the child is seen, the reason for not seeing the child within the response time lines should be entered under the variance button under the immediate safety assessment screen.

Variances. A child may not be seen within designated response times. The rationale behind the delay must be thoroughly documented and reviewed (approved in FOCUS) by the supervisor. Circumstances that might warrant a variance include:

- Geographical constraints;
- Weather hazard;
- Good practice decision or professional judgment (be specific);
- Law enforcement has already sheltered the child;
- Worker safety;
- Child has left the area temporarily or permanently;
- Unable to locate, given diligent efforts;
- Other

Other variances related to immediate safety assessment should be documented under the assessment narrative (including an explanation for the variance) if the variance is related to a rule or standard and occurs during the timeframes of the assessment.

Variances are not to be granted after the fact to explain why something did or did not occur in accordance with rules or standards. Neither are variances to be written or approved to excuse social workers from adhering to practice expectations because of capacity or case load size.

Forty-Eight Hour Supervisory Review

In all Priority I and II cases where the alleged victim of abuse, neglect or abandonment is six years old or under, a review of the case by a supervisor will be conducted within forty-eight (48) hours of initiation of the Immediate Safety Assessment. The purpose of the review is to ensure the child was seen, gain an understanding of the safety factors, and consider options for the safety decision and planning if the child is found to be "conditionally safe" or "unsafe." The

supervisor will sign off on the 48 hour review in FOCUS. A brief narrative, documented by the social worker/clinician or the supervisor shall accompany the supervisor's signature to document whether the child is safe and that the supervisor concurs with the proposed safety plan.

Role of Supervisors in Safety/Risk Assessment

The supervisory review represents the supervisor's participation in the decision-making process and his/her acknowledgment that the decisions and assessment documentation meets supervisory expectations and CFS practice standards.

Supervisors are required to monitor the following criteria in reviewing the Immediate Safety, Comprehensive, and Reassessment instruments:

- Was the assessment completed in a timely manner?
- Does the assessment provide a thorough description of the family's situation so it can be used to support decision making in the case?
- Were CFS standards, policies, and rules adhered to regarding the assessment process?
- Was the assessment documented in FOCUS, using the best practice standard for documentation?

Any variance to these standards will be documented and approved by Division administration, unless otherwise noted.

H. Appendix D: Family Preservation Standards

STANDARD: FAMILY PRESERVATION -- IN-HOME FAMILY SERVICES

PURPOSE

The purpose of these standards is to provide direction and guidance to the Child and Family Services (CFS) programs regarding family preservation in-home family services. These standards are intended to achieve statewide consistency in the development and application of CFS core services and shall be implemented in the context of all-applicable laws, rules, and policies. The standards will also provide a measurement for program accountability.

INTRODUCTION

Whenever possible, children should remain with their family. The purpose of family preservation services is to prevent the removal or eliminate the need to remove children from their homes. Efforts to prevent removal are to be pursued *only* when they are consistent with the child's safety. The goals of family preservation services are:

(1) Resolve the immediate crisis;
(2) Maintain the safety of children in their own homes;
(3) Help families obtain services that meet their multiple needs in a culturally appropriate manner and prevent unnecessary out-of-home placement.

Services to in-home cases may represent "reasonable efforts" by the Department to preserve families, prevent placement into alternate care, and promote family unity while taking measures to safeguard children from abuse or neglect.

"Reasonable efforts" to prevent removal of children from their families are required under Title IV-E and have lead to (1) an overall decrease in the numbers of placements (2) more goal-oriented planning for children and families, (3) a greater emphasis on family decision making, and (4) a reduction in the amount of time children spend in care.

Family Preservation In-Home Services may also be used in reunification cases, and with resource families. Details regarding these specific uses will be detailed further in the Standard.

STANDARD

A social worker will conduct a risk assessment on each priority I, II, or III referral which is received. When the risk level is determined to be **moderate to high** and the child can be kept **safe at home**, a case will be opened and the family will receive services which allow the child to remain at home **without removal**. Services are to address the identified risk issues.

DEFINITIONS

Family Preservation In-Home Family Services: A referral involving a family who is the subject of a report of child abuse or neglect that is opened for services, after a risk assessment has been completed, to prevent the removal of a child from their home.

Any activities regarding safety planning, including referral to other services or case management activities, delivered prior to completion of the Comprehensive Risk Assessment and a Case Plan are considered part of the risk assessment process.

PROCEDURES and accompanying flowchart:

(1) All referrals given a Priority I, II or III will receive an Immediate Risk/Safety Assessment (Part A);

(2) If the risk level is determined to be "moderate" to "high," and the child(ren) is found to be "conditionally safe," the assigned social worker will make every effort to engage the family and offer services. A parent's response/actions during the immediate risk assessment assists the social worker in determining if the family will voluntarily work with CFS of if CFS needs to approach the prosecutor regarding legal action in those situations where the standard of imminent danger is not met;

(3) Develop a Safety Plan with the family and put supports in place to implement the plan. Effective Safety Plans are developed with the family's direct input, emphasizing their individual strengths and capabilities. A family group decision making process may also be helpful in developing a safety plan. At this critical point, families and their extended member are often motivated to solve family issues when brought together. Document the safety plan on the Immediate Risk/Safety Assessment (Part A) in FOCUS;

(4) Comprehensive Risk Assessment and Case Plan requirements within 30 days;

(a) Complete a Comprehensive Risk Assessment (Part B).

(b) Engage the family in developing a service plan. A family group decision making process may be utilized where family members and their supports participate fully in development of the plan. This process engages both the immediate family members in the development and success of the plan as well as the family's support systems.

(c) When the Department is contracting with a private provider to provide family preservation services IDHW, the contractor, and the family will jointly develop the case plan.

(d) Social workers should consider whether identified health or educational needs are relevant to the reason why the agency is involved with the family **and** whether the need to address the health or educational issues is a reasonable expectation given the circumstances of the family and agency's involvement.

(e) Enter the family's case plan into FOCUS

(5) In situations where a family **refuses to work with IDHW** on a voluntary basis in spite of the worker's diligent efforts to engage the family, and the level of risk is **moderate to high**, but does not meet the standard of imminent danger, CFS will contact the local county prosecutor about a judicial order for Protective Supervision. The contact with the prosecutor will be documented in FOCUS on the Presenting Issue narrative. This action will demonstrate continued attempts by the agency to make reasonable efforts to prevent removal while reducing the level of risk.

(6) The CFS Worker Contact with the Child and Family Standard applies to these in- home cases. The family's IDHW social worker, clinician or other responsible party who has full responsibility and decision making authority must see the child(ren) and their parent(s) in the family home at least once per month, and more frequently if needed.

(7) At 6 months, each family preservation in-home case shall receive a risk re-assessment. The reassessment of risk is completed to help determine whether risk levels have decreased or services are not resulting in reduction of risk. A supervisory staffing will be conducted regarding case direction. If current services are not effective in decreasing the likelihood of future child abuse or neglect, consideration will be given to changing services, convening or reconvening a family group decision making meeting, or approaching the court for an increased level of intervention.

(8) A formal re-assessment of risk must be completed prior to case closure.

PROCEDURES FOR USE OF FAMILY PRESERVATION SERVICES IN REUNIFICATION CASES:

(1) Social Workers will staff reunification cases with their supervisor to determine whether family preservation services are needed, and would be effective in the successful return of the child to the family home. Family preservation services can be extremely beneficial in transitioning children back into their families after placement in foster care. Family preservation efforts would focus on continued/maintained reduction of risk to the child or children.

(2) The re-assessment of risk must indicate family preservation services as an identified need for the family.

(3) The Family Service Plan must include family preservation services as part of the reunification plan.

(4) When the Department is contracting with a private provider to provide family preservation services, IDHW, the contractor, and the family will jointly develop the goals specific to the service. These goals will be entered into FOCUS.

PROCEDURES FOR USE OF FAMILY PRESERVATION SERVICES IN CASES WITH RESOURCE FAMILIES:

(1) Socials Workers will staff with their supervisors and regional licensing staff, potential referrals of resource families for family preservation services. Resource families who foster children who are at risk of a disrupted placement will be staffed and referred for Family Preservation Services.

(2) A Resource Family Assessment, and evaluation of PRIDE competencies will be completed.

(3) When the Department is contracting with a private provider to provide family preservation services, IDHW, the contractor and the resource family will jointly develop the plan for services.

(4) After completion of the family preservation services, PRIDE competencies will be re-evaluated.

Any variance to these standards shall be documented and approved by the Division Administrator, unless otherwise noted.

REFERENCES

Standard: Contact Between the Social Worker, the Child, the Family, and Resource Parent(s) or other Alternate Care Providers

I.D.A.P.A 16.1601.450.05 Contact with Child

FAMILY PRESERVATION IN-HOME CASES

Immediate Risk/Safety Assessment (Part A) on Priorities I, II and III

No to Low Risk ◀◀ **(results)** ▶▶ **Moderate to High Risk**

↓

Refer to Community Resources

↓

Close Referral

↓

Develop and Resource A Safety Plan with the family

↓

Within 30 days: Comprehensive Assessment Family Case Plan

↓

If family refuses voluntary services contact prosecutor and document response in FOCUS ← ← ← ← ← ←

Provide family preservation services

↓

At least monthly face-to-face contact with child(ren) and parent(s) in family home

↓

Risk Reassessment at 6 months

↓

Supervisory Staffing for Decision

Risk Increased

↓

(1) Modify or increase services
(2) Consider family group decision making meeting
(3) Court intervention for an increased level of intervention

Risk Reduced

↓

Close Case

CHAPTER III: INITIATING A CPA CASE

Revised May 29, 2007
Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Methods of Initiating a Child Protection Case

There are four ways to initiate a child protection case pursuant to the Idaho Child Protective Act (CPA).[1] First, law enforcement officers can declare a child to be in imminent danger and remove the child or the alleged offender from the home.[2] Second, the county prosecutor or a deputy attorney general can file a petition with the court pursuant to the Child Protection Act, asking the court for either an order to remove the child (which directs law enforcement or agency officials to remove the child from the home) or a protective order (removing the alleged offender from the home).[3] Third, the county prosecutor can file a petition with the court pursuant to the CPA without asking for emergency removal of the child pending the hearing on the petition.[4] Finally, the court can expand a juvenile corrections proceeding into a child protection proceeding.[5]

In emergency situations, it may be necessary to take steps to protect a child at or even before the beginning of the child protection case. The significance of the procedure for declaration of imminent danger is that it allows law enforcement officers to remove the child from the home and place the child in shelter care *without prior court order*. The significance of the procedure for an order removing a child is that it allows a child to be removed from the home and placed in shelter care *pursuant to a court order, but without prior notice to parents and opportunity for hearing by the parents*. Generally, a declaration of imminent danger should be used only if the child would be endangered if removal were delayed until a CPA petition could be filed and an order to remove the child can be obtained.

If a child is abandoned pursuant to the Idaho Safe Haven Act,[6] a safe haven may take temporary custody of a child. The safe haven must immediately notify either law enforcement or the individual designated by the court in that county to receive such notifications. Once temporary custody of such a child has been assumed, a CPA proceeding must be initiated by the Idaho Department of Health and Welfare (IDHW).

1. Declaration of Imminent Danger

A law enforcement officer can declare a child to be in imminent danger, take custody of the child, and turn the child over to IDHW to be placed in shelter care. The officer can remove the

[1] Idaho Code §16-1601 *et seq.*
[2] Idaho Code §16-1608 and IJR 31.
[3] Idaho Code §§16-1611(4) or (5), IJR 34. A order to remove a child used to be called and "Endorsement on Summons." The statute was amended in 2007 to more accurately describe the order.
[4] Idaho Code §16-1611.
[5] IJR 16.
[6] Idaho Code §§ 39-8202-8205.

child "only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child." [7]

If a child is in imminent danger from an alleged offender in the child's home, a law enforcement officer can remove the alleged offender instead of removing the child. The officer can remove the alleged offender only where the child is endangered and the prompt removal of the alleged offender is necessary to prevent serious physical harm or mental injury to the child."[8]

The CPA authorizes other persons to declare a child in imminent danger and to remove the child or the alleged offender from the home.[9] For example, an administrative order of the court might authorize on-call workers from IDHW to declare a child in imminent danger pursuant to the CPA.

If a child is declared in imminent danger, the county prosecutor or the deputy attorney general files a CPA petition with the court and serves notice of the petition. The court must then hold a shelter care hearing. The shelter care hearing must be within 48 hours of the child's removal or 24 hours of the alleged offender's removal, not including weekends and holidays.[10] There is more information about the petition and service of process later in this chapter, and there is more information about the shelter care hearing in Chapter IV of this Manual.

If a child is declared in imminent danger, the Idaho Juvenile Rules require the officer making the declaration to prepare a *Notice of State Action*.[11] The form of the notice is set forth in the court rules and includes information about the shelter care hearing and the right to counsel. The notice must be personally served on the child's parent(s), guardian, or custodian if the child is removed, or notice must be served on the alleged offender, if the alleged offender is removed. Service must be made at least 24 hours prior to the shelter care hearing. Personal service is not required for persons who cannot be located or who are out-of-state.[12]

2. Order Removing the Child

A county prosecutor or deputy attorney general can file a CPA petition with the court, asking the court to place an Order to Remove the Child on the summons. The summons is the notice to the parents that a CPA case has been filed. An order removing the child directs law enforcement or agency personnel to take custody of the child, who is then placed in shelter care pending the shelter care hearing.

The court may issue the Order to Remove the Child based either on testimony presented on the record or on a verified petition or affidavit. The recommended best practice is to file affidavit(s) with the court along with the petition, with the affidavits containing all the information necessary to support the findings and conclusions that the court is required to make.

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[7] Idaho Code §16-1608(a)(1).
[8] Idaho Code §16-1608(1)(b).
[9] Idaho Code §16-1608(1).
[10] Idaho Code §16-1610, 16-1608(2),(3); IJR 32.
[11] IJR 32.
[12] IJR 32.

Before issuing an order removing the child, the Idaho Code requires the court to make the following findings and conclusions under Idaho state law:

- It appears that the child is within the jurisdiction of the CPA (the grounds for jurisdiction, such as abuse, neglect, etc., are discussed later in this chapter); and
- It appears that it would be contrary to the welfare of the child to remain in the home, and it would be in the best interests of the child to be placed in shelter care.

In addition, Idaho law requires the court, when granting an order to remove the child, to make a finding that continuation in the child's current surrounding would be contrary to the child's welfare and that vesting legal custody of the child with IDHW is in the child's best interests. Federal law requires the court, in an Order to Remove the Child, to make a *contrary to the welfare/best interests* finding that is *case-specific* and *documented* in the court's order as it is the first order sanctioning removal of the child from the home.[13] If this finding is not made, the child will not be eligible for federal IV-E funds, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the specific circumstances making removal of the child in the child's best interests. If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific best interests/contrary to the welfare findings.

★★★The finding that remaining in the home is contrary to the child's welfare and that removal from the home is in the child's best interests is **required to preserve the child's IV-E funding.**

In addition to the contrary to the welfare/best interests finding, the court may, as a matter of best practice, review the reasonable efforts made by IDHW to avoid removal of the child from the home. The court must make a finding that IDHW made reasonable efforts to prevent removal of the child from the home OR that the efforts to prevent the child's removal from his/her home were reasonable given that the agency's assessment accurately determined that no preventative services could have been safely offered. Federal law requires that this finding be made within the first 60 days after the child is removed from the home.[14] The Idaho Code requires this finding to be made at the shelter care hearing and at the adjudicatory hearing. Failure to make a case-specific finding regarding the reasonable efforts of the agency to avoid removal within the first 60 days after removal will result in loss of IV-E funding for the child. To ensure that the finding is made in a timely fashion and to avoid the unnecessary removal of the child from the home, the court should begin the process of reviewing the agency's efforts at the hearing for the order to remove the child.

★★★The finding that IDHW has made reasonable efforts to prevent removal of the child from the home is **required to preserve the child's IV-E funding.**

If it appears that the child is within the jurisdiction of the CPA, but a protective order would enable the child to safely remain in the home, the court may enter a protective order instead of an

[13] 42 U.S.C. §§672(a)(1), 673(a)(2)(A)(i); 45 C.F.R. §1356.21(c)(d). The importance of this finding is discussed in this Manual in Chapter IV.
[14] *Id.*

order to remove the child.[15] For example, removal of an abusive parent may enable the child to remain safely at home with a non-abusive parent. If the child is in joint custody, the statute requires that the protective order state with specificity the rights and responsibilities of each parent.[16]

After the order to remove the child or the protective order is issued, the county prosecutor or deputy attorney general serves notice, and the court must then hold a shelter care hearing. The shelter care hearing must be held within 48 hours of the child's removal or within 24 hours of the alleged offender's removal, not including weekends and holidays.[17] There is more information about the petition and service of process later in this chapter, and there is information about the shelter care hearing in Chapter IV.

3. Petition without Emergency Removal

CPA cases are usually initiated as a result of the need for removal of the child or the alleged offender from the home. A CPA case can, however, be initiated without removal of the child or an alleged offender. Generally, this procedure is used for cases of neglect or unstable home environment, where it is clear that improvements are necessary for the health and well-being of the child but where removal of the child is not necessary for the child's protection. In these cases, the court's involvement is sought to ensure that the parents participate in remedial services and make the necessary improvement in their care of the child or in the home environment.

In these situations, the Petition may seek removal of the child. If removal is sought, a shelter care hearing must be held. More often, when the child is not removed prior to the filing of the petition or upon service of an order removing the child, protective supervision is sought.[18]

Where protective supervision is sought, a petition is filed, process is served, and the matter proceeds to an adjudicatory hearing. A shelter care hearing is not needed because neither the child nor the alleged offender were removed from the home, and the state is not requesting an order for emergency removal pending the adjudicatory hearing. There is more information about the petition and service of process later in this chapter, and there is information about the adjudicatory hearing in Chapter V.

4. Expansion of Juvenile Corrections Case

In Idaho, most offenses committed by juveniles are prosecuted under the Juvenile Corrections Act (JCA) and the Idaho Juvenile Rules.[19] In some cases, the court or other participants in the JCA proceeding may have reason to believe or cause for concern that the juvenile is abandoned, abused, neglected, or otherwise falls within the jurisdiction of the CPA. (Grounds for jurisdiction under the CPA are discussed later in this chapter.) Rule 16 of the Idaho Juvenile Rules provides that the court may order a JCA proceeding expanded into a CPA proceeding whenever the court has reasonable cause to believe that a juvenile living or found within the state

[15] Idaho Code §16-1611(5).
[16] *Id.*
[17] IJR 32, Idaho Code §16-1610, 16-16082(2),(3).
[18] Idaho Code § 16-1610(5)(a).
[19] *See* Idaho Code §20-501 *et seq*, and IJR 1 *et seq*.

comes within the jurisdiction of the Act. Practitioners commonly refer to such cases as "Rule 16 expansions."

Upon expansion, the court may order the child placed in shelter care under the CPA if it is in the best interests of the juvenile and if it is needed for the juvenile's protection. Federal law requires the court to make a best interests finding that is *case-specific* and *documented* in the *first order* sanctioning removal of the child from the home.[20] If this finding is not made, the child will not be eligible for federal funding, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute. It can, however, incorporate by reference written reports in the court file, such as reports by juvenile probation officers.[21]

In some cases, the first order sanctioning the removal of the child from the home will have been the JCA Disposition order. Because of the importance of the federal reasonable efforts finding, IJR 19(b) requires that the federal contrary to the welfare/best interests and reasonable efforts findings be made in every juvenile case in which a juvenile is committed to the custody of the Department of Juvenile Corrections.[22]

★★★The finding that remaining in the home is contrary to the child's welfare and that removal from the home is in the child's best interests is **required to preserve the child's IV-E funding.**

If expansion is ordered, then notice must be given to the parents and others in the same manner as in any CPA case. If shelter care is ordered, then a shelter care hearing must be held. The case then proceeds to adjudicatory hearing, the same as in any CPA case. The juvenile proceeding continues unless otherwise ordered by the court.

When an expansion is ordered, it is essential that the prosecutor promptly contact the appropriate local IDHW staff and that the prosecutor and the agency conduct appropriate investigation pending the shelter care and/or adjudicatory hearings. The burden remains with the prosecutor to go forward and prove the case the same as in any other CPA proceeding. The filing of a petition is not required, but the prosecutor may want to file a petition so that the pleadings conform to the case the prosecutor intends to make.

Sometimes, there is reason for concern that the child is within the jurisdiction of the Act, but that there is insufficient evidence to support a finding of reasonable cause to believe that the child is within the jurisdiction of the act. In such cases, the Idaho Juvenile Rules authorize the court to enter an expansion order or to direct the prosecutor and the agency to investigate the matter and report back to the court.[23]

[20] 42 U.S.C. §§672(1)(1), 673(a)(2)(A)(i); 45 C.F.R. §1356.21(c),(d).
[21] If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific finding best interests finding.
[22] IJR 19.
[23] IJR 16(1).

B. Filing a Child Protection Case

To file a child protection case, the county prosecutor or deputy attorney general will need to prepare the following documents:

- Petition
- Summons
- Affidavit(s), if a child was declared in imminent danger or if removal of the child or the alleged offender is sought prior to the adjudicatory hearing.

1. Petition

The contents of the petition are specified by statute.[24] It is important that the petition be properly prepared. Defects in the petition can result in a great deal of time spent on motions to dismiss, motions to clarify, and motions to amend, which could be avoided simply by careful attention to the preparation of the petition.

The petition must be entitled "In the Matter of _____, a child (children) under the age of eighteen years." It must be signed by the county prosecutor or deputy attorney general and verified. It must include the following:

- The facts which bring the child within the jurisdiction of the CPA, including a description of the actions of each parent. The grounds for jurisdiction, such as abuse or neglect, are described later in this chapter.
- The name, birthdate, sex, and residence address of the child.
- The name, birthdate, sex, and residence address of all other children living at or having custodial visitation at the same home as the child named in the title of the petition.
- The names and residence addresses of boththe mother and father, guardian, or other custodian. If none of these persons reside or can be found within the state, the name of any known adult relative residing within the state should be included.
- The names and residence addresses of each person having sole or joint legal custody of any of the children named in the petition.
- Whether a court has adjudicated the custodial rights of the parents of the child named in the title of the petition, and if so, the custodial status of the child.
- Whether there is a legal document controlling the custodial status of any of the children.
- Whether the child is in shelter care, and if so, the type and nature of the shelter care, the circumstances justifying the shelter care, and the date and time the child was placed in shelter care.
- If the child has been or will be removed from the home, the petition must state that:

  i) remaining in the home was contrary to the welfare of the child,

  ii) it is in the best interests of the child to place the child in the custody of IDHW or other authorized agency, and

  iii) reasonable efforts were made to prevent the removal of the child, *or* efforts to prevent the removal of the child from the home were reasonable given that the agency's assessment accurately determined that no preventative services could have been safely

[24] Idaho Code §16-1605.

offered, *or* reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.[25]

In many cases, the attorney filing the petition will not know and cannot reasonably determine some of the elements required by the statute prior to filing the petition. In such case, the element can be omitted, but the petition must state that it is not known. The petition may be based on information and belief rather than on the personal knowledge of the person(s) signing the petition, but the petition must state the basis for the information and belief.

The petition should also include the following:

- If the state is seeking a determination that the parent subjected the child to aggravated circumstances, a statement of the grounds and the facts that bring the parent's actions within those grounds. "Aggravated circumstances" are discussed later in this chapter.
- Whether the child is an Indian child, and if so, the name of the child's Indian custodian (if any) and Indian tribe. The purpose of this requirement is to ensure an early determination of whether the proceeding is subject to the requirements of the Indian Child Welfare Act, which is discussed later in this chapter.

2. Summons

The summons is a notice of the filing of a petition pursuant to the CPA, which must be served on the child's parents, guardian, and/or custodian, along with a copy of the petition.[26] There must be a separate summons for each person to be served. The form of the summons is set forth in the Idaho Juvenile Rules.[27] The summons should be prepared by the attorney filing the petition, to be signed by the court clerk. The summons provides essential information to the parents, most importantly:

- the date and time for shelter care hearing [or the adjudicatory hearing, if removal of the child or alleged offender has not been made and is not requested];
- the right to counsel, including appointed counsel for parents who cannot pay for an attorney, and directions for requesting appointed counsel; and
- that if the parent fails to appear, the court may proceed in the parent's absence, and the missing parent may be subject to proceedings for contempt of court.

The form for the summons set forth in the Idaho Juvenile Rules does not include language for the order removing the child. If the petitioner is seeking an order removing the child, language should be included in the summons for the order to remove the child.[28]

3. Supporting Affidavit(s)

A supporting affidavit is essential for the shelter care hearing where the child has been declared in imminent danger, where the petitioner (the county prosecutor or deputy attorney general) is asking that an order to remove the child be placed on the summons, or where the state is asking

[25] Aggravated circumstances are discussed later in this chapter. There is more information about "reasonable efforts" in Chapter IV.
[26] Idaho Code §§16-1611, 16-1612. There is more information about service of process later in this chapter.
[27] IJR 33.
[28] See part A.2 of this chapter. See also Idaho Code § 16-1611 and IJR 32. The model Summons available on the Idaho Supreme Court's website contains the appropriate language for removal of the child.

for a protective order. The affidavit should contain all the information necessary to support the findings and conclusions the court is required to make.

Before issuing an order removing the child, the court must make the following findings and conclusions:

- It appears that the child is within the jurisdiction of the CPA (the grounds for jurisdiction, such as abuse, neglect, etc., are discussed later in this chapter), and
- It appears that it would be contrary to the welfare of the child to remain in the home and that it would be in the best interests of the child to be placed in shelter care.

Before issuing a shelter care order, the court must make the following findings and conclusions:

- a CPA petition has been filed;
- there is reasonable cause to believe that the child comes within the jurisdiction of the CPA (the grounds for jurisdiction, such as abuse, neglect, etc, are discussed later in this chapter);
- IDHW made reasonable efforts to prevent removal of the child from the home OR that the efforts to prevent the child's removal from his/her home were reasonable given that the agency's assessment accurately determined that no preventative services could have been safely offered;
- the child cannot be placed in the temporary sole custody of a parent having joint custody of the child; and
- it is contrary to the welfare of the child to remain in the home, and it is in the child's best interests to be placed in shelter care pending the adjudicatory hearing.[29]

Federal law requires the court to make a *contrary to the welfare/best interests* finding that is *case-specific* and *documented* in the *first order* sanctioning removal of the child from the home.[30] In most cases, the first order will be either the order removing the child included on the summons or the shelter care order. If this finding is not made, the child will not be eligible for federal funds, and the omission cannot be corrected at a later date to make the child eligible.[31] The finding cannot be a mere recitation of the language of the statute, but *it can incorporate by reference an affidavit* that describes the specific circumstances making removal of the child in the child's best interests. Filing an affidavit that includes this information along with the petition is the best way to ensure compliance with federal laws and to safeguard the child's eligibility for federal funds.

The recommended best practice in all cases is to prepare supporting affidavits from the investigating authorities (usually IDHW caseworkers, sometimes law enforcement officers, sometimes medical or school personnel) that include all the supporting information for all the facts that must or should be alleged in the petition. This serves several important functions. First, it assists in preparation of the petition. Second, it can tighten the analysis of the evidence and the case by the agency and the county prosecutor or deputy attorney general. Third, the

[29] There is more information about the key decisions the court must make at the shelter care hearing in Chapter IV, part D.

[30] 42 U.S.C. §§672(a)(1), 673(a)(2)(A)(i); 45 C.F.R. §1356.21(c)(d).

[31] If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific best interests/contrary to the welfare finding.

availability of an affidavit that thoroughly documents the current information promotes the potential for informed settlement and appropriate stipulations.

The supporting affidavits should be attached to the petition to ensure service of process of the affidavits along with the petition and summons.

C. Service of Process

1. Manner of Service

Service of process must be made by personal delivery of an attested copy of the summons, with the petition attached. Service of process must be completed at least 48 hours prior to the time set for the hearing in the summons. Service of process must be made by the sheriff or another person appointed by the court. The summons includes a return of service, which must be completed and filed with the court to show that service has been made.[32]

If it is impracticable to personally serve summons, the court may order service by registered mail or by publication, or both. If service is by publication, the summons must be published once a week for two consecutive weeks in a newspaper of general circulation in the county, and the newspaper in which notice is to be published must be designated by the court in the order for publication of the summons. The county in which notice is published should be the county in which the person to be served is most likely to be found. If service is to be made by registered mail, it should be made to the address most likely to give the person to be served actual notice.

Where personal service is impracticable, the county prosecutor or deputy attorney general responsible for the case should seek court approval of service by registered mail and publication as soon as possible,[33] so that service can be completed prior to the adjudicatory hearing.[34] The request should be by written motion. The motion should either be verified and include the following, or should be accompanied by a supporting affidavit that includes the following:

- a description of the efforts made to identify, locate, and serve the missing party;
- a statement of the address where service by registered mail is most likely to achieve actual notice;
- a description of why that address is most likely to achieve actual notice;
- a statement of the newspaper of general circulation must likely to achieve actual notice; and
- a description why that newspaper is most likely to achieve actual notice.

The motion should also be accompanied by a proposed order. The proposed order should include findings that personal service is impracticable and that service by registered mail at the specified address and by publication in the specified newspaper are most likely to achieve actual notice. The proposed order should require filing of an affidavit of service and an affidavit of publication to show completion of service in accordance with the order.

[32] Idaho Code §16-1612(3).
[33] Idaho Code § 16-1611(1), (2).
[34] There is information about the adjudicatory hearing in Chapter V.

2. Persons to be Served

Service of process must be made to each of the child's parents, legal guardian, or custodian. This includes non-custodial parents, putative fathers, and adoptive parents but does not include a parent whose parental rights have been terminated. Identification and joinder of all parents is essential for several reasons. First, it is essential to the protection of substantial individual rights that these persons have notice and opportunity to participate. Second, the sudden appearance of a missing party later in the process can cause substantial disruption, both to judicial proceedings and to the life of the child. Finally, the participation of these parties may prove essential to achieving the ultimate goal - a safe home and loving family for the child. To the extent that there are issues of paternity, putative fathers should be identified and joined, and the petitioner should be prepared to seek orders for paternity testing to resolve issues as to paternity as early as possible in the proceedings.

3. Complying with the Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act establishes special procedural and substantive requirements for Indian children in CPA cases.[35] If the child is an Indian child, the parent or Indian custodian and the child's Indian tribe have the right to intervene.[36] Notice must be given by registered mail, return receipt requested, to the parent or Indian custodian and to the Indian child's tribe, of the pending proceedings and their right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior, who has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe.[37] A detailed discussion of ICWA can be found in Chapter XI of this Manual.

For purposes of the Indian Child Welfare Act, a child is an Indian child if the child is a member of, or is eligible for membership in, an Indian tribe.[38] If there is a question as to whether the child is a member or is eligible for membership in a particular Indian tribe, it may be necessary to request a determination of that issue from the Indian tribe. Each Indian tribe establishes the requirements that must be met to be a member of that tribe, and the tribe's determination of membership is final and is entitled to full faith and credit.[39]

Identification of Indian children and joinder of the child's Indian tribe is important, not only because is it required by federal law. Compliance with ICWA is important to protect the unique and substantial interest of the tribe and the Indian child, and because the tribe often has information regarding the child and the family that is critical to assisting the court in good

[35] 25 U.S.C. §1901 *et seq.*

[36] 25 U.S.C. §1911(c).

[37] 25 U.S.C. §1912(a). That section further provides that no foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary of Interior. It also provides that the parent, Indian custodian, or the tribe shall, upon request, be granted up to twenty additional days to prepare for such hearing. Presumably, the reference in ICWA to foster care placement proceedings would mean the adjudicatory hearing under Idaho law, not the shelter care hearing. Otherwise, the court would be unable to make emergency placement necessary for the child's protection while efforts to comply with ICWA were underway.

[38] 25 U.S.C. §1903(4).

[39] 25 U.S.C. §1911(d); *see e.g.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); *see also* Indian Tribe v. Doe, 123 Idaho 464, 849 P.2d 925 (1993) and Doe v. Doe, 127 Idaho 452, 902 P.2d 477 (1995), for Idaho decisions applying ICWA.

decision-making regarding the child. In addition, the sudden appearance of a tribal claim at a later point in the process can cause major disruption to the judicial proceedings and, more importantly, to the life of the child. Such disruption can be avoided by early and diligent efforts to determine whether the child is an Indian child and by providing notice to the child's tribe as soon as possible.[40]

D. What Facts Support Filing of a CPA Case?

1. Jurisdiction

A child is within the jurisdiction *of the court* if the child lives or is found within the state. The child is within the jurisdiction *of the Act* if the child is abused, abandoned, neglected, homeless, or lacks a stable home environment. Other children in the home may also come within the jurisdiction of the act.[41]

a. Abandoned

Idaho law defines abandonment as "the failure of a parent to maintain a normal parental relationship with his child including, but not limited to, reasonable support or regular personal contact." The statute further provides that failure to maintain this relationship for one year is prima facie evidence of abandonment.[42]

b. Abused

Idaho law defines "abused" as any case in which a child has been the victim of

i. conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of accidental occurrence, or

ii. sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.[43]

c. Neglected

Idaho law defines a "neglected" child as one:

i. who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them…. or

[40] In some cases, the proceedings must be transferred to the tribal court for resolution. 25 U.S.C. 1911(b). ICWA also establishes preferences for placement of Indian children. There is more information about ICWA in Chapter VI, Part A.1 and in Chapter XI.

[41] Idaho Code §16-1603.

[42] Idaho Code §16-1603(1)(a), §16-1602(2).

[43] Idaho Code §16-1603(1)(b), §16-1602(1).

ii. whose parents are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.[44]

Idaho law specifically provides that a child will not be deemed neglected solely because a child's parent or guardian chooses spiritual treatment for a child instead of medical treatment. There is statutory authority, however, for the court to order emergency medical treatment for a child, whether or not the child is within the jurisdiction of the Act.[45]

d. Homeless

The CPA does not define "homeless." The purpose of this provision is to address two types of situations. The first is where a child has come into contact with authorities and is apparently homeless, as no parent or other custodial adult can be located, and the child needs a home while authorities investigate the situation. Typically the child is a runaway or a juvenile whose parents refuse to allow the child home, sometimes after the juvenile's release from incarceration.

The second is where a family is homeless, and therefore the children are homeless. The purpose of including homelessness in the CPA is not to impose further displacement on an already displaced family. The purpose is to establish a statutory basis to provide services and shelter to the children when the parents are unable or unwilling to do so. In such cases, the reasonable efforts of the agency to provide housing or employment assistance, and the parent's ability and willingness to participate in those services, become an issue in the adjudication phase, as well as in the disposition phase. If the parents are not able to provide the child with a home despite agency assistance, or if they are unwilling to accept assistance that would enable them to provide the child a home, then such evidence supports a determination that the child comes within the jurisdiction of the act.

e. Lacks stable home environment

The CPA does not define lack of a "stable home environment." This provision should not be interpreted to provide a basis for state intervention simply because the parent's lifestyle is outside the norm. Rather, it should be limited to those situations where the seriousness of the harm to the child is similar to that of the other bases for jurisdiction.

Often, the situations that fall in this category also fall into the category of neglect. There are two types of situations that fall into this category that might not necessarily fit into the category of neglect. One is the "drug house" – where an occupant of the home is a manufacturer or distributor of illegal drugs, and the nature of the substances and people frequently in and through the house endangers the safety of the child or children in the home.

Another situation that might fall within this category is the violent home – where the child is not directly abused, but he or she regularly witnesses domestic violence. Like homelessness, discussed above, the purpose of this provision is not to punish the adult victim of domestic violence by taking the children away, but rather, to establish a statutory basis to provide services

[44] Idaho Code §16-1603(1)(b), §16-1602(21).

[45] Idaho Code §16-1602(providing that religious or spiritual care alone cannot be the sole basis of a finding of neglect), and §16-1627(providing for emergency medical treatment of children and requiring the court to consider that the parents desire to have prayer or spiritual treatment for the child)

and shelter to the child when the parent is unable to do so. Also like homelessness, discussed above, the reasonable efforts of the agency to provide assistance to the adult victim, and the adult victim's ability and willingness to participate in those services, becomes an issue in the adjudication phase, as well as in the disposition phase. If the parent who is the adult victim of domestic violence is not able to provide the child with a safe home despite agency assistance, or is unwilling to accept assistance that would enable the parent to provide the child a safe home, then such evidence supports a determination that the child comes within the jurisdiction of the Act. (The court can enter protective orders that expel the abusive parent from the home or that limit contact between the abusive parent and the non-abusive parent or the child. This is further discussed part E, below.)

2. Other Children in the Home

An issue that frequently arises in child protection cases is what to do about other children in the home when one of the children is abandoned, abused, or neglected. If one child is abused, abandoned or neglected, it cannot simply be presumed that the others are also. But neither can it be assumed that the other children are safe. Idaho law provides that if a court has taken jurisdiction of a child, it may take jurisdiction over another child, if the other child is living or having custodial visitation in the same household, and if the other child has been exposed to or is at risk of being a victim of abuse, abandonment, or neglect.[46]

3. Aggravated Circumstances

The concept of aggravated circumstances was added to the law of child protection to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find a new family who will provide the child with a safe home and loving family can be initiated promptly and so that the permanent placement of the child with that family can be implemented promptly. (Permanency planning, reunification plans, and alternative permanent placement plans are further discussed in Chapters VI and VII.)

Generally, if aggravated circumstances is an issue, then it should be alleged in the CPA petition and determined by the court at the adjudicatory hearing.[47] The statute specifically identifies the following as aggravated circumstances:

- abandonment,
- torture,
- chronic abuse,
- committed murder or voluntary manslaughter,
- aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter,
- committed a felony assault that results in serious bodily injury to any child of the parent, or
- the parental rights of the parent to a sibling have been terminated involuntarily.[48]

[46] Idaho Code §16-1603(2). The other child must be named in the petition or amended petition, the parents or legal guardians must have notice, and the child must be living or found within the state.

[47] There is no requirement that aggravated circumstances be alleged in the petition, or determined at the adjudicatory hearing. Aggravated circumstances can be asserted later in the proceedings, either by amendment of the petition or by written motion, with notice and opportunity for hearing. *See* Idaho Code §16-1610, §16-1619.

[48] Idaho Code §16-1619(6)(d).

The statute further provides that aggravated circumstances "include but are not limited to" those specifically listed. Two factors should guide the determination of whether other circumstances constitute aggravated circumstances: whether the circumstances are similar in severity to those listed in the statute, and whether the circumstances are such that no effort should be made to reunify the family.

4. Considerations in Determining whether a CPA Petition should be Filed

- Does the case meet the statutory requirements for jurisdiction? Is the child abandoned, abused, neglected, or homeless, or does the child lack a stable home environment?
- Can the case be proven in court? Are there witnesses who can testify to the conduct or conditions? Are there photographs, medical records, or other exhibits to demonstrate the conduct or conditions?
- What further investigation is necessary to gather essential information? What further efforts are necessary to ensure that the information is in a form that is admissible in court?
- What is being sought by filing the petition? Temporary emergency protection? Family cooperation in services? Permanent removal of the child?
- Can the goal be accomplished by another method, such as a voluntary agreement? (Voluntary agreements are discussed in Chapter II).
- Are necessary services available only through a child protection proceeding?

E. What Relief Can be Sought in a Child Protection Case?

The relief that can be sought includes both temporary relief pending the adjudicatory hearing and other, more permanent forms of relief that can be sought as part of the dispositional phase of the adjudicatory hearing.

1. Emergency Removal

As noted above, the petitioner can seek emergency removal of the child through placement of an order to remove the child on the summons. The request for this relief can be included in the petition, or it can be requested by a separate written motion.

2. Shelter Care

The petitioner can ask that the child be placed in shelter care pending the adjudicatory hearing. If the petitioner is asking that the child be placed in shelter care pending the adjudicatory hearing, then in the vast majority of cases the child will already have been removed pursuant to a declaration of imminent danger or an order to remove the child on the summons.[49] As noted above, the statute requires that the petition state whether the child is in shelter care and the date the child was placed in shelter care (among other things).[50]

3. Legal Custody or Protective Supervision

At the adjudicatory hearing, the court first determines whether the child comes within the jurisdiction of the Act, and then determines the disposition of the child. There are two options

[49] *See* Idaho Code §§ 16-1610; 16-1615. Removal of the child from the home is discussed in parts A.1 (emergency removal) and A.2 (order to remove the child) of this Chapter. *See* Idaho Code §§ 16-1608, 16-1610 and IJR 31 and 32.

[50] Idaho Code §16-1610 (2)(g).

for disposition: vesting legal custody of the child in IDHW or placing the child in the child's own home under protective supervision.[51] There is more information about the adjudicatory hearing in Chapter V, and particularly about dispositional issues, in Chapter V, part F.2. The petition should normally state the disposition sought, although the petition can state a generic request for legal custody and/or protective supervision.

4. Protective Orders

After the child is found to be within the jurisdiction of the Act at the adjudicatory hearing, the court can enter protective orders.[52] There is more information about the entry of protective orders at the adjudicatory hearing in Chapter V, part F.2. After the court finds that there is reasonable cause to believe that the child is within the jurisdiction of the Act at the shelter care hearing, the court can also enter protective orders pending the adjudicatory hearing.[53] There is more information about entry of protective orders at the shelter care hearing in Chapter IV, part D. Finally, as noted above, the court can issue a protective order when an order to remove a child is requested, if it appears that the child is within the jurisdiction of the CPA but a protective order would enable the child to safely remain in the home.[54] If a protective order is sought, the petition should set forth the proposed terms and conditions of the protective order.

5. Child Support

If the petition asks that the child be placed in the legal custody of the agency, the petition should also ask that the child's parent(s) or legal guardian be required to pay child support in a reasonable amount. The CPA specifically provides that, whenever legal custody of the child is vested in someone other than the child's parents, and after due notice, the court's decree may require the parent(s) or other persons legally responsible for the support of the child to pay child support.[55]

F. The Role of the Petitioner

The petitioner in a CPA case is the county prosecutor or a deputy attorney general.[56] The child protective agency in Idaho is the Idaho Department of Health and Welfare (IDHW). IDHW is an essential participant in child protection cases, because of the extensive duties imposed on the agency by the CPA. However, IDHW is not a party to the case. The prosecuting attorney (the county prosecutor or deputy attorney general filing the case) represents the state's interests in the proceeding; IDHW is not the attorney's "client." The prosecuting attorney or attorney general has prosecutorial discretion, and it is ultimately up to the prosecuting attorney whether to file the case and how to proceed with the prosecution of the case. Even if a child has been declared in imminent danger, the prosecuting attorney can decide that the filing of a CPA petition is not appropriate and direct that the child be returned home.

Although the prosecuting attorney has independent prosecutorial discretion, the roles of the prosecuting attorney and the agency are, as a practical matter, highly interdependent. The

[51] Idaho Code §16-1619.
[52] Idaho Code §16-1619(9).
[53] Idaho Code §16-1615(4)(f).
[54] Idaho Code §16-1611(5).
[55] Idaho Code §16-1628.
[56] Idaho Code §16-1610(1)(a).

successful resolution of a child protection case requires a high level of commitment by both the assigned attorney and the assigned caseworker, and in particular, a commitment by both to cooperate and communicate.

It is important that the attorney representing the state be sufficiently knowledgeable and experienced in trial practice, generally, and in child protection, specifically, to ensure quality representation of the state's interests, and also to provide leadership in the investigation, prosecution, and resolution of child protection cases. The same attorney should represent the state throughout the case to ensure consistent, goal-oriented representation of the state's interests in the case.

It is essential that the attorney for the state make continuing efforts to create and maintain an active partnership with the local agency caseworkers and local law enforcement officers. The attorney must rely on caseworkers and involved law enforcement officers to gather information and prepare recommendations to be presented to the court. Caseworkers and law enforcement officers must rely on the attorney to ensure that the information is admitted into evidence by the court and is legally sufficient to support the recommended action. Regular communication and active cooperation between counsel for the state, agency caseworkers, and involved law enforcement officers is essential to the investigation, prosecution, and resolution of child protection cases.

The CPA provides that the prosecuting attorney in each county is responsible for the development of an interagency multidisciplinary team or teams for investigation of child abuse and neglect referrals in each county.[57] The team must include the prosecutor or a deputy prosecutor, IDHW personnel, and law enforcement personnel. The team may include others whose knowledge or expertise may be of assistance, either as permanent members or as periodic participants. Additional participants might include school officials, medical personnel, juvenile and adult probation and parole officers, or representatives from local domestic violence or guardian *ad litem* programs.

The teams are required to develop a written protocol for the investigation of child protection cases and for interviewing alleged victims of abuse and neglect. Each team is required to develop written agreements, to be signed by member agencies and to specify the role of each agency, procedures for risk assessment, and procedures to be followed to ensure the child's safety, including removal of children and alleged offenders.

It is not possible to overemphasize the importance of an effective MDT. Ensuring the safety and welfare of the children of the community requires a community-based approach. Communication and cooperation between the local participant agencies and other community resources is essential to the effective investigation of child abuse and neglect and to the successful prosecution and resolution of child protection cases. MDTs are an essential tool in achieving this communication and cooperation, and the commitment of the team members, under the leadership of the prosecutor's office, is essential to the effectiveness of the MDT.

[57] Idaho Code § 16-1617.

G. Special Considerations in a Rule 16 Expansion

Idaho Juvenile Rule 16 allows the court to expand Juvenile Corrections Act proceedings to Child Protective Act proceedings and to expand Child Protective Act proceedings to Juvenile Corrections Act proceedings. This power to expand a juvenile or child protection matter allows the Court to take action in the best interests of child or society, while holding parents and child accountable when necessary.

When these expansions occur, it is in the best interests of the children that courts, prosecutors, IDHW, the Department of Juvenile Corrections, local juvenile justice officials, and families work together to bring order back into the lives of the families before the court.

As when a case is initiated as a child protection case, the court should remain actively involved in expansion cases over the entire period of the proceedings. The judge should not simply make a one-time decision concerning the care, custody, and placement of the child, but rather make a serious of decisions over time. In effect, the judge must determine step-by-step how best to assure the safe upbringing of the child and the protection of society.

It is important to note that the expansion provisions of Rule 16 do not preclude the prosecutor from filing a separate Child Protection Petition or Juvenile Corrections Act Petition if the prosecutor deems such filing supported by the facts of the case. The rule gives the power to the court to also make the decision to expand a case.

Revisions to IJR 16 are currently being proposed. Those revisions are consistent with the best practice suggestions contained in these materials.

1. Expanding a Juvenile Corrections Act Proceeding

Idaho Juvenile Rule 16 currently provides in relevant part:

(a) If at any stage of a JCA proceeding the court has reasonable cause to believe that a juvenile living or found within the state is neglected, abused, abandoned, homeless, or whose parent(s) or other legal custodian fails or is unable to provide a stable home environment, as set forth in Idaho Code section 16-1603, the court may order the proceeding expanded to a CPA proceeding. Any order expanding the proceeding to a CPA proceeding must be in writing and contain the factual basis found by the court to support its order.

(b) Upon expanding the proceeding to a CPA, the court may order the juvenile placed in shelter care under the CPA if that is in the best interests of the juvenile and needed for the juvenile's protection. If the juvenile is placed in shelter care, a shelter-care hearing under the CPA must be held within 48 hours, excluding Saturdays, Sundays, and holidays, and notice thereof shall be given to the juveniles parents(s), guardian, or custodian, and to the Department of Health and Welfare.

(c) Notice of an order expanding a JCA proceeding to a CPA proceeding shall be given to the juvenile's parent(s), guardian, or custodian, the Idaho Department of Health and Welfare, the prosecuting attorney, and the Department of Juvenile Corrections if the juvenile is currently under commitment to the Department, pursuant to these rules and the rules of civil procedure.

(d) No further CPA petition will be required. Any adjudicatory hearing pursuant to Idaho Code section 16-1608 will be held within 30 days of the court's determination to expand the proceeding to a CPA proceeding. A notice of the hearing will be served upon the parent(s), the Department of Health and Welfare, and the juvenile as though a petition under the CPA has been filed. The burden of going forward with the evidence at the adjudicatory hearing shall remain with the prosecuting attorney.

(e) The proceeding under the JCA will continue unless otherwise ordered by the court. The court may consolidate hearings under both the JCA and the CPA if the purposes of both acts can be served and the rights of the participants are not prejudiced.

(f) The Department of Juvenile Corrections shall have standing as an interested party in the child protective action if the juvenile is in the custody of the Department.

While the rule provides the framework for expansion, it does not provide a procedural outline of how an expansion case proceeds. Two different approaches have been used in the different Idaho courts. In some districts, the Court's expansion order serves as the petition for the child protection case and no new petition is filed by the local prosecutor. In other districts, prosecutors have felt uncomfortable proceeding in the child protection case without a petition setting forth the specific allegations of abuse and neglect. In these districts, prosecutors commonly file a new child protection petition if they determine that the facts support jurisdiction under the Child Protection Act.

In either of these situations, it is important in an expansion situation that the court provide as much guidance as possible as to the basis for the expansion and the court's expectations of the various parties. If the court is aware that a juvenile case could potentially be converted into a child protection case, the court should request a representative from IDHW to be present at the hearing. It is recommended that the court provide the following to the prosecutor and IDHW:

- In addition to the minimum language required for this order, provide specific information justifying the initiation of a child protection case;
- Direction to IDHW on what is the court expectations in this case – should an investigation be initiated, etc.;
- Explanation to the parents and other legal guardians that the court has expanded this case, what this means, and the reasons for the expansion;
- Direction to the juvenile probation department to provide information and assistance that would aid and help to expedite the C.P. investigation (specify the information/assistance to be given when appropriate);
- A completed social history and any available evaluations at the same time of notice of the expansion is given to IDHW
- Documentation of what attempts the juvenile probation department has made to get the parents to comply with juvenile court orders, and what the results of these attempts were; and
- Information regarding the juvenile probation officer's reasonable belief and evidence that abuse, abandonment, or neglect of a child has taken place and any information supporting that belief.

The Court should also order:

- a joint juvenile probation/ IDHW staffing meeting to share information about the case;

- that juvenile probation assist the IDHW child protection investigator in the investigation as requested;
- that if the juvenile resides in DJC custody, DJC will adhere to the above recommendations along with the juvenile probation department; and
- that expansion of the JCA proceedings to child protection proceedings remain open until the court'ss concerns have been satisfied and the court is in agreement with the closure of the case.[58]

In many cases it is appropriate and recommended by the Department of Juvenile Corrections that the JCA proceeding remain open so that the juvenile may be held accountable for her or his actions independent of resolving issues regarding the juvenile's care. When the custody of the child resides with DJC and there is an open child protection case, the court should make available the records of the child protection proceeding to the DJC, according to Idaho Code Section 16-1621. The court may also order IDHW to make available its records to DJC according to Idaho Code Section 16-1623 (f). This is to be done in the best interests of the child, so that DJC can provide proper coordination of treatment and appropriate placement with the IDHW.

If DJC has a juvenile in its custody and the juvenile is the subject of an open child protection case, DJC should invite IDHW to remain involved in the juvenile's case and to collaboratively plan for the after care of the juvenile. IDHW will continue to work with the family to resolve the child protection issues for the safe return of the juvenile, as well as permanency planning.

2. Special Issues When Juvenile Ordered to Shelter Care

Special concerns are presented when the court orders a juvenile into shelter care as part of a Rule 16 expansion. If the judge orders the juvenile to shelter care, the Rule 16 order is the first order in the case sanctioning removal of the child from the home. As such, it must contain the findings describe above in part A.4 of this chapter.

H. Checklist for Initiating a CPA Case

Notice of State Action (if child or offender have been removed from the home under emergency circumstances)

- In the form required by IJR 32.

Petition (contents)

- Signed by county prosecutor or deputy attorney general and verified.
- The facts that bring the child within the jurisdiction of the CPA, including a description of the actions of each parent. The grounds for jurisdiction, such as abuse or neglect, are described later in this Manual.
- The name, birthdate, sex, and residence address of the child.
- The name, birthdate, sex, and residence address of all other children living at or having custodial visitation at the same home as the child named in the title of the petition.

[58] These best practice recommendations are incorporated in the proposed revisions to Rule 16.

- The names and residence addresses of both the mother and father, guardian or other custodian. If none of these persons reside or can be found within the state, the name of any known adult relative residing within the state.
- The names and residence addresses of each person having sole or joint legal custody of any of the children named in the petition.
- Whether a court has adjudicated the custodial rights of the parents of the child named in the title of the petition, and if so, the custodial status of the child.
- Whether there is a legal document controlling the custodial status of any of the children.
- Whether the child is in shelter care, and if so, the type and nature of the shelter care, the circumstances justifying the shelter care, and the date and time the child was placed in shelter care.
- If the child has been or will be removed from the home, a statement that:
  (a) remaining in the home was contrary to the welfare of the child,
  (b) it is in the best interests of the child to be placed in the custody of IDHW or other authorized agency, and
  (c) reasonable efforts were made to prevent the removal of the child or efforts to prevent removal were reasonable given that IDHW's reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.
- If the state is seeking a determination that the parent subjected the child to aggravated circumstances, a statement of the grounds and the facts that bring the parent's actions within those grounds.
- Whether the child is an Indian child, and if so, the name of the child's Indian custodian (if any) and Indian tribe. The purpose of this requirement is to ensure an early determination of whether the proceeding is subject to the requirements of the Indian Child Welfare Act.
- Prayer for relief
  (a) Order to remove the child, if one is sought.
  (b) Shelter care hearing and order, if the child or the alleged offender has been removed or if removal is sought.
  (c) Adjudicatory hearing, decree determining child within jurisdiction of court and CPA, and disposition to legal custody or protective supervision of agency, in accordance with CPA.
  (d) Protective orders, if sought.
  (e) Child support, if seeking legal custody of the child.

Summons

- In form required by IJR 33.
- For each person to be joined, including each parent, legal guardian, and custodian.
- If the child is an Indian child, notice to Indian custodian and tribe of their right to intervene, as required by ICWA.
- Order to remove the child is such an order is sought.

Supporting Affidavits

- Information necessary to support findings and conclusions the court is required to make for an order to remove the child, if one is sought:

(a) It appears that the child is within the jurisdiction of the CPA, and

(b) It appears that it would be contrary to the welfare of the child to remain in the home, and it would be in the best interests of the child to be placed in shelter care.

- Information necessary to support findings and conclusions the court is required to make at the shelter care hearing, if the child or alleged offender has been removed from the home, or if removal is sought.

  (a) A CPA petition has been filed.

  (b) There is reasonable cause to believe that the child comes within the jurisdiction of the CPA

  (c) Reasonable efforts to prevent placement of the child in shelter care were made but were not successful, or reasonable efforts to prevent placement could not be made because of immediate danger to the child.

  (d) The child cannot be placed in the temporary sole custody of a parent having joint custody of the child.

  (e) It is contrary to the welfare of the child to remain in the home, and it is in the child's best interests to be placed in shelter care pending the adjudicatory hearing.
- Information necessary to determine terms and conditions of a protective order, if a protective order is sought pending the adjudicatory hearing.

Service of process

- By personal service, where practicable.
- If personal service is not practicable:

  (a) Verified motion or motion with supporting affidavit, stating:

  --- Efforts made to identify, locate, and serve missing party.

  --- Address where service of process by registered mail is most likely to achieve actual notice, and why.

  (b) Newspaper of general circulation most likely to achieve actual notice, and why.

  (c) Proposed order.
- If the child is an Indian child, by registered mail to the child's Indian custody, and Indian tribe, or if unknown, to the Secretary of Interior, in accordance with ICWA.
- Return of service filed with court, where personal service completed.
- Affidavit of service filed with court, where service made by registered mail.
- Affidavit of publication filed with court, where service made by publication.

CHAPTER IV: SHELTER CARE

Revised May 29, 2007
Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Purpose and Goals of the Shelter Care Hearing

The purpose of the shelter care hearing is to first decide whether there is reasonable cause to believe that the child is within the jurisdiction of the courts pursuant to the Child Protective Act. If there is reasonable cause to believe the child is within the jurisdiction of the court, the second purpose of the shelter care hearing is to decide whether it is in the child's best interests to remain in or be placed in a place of shelter care pending the adjudicatory hearing. These initial decisions are often the most important decisions to be made in an abuse and neglect case. Although they are made on an emergency basis, the decisions must be based upon a competent assessment of risks and dangers to the child.

A shelter care hearing must also be held when the child is removed from his or her home pursuant to an order for protective supervision.[1] In such a situation the child has previously been found to be within the jurisdiction of the Child Protective Act. However, the court must determine whether it is in the child's best interests to remain in or be placed in a place of shelter care pending the adjudicatory hearing.

[1] Idaho Code §16-1619(9).

1. Is There Reasonable Cause to Believe the Child is Within the Jurisdiction of the Court Pursuant to the Child Protective Act?

A child is within the jurisdiction of the court pursuant to the Child Protective Act under the following circumstances:

- ✓ the child is abused, neglected, or abandoned;
- ✓ the child is homeless;
- ✓ the child's parents or legal custodian fails to provide a stable home environment; or
- ✓ the court has taken jurisdiction over another child living or having visitation in the same household, and the child is at risk of being abused, neglected or abandoned.

The shelter care hearing is an emergency matter. The family is often in crisis. Great demands are placed upon IDHW to stabilize the situation and to provide services to permit the child to safely remain at home or to return home. The removal of the child, however, should not be viewed as a preventive measure with the notion that the child will return to the family after a full investigation is completed. This perspective ignores the great risk of out-of-home placements, the disruption such placements cause to the child and the family, and the emotional and fiscal costs involved in placing children. It also ignores the reality that safe, in-home caretakers can often be found if adequate investigation is undertaken and services are provided.

2. Is It in the Child's Best Interests to Remain in or be Placed in a Place of Shelter Care Pending the Adjudicatory Hearing?

To evaluate the likelihood and severity of harm if the child is returned home, the court must take into account not only the facts and circumstances that gave rise to the original removal of the child (in other words, the parents' or guardian's possible abuse or neglect, the homelessness of the child, or the lack of stability in the home environment), but also what might be done to safeguard the child in the home. That is, the court should evaluate both the current danger to the child, and what can be done to eliminate the danger. Harmful consequences of removal should also be considered. Removal is always a traumatic experience for a child. Once a child is removed it becomes logistically and practically more difficult to help a family resolve its problems.

The court should evaluate whether the need for immediate out-of-home placement of the child could be eliminated by providing additional services or by implementing court orders concerning the conduct of the child's caretaker(s). If the court determines that the child needs to be placed, the court must evaluate the appropriateness of the placement proposed by IDHW and seek the least disruptive alternative that can meet the needs of the child. For example, the court should explore whether the needs of the child could be met in the home of a relative.

If the child is not returned home and is, instead, placed within the custody of IDHW at the shelter care hearing, it is the agency's role to decide where to place the child. While the decision of IDHW is subject to judicial review, there are substantial questions regarding the scope of judicial review. The Idaho Supreme Court has given substantial deference to placement decisions of IDHW.[2]

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[2] *See Doe v. State*, 134 Idaho 760, 9 P. 2d 1226 (2000)(upholding the placement decision of IDHW against challenge by a grandparent); Idaho Department of Health and Welfare v. Hayes, 137 Idaho 233, 46 P. 3d 529 (2002)(reversing magistrate judge's decision to reject IDHW placement decision).

An out-of-state placement may not be made without court order. If the result of the shelter care hearing is that a child is to be placed out-of-state, the placement must be made in accordance with the Interstate Compact on the Placement of Children (ICPC).[3]

B. Timing of the Shelter Care Hearing

The shelter care hearing is the first court hearing in a Child Protective Act case if the child has been removed from his or her home, if the alleged offender is removed from the home, or if removal has been requested. This initial shelter care hearing may have been preceded by ahearing on a request to place an order removing the chil on the summons and the subsequent removal of the child from the home.[4] In emergency cases, a child may have been removed from home without prior court approval,[5] and the shelter care hearing is the first court review of the placement.

In any case, the shelter care hearing must occur within 48 hours of the removal of the child from the home or within 24 hours of the removal of the offender from the home.

C. Who Should Be Present

1. Magistrate Judge

A magistrate judge presides over the shelter care hearing and is responsible for making the required decisions. Whenever possible, the judge should regularly preside over child abuse or neglect cases and be familiar with the workings of the entire child welfare system and who should have broad knowledge of and experience with the services and placement options available in the community.

Persons who should always be present at the shelter care hearing:

- Judge
- Parents whose rights have not been terminated, including putative fathers
- Child's guardian, legal custodian and/or other custodial adults
- Indian custodian, the child's tribe, and attorney, if applicable
- Assigned caseworker
- County prosecutor or deputy attorney general
- Attorney for parents (separate attorneys if conflict warrants)
- Guardian *ad litem*, attorney for the GAL and/or attorney for the child
- Court reporter or suitable technology
- Security personnel

2. Parents whose Rights have not been Terminated, including Putative Fathers

It is critical that all parents involved in the life of the child be made a part of the court case as soon as possible.[6] "Parent" includes a biological parent whose rights have not been terminated, as well as a parent who has adopted a child and who has the same parental rights as a biological parent. Non-custodial parents and involved putative fathers should be present

[3] The ICPC is discussed in detail in Chapter X of this Manual.

[4] Idaho Code § 16-1611(4); IJR 39. *See* Chapter III of this Manual for a discussion of the Order to Remove the Child on the Summons.

[5] Idaho Code §16-1609; IJR 32. *See* Chapter III of this Manual for a discussion of emergency removal of a child or offender from the home.

[6] Idaho law *requires* notice to each parent and guardian. Idaho Code § 16-1615(2).

because, if the child cannot be returned to the custodial parent immediately, it might be possible to place the child with the other parent rather than in state care. Putative fathers who have not previously been involved in the child's life should also be brought into the court process as quickly as possible. Timely resolution of paternity issues is both in the best interests of the child and essential to further case processing.

The court should determine whether further efforts are needed to identify, locate, and serve missing parents, including putative fathers. If notice has been given and a parent does not appear, the judge should ensure that this is documented in the file and should make appropriate findings in the shelter care order. In addition, the court should order paternity testing where appropriate to establish parentage.

3. Child's Guardian, Legal Custodian and/or other Custodial Adults

When parents do not have custody, other custodians or guardians must, by law, be given notice and the opportunity to participate in shelter care hearings. In many child neglect cases, parents have left children in the homes of relatives or friends who have become full-time caretakers but who lack legal custody. Full-time caretakers lacking legal custody but functioning as parents (*in loco parentis*) should also be present at the shelter care hearing. Their presence is needed both because the best decision may be to leave the child in their homes prior to trial and because they often have vital information about the child and the family. Unfortunately, because shelter care hearings are set within short time frames, it is often difficult to notify parents through normal service of process. The social worker from IDHW is often in the best position to notify parents of a shelter care hearing and should be expected to do so. The court can monitor IDHW efforts to notify parents by inquiring at the hearing as to what efforts were made to notify the parents and by setting additional hearings within a few days if a parent fails to appear. The prospect of an additional court appearance can motivate IDHW or the prosecutor's office to secure the attendance of parents at the shelter care hearing.

4. Assigned Caseworker

To provide the court with complete, accurate, and up-to-date information for the hearing, the caseworker with primary responsibility for the case must be present. When this is not possible, the worker's supervisor, who has been well briefed on the case, should be present.

5. Indian Custodian/Child's Tribe and Tribal Attorney

Efforts must be undertaken to ascertain whether the child is an Indian child and whether further efforts are needed to give notice as required by the Indian Child Welfare Act.[7] An Indian child's tribe has the right to notice and to an opportunity to participate in all hearings involving the child.[8] For Indian children, the tribe often has information regarding the child and the family that is crucial to the court making a good placement determination regarding the child. If notice has been given to a tribe and the tribe does not appear, the court should ensure that this is documented in the file and should make appropriate findings in the shelter care order.

[7] The requirements of ICWA are discussed in detail in Chapter XI of this Manual, available at http://www.isc.idaho.gov/childapx.htm

[8] 25 U.S.C. 1912(a), 1911(c).

6. County Prosecutor or Deputy Attorney General

The shelter care hearing is a critical event. This stage of the proceedings may have a powerful impact on the child and the family and on the long-term outcome of the case. All parties should be represented by counsel at the shelter care hearing. In child protection cases in Idaho, the state is represented by the county prosecutor or a deputy attorney general.[9] Further, the court should expect counsel to have prepared for the hearing in advance. This requires, at a minimum, that the attorney has interviewed witnesses and conferred with both the worker and counsel for other parties as much in advance of the hearing as possible.

7. Attorney for Parents (separate attorneys if conflict warrants)

Because of the critical strategic importance of the shelter care hearing, it is essential that parents have meaningful legal representation at the hearing. To ensure that the necessary persons are present and prepared to proceed at the shelter care hearing, the court must, whenever possible, make arrangements for the necessary appointments prior to the shelter care hearing.

Most parents involved in these proceedings cannot afford counsel. Idaho law requires that the notice to the parents inform them of their right to counsel. The notice must also instruct the parents to contact the court at least two days prior to the hearing to apply for court-appointed counsel.[10] Given the short time frames for shelter care hearings, however, this is usually not possible.

The recommended best practice is to appoint counsel for the parents at the time the petition is file. At the shelter care hearing, if the court determines that the parents are not in fact indigent, the court can withdraw the appointment at the conclusion of the shelter care hearing. Or, if the parents appear with counsel of their own choice, the appointment can be withdrawn at the beginning of the shelter care hearing. This ensures competent representation for the parents at the shelter care hearing while avoiding routine delays of shelter care hearings pending appointment of counsel.

Conflicts between the parents may warrant the appointment of separate counsel for each. In some cases, the conflict will be apparent from the pleadings and separate counsel can be appointed from the outset.

8. Guardian *ad litem*, Attorney for GAL and/or Child's Attorney

Federal law strongly suggests that children should have individual legal representation in cases of child abuse and neglect, including at the critical shelter care hearing.[11] Idaho law requires the appointment of a guardian *ad litem* for the child, to serve at *each stage* of the proceeding, and provides that the court may appoint counsel for the guardian *ad litem*. Idaho law further provides that the court may appoint separate counsel for the child and that it *must* appoint separate counsel for the child in cases where no guardian is available for appointment.[12]

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[9] *See* Idaho Code § 16-1609.
[10] Idaho Code § 16-1615(2); IJR 37(d).
[11] The availability of federal grant funding under the Child Abuse Prevention and Treatment/Adoption Reform Act will be based in part on whether states appoint counsel for children in child abuse actions. 42 U.S.C. §5106a.
[12] Idaho Code § 16-1614; IJR 37 (a)-(c).

Private organizations receiving grant funding from the Idaho Supreme Court recruit and train guardians *ad litem*. Some local guardian *ad litem* organizations rely on volunteer attorneys to provide representation to the guardian *ad litem*; most organizations rely on court-appointed counsel. In some counties, the public defender is appointed to represent the guardian *ad litem*; in others, the court maintains a list of private counsel who are available for appointment in child protection cases and who can be available for shelter care hearings on short notice. To ensure that the child's interests are fully represented, and that information concerning the child's interests is properly presented to the court, it is essential that the guardian *ad litem* be represented by qualified counsel.

The recommended best practice is for the court to appoint the guardian *ad litem* for the child and the attorney for the guardian *ad litem* (or if no guardian *ad litem* is available, an attorney for the child) upon the filing of the petition. To ensure that the necessary persons are present and prepared to proceed at the shelter care hearing, it is essential that the court make arrangements for the necessary appointments prior to the shelter care hearing.

9. Court Reporter or Suitable Technology

A court reporter or stenographer should be present to accurately record all proceedings at each shelter care hearing. If electronic technology is substituted for a court reporter, the recording equipment must be of appropriately high quality to allow for the efficient, cost-effective, and timely production of a hearing transcript, when needed.

10. Security Personnel

Security personnel should be available during all child abuse and neglect hearings. In all courts, security personnel must be immediately available to the court whenever needed. In some counties, security concerns may be serious enough to require guards or bailiffs to be present during all hearings.

11. Interpreters, if applicable

If a parent or other essential participant is not fluent in English, a qualified interpreter must be present. If there is more than one essential participant who needs an interpreter, more than one interpreter may be required. For example, if two parents are represented by one attorney then one interpreter may serve for both parents. However, if parents are represented by different attorneys, then one interpreter will be needed for each parent. If one or more non-English speaking witnesses will be called to testify, then another interpreter will be needed for the witnesses.

D. Persons whose Presence may also be Needed at the Shelter Care Hearing

In addition to persons who always should be present at shelter care hearings, there are others whose presence may also be needed, depending upon the facts and circumstances of the case:

1. Age-Appropriate Children

Often, children should be present at the shelter care hearing Their attendance, however, can depend upon many factors, including the age of the child, the physical and emotional condition of the child, and the potential traumatization from requiring the child to attend. As an alternative to bringing the child to a hearing, IDHW may choose to present the child's hearsay statements

and then to allow the child's guardian *ad litem* to have access to the child at an off-site location or by telephone.[13] In all cases, the child should be accessible in the event that the court determines that the child's presence is necessary.

Persons whose presence may also be needed at the shelter care hearing:

- Age-appropriate children
- Extended family members
- Adoptive parents
- Judicial case management staff
- Law enforcement officers
- Service providers

2. Extended Family Members

When relatives either are already actively involved with a child or are interested in caring for a child, their presence can be valuable at a shelter care hearing. Relatives can provide essential information about the situation that can help protect the child in the home (thus allowing the court to return the child home), or, alternatively, they can become the immediate caretaker of the child, if necessary. It is helpful for the court to observe the child's relatives and be able to speak to them directly at the hearing.

3. Adoptive Parents

Adoptive parents must, by law, have the same rights in the legal process as biological parents.

4. Judicial Case Management Staff

It is possible for courts to function efficiently with no judicial staff in the courtroom other than the judge. However, administrative staff who are present in the courtroom can help the judge by greeting the parties, handing out papers, operating tape recording equipment (where applicable), preparing and checking court orders, and completing errands and tasks necessary to help the judge complete the hearing.

5. Law Enforcement Officers

Law enforcement officers who remove children from dangerous situations are often key witnesses. They sometimes need to be present to testify when parents demand the child's immediate return home.

6. Service Providers

When a family has already been intensively involved with a service provider, such as a public health official, homemaker, or mental health professional, that professional may provide essential information at the shelter care hearing. The professional may, for example, assist the court in identifying a plan for leaving the child safely at home.

7. Adult or Juvenile Probation or Parole Officer

Family members may either presently or recently have been involved with juvenile or adult probation or parole services. Probation and/or parole officers with past or current knowledge pertinent to the family's circumstances can often provide the court with valuable testimony. Both juvenile and adult probation and parole departments should be contacted and potential witnesses identified and asked to appear at the shelter care hearing.

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[13] The caseworker's testimony as to the child's statements would be hearsay but such hearsay is admissible at shelter care hearings. IJR 51(2) and IRE 101(e)(6) provide that the rules of evidence, which include the hearsay rules, do not apply at shelter care hearings.

8. Other Witnesses

Critical decisions affecting the lives of children are made at shelter care hearings. Allowing the child to remain or return home may in some cases endanger the child. At the same time, removal is traumatic and in some cases may be unnecessary. To ensure careful and informed judicial decisions, the court must make it possible for witnesses to testify at the shelter care hearing. Eyewitnesses to the neglect or abuse of the child, police officers who have investigated the case, service providers who have been involved with the family, and medical providers who have examined the child can all provide valuable testimony at the shelter care hearing.

Each party is responsible for securing the attendance of its own witnesses, but the greatest burden is on IDHW and counsel representing the state, because the burden of proof is on the state. Securing attendance of witnesses may be difficult, because the witnesses might not be available in the short time frames required for shelter care hearings, and subpoenas often cannot be delivered in time for the hearing. IDHW and counsel for the state may not know to what degree the hearing will be contested and therefore may not know which witnesses will actually be needed.

Courts can make sure that parties and key witnesses are present by:

- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in language understandable to each party and witness.
- Requiring notice to include reason for removal, purpose of hearing, and availability of legal assistance.
- Requiring caseworkers to encourage attendance of parents and other parties.

If a witness is unavailable to testify in court, the witness can testify by telephone, and well-prepared written reports, such as medical or police reports, can be made available prior to the hearing. The use of reports is a less desirable option, as the preparer of the report is not available for questioning, but the less stringent rules applicable to shelter care hearings make this an option.[14] Finally, the court may adjourn the hearing for brief periods, allowing the currently available witnesses to testify at the originally scheduled shelter care hearing and setting a continued hearing for the next available time the remaining witness(es) can be present. Continuances must be kept as short as possible, and calendars rearranged as necessary, to enable the court to make its decision as soon as possible.

9. Best Practices for Securing Attendance at Hearings

To make sure that parents, custodians, and other witnesses are present during shelter care hearings, special efforts are required. Understandable explanations of what has happened must be provided to parents, custodians, or caretakers when a child is first removed. A written notification in understandable language must state the reason for removal, the time and place of the shelter care hearing, the name and number of a person to call to obtain court-appointed counsel, and the need for immediate action.

[14] IRE 101(e)(6) provides that the rules of evidence, which include the rules regarding hearsay, do not apply at shelter care hearings.

When parents, custodians, and other caretakers are not present when a child is removed, IDHW must make diligent efforts to provide them with this information. At the hearing, the IDHW caseworker must explain what has been done to notify the parties. Finally, court staff must be available to take calls from parents and to arrange for the appointment of counsel.[15]

Perhaps the most important factor in influencing whether parents and others will actually appear at the shelter care hearing is the attitude of the assigned caseworker. The judge should require caseworkers and counsel for the state to exert their best efforts to have parents and other necessary witnesses attend the shelter care hearing. In some cases, this may even involve arranging appropriate transportation for parties.

E. Key Decisions the Court Should Make at the Shelter Care Hearing

Both Idaho and Federal law impose obligations for decision-making on the court at a shelter care hearing. The recommendations in this section are consistent with the Shelter Care Hearing Benchcard and with the form shelter care order provided in the Idaho Child Protection Forms or available at the Idaho Supreme Court's website: www2.id.us/judicial/material.htm. As a matter of best practice courts and attorneys should follow the hearing requirements set forth on the Benchcard and use the form order to avoid mistakes that may jeopardize the available of federal funds for the child.

1. State Law Requirements

Idaho Code § 16-1615(5) lists the specific findings that the court is required to make at the shelter care hearing, including fundamentally important decisions about the child's placement. In addition, the shelter care hearing provides the court with an opportunity to take steps to move the litigation forward; to oversee IDHW's initial involvement with the case; and to emphasize specific problem-solving so that the child can safely remain in the home or be returned to the home as quickly as possible.

State Law Findings to be Made at the Shelter Care Hearing:

- Has a CPA Petition been filed?
- Is there reasonable cause to believe that the child is within the jurisdiction of the Child Protection Act?
- Should the child be returned home immediately or kept in foster care prior to trial?
- Has IDHW made reasonable efforts to avoid out-of-home placement of the child?
- Can the child be placed in the sole custody of a parent having joint legal or physical custody?
- Are there services available or could protective orders be entered that would safeguard the child's welfare while allowing the child to remain in the home?
- If the child is removed from the home, is removal in the child's best interests?

a. Appointments

Pursuant to Idaho Code § 16-1615(2), parents who are legally indigent are entitled to appointment of counsel. In addition pursuant to Idaho Code § 16-1614, the child is entitled to the appointment of a guardian *ad litem* or an attorney. Finally, an attorney may be appointed for the guardian *ad litem*. The rules regarding these appointments are discussed earlier in this chapter in the section entitled "Who Should Be Present." These appointments should be made upon the filing of the CPA petition. If they have not been made by the time of the shelter care hearing, these appointments should be made at the hearing.

[15] Idaho law requires service of notice that includes key information for the parents or other guardians. *See* Idaho Code § 16-1615(2) and IJR 37. There is more information about service of process in Chapter III.

b. State law findings

The following is a discussion of specific key decisions, including statutorily-required findings, to be made by the court at the shelter care hearing:

i. Has a CPA petition been filed?

Idaho law requires that a petition be filed prior to the shelter care hearing.[16]

ii. Is there reasonable cause to believe that the child is within the jurisdiction of the Child Protection Act?

A child is within the jurisdiction of the Child Protection Act if the child is abused, abandoned, neglected, homeless, or lacks a stable home environment. Another child residing in or having custodial visitation in the same home may also come within the jurisdiction of the Act if certain conditions are met.[17] The court cannot exercise its authority under the CPA to remove the child (or the alleged offender) from the home unless the court makes this preliminary finding.[18] If the court finds that reasonable cause does not exist, the court is not required to dismiss the petition. The state can still proceed to phase one of the adjudicatory hearing to prove its petition, but the child cannot be removed from the home pending the adjudicatory hearing.

iii. Should the child be returned home immediately or kept in foster care prior to the adjudicatory hearing?

As explained above, the key decision that the court makes at the shelter care hearing is whether to return a child to the home immediately. The child's removal from home triggers the shelter care hearing, and the hearing is held to decide whether the child needs to remain outside the home. In deciding whether to return the child home, the court must evaluate the danger to the child by hearing allegations of abuse or neglect. In addition, the court must examine whether there are any possible means of protecting the child without placing the child in foster care.

iv. Has IDHW made reasonable efforts to avoid protective placement of the child?

Under Idaho law, the court may order a child placed in shelter care at the shelter care hearing only if the court finds, among other things, that 1) reasonable efforts were made to prevent the placement of the child in shelter care but were not successful, OR 2) the department's efforts to prevent removal were reasonable given that the department's assessment accurately determined that no preventive services could be safely provided reasonable efforts could not be provided.[19]

v. Can the child be placed in the sole custody of a parent having joint legal or physical custody?

Under Idaho law, the court must determine whether the child can be placed in the temporary sole custody of a parent having joint legal or physical custody.[20] In some cases there is reason to believe that the child has been abused or neglected in one parent's home but that there is another parent with joint physical or legal custody who could provide a safe home for the child pending

[16] Idaho Code § 16-1615(5)(a).
[17] Idaho Code § 16-1603.
[18] Idaho Code § 16-1613(5)(b).
[19] Idaho Code §16-1615(5)(b).
[20] Idaho Code § 16-1615(5)(c).

further proceedings. State law, in effect, establishes a presumption that placement in shelter care is not in the child's best interests if the child can be safely placed with another parent having joint custody of the child.

vi. If the child is removed from the home, is removal in the child's best interests?

As part of the shelter care order, Idaho law requires the court to determine that it is contrary to the welfare of the child to remain in the home and that it is in the best interests of the child to remain in temporary shelter care pending the conclusion of the adjudicatory hearing.[21]

2. Federal Law Requirements

a. Indian Child Welfare Act

If the child is an Indian Child, the case will be governed by the Indian Child Welfare Act[22]. The court should inquire as to the child's status as an Indian child and should make a finding, if possible. If it is not possible to make a finding on the child's status as an Indian Child, under the federal Act the court should order that further efforts be undertaken to resolve the status of the child.

If the child is an Indian Child, and the case is governed by ICWA, consult Chapter IX of this Manual and the Benchcard dealing with ICWA cases.

b. Adoption and Safe Families Act requirements

Federal law imposes a number of overlapping requirements on the court when a child is removed from her or his home. Often, ongoing state program funding or funding for the individual needs of the child are conditioned on these findings.

i. Is remaining in the home contrary to the child's welfare and is removal in the child's best interests?

If the shelter care order is the *first court order* sanctioning removal of the child from the home, federal law requires that the court make a finding that it is contrary to the welfare of the child to remain or to be returned home and that it is in the child's best interests to remain in custody. This finding must be *case-specific* and it must be *documented* in the court order.[23] If this finding is not made, the child will not be eligible for federal IV-E funds, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the specific circumstances making removal in the child's best interests. If the court makes the case-specific finding, but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific finding. (If the child was taken into custody pursuant to an order to remove the child on the summons, then that order is the first order sanctioning removal, and the documented, case-specific best interests finding must be made in that order and is thus not required at the shelter care hearing.)[24]

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[21] Idaho Code § 16-1615(5)(d) & (e).
[22] 25 U.S.C. §§ 1901-63
[23] 45 C.F.R. § 1356.21(c)(d).
[24] *See* Chapter III regarding order to remove the child.

ii. Has IDHW made reasonable efforts to avoid removal of the child from the home?

Both state and federal law require the court to determine whether IDHW made reasonable efforts to prevent placement of the child in shelter care. There are, however, subtle yet important differences in the state and federal requirements.

Federal Requirements

- Is remaining in the home contrary to the child's welfare and is removal in the child's best interests?
  The finding that remaining in the home is contrary to the child's welfare and that removal from the home is in the child's best interests is **required to preserve the child's IV-E funding.**

- Has IDHW made reasonable efforts to avoid removal of the child?
  The finding that IDHW has made reasonable efforts to avoid removal of the child from the home is **required to preserve the child's IV-E funding.**

Under Idaho law, the court may order a child placed in shelter care at the shelter care hearing if the court finds, among other things, that 1) reasonable efforts were made to prevent the placement of the child in shelter care but were not successful, OR 2) reasonable efforts could not be provided because of immediate danger to the child.[25]

Federal law requires a finding by the court that the agency made reasonable efforts to prevent the child's removal from the home. Where the child is removed because of immediate danger, the court should examine the circumstances and make a finding that *the department's efforts to prevent removal were reasonable given that the department's assessment accurately determined that no preventive services could be safely provided*.

This federal reasonable efforts finding must be made within 60 days after the child is removed from the home. If this finding is not made within 60 days after removal (or is not made in the manner required by federal law), the child will lose eligibility for federal funds, and the omission cannot be corrected at a later date to reinstate the child's eligibility.

To ensure compliance with the federal requirement, the recommended best practice is to make the finding at the shelter care hearing. The finding could also be made at the adjudicatory hearing, but only if the adjudicatory hearing occurs within 60 days after the child is removed from the home.

Federal law requires that the finding be *case-specific* and *documented* in the court's order.[26] The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the reasonable efforts that were made and the circumstances that made further efforts unreasonable. If the court makes a case-specific finding on the record at the hearing, but fails to document it in the court's order, the omission can be corrected with a transcript of the hearing. (Preparation of transcripts is, however, very expensive.)

The only exception to the federal requirement for a reasonable efforts finding is where the court finds that the parent subjected the child to aggravated circumstances or where the imminent risk to the child's safety was such that no efforts were reasonable. *In the case of imminent danger to the child's safety, in order to assure federal funding the court's order should specifically state*

[25] Idaho Code §16-1615(5)(b).
[26] 42 U.S.C. §§ 671(a)(15) and 672(a)(1); 45 C.F.R. 1356.21(b)(1).

that "The department's efforts to prevent removal were reasonable given that the department's assessment accurately determined that no preventive services could be safely provided." As a matter of best practice, the order should reflect the basis for such an assessment of imminent risk.

What constitutes reasonable efforts depends on the time available in which such efforts could be made.[27] In many cases, IDHW's first contact with the family occurs as part of the incident giving rise to the petition. In other cases, the agency has had prior contact with the family. By taking a careful look at the agency's efforts, the court can better evaluate both the danger to the child and the ability of the family to respond to help.

3. Additional Findings the Court Should Consider

a. Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate?

In cases where a child is alleged to have been physically or sexually abused by only one parent, it may be that the child can be safely returned to the non-abusing parent. In order to ensure that the child will be protected, it may be necessary to issue protective orders concerning the child. These may include, for example, orders expelling the allegedly-abusive parent from the home or restraining the allegedly abusive parent from contacting or visiting the child.[28]

b. Are there services available or could protective orders be entered that would safeguard the child's welfare while allowing the child to remain in the home?

The CPA does not specifically provide for the child to remain in the home under agency supervision pending the adjudicatory hearing. Ordering such an arrangement raises a number of questions. It is not clear that the court has the power to enter such an order prior to finding that the child is within the jurisdiction of the CPA. In addition, IDHW's supervision responsibilities are not spelled out by the act.

Nonetheless, it is sometimes possible and appropriate to allow the child to stay at home pending the adjudicatory hearing if the proper protections can be put in place. To decide whether there are available means to allow a child to be maintained safely at home, the court must be made aware of services available in the community. In neglect cases, for example, emergency homemakers, day care, or in-home baby-sitters can often eliminate immediate danger to the child. In a

Additional Findings the court should consider:

- Are restraining orders or orders expelling an allegedly-abusive parent from the home appropriate?
- Are services available that will allow the child to remain safely at home, and will parents commit to participate in the services?
- Are orders needed for examinations, evaluations, or immediate services?
- What are the terms and conditions for parental visitation?
- What consideration has been given to financial support of the child?
- Is the placement proposed by IDHW the least disruptive and most family-like setting that meets the needs of the child?

[27] *See* YOUTH LAW CENTER, MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD (1999) (available on-line at www.emcf.org/pdf/children_makingreason.pdf or by calling 212-551-9100); MARK HARDIN, ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION (1989).

[28] Idaho Code § 16-1615(5)(f) authorizes entry of protection orders following the shelter care hearing.

wide variety of cases, intensive home-based services, in which professionals spend long periods of time in the home, sharply reduce the danger to the child. The court can order specific, in-home services to ensure the child's safety while remaining with or returning to the family. Whether these services are sufficient to eliminate the immediate danger to the child will depend, in part, on the parents' commitment to participate in these services.

Where services are available, parents are willing to participate, and IDHW is willing and able to provide the services, IDHW and the parents should enter into a stipulation. The stipulation should set out the reasons why supervision is appropriate and what the specific conditions are for the child to remain in the home pending the adjudicatory hearing.

c. Is the placement proposed by the agency the least disruptive and most family-like setting that meets the needs of the child?

Idaho law requires that IDHW make reasonable efforts to place the child in the least disruptive environment to the child[29] For example, a child should not routinely be placed in group home shelters when the child is capable of functioning in the family-like setting of an individual foster home. If the most appropriate setting for the child is not immediately available on an emergency basis, the court may make certain that appropriate referrals are made so that the child can be moved to a preferred placement when one becomes available.

d. Are responsible relatives or other responsible adults available?

Idaho law directs IDHW to consider placement of the child with related persons.[30] Thus, at the shelter care hearing, the court should take into account what help may be obtained from appropriate relatives or other responsible adults involved with the child, if such information is available. Immediate placement with relatives or another responsible adult is possible if such individuals are willing to care for the child and the agency has already been able to favorably evaluate them. Even if relatives or other responsible adults are not available to assume full-time care of a child, they may be available as a resource to supervise visitation when necessary. Sometimes, IDHW will not have had time to assess relatives or other responsible adults involved with the child prior to the shelter care hearing. If it is too early to evaluate relatives or other adults, but placement of the child with them is a possibility, the court should set a schedule for prompt agency evaluation.

e. Are orders needed for examinations, evaluations, or immediate services?

During many shelter care hearings, the court should order an examination or evaluation by an expert. For example, the court may need to authorize a prompt physical or mental examination of the child to assess the child's need for immediate treatment. An expert evaluation of a child is frequently essential for placement planning if the child needs to be placed outside of the home. An evaluation can often identify special treatment needs of the child; for example, whether the child will need placement in a residential treatment facility or a therapeutic foster home.

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[29] Idaho Code § 16-1629(11). When a child is placed in the custody of the agency, Idaho Code § 16-1625(h) vests authority in the agency to determine the child's placement, subject to review by the court. For further discussion of the relative authority of the agency and the court concerning placement of a child in IDHW custody, see Chapter VI: Permanency Planning, subheading B.5.

[30] Idaho Code § 16-1629(11).

Further examination of the child may be needed to preserve evidence bearing on whether the child has been abused. The need for such examinations and evaluations is often already clear at the shelter care hearing and ordering them at that time can speed the pace of litigation. Sometimes an expert evaluation is needed to determine the fitness of a parent or relative to provide immediate care for the child. If the evaluation is positive, it can curtail the child's separation trauma by allowing the child's early return from foster care. On the other hand, if the evaluation is negative, its early submission will speed the pace of litigation and will also shorten the child's stay in foster care. A judge may also recommend an examination; may hold an additional hearing and subpoena witnesses if the evaluation does not take place as recommended, and may withhold a positive determination of reasonable efforts if evaluations are not promptly completed.

f. What are the terms and conditions for parental visitation?

If a child cannot be returned home after the shelter care hearing, immediate parent-child visitation often can ease the trauma of separation. Early visitation helps to maintain parental involvement and speed progress on the case.[31] Judicial oversight of visitation helps to ensure that visitation is begun promptly, that it is permitted frequently, and that unnecessary supervision and restrictions are not imposed. The court should make an initial decision concerning the frequency, duration, and terms of visitation for the parents, such as whether visitation should be supervised or unsupervised. The court should also decide whether there is a need for any additional orders concerning the conduct of the parents or agency efforts to provide services to the parents or child.

g. What consideration has been given to financial support of the child?

All potential sources of financial support for the child should be identified and considered in court decisions affecting the child. This includes financial support for health services, special educational or developmental needs, and basic child support. Paternity issues which remain unresolved at the time of the shelter care hearing remain a judicial priority at all subsequent proceedings.

F. Additional Activities at the Shelter Care Hearing

In addition to the preceding key decisions, there are a number of other functions that the court should perform at shelter care hearing.

Additional Activities at the Shelter Care Hearing:

- Reviewing notice to missing parties and relatives;
- Serving the parties with a copy of the petition;
- Advising parties of their rights; and
- Accepting admissions to allegations of abuse or neglect.

1. Reviewing Notice to Missing Parties and Relatives

One of the most important functions of the court during the shelter care hearing is to oversee the agency's early efforts to locate and notify missing parties and relatives. During the shelter care hearing, the court should inquire about parties who are not present and should require an explanation of agency efforts to locate and notify them of the

[31] See K. Blumenthal & A. Weinberg *Issues Concerning Parental Visiting Of Children In Foster Care*, in FOSTER CHILDREN IN THE COURTS, 372-398 (M. Harden, ed.1983).

proceeding. Speedy decision-making is critical in child abuse or neglect cases, and timely notice to the parties helps prevent delays.

It is particularly important that efforts to identify and locate an absent parent be initiated as early as possible in the process, even if the parent has not previously been involved in the child's life. Identification of a parent may include paternity testing of putative fathers. Paternity testing should be ordered as early as possible in the proceedings, to minimize delays while awaiting test results.

It is also very important that efforts be made as early as possible to determine if the child is an Indian child. The Indian Child Welfare Act (ICWA) establishes special procedural and substantive safeguards to protect the interests of Indian children and families.[32] It applies to any child who is a member of an Indian Tribe or who is eligible for membership in an Indian Tribe. If the child is an Indian child, the child's Indian Tribe has the right to notice and an opportunity to participate in all hearings regarding the child. ICWA also establishes preferences for placement of Indian Children.

2. Serving the Parties with a Copy of the Petition

The petition and summons must be prepared in advance of the shelter care hearing. The hearing provides an excellent opportunity to efficiently complete service of process.

3. Advising Parties of their Rights

If a party is not represented by counsel at the shelter care hearing, the court should advise the party of the right to counsel, including the right to court-appointed counsel, where applicable. Even when the parties are represented at the hearing, the court should explain the nature of the hearing and the proceedings that will follow.

4. Agreements by the Parties

When counsel has been provided in advance of the shelter care hearing, parties are sometimes willing and able to enter into stipulations at the shelter care hearing. Reviewing and accepting the stipulation at that point advances the pace of the litigation and simplifies the work of all participants.

In many cases, the parties will stipulate to temporary shelter care pending the adjudicatory hearing. The court should ensure that the agreement has been thoroughly considered by all participants, especially the parents and the guardian *ad litem*. The court should ensure that the agreement addresses all of the key decisions the court needs to address at the shelter care hearing, and the court should resolve any items that are omitted. If the stipulation includes placement of the child with a family member, the court should specifically inquire as to the agency's investigation of the family member as a care provider for the child. The court should also inquire of the family member's commitment to providing care for the child until the proceedings are resolved and to placing the child's needs ahead of what the parents might want. (The purpose of this inquiry is to try to prevent a child from being shuffled from relative to relative while the case is pending or from being placed with a family member who is more interested in protecting the parents from governmental intervention than in protecting the child.)

[32] 25 U.S.C. § 1901, *et seq.*

As to services to be provided to enable the child to safely return or remain home, the court should specifically ask the parents, on the record, whether they are willing and able to comply and whether there are any services they need or want that will enable them to address the issues that need to be resolved. If the child is to be placed in the custody of IDHW, and the shelter care order is the first order sanctioning removal of the child, the stipulation must include facts to support a case-specific finding that removal is in the child's best interests.

In some cases, the parties will enter into a stipulation at the shelter care hearing that the child is within the jurisdiction of the CPA and that the child should be placed either in the custody of IDHW or in the child's own home under the protective supervision of IDHW. In other words, the parties will enter into a stipulation at the shelter care hearing that addresses the two primary issues to be decided at the adjudicatory hearing. In such cases, the court must ensure that the stipulation addresses all the key decisions that the court must or should make at the adjudicatory hearing, and the court should resolve any issues not addressed by the stipulation. Chapter V includes a discussion of the key decisions to be made by the court at the adjudicatory hearing.

In some cases, the parties will enter into a stipulation to dismiss the petition. In such cases, the court should inquire as to the basis for the stipulation, and as to whether there has been adequate investigation of the allegations of abuse or neglect. If the parties are in agreement that no abuse or neglect has occurred, or that the issues are sufficiently minor that they can be addressed informally, then dismissal may be appropriate. If the proposed dismissal is due to lack of adequate investigation, the court can retain the matter pending further investigation.

5. The Time and Date for the Next Hearing and any Orders Needed to Prepare for the Next Hearing.

In most cases, the next hearing will be the adjudicatory hearing. Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition. Idaho law further requires that a pretrial conference be held three to five days prior to the adjudicatory hearing and provides for both IDHW and the guardian *ad litem* to file written reports prior to the adjudicatory hearing.[33] Federal law requires the court to make a documented, case-specific finding as to whether the agency made reasonable efforts to prevent the need for placement of the child in foster care and requires that this finding be made within 60 days from the date the child was removed from the home. If this finding is not made within the deadline, the child may lose eligibility for federal funds. This omission cannot be corrected at a later date to reinstate the child's eligibility for funding.[34] It is, therefore, essential that this finding be made at the adjudicatory hearing and that the adjudicatory hearing be held within the state and federal time standards.

As noted above, the parties may enter into a stipulation at the shelter care hearing that the child comes within the jurisdiction of the CPA and that the child should be placed either in the custody of IDHW or in the child's own home under the protective supervision of IDHW. In other words, the parties may reach an agreement at the shelter care hearing that addresses the issues to be determined at the adjudicatory hearing. In such cases, the next hearing will be the case planning hearing. Idaho law requires that a written case plan be filed with the court no later than 60 days

[33] Idaho Code §§ 16-1616, 16-1619(1) and (b), 16-1633(2).
[34] 42 U.S.C. §671(a)(15)(B)(i); 45 C.F.R §1356.21(b)(1)(ii).

from the date the child was removed from the home or 30 days from the date of the adjudicatory hearing, whichever if first. Idaho law further provides that the case planning hearing must be held within 5 days after the plan is filed.

The court should set the time and date of the pretrial conference and adjudicatory hearing on the record prior to the conclusion of the shelter care hearing and order the filing of IDHW and GAL reports prior to the pretrial conference. (If the next hearing will be the case plan hearing, the court should set the time and date for the hearing, order the filing of the case plan, and set the deadline for filing of the case plan.) Because there are so many participants in child protection cases and so many proceedings with strict deadlines, scheduling can be extremely difficult. These difficulties can be minimized by scheduling the next hearing on the record when all the participants are present with their calendars available. Also, if a party fails to appear, scheduling the next proceeding on the record forecloses any potential excuse that the party did not have notice or did not know of the date and time for the hearing. Finally, if the parties have been ordered to appear, sanctions and warrants become available as a means to address a party's failure to appear.

Sometimes, an essential participant is in state or local custody. A parent may be in jail or prison or a child may be in detention or in the custody of juvenile corrections. The court should address whether transport orders will be needed to ensure the presence of all essential participants at the next hearing. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

6. Mediation or Other Means of Alternative Dispute Resolution

Many courts are beginning to successfully use mediation or other forms of alternative dispute resolution in child protection cases. Mediation can help to promote a more cooperative, problem-solving approach among the participants in the case, can identify options for resolution of the case that have the active commitment of all participants, and can achieve a safe reunification of the family or the best possible alternative permanent placement for the child. The Idaho Supreme Court maintains a list of qualified mediators, including those who primarily handle cases involving child custody. The potential for mediation is one of the issues that should be addressed at the shelter care hearing.

Submission of Reports to the Court:

- The court should require submission of agency and/or law enforcement reports in the form of an affidavit to be filed with the court along with the petition.
- The report should describe all circumstances of removal, including facts that bring the child within the jurisdiction of the CPA, and all efforts made to prevent the need to remove the child from the home.

G. Submission of Reports to the Court

Given the short time period between removal of the child and the time of the shelter care hearing, it is not reasonable to expect lengthy reports and written assessments to be submitted in advance of the hearing. However, federal law requires the court to make a documented, case-specific finding that removal is in the best interests of the child in the first order sanctioning removal of the child (either the order to remove the child on the summons or the shelter care order), and failure to make that finding could result in the child losing eligibility for federal funding.[35] In

[35] *See* 45 C.F.R. § 1356.21(c),(d) and discussion of the best interest finding in part C of this chapter.

addition, Idaho law requires that the petition describe the facts that bring the child within the jurisdiction of the Child Protection Act.[36]

The recommended best practice is for the petition to be accompanied by a report, in the form of an affidavit, describing all the circumstances of the removal, including the facts that bring the child within the jurisdiction of the CPA, the reasons why removal of the child from the home is in the child's best interests, and the efforts made to prevent the need to remove the child from the home. The report should include information from the IDHW caseworker and from the law enforcement officer, if law enforcement was involved in the removal of the child of the circumstances surrounding removal of the child. Advance preparation of this information ensures that the state is prepared to proceed at the shelter care hearing, provides essential information to the court, the guardian *ad litem*, and the parents, provides the parents with an opportunity to offer a defense or propose alternatives to shelter care, and may form the basis for an appropriate resolution through stipulation of the parties.

H. The Court's Written Findings of Fact and Conclusions of Law at the Shelter Care Hearing

At the conclusion of the hearing, the court's written findings of fact and conclusions of law should be prepared and distributed in person to the parties. Idaho law requires that a written order be issued within 24 hours of the hearing.[37] Ideally, this should occur at the conclusion of the hearing while the parties are still present. If the court has a shelter care form on a computer, the order and findings can be filled in quickly at the conclusion of the hearing. Handing out an order and findings at the hearing gives the parties an immediate, written record of what has been decided, what they are expected to do prior to the next hearing, and the date and time of the next hearing.

Findings, conclusions, and orders at the shelter care hearing should:

- Be written in easily understandable language

If the child is placed outside the home:

- Include findings that there is reasonable cause to believe that the child is within the jurisdiction of the CPA
- Include case-specific findings as to why it is in the child's best interests to be removed from the home (as required for the child to be eligible for federal funds)
- Include findings as to reasonable efforts made by the agency to avoid the need for out-of-home placement (as required for child to be eligible for federal funds)

Whether or not the child is placed outside the home:

- Schedule further proceedings and enter any orders necessary to prepare for the next hearing
- Provide further directions to the parties, such as those governing future parental conduct and any agency services to be provided to the child and/or the parents pending further proceedings

The court's form should include the following findings conclusions and orders:

- ✓ which parties and counsel were present and which were not (as to those who were not, whether proper notice was given);
- ✓ whether the order is entered based upon the agreement of the parties, and if so, that the agreement was entered into knowingly and voluntarily and has a reasonable basis in fact;
- ✓ that a petition has been filed;

[36] Idaho Code § 16-1610(2)(a) and discussion of the petition in part C of this chapter and in Chapter III.
[37] Idaho Code § 16-1615(5)(f).

- ✓ whether the child is an Indian child, and if so, whether notice has been given as required by ICWA;
- ✓ whether there is reasonable cause to believe that the child comes within the jurisdiction of the CPA, and if so, the basis upon which there is reasonable cause to believe the child comes within the jurisdiction of the Act (in other words, there is reasonable cause to believe that the child is abandoned, abused, or neglected, etc.);
- ✓ whether it is contrary to the child's welfare to remain in the home and in the best interests of the child to be placed in temporary shelter care pending further proceedings, *including case-specific findings as to why removal from the home is in the child's best interests*;
- ✓ whether the child's safety and welfare can be adequately safeguarded by placing the child in the sole custody of a parent having joint custody of the child;
- ✓ whether IDHW made reasonable efforts to prevent the need to remove the child, *including case-specific findings regarding IDHW's reasonable efforts*, or where emergency removal occurs because of imminent danger to the child, whether the agency's efforts were reasonable under the circumstances;
- ✓ whether reasonable efforts to prevent or eliminate the need for shelter care could be effected by a protective order safeguarding the child's welfare;
- ✓ the date and time for the pretrial conference and the adjudicatory hearing;
- ✓ the deadline for filing IDHW and guardian *ad litem* reports;
- ✓ an order as to the placement of the child pending further proceedings;
- ✓ orders as to further efforts to identify, locate, and serve essential parties, to determine whether the child is an Indian child, or to give notice in accordance with the Indian Child Welfare Act;
- ✓ the terms of any protective orders;
- ✓ an order to the parties and counsel to be present for the pretrial conference and the adjudicatory hearing;
- ✓ an order to IDHW and the guardian *ad litem* to investigate, prepare, and file reports;
- ✓ orders as to examinations, evaluations, or immediate services for the child pending further proceedings;
- ✓ orders to IDHW to continue to make reasonable efforts to eliminate the need for placement of the child, including services IDHW is required to provide to the parents and in which the parents are required to participate pending further proceedings;
- ✓ orders as to visitation, if appropriate; and
- ✓ any other orders necessary to prepare for the next hearing or to ensure the proper progress of the case.

The court's findings of fact, conclusions of law, and order should be written in easily understandable language, which allows the parents and all parties to fully understand the court's order. Along with its legal conclusions, the court should provide a brief explanation of the facts upon which its conclusions are based. The court's entry need not be elaborate, but should document that the court has addressed each of the basic issues presented at a shelter care hearing and that the court's decision is based upon a reasoned analysis of the evidence presented. The burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or other participants. The entry should also document the court's orders and expectations concerning the parents' and the agency's future conduct. Where possible, an

oral record of the court's findings should also be made to provide a basis for correcting defective findings.

I. Best Practice Recommendations for the Shelter Care Hearing

A primary goal of the court should be to make the shelter care hearing as thorough and meaningful as possible. The court should conduct an in depth inquiry concerning the circumstances of the case. It should hear from all interested persons present.

If the child will remain outside the home during the child protective case, it is important to keep in mind that the time in which the shelter care hearing is held is a critical period of crisis for the family. It is the responsibility of the court to make sure that IDHW takes immediate steps toward family reunification and works to maintain the relationship between parent and child.

A secondary purpose of the shelter care hearing is for the court to move the litigation forward as quickly as possible and to oversee the IDHW's initial involvement in the case. Time is of the essence in child abuse or neglect cases. At the shelter care hearing the court should take steps to eliminate potential sources of delay in the litigation.

Due to the time constraints, in some cases it might not be possible for the court to conduct a careful and complete initial shelter care hearing. In these circumstances, the court should:

- Decide all issues that can be immediately resolved at the current shelter care hearing;
- Provide specific guidance as to the persons who must be present and the issues to be decided at the subsequent shelter care hearing; and
- Continue the shelter care hearing for not more than 24 hours.

When shelter care hearings are thorough and timely, some cases can be resolved with no need for subsequent court hearings and reviews. In other cases, a thorough and early shelter care hearing can help simplify and shorten early hearings and can move the case more quickly to the later stages of adjudication, disposition, and review. This not only preserves court resources but reduces the cost and harm of unnecessary, prolonged out-of-home placement of the child.

A timely and thorough shelter care hearing can shorten the time of foster care and speed the judicial process. By ensuring speedy notice to all parties, the hearing avoids delays due to difficulties with service of process. By ensuring early, active representation of parties, the hearing avoids trial delays due to scheduling conflicts and the late appointment of unprepared advocates. By clearing the trial (adjudication) date at a very early time, the hearing avoids later scheduling conflicts that otherwise would delay trial dates.

By thoroughly exploring all issues at the shelter care hearing, the court can resolve and dismiss some cases on the spot, move quickly on some pretrial issues (such as discovery or court-ordered examination of parties), encourage early settlement of the case, encourage prompt delivery of appropriate services to the family, and monitor agency casework at a critical stage of the case. Another purpose of the shelter care hearing is for the court to begin setting a problem-solving atmosphere so that the child can remain safely at home or be safely returned home as quickly as possible.

Parents are often angry and emotionally distraught at this hearing. The emergency removal of the child may have occurred because the relationship between the social worker and parents has broken down. The adversarial nature of court proceedings can aggravate tensions between the parties. The court should take active steps to defuse hostilities, to gain the cooperation of the parties, and to assist parties in attacking problems rather than each other.

Although the court should not assume the role of caseworker, there are practical steps that a court can take to gain the cooperation of the parties and to develop a problem-solving atmosphere. The court should remember that for many parents the shelter care hearing will be their first experience in court. The court can explain the hearing process to parents so that they are less confused. The court can explain that it is not an arm of IDHW, but that its role is to be an impartial decision-maker, acting upon information provided by all parties. The court can carefully listen and seek to thoroughly understand the perceptions and concerns of all parties present at the hearing. The court can insist that proper decorum is maintained by each party so that all persons present are treated with dignity and respect. The court can attempt to identify areas of agreement and mediate areas of dispute between parties so that some disputes are resolved through agreement rather than through contested hearings.

At the conclusion of the shelter care hearing, the parties should leave with a decision from the court concerning the placement of the child that is based on thorough understanding and careful consideration of the circumstances of the case. The parties should see that the court has taken an active role to move the case forward and to make certain that the agency responds to the needs of the child and family in a timely manner. The parties should leave the hearing with the perception that they were treated fairly by a court that is concerned about their interests and that is striving to build a working relationship between the parties so that the need for court intervention can be ended as quickly as possible.

A complete shelter care hearing requires a substantial initial investment of time and resources. Such an investment results in better decisions for children and their families and preserves the resources of the court and child welfare system. Significant costs are incurred when a child is unnecessarily placed outside of the home. A child can suffer serious emotional and behavioral problems from the disruption and upheaval caused by out-of-home placement. The parents' feelings of inadequacy and helplessness may be intensified, thereby making efforts to change their behavior even more difficult. The family may lose its income and housing if the family has been dependent on public assistance. As a result of these and other effects of removing a child, extra efforts must often be made and significant costs incurred to resolve problems as early as possible in each case.

By insisting that adequate services are delivered to safely prevent the need for out-of-home placement and by making certain that decisions to remove children from their homes are made with great care, courts can avoid costs associated with unnecessary placements. By investing the time to carefully review agency efforts and to suggest or order additional or more appropriate services, the court may find that its own time and resources are saved as cases are resolved in a timelier manner.

J. Conclusion

A timely, careful, and complete shelter care hearing can benefit each child and family before the court by:

- Preventing the unnecessary removal of children from their families by carefully evaluating the danger and exploring possible safe alternatives to removal.
- Limiting the trauma when a child must be removed by requiring liberal parent-child visits (where safe and appropriate), by identifying appropriate placements, and by making sure that relatives and family friends will promptly be contacted and involved.
- Speeding casework when children must be temporarily removed from their families by requiring early evaluations, examinations, and emergency services.
- Speeding litigation by early completion of critical court business, such as service of process, establishment of trial date, and face-to-face meetings between attorneys and clients.
- Explaining to parents and other family members why the state has intervened and how the judicial process works.
- Beginning early discussions of settlement possibilities and appropriate services to the child and its family.

CHAPTER V: THE ADJUDICATORY HEARING

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A. Introduction

The adjudicatory hearing is a two-phase process. The first is the adjudication phase, in which the primary function of the court is to determine whether the child is within the jurisdiction of the CPA. In other words, whether the child is abandoned, abused, neglected, homeless, or lacks a stable home environment.[1]

The second phase is the disposition phase, in which the primary function of the court is to determine whether to place the child in the custody of the Idaho Department of Health and

[1] Idaho Code § 16-1619(3) and § 16-1603. In some cases, another child in the same home may come within the jurisdiction of the Act. Jurisdiction over other children in the home is discussed in Part F, below.

Welfare (IDHW, or the agency), or to place the child in the child's own home under the protective supervision of IDHW.[2]

There is a third determination that the court may make in the first phase of the adjudicatory hearing, which fundamentally affects the course of the proceedings and the future of the child and the family. The petition may allege that the parent(s) subjected the child to aggravated circumstances. If the court finds that the parent(s) subjected the child to aggravated circumstances, then the agency is not required to make reasonable efforts to reunify the family, and the agency instead proceeds with plans to identify and implement an alternative permanent placement for the child. The agency is required to proceed with the filing of a petition to terminate parental rights within 60 days of the finding of aggravated circumstances, unless there are compelling reasons why termination of parental rights is not in the best interests of the child.[3]

1. Phase 1: Adjudication

The adjudicatory phase of the hearing is the trial.[4] This is the stage of the proceedings in which the court determines whether allegations of abandonment, abuse, neglect, homelessness, or lack of a stable home environment concerning a child are sustained by the evidence, and if so, whether the allegations are legally sufficient to support state intervention on behalf of the child. If the petition seeking court intervention on behalf of a child is sustained, the court may proceed to the disposition stage and determine who shall have responsibility for the child and under what conditions.

Adjudication provides the basis for state intervention into a family, while disposition concerns the nature of such intervention. The outcome of adjudication controls whether the state may intervene over the objections of the family. In all cases, the legal rights of interested parties are affected by the adjudication and interested parties are therefore entitled to notice as a matter of constitutional law.

The manner in which the adjudication is conducted also has important long-term implications for the child and the family. First, a speedy adjudication can reduce the length of time a child spends in out-of-home placement. Often it is necessary for the court to make a definitive decision whether or not a child has been abused or neglected before the agency and parents can begin to work together. The time in which this adjudication is completed may control the timing of later judicial proceedings.

A primary characteristic of the adjudication phase of the hearing is that formal legal process must be used to notify essential parties and witnesses of the hearing and to secure their attendance. At shelter care hearings, problems may arise because of short notice for obtaining

[2] Idaho Code §16-1619(5). Prior to the 2001 revisions to the Child Protective Act, the disposition hearing was separate from the adjudicatory hearing, although the disposition hearing could be held immediately after the adjudicatory hearing if the parties agreed. The 2001 amendments combined the adjudicatory hearing and the disposition hearing into one hearing for two reasons. First, in most cases the information needed for disposition is available at the time of adjudication, and in most cases, the parties agreed to proceed with the disposition hearing at the time of the adjudicatory hearing. Secondly, combining the two hearings enable the process to comply with federal deadlines for reasonable efforts findings, described later in Part B, below.

[3] Idaho Code §§6-1619(6)(d) , 16-1620 and 16-1624.

[4] The CPA also requires a pretrial conference, discussed later in this chapter in Part B.

representation for parents and guardians *ad litem* for children. This problem should be addressed at the shelter care hearing so that by the time an adjudicatory hearing is held, all necessary appointments are made. Case outcomes are improved when all interested parties receive timely notice of the adjudication. Parties include not only the parent allegedly committing the abuse or neglect, but also non-custodial parents, putative fathers, other persons with legal custody, long-term physical custodians, and in the case of Indian children, the child's Indian tribe.

When these parties are provided with early notice, they may make essential contributions to resolving the case, by (a) giving important information to the court, (b) providing a placement for the child, (c), paying child support, or (d) offering important emotional support for the child. When parties are not provided with notice prior to the adjudicatory hearing, this often prolongs a child's placement in foster care. For example, when a non-custodial parent or putative father is first notified only after efforts to work with the custodial parent are exhausted, new efforts must be initiated to work with the non-custodial parent or putative father, thus potentially prolonging the CPA case and the child's stay in foster care.

Locating missing parents may require inter- or intra-agency efforts. The portion of the agency that is responsible for child protection cases should be expected, and, if necessary, required to work with the portion of the agency that is responsible for child support enforcement, to obtain the assistance of the Parent Locator Service. IDHW or counsel for the state may need to work with correctional agencies to determine whether missing parents are in federal, state, or local custody, to provide notice, and to secure the parents' attendance (either in person or by telephone) at hearings. Efforts to identify, locate, and join essential parties should begin as early as possible in the process and if early efforts are not successful, should continue throughout the process.

Paternity issues must be resolved at an early point in the litigation. This should include prompt paternity testing, if necessary. It may be necessary to resolve paternity to determine such issues as whether the putative father should be admitted as a party to the litigation, whether an attorney should be appointed to represent him if he is indigent, and whether he should be considered as a candidate for custodian of the child.

The court must also resolve issues concerning a child's Indian heritage at an early point in the litigation. If the child is an Indian child, then the Indian Child Welfare Act applies and can substantially impact each stage of the child protection process, including the adjudicatory hearing.[5] The child's tribe is entitled to notice and opportunity to appear, and ICWA establishes certain preferences in the placement of the child.

An accurate trial record at the adjudication phase has importance beyond the adjudication itself. Adjudication should determine the precise nature of the abuse or neglect so that disposition, case work, and later court review can be focused on the specific facts which resulted in state intervention. Until the facts have been legally established at adjudication, IDHW may be unable to secure the cooperation of the parents who have denied that any problems exist. A clear record of the facts established at the adjudication may be useful in later court proceedings. This record

[5] 25 U.S.C. § 1901 *et seq.* *See* Chapter XI of this Manual.

may foreclose later factual disputes or may provide important evidence which would otherwise be unavailable.

2. Phase 2: Disposition

The second phase of the adjudicatory hearing is disposition. Disposition is the stage of the child protection process in which, after finding that the child is within the jurisdiction of the Child Protective Act, the court determines who shall have custody and control of the child. The court may set conditions concerning the child's placement and may issue specific directions to the parties.[6]

Court proceedings to determine disposition are a crucial part of the child protection process. At disposition, the court makes the decision whether to continue out-of-home placement or to remove a child from the home. A full examination of this issue is needed, including an examination of the agency's plan to protect the child from further harm, to prevent unnecessary out-of-home placement and to determine safe alternatives to placement. Based on this examination, the court can then evaluate whether these agency actions constitute reasonable efforts to prevent placement. Dispositional reports by the agency and the guardian *ad litem* that address these issues are needed to help the court and parties evaluate the necessity of removal.

When the court decides to place a child outside the home, additional steps are needed to minimize the harm of separation. The court should set terms for appropriate visitation and parent-child communication. The court may need to specify services needed to help the child deal with the trauma of separation and to deal with the child's other special needs. When the separation of siblings is unavoidable, visitation and communication between siblings must be addressed during disposition.

Decisions at disposition should help IDHW and parents develop an appropriate plan to address the specific problems which necessitated state intervention in the case. While adjudication should identify the problems justifying court involvement, disposition should make sure that the parties work out a plan to resolve them. The court should ensure that IDHW and the court do not work at cross-purposes.

Disposition should set a framework for review. Effective dispositional proceedings enable review proceedings to evaluate progress in the case. Where the family problems can be clearly described, appropriate services can be identified and appropriate objectives can be chosen, thus providing a clear focus for subsequent review hearings.

The precision with which the needed changes and remedial steps can be identified at disposition depends on the timing of the hearing and the nature of the family problems. If the family problems are not yet fully known, the case plan may need to set up further evaluation rather than to set concrete behavioral goals for parents. If family problems are already clear, it is appropriate for the court to state in some detail what the parties are expected to accomplish. Where the agency and parents have already worked out an initial case plan by the time of the

[6] Idaho Code § 16-1619(5). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed in Part 5, below.

adjudicatory hearing, it may be desirable for the court to incorporate particular provisions of the plan into its written findings of fact, conclusions of law, and order.

3. Need for Distinct Disposition Phase at the Adjudicatory Hearing.

Disposition issues should be considered separately from adjudication issues at the adjudicatory hearing. Whether the petition has been sustained (including both allegations of neglect or abuse and allegations of aggravated circumstances) and what is to happen next to the child, are two distinct determinations that need to be examined separately to accord full consideration to each. The two decisions are as distinct from one another as a finding of guilt is distinct from sentencing in a criminal case. It is important that they are not blurred.

When the adjudication and disposition functions are not separated, emphasis may fall on one at the expense of the other. Emphasis on dispositional issues at the expense of adjudication issues may result in the court asserting authority over the child and the family when the record and the findings do not support the exercise of that authority. Emphasis on adjudication issues at the expense of disposition issues may result in placement of the child without adequate consideration of all possible alternatives and which of those alternatives best meets the needs of the child.

Because the issues at the adjudication phase of the hearing directly affect substantive rights, these issues must be determined in proceedings that comply with the rules of civil procedure and the rules of evidence. Once the adjudication issues are determined, disposition issues may be resolved less formally. For example, agency reports and guardian *ad litem* reports are prepared for the disposition phase of the hearing and address issues of placement, visitation, and services. These reports typically contain hearsay information or information that does not comply with other rules of evidence. It is improper for the court to use these reports to determine whether the child is within the jurisdiction of the CPA, or whether aggravated circumstances exist, unless the parties stipulate to admission of the reports into evidence at the adjudication phase of the hearing.

B. Timing of the Adjudicatory Hearing and Pretrial Conference

Principles of case management require that there be specific and strict time limits for every stage of the court process, including both the adjudication and disposition phases of the adjudicatory hearing. More importantly, because of the critical impact of child protection proceedings on the present and future quality of life of the child, it is essential that the case move forward expeditiously, toward a resolution that enables the child to safely and permanently return home or to an alternative permanent placement. Court enforcement of the time limits within which the adjudicatory hearing must take place compels court clerks, attorneys, investigators, and social workers to adjust to a quick pace of litigation.

Both state and federal law place deadlines on the timing of the adjudicatory hearing. State law establishes procedures designed to facilitate a timely adjudication, and federal law imposes severe consequences for failure to achieve a timely adjudication.

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.[7] The Child Protective Act requires that a pretrial conference be held within three to five

[7] Idaho Code §16-1619(1).

days prior to the adjudicatory hearing.[8] The statute further provides for IDHW and the guardian *ad litem* to investigate and prepare written reports, which must be filed with the court prior to the pretrial conference.[9] The purpose of these requirements is to ensure the exchange of essential information, to promote knowing and voluntary settlement prior to trial, and to promote effective trial of issues to be determined by the court. The statute provides for the pretrial conference to be held outside the presence of the court, but the recommended best practice is for the judge to be available to accept stipulations or to resolve pretrial issues.

As part of the disposition phase of the adjudicatory hearing, the court must determine whether the agency made reasonable efforts to prevent the need for placement of the child in foster care. Federal law requires the court to make a *documented, case-specific* finding of reasonable efforts and requires that this finding be made within 60 days from the date the child was removed from the home. **If this finding is not made within the deadline, the child may lose eligibility for federal funds.** This omission cannot be corrected at a later date to reinstate the child's eligibility for funding.[10] It is therefore essential that the disposition phase of the adjudicatory hearing be held within 60 days from the date the child was removed from the home.

It is strongly recommended that the finding that IDHW made reasonable efforts to avoid out-of-home placement be made at the Shelter Car Hearing (*see* Chapter III.D.2 of this Manual). Regardless, the court should determine whether the finding has been made, and if not, should make the finding at Phase I of the Adjudicatory Hearing.

Due to the difficulty of scheduling hearings with numerous participants and within strict time limits, child protection cases must be given priority in scheduling and should be set for firm dates and times. The court should have a strong policy against continuances. Continuances should be granted only for compelling reasons and only for a short period of time. The continued hearing must be within the federal time limit if there is potential that the hearing will result in placement of the child in the custody of the agency. If a continuance is granted, the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

Generally, only a genuine personal emergency of a party or counsel warrants a continuance. In instances where there is an unavoidable delay in obtaining crucial witnesses or evidence, the court may proceed with the hearing to allow presentation of the available witnesses and evidence, adjourn the proceedings for a short period of time, and then reconvene as soon as possible to accept the remaining testimony or other evidence. Awaiting the outcome of criminal proceedings, even criminal proceedings related to the child protection case, is generally NOT a compelling reason to continue an adjudicatory hearing.

Although the court's decision at the adjudicatory hearing should help to identify family problems and needed remedial steps, there is no need to postpone disposition to identify all problems or all potential assistance and services. Many times the adjudicatory hearing will occur before

[8] Idaho Code §16-1619(2).
[9] Idaho Code §§ 16-1616, 16-1633(a), (b), 16-1619(2). For more information about submission of reports to the court, see Part E, below.
[10] 42 U.S.C. §671(a)(15); 45 C.F.R. §1356.21(b)(1).

significant case planning has taken place. Ongoing evaluation and work with the family will develop this further, and can be incorporated in the case plan to be reviewed by the court at the case planning hearing. Information about the case plan and the case planning hearing is included in Chapter VI.

C. Agreements by the Parties

Most petitions are uncontested, i.e. are resolved by agreement of the parties. Therefore, court practices and procedures for uncontested or stipulated cases are particularly important. Parties should be able to stipulate or consent to adjudication issues without addressing disposition issues. Likewise, they should be permitted to reach a simultaneous settlement of adjudication and disposition issues. Idaho Juvenile Rule 38 sets forth minimum standards for court endorsement of stipulations by the parties.

Rule 38 provides that "the court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interests of the child. Any order entered based on a stipulation must include any case-specific findings as required by the statute or these rules."

Thus, before accepting a stipulation, the court should conduct sufficient inquiry on the record to ensure that the agreement has been carefully considered by all the parties, especially the parents and the guardian *ad litem*, and that the parties are entering into the agreement knowingly and voluntarily. The court should determine that the parties have thoroughly considered the reports by the agency and the guardian *ad litem*, that the parties understand the content and consequences of the stipulation, and that the parties have had sufficient opportunity to confer with their attorneys.

The court should also conduct sufficient inquiry, on the record, to ensure that the stipulation is reasonable and appropriate. There are limits to a judge's role in overseeing settlement agreements, due to the court's mandated impartiality and lack of independent knowledge of the facts of a case. Nonetheless, many inappropriate stipulations can be eliminated through careful judicial scrutiny.

The court should ensure that the stipulation is comprehensive and that it addresses all of the key decisions the court must or should make at the adjudicatory hearing. The could should resolve any issues not addressed by the stipulation. The key decisions that the court must make at the adjudicatory hearing, including both adjudication and disposition issues, are described in Part F, below.

With respect to the adjudication phase, it is essential that the court's findings accurately record the reasons for state intervention. Adjudicatory findings are the basis for the case plan, and the benchmark for reviews of case progress. They are a critical point of reference when the court must later decide whether a child can safely return home. The accuracy of adjudicatory findings should not be bargained away, and judges should discourage this practice.

If the disposition is to place the child in the custody of the agency, the issue of "reasonable efforts" must be addressed. Federal law requires a documented, case-specific finding that the agency made reasonable efforts to prevent or eliminate the need for placement of the child.[11] If this finding is not made, the child may lose eligibility for federal funding. The omission cannot be corrected later to reinstate the child's eligibility. If the finding is made verbally on the record but is not documented, it can later be documented through a transcript of the hearing. The findings can incorporate by reference a written affidavit or report that describes the circumstances of the case and the efforts made in light of those circumstances. The only exception to the reasonable efforts requirement is in those cases where the court finds (based on hearing or stipulation) that the parent(s) subjected the child to aggravated circumstances.

★★★Even where the parties enter into a voluntary agreement for care, a **case-specific, documented finding** of **reasonable efforts to avoid removal** is **required** in order to preserve the child's eligibility for federal IV-E finding. This finding is discussed in Chapter V.G.2.h.

Sometimes the parties will enter into a stipulation to dismiss the case. In such cases, the court should inquire, on the record, as to the basis for the stipulation. If the parties are in agreement that no abuse or neglect has occurred, or that the issues are sufficiently minor that they can be addressed informally, then dismissal may be appropriate. If the proposed dismissal is due to lack of evidence, then the court should inquire as to whether there has been adequate investigation.

D. Who Should Be Present

Generally, the same persons whose presence is required at the shelter care hearing are also essential to the adjudicatory hearing. Even if the adjudicatory hearing is uncontested, all parties who have been located and served should be present with their attorneys at the hearing. Their presence is needed to enable the court to ensure that the stipulation is appropriate and complete, that all parties knowingly and voluntary agree to it, and to schedule further proceedings.

Persons Whose Presence are Required at the Adjudicatory Hearing:

- Judge
- Parents whose rights have not been terminated , including putative fathers
- Relatives with legal standing and other custodial adults
- The child's tribal custodian, tribe and tribal attorney, if applicable
- Assigned caseworker
- County Prosecutor or Deputy Attorney General
- Attorney for parents (separate counsel if conflict warrants)
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter or suitable technology, security personnel, and interpreter(s), if applicable

1. Judge

The judge who conducts the adjudicatory hearing should be the assigned judge for the duration of the case. Ideally, because adjudicatory issues are often resolved at shelter care, the same judge should preside over all stages of the child protection case, including the shelter care hearing. The involvement of one judge creates consistency in the directions given to the family and to the agency, avoids rehashing old arguments, and allows the judge who presides over subsequent hearings to be thoroughly familiar with facts presented at previous hearings.

[11] 42 U.S.C. §671(a)(15); 45 C.F.R. 1356.21(b)(1).

2. Parents whose Rights have not been Terminated, Including Putative Fathers

As previously discussed in Chapter IV, and in the introduction to this chapter, it is essential that efforts begin as early as possible to identify, locate, and serve notice on all parents whose rights have not been terminated, including adoptive parents, non-custodial parents, and putative fathers. Issues as to paternity should be resolved as early as possible, including prompt paternity testing, if necessary. Identification and joinder of all parents is essential for several reasons. First, it is essential to the protection of substantial individual rights that these persons have notice and opportunity to participate. Second, the sudden appearance of a missing party later in the process can cause substantial disruption, both to judicial proceedings and to the life of the child. Finally, the participation of these parties may prove essential to achieving the ultimate goal - a safe home and loving family for the child. Parents should be present for the adjudicatory hearing, even if the case is uncontested, to enable the court to ensure that they fully understand and approve the stipulation.

The judge should make sure that service of process is completed as soon as possible. The judge may need to review the efforts of agency and counsel and enter orders as to further efforts to identify, locate, and serve missing parents. Although Idaho law generally requires service of process by personal service, it also permits service by registered mail and/or publication where personal service is impracticable.[12] Where personal service is impracticable, the county prosecutor or deputy attorney general responsible for the case should seek court approval of service by registered mail and publication well before the adjudicatory hearing, so that service can be completed prior to the adjudicatory hearing. The request should be by written motion, supported by an affidavit that 1) describes the efforts made to identify, locate, and serve the missing party, 2) states the address where service by registered mail is most likely to achieve actual notice, 3) describes why that address is most likely to achieve actual notice, 4) states the newspaper of general circulation must likely to achieve actual notice, and 5) describes why that newspaper is most likely to achieve actual notice.

If parties appear in a timely manner after receiving notice, they should be permitted to be heard on all issues, including application for custody of the child and dismissal of the case. If parties fail to appear and the record shows that proper notice has been given, the adjudicatory hearing should proceed as scheduled, while efforts to identify, locate, and join parents should continue as part of the permanency planning process.[13]

3. Relatives with Legal Standing and Other Custodial Adults

In many child protection cases, parents have left children in the homes of relatives or friends who have become full-time caretakers but who don't have legal custody. Full-time caretakers who don't have legal custody but who are functioning as parents should be present at the adjudicatory hearing. Their presence is needed because they may be essential witnesses regarding issues to be determined in the adjudication phase, and they may be essential resources in the disposition phase, as continuing caregivers for the child.

[12] Idaho Code §16-1612. See Chapter III for more information about initiating a child protection case, including service of process.

[13] *See* Chapter VI regarding permanency planning.

Generally, in Idaho, the only relatives whose legal standing is clearly acknowledged are parents whose rights have not been terminated (including adoptive parents) or another relative who has been appointed by the court as the child's guardian. Whether other relatives and step-parents have legal standing entitling them to party status or other levels of participation in a child protection case is a subject of considerable debate. In *Roe. v. Idaho Department of Health and Welfare*, 134 Idaho 760, 9 P. 3d 1226 (2000), the Idaho Supreme Court denied the request of a grandparent who sought to intervene in a child protection case (to seek placement of the child) even where the grandparent was providing foster care to the child at the time of the request.[14]

4. Indian Custodian, the Child's Tribe and Attorney, if Applicable

It is very important that efforts be made as early as possible to determine if the child is an Indian child. For purposes of the Indian Child Welfare Act, a child is an Indian child if the child is a member or is eligible for membership in an Indian tribe.[15] If there is a question as to whether the child is a member or is eligible for membership in a particular Indian tribe, it may be necessary to request a determination of that issue from the Indian tribe.[16] If the child is an Indian child, the child's Indian tribe is entitled to notice and an opportunity to appear.[17] In some cases, the proceedings must be transferred to the tribal court for resolution.[18]. ICWA also establishes preferences for placement of Indian children.[19]

Identification of Indian children and joinder of the child's Indian tribe is important beyond just issues of compliance with federal law. Compliance with ICWA is important to protect the unique and substantial interest of the tribe and the Indian child, and because the tribe often has information regarding the child and the family that is critical to assisting the court in good-decision making regarding the child. In addition, the sudden appearance of a tribal claim at a later point in the process can cause major disruption to the judicial proceedings and, more importantly, to the life of the child. Such disruption can be avoided by early and diligent efforts to determine whether the child is an Indian child and to provide notice to the child's tribe.

5. Assigned Caseworker

To provide the court with complete, accurate, and up-to-date information for the hearing, and to engage in meaningful settlement efforts, the caseworker with primary responsibility for the case must be present, both for the adjudicatory hearing and the pretrial conference. The presence of other agency staff may also be necessary if they are witnesses regarding issues to be determined in the adjudication phase of the adjudicatory hearing.

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[14] *See also* Troxell v. Granville, 530 U.S. 57 (2000); Stockwell v. Stockwell, 116 Idaho 297, 775 P.2d 611 (1989); In re Copenhaver, 124 Idaho 888, 865 P.2d 979 (1993); Leavitt v. Leavitt, 132 P. 3d 421(2006). *See also* Idaho Code § §32-717(3) and 32-719.

[15] 25 U.S.C. §1903(4).

[16] For a thorough discussion of ICWA, see Chapter XI of this manual. Each Indian tribe establishes the requirements that must be met to be a member of that tribe. The tribe's determination of membership is final and is entitled to full faith and credit under §1911(d) of ICWA and federal case law. *See e.g.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); *see also* Indian Tribe v. Doe, 123 Idaho 464, 849 P.2d 925 (1993) and Doe v. Doe, 127 Idaho 452, 902 P.2d 477 (1995), for Idaho decisions applying ICWA.

[17] 25 U.S.C. §1912.

[18] 25 U.S.C. §1911.

[19] See Chapter XI and Chapter VI, part 1, for further information about placement of Indian children pursuant to ICWA.

6. County Prosecutor or Deputy Attorney General

In child protection cases in Idaho, the state is represented by the county prosecutor or a deputy attorney general.[20] It is important that the attorney representing the state be sufficiently knowledgeable and experienced in trial practice generally and in child protection specifically, not only to ensure quality representation of the state's interest, but also to provide leadership in the investigation, prosecution, and resolution of child protection cases. The same attorney should represent the state throughout the case, to ensure consistent, goal-oriented representation of the state's interest in the case.

The attorney for the state must make continuing efforts to create and maintain an active partnership with the local agency caseworkers and local law enforcement officers. The attorney must rely on caseworkers and involved law enforcement officers to gather information and prepare recommendations to be presented to the court. Caseworkers and law enforcement officers must rely on the attorney to ensure that the information is admitted into evidence by the court and is legally sufficient to support the recommended action.

7. Attorney for Parents (Separate Attorneys if Conflict Warrants)

As discussed in Chapter IV (Shelter Care), it is essential that parents have meaningful representation at all stages of a child protection case. Appointment of counsel for parents who are indigent should have been made prior to or at the shelter care hearing. This includes appointment of separate counsel if one attorney would have a conflict of interest representing both parents. In some cases, the conflict will be apparent from the outset, and separate counsel can be appointed from the outset. In other cases, the conflict should be apparent prior to or at the pretrial conference. An attorney representing both parents should be alert to the potential for a conflict of interest in the representation of both parents and should promptly notify the court of any conflict warranting his or her withdrawal as attorney for one of the parents. This will enable the court to promptly appoint substitute counsel, minimizing delay of the progress of the case.

8. Guardian *ad litem*, Attorney for Guardian *ad litem*, and/or Attorney for Child

As discussed in Chapter IV (Shelter Care), it is essential that the child's interests be independently represented in child protection cases, either through a guardian *ad litem* and counsel for the guardian *ad litem*, and/or through counsel for the child. Appointment of the guardian *ad litem*, the attorney for the guardian *ad litem*, and/or an attorney for the child should have been made prior to or at the shelter care hearing. The guardian *ad litem* is entitled to full participation in the proceedings and has specific authority to investigate the circumstances of the case and to monitor the progress of the case.[21]

In some cases, conflict may arise between the guardian *ad litem* and an older child as to what is in the best interests of the child. In these cases, it may be appropriate to appoint separate counsel for the child to ensure that the child's views are meaningfully presented to the court. Other Idaho laws recognize that older children should have a voice in judicial determinations regarding the selection of their custodians.[22] Because determinations of custody and best interests are

[20] *See* Idaho Code §16-1605.
[21] Idaho Code §16-1933.
[22] *See e.g.* Idaho Code §§ 15-5-203, 15-5-206, and 15-5-207, regarding guardianship of minors; §§ 32-704(4) and 32-717(2), regarding custody of children in divorce cases.

dispositional issues, a conflict warranting appointment of separate counsel for the child should not delay the adjudication phase of the adjudicatory hearing.

9. Court Reporter or Suitable Technology, Security Personnel, and Interpreter(s), if Applicable

As discussed in Chapter IV (Shelter Care), these requirements apply to each proceeding in a child protection case. Court reporters or other suitable technology are necessary to ensure that an accurate record is made of child protection proceedings. Security personnel must be immediately available whenever needed to ensure the safety of all participants. Interpreters must also be available for non-English speaking parties and witnesses.

E. Persons whose Presence may also be Needed

If the adjudicatory hearing is contested, additional witnesses deemed necessary by the parties must be present. Although each party, through counsel, is responsible for securing the attendance of its witnesses, the court's role in ensuring the presence of witnesses can be vital. The court may need to inquire as to efforts to identify and locate witnesses, and it may issue subpoenas and other appropriate orders.

Persons whose presence may also be needed:

- Age-appropriate children
- Extended family members
- Judicial case management staff
- Law enforcement officers
- Service providers
- Adult or juvenile probation or parole officers
- Other witnesses

Witesses required for the adjucication phase may differ from those required for the dispostion phase. Because the primary issue at the adjudication phase is whether the child is abused, neglected, or otherwise within the jurisdiction of the Act, the key witnesses will be those who have knowledge of the circumstances giving rise to the petition, such as law enforcement officers involved in the removal of the child, doctors who have examined the child's injuries or diagnosed the child's physical or developmental condition, or other witnesses to incidents of abuse, neglect, or abandonment. Because the primary issues at disposition are the placement that is in the child's best interests, and whether the agency made reasonable efforts to avoid placement, key witnesses may include friends, family members, or service providers, who have been or may be called upon to provide resources for the child and/or the parents.

Careful consideration should be given to whether the child should be present for the adjudicatory hearing. The considerations as to the child's presence are different at the adjudication and disposition phases.

In the adjudication phase of a contested adjudicatory hearing, the proceeding is more formal and the key issue is whether the child is abused, neglected, or otherwise comes within the jurisdiction of the Act. Generally, the child should not be present for this portion of the hearing, due to the potential trauma to the child from the testimony and other aspects of such a hearing. Every effort should be made to make the child's testimony unnecessary, but if the child's testimony is necessary, alternatives to in-court testimony should be pursued to minimize the trauma to the child.

The disposition phase is less formal, and the primary issue is what placement is in the child's best interests. It may be both appropriate and desirable for older children to be present at this stage, both from the court's perspective and the child's perspective. Age-appropriate children can provide the court with information as to their perception of their needs, interests, and concerns, and the opportunity to see and hear the child can be of great value to the judge. Older children may have questions that can be answered at the disposition phase, and the opportunity to participate may allow a child a greater sense of self-determination.

F. Submission of Reports to the Court

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, prepare a written report, and file the report with the court prior to the pretrial conference.[23]

Idaho law further provides for the guardian *ad litem* to conduct an independent investigation of the circumstances of the child, to prepare a written report, and to file the report with the court at least five days prior to the adjudicatory hearing.[24] As noted in Chapter IV (Shelter Care), the recommended best practice is to appoint a guardian *ad litem* for a child in every child protection case. A further recommended best practice is to include language in the court's shelter care order requiring the preparation of the report and the filing of the report prior to the pretrial conference.

The primary purpose of the reports is to address issues at the disposition phase of the adjudicatory hearing. The reports are a valuable tool in the disposition phase of the case for several reasons. The process of report preparation can tighten a caseworker's or guardian's analysis of the case. The information in the reports can assist the parties and counsel in their analysis and enable them to more effectively contribute to a sucessful resolution of disposition issues. Additionally, once a child has been determined in the adjuciatory phase to be within the jurisdiction of the CPA, the information can be of invaluable assistance to the court in determining disposition issues when disposition is contested or in determining whether to approve a stipulated disposition.

The reports are NOT admissible by the court for purposes of determining issues at Phase I of the adjudicatory hearing[25] – whether the child is within the jurisdiction of the CPA or whether the parent(s) subjected the child to aggravated circumstances – because the reports typically contain hearsay information or other information that does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes prior to disposition. As noted above, the process of report preparation can tighten a caseworker's or guardian's analysis of the case. Also, the reports often serve as the primary discovery mechanism in child protection cases, ensuring that essential information is distributed to all parties prior to the adjudicatory hearing, working as an alternative to the more time-consuming methods of discovery used in other civil

[23] Idaho Code §16-1616. Although the preparation of such reports is routine, prior to 2005 they were not required by the Child Protective Act. The 2005 amendments to the CPA clarify that the preparation of a report is mandatory.
[24] Idaho Code §16-1633.
[25] Idaho Code §16-1616(3).

proceedings.[26] The availability of this information prior to the pretrial conference promotes reasonable and informed settlement of cases prior to trial. Finally, when a stipulation is reached, the parties may stipulate to admission of all or portions of the reports, which then can be used as the basis for the court's written findings and conclusions.

The agency is required to investigate the circumstances of the child and the child's family, and the report is required to include a social evaluation of the child and the parents, or other legal custodian, and such other information as the court shall require.[27] The guardian *ad litem* is required to conduct an independent investigation of the circumstances of the child, including the circumstances described in the petition, but the statute does not specify the contents of the guardian *ad litem's* report. The statute provides that the guardian *ad litem* shall have such other duties as the court may require, which would include further investigation or report preparation.[28]

The reports should be as thorough and comprehensive as possible. They should include all relevant information available to IDHW or the guardian *ad litem* concerning all the issues to be determined by the court at the adjudicatory hearing. This includes issues to be determined at Phase I of the adjudicatory hearing, even though the report is not admissible by the court to determine the adjudication issues in a contested proceeding. Information relevant to the adjudication issues is important because this information promotes reasonable and informed settlement, and because information as to adjudication issues provides the framework for determination of the disposition issues. As previously discussed in the introduction of this section, specific findings as to the nature of the harm that brings the child within the jurisdiction of the statute is a necessary prerequisite to determining the actions necessary to prevent that harm or to protect the child from further harm in the future.

Agencies and organizations who provide guardians *ad litem* for child protection cases should develop report forms to expedite report preparation. The forms should be precisely worded to address the exact issues to be determined by the court. This promotes a thorough analysis of each of the key issues by the caseworker or guardian who is preparing the report. It also allows the judge, when appropriate, to incorporate the reports by reference in the court's written findings and conclusions.

G. Evidentiary Issues at the Adjudicatory Hearing

The standard of proof at Phase I of the Adjudicatory Hearing is preponderance of the evidence.[29] The Idaho Rules of Evidence apply to Phase I of the hearing.[30] Because they contain hearsay, the reports of IDHW and the guardian *ad litem* may not be considered during Phase I of the Adjudicatory Hearing.[31]

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[26] Neither the CPA nor the Idaho Juvenile Rules prohibit the use, in CPA cases, of the formal methods of discovery available in civil cases generally. However, the use of formal discovery by the state against the parents may in some instances raise constitutional issues regarding the parent's rights against self-incrimination. *See* Id. R. Crim. Pro. 26-37.
[27] Idaho Code §16-1616(1), (2).
[28] Idaho Code 16-1633.
[29] Idaho Code § 16-1619(4).
[30] Id R. Evid.101; I.J.R. 51.
[31] Idaho Code § 16-1616(3).

In Phase II of the Adjudicatory Hearing, the court may consider any information relevant to its decision regarding the child's disposition including the reports of the guardian *ad litem* and of IDHW.[32]

Attempts to present hearsay evidence at Phase I of the adjudicatory hearing can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, agency caseworkers or law enforcement officers may rely on a doctor's written report of a medical diagnosis in concluding that a child is abused or neglected. At the adjudicatory hearing, however, the rules of evidence apply, including rules regarding the admissibility of hearsay evidence.[33] To continue the example, the doctor's testimony will be necessary at the adjudicatory hearing. The caseworker cannot testify as to the doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit the doctor's written report. Caseworkers and law enforcement officers are surprised and frustrated by the exclusion of such testimony, and attorneys representing the state's interests are frustrated and embarrassed by the dismissals that result when the excluded testimony is essential to the case. Regular communication and active cooperation between counsel for the state, agency caseworkers, and involved law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

H. Key Decisions the Court Should Make at the Adjudicatory Hearing

1. State Law Requirements

a. Phase 1: Adjudication

i. Is the child within the jurisdiction of the Child Protective Act?

The first issue the court must determine is whether the child is within the jurisdiction of the Child Protective Act. The burden of proof is on the state, and the standard of proof is by a preponderance of the evidence. Idaho law requires the court to make a finding on the record of the facts and conclusions of law which bring the child within the jurisdiction of the CPA.[34] Some confusion results from the use of the word "jurisdiction" in the Idaho statute. A child is within the jurisdiction of the court if the child lives or is found within the state. The child is within the jurisdiction of the Act if the court determines that one of the five bases for jurisdiction exists (abuse, abandonment, neglect, etc.). If the child is within the jurisdiction of the court, then the court has authority to determine if the child comes within the jurisdiction of the Act. If the child is within the jurisdiction of the Act, then the court has the authority to exercise the powers set forth in the act. There are five bases for a child to be within the jurisdiction of the Act.

♦ Abandoned

Idaho law defines abandoned as "the failure of a parent to maintain a normal parental relationship with his child including, but not limited to, reasonable support or regular personal

[32] Idaho Code § 16-1616(4); 16-1619(5); 16-1633(2).
[33] Id. R. Evid. 101.
[34] Idaho Code §16-1619(4).

contact." The statute further provides that failure to maintain this relationship for one year is prima facie evidence of abandonment.[35]

♦ Abused

Idaho law defines "abused" as any case in which a child has been the victim of:

> (a) conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of accidental occurrence, or (b) sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.[36]

Key state law decisions to be made at Phase 1 of the adjudicatory hearing:

- Is the child within the jurisdiction of the Child Protective Act because the child has been abandoned, abused, neglected, is homeless or lacks a stable home environment or because the child is a sibling or a child who has been abandoned, abused, or neglected?
- Has the parent subjected the child to aggravated circumstances?

♦ Neglected

Idaho law defines "neglected" as a child:

> (a) who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them…. or
> (b) whose parents are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.[37]

Idaho law specifically provides that a child will not be deemed neglected solely because a child's parent or guardian chooses spiritual treatment for a child instead of medical treatment, but there is statutory authority for the court to order emergency medical treatment for a child, whether or not the child is within the jurisdiction of the Act.[38]

♦ Homeless

The CPA does not define "homeless." The purpose of this provision is to address two types of situations. The first is where a child has come into contact with authorities and is apparently homeless, because no parent or other custodial adult can be located, and the child needs a home while authorities investigate the situation. Typically the child is a runaway or a juvenile whose parents refuse to allow the child home, sometimes after the juvenile's release from incarceration.

[35] Idaho Code §16-1603(1)(a), §16-1602(2).
[36] Idaho Code §16-1603(1)(b), §16-1602(1).
[37] Idaho Code §16-1603(1)(b), §16-1602(21).
[38] Idaho Code §16-1602(21), §16-1616.

The second is where a family is homeless, and therefore the children are homeless. The purpose of including homelessness in the CPA is not to impose further displacement on an already displaced family. The purpose is to establish a statutory basis to provide services and shelter to the children when the parents are unable or unwilling to do so. In such cases, the reasonable efforts of the agency to provide housing or employment assistance, and the parent's ability and willingness to participate in those services, becomes an issue in the adjudication phase, as well as in the disposition phase. If the parents are not able to provide the child with a home despite agency assistance, or are unwilling to accept assistance that would enable the parent to provide the child a home, then such evidence supports a determination that the child comes within the jurisdiction of the act.

♦ Lacks stable home environment

The CPA does not define lack of a "stable home environment." This provision should not be interpreted to provide a basis for state intervention simply because the parent's lifestyle is outside the norm. Rather, it should be limited to those situations where the seriousness of the harm to the child is similar to that of the other bases for jurisdiction.

Often, the situations that fall in this category also fall into the category of neglect. But there are two types of situations that fall into this category that might not necessarily fit into the category of neglect. One is the "drug house" – where an occupant of the home is a distributor of illegal drugs, and the nature of the substances and people frequently in and through the house endangers the safety of the child or children in the home.

Another situation that might fall within this category is the violent home – where the children are not directly abused, but they regularly witness domestic violence. Like homelessness discussed above, the purpose of this provision is not to punish the adult victim of domestic violence by taking the child away, but rather, is to establish a statutory basis to provide services and shelter to the child when the parent is unable to do so. Like homelessness discussed above, the reasonable efforts of the agency to provide assistance to the adult victim, and the adult victim's ability and willingness to participate in those services, becomes an issue in the adjudication phase, as well as in the disposition phase. If the parent who is the adult victim of domestic violence is not able to provide the child with a safe home despite agency assistance, or is unwilling to accept assistance that would enable the parent to provide the child a safe home, then such evidence supports a determination that the child comes within the jurisdiction of the Act. (The court can enter protective orders that expel the abusive parent from the home or that limit contact between the abusive parent and the non-abusive parent or the child, which is discussed in part F, below.)

♦ Other children in the home

An issue that frequently arises in child protection cases is what to do about other children in the home when one of the children is abandoned, abused, or neglected. If one child is abused, abandoned, or neglected, it cannot simply be presumed that the others are also. Neither, however, can it be assumed that the other children are safe. Idaho law provides that, if a court has taken jurisdiction of a child, it may take jurisdiction over another child, if the other child is

living or having custodial visitation in the same household, and if the other child has been exposed to or is at risk of being a victim of abuse, abandonment, or neglect.[39]

ii. Has the parent subjected the child to aggravated circumstances?

Generally, if aggravated circumstances is an issue, it will be alleged in the petition and determined at the adjudicatory hearing. The concept of aggravated circumstances was added to the law of child protection to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find a new family who will provide the child with a safe and loving home can be initiated promptly and so that the permanent placement of the child with that family can be implemented promptly.

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing, so aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.[40] However, a finding of aggravated circumstances will fundamentally alter the process of the case. Such allegations should be made at the earliest possible point in the case.

If aggravated circumstances are found, then:
1) the agency is not required to make reasonable efforts to reunify the family;[41]
2) the next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent placement for the child;[42] and
3) IDHW must file a petition to terminate parental rights unless the court finds compelling reasons why termination is not in the best interests of the child.[43]

If aggravated circumstances are not found, then the next step is the case plan hearing, the purpose of which is to determine a case plan that includes a reunification plan and an alternative permanent placement plan.[44] Because a finding of aggravated circumstances has such substantial consequences, it should be considered an adjudication issue, to be determined at a hearing where the rules of civil procedure and rules of evidence apply.

In determining whether the parent has subjected a child to aggravated circumstances, the statute specifically identifies the following: abandonment; torture; chronic abuse; committed murder or voluntary manslaughter; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter; committed a felony assault that results in serious bodily injury to any child of the parent; or the parental rights of the parent to a sibling have been terminated involuntarily.[45] The statute further provides that aggravated circumstances "include but are not limited to" those specifically listed. In determining whether other circumstances constitute aggravated circumstances, the court should be guided by two factors: whether the circumstances

[39] Idaho Code §16-1603(2). The other child must be named in the petition or amended petition, the parents or legal guardians must have notice, and the child must be living or found within the state.
[40] *See* Idaho Code §16-1610, §16-1619.
[41] Idaho Code §16-1619(6)(d) and 16-1620(1).
[42] Idaho Code § 16-1620(1).
[43] Idaho Code §§ 16-1610(6)(d), 16-1620, 16-1624. See Chapters VI and VII for further discussion of permanency planning, the permanency hearing, and compelling reasons.
[44] Idaho Code §16-1621; *see* Chapter VI for further discussion of the case plan and the case plan hearing.
[45] Idaho Code §16-1619(6)(d).

are similar in severity to those listed in the statute and whether the circumstances are such that no effort should be made to reunify the family.

b. Phase 2: Disposition

i. Should the child be placed in the custody of the agency or in the child's own home under agency supervision?

If the child is found to be within the jurisdiction of the CPA, then the child must be placed either in the custody of the agency or in the child's own home under protective supervision of the agency.[46] This is the primary decision to be made at the disposition phase of the adjudicatory hearing. The primary consideration in determining the disposition of the child is the child's best interests. Placement of the child at home under agency supervision is appropriate if the placement of the child in the home can be made subject to conditions that will ensure the health and safety of the child while in the home. Otherwise, placement of the child in the custody of the agency is necessary to ensure the health and safety of the child while reunification efforts are made. Where aggravated circumstances have been found, no effort is to be made at reunification, and the child must be placed in the custody of the agency.

A decree placing the child in the custody of the agency or in the child's own home under agency supervision continues until the child turns eighteen or until the court orders otherwise.[47] Prior to the child's eighteenth birthday, the case remains under the continuing supervision of the court until the child is either permanently and safely returned home and the court closes the case or until the child is permanently placed with a new family and the court closes the case.[48]

Key State Law Decisions to be made at Phase 2 of the adjudicatory hearing (disposition):

- Should the child be placed in the custody of the agency or in the child's own home under agency supervision?
- If the child is to be placed in the custody of the agency, why is it contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in custody of the agency?
- If the child is to be placed in the custody of the agency, is the agency's proposed placement the least disruptive environment for the child?
- If the child is to be placed in the custody of the agency, are orders needed for parental visitation, sibling visitation, or child support?
- If the child is to be placed in the child's own home under agency supervision, what conditions are needed to ensure the child's safety and welfare in the home?
- Is there a continuing danger to the child, and is it in the best interest of the child to enter a protective order? If so, what are the terms and conditions of the protective order?
- What services are the agency to provide to the child, the child's parents, or the foster parents, pending the next hearing? In what services will the parent(s) be required to participate?
- If the child is to be placed in the custody of the agency, did the agency make reasonable efforts to prevent or eliminate the need for placement of the child in the custody of the agency (foster care)?

[46] Idaho Code §16-1619(5)(a)&(b).
[47] Idaho Code §16-1619(7).
[48] This is one of the major changes to the CPA enacted in 2001. Previously, a child was placed in the custody of the agency or in the child's own home for a period not to exceed one year, subject to renewal. Idaho Code §16-1610(b),(d) (2000). The purpose of the amendment was to address the "revolving door" phenomenon, in which a child came into custody, the order expired, the child returned home, the child was subjected to new incidents of abuse and neglect, and the child came back into custody.

ii. If the child is to be placed in the custody of IDHW, why is it contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in the custody of the agency?

If the child is to be placed in the custody of the agency, state law requires that the court make detailed written findings, based on facts in the record, that it would be contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in the custody of the agency.[49] This finding is similar to federal findings that must be made within sixty days of removing the child from the home. This Manual recommends that the required federal finding be made at the shelter care hearing.[50] It is further recommended that at Phase 2 of the adjudicatory hearing, the court verify that the necessary federal finding was made at the shelter care hearing. If the federal finding was not made at shelter care, the court should make the finding at Phase 2 of the adjudicatory hearing.[51]

iii. If the child is to be placed in the custody of the agency, is the agency's proposed placement the least disruptive environment for the child?

When a child is placed in the custody of the agency, Idaho law vests authority in the agency to determine the child's placement, subject to review by the court.[52] Idaho law requires IDHW to make a reasonable effort to place the child in the least disruptive environment to the child, and the agency may consider placement of the child with related persons.[53] More information about the factors to be considered in determining or reviewing the appropriateness of a child's foster care placement can be found in Chapter VI, part B.5.

Because the placement of the child is critical to the child's well-being, the court should make careful inquiry as to the agency's proposed placement for the child at the disposition phase of the adjudicatory hearing. Under both state and federal law, there are substantial questions as to the nature and extent of the court's review, and a detailed discussion of those questions is beyond the scope of this text. But as a beginning point, Idaho judges and practitioners must be familiar with the following specific provisions of Idaho and federal law and with the recent decision of the Idaho Supreme Court in *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000)("*Roe 2000*").

In *Roe 2000*, a grandmother who had established a strong relationship with her granddaughter as a de facto parent sought to intervene in a child protection case to seek permanent placement of her granddaughter. The Idaho Supreme Court affirmed the trial court's decision denying intervention, holding that the denial of the right to intervene was an appropriate exercise of the trial court's discretion. The Court further held that Idaho Code §16-1623(k), which requires the agency to make reasonable efforts to place the child in the least disruptive environment, "does not provide for intervention by related persons who believe that placement in their home will cause the least disruption in the child's life."[54] The Court noted that the grandparent did have the right to be heard in any review or hearing with respect to the child, pursuant to 42 U.S.C. 675(5)(g) and IDAPA 16.06.01.424.03.d.i (July 1, 1999), so that, although she would not be

[49] Idaho Code §16-1619(6).
[50] *See* Chapter IV.
[51] *See* Part H.2 of this chapter.
[52] Idaho Code §16-1629(8).
[53] Idaho Code §16-1623(k).
[54] 134 Idaho at 765, 9 P. 3d at 1230.

entitled to full participation as a party, she would be allowed to express her concerns regarding the child's placement. In reaching its result, the Court further stated:

> If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-1623(h), the CPA provides the court only limited authority to review the Department's placement decisions.[55]

The Court next noted the specific sections of the CPA which require the court to approve placement of the child outside the state, to approve the return of the child to the home from which it was removed, and to review the agency's periodic reports as to the progress of the case. The court then stated:

> The court's role in CPA actions is therefore much more limited than in custody cases, in which the court must determine which custody arrangement will advance the best interest of the child. [Citations omitted.] Therefore, Roe's claim for permanent placement is inconsistent with the limited scope of CPA proceedings.[56]

Although the Court offered these statements as to what judicial review of the agency's placement decision is *not*, it did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. The Court did, however, note the case planning requirements of the CPA in a earlier part of the decision. Pursuant to the CPA, once a child is found to be within the jurisdiction of the statute, the agency is required to file a case plan, which includes a reunification plan and an alternative permanent placement plan for the child; the CPA court then conducts a planning hearing at which the court determines whether to accept, reject, or modify the plan.[57] In cases where aggravated circumstances are found, IDHW is required to file a permanency plan, which is the agency's plan for the permanent placement of the child.[58] Presumably, the court could require the agency to include the child's foster care placement in the case plan and reject a plan that includes an inappropriate placement. Judicial review of the IDHW's placement decision in this manner should comply with both the statute and recent case law. There is more information about the case plan and the permanency plan in Chapters VI and VII.

This leaves a major question as to the nature and extent of judicial review of the IDHW's placement decision at the adjudicatory hearing and leaves the trial courts and the parties facing a serious dilemma in cases where the placement of the child is a major issue that needs to be

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[55] *Id*. at 767, 9 P. 3d at 1233 (referring to pre-2005 numbering of the Child Protective Act).
[56] *Id.*
[57] At that time, the case planning provision of the CPA was found at Idaho Code §16-1610(c); the provision is now Idaho Code § 16-1621. *See also* IJR 44.
[58] At that time, the permanency planning provision of the CPA was found at Idaho Code §16-1610(b)(2)(iv); following the 2001 revisions, it is found at Idaho Code §16-1608(e)(4). *See also* IJR 40(d).

resolved. Nonetheless, the placement of the child is of such importance to the child's well-being that the existence of these questions should not discourage the court and the parties from careful inquiry as to the agency's proposed placement of the child at the adjudicatory hearing. To the extent there is a genuine issue as to the appropriateness of the proposed placement, the court and the parties should explore the options, both practical and procedural, for resolution of that issue. One option may include orders for further investigation of the proposed placement or other placement options, to be included in the court's order scheduling the planning or permanency hearing. Another option may be to consider methods of alternative dispute resolution, such as mediation.

Finally, federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.[59] It is unclear whether the child may lose eligibility for federal funds if the agency's placement is rejected as part of judicial review. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[60]

iv. If the child is to be placed in the custody of the agency, are orders needed for parental visitation, sibling visitation, or child support?

It is important that the child have the opportunity for regular and meaningful contact with the parent to maintain the parent-child relationship while efforts at reunification proceed. It is equally important that visitation include appropriate terms and conditions to protect the child's safety, to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid undue disruption of the child's foster placement. All appropriate efforts should be made to keep sibling groups together. If, however, siblings must be separated, it is very important that the siblings have the opportunity to spend time with each other. Finally, parents who are able to pay should be expected to help cover the costs of foster case, although the court should take care to avoid financial burdens that interfere with family reunification.[61] The court should inquire as to how these issues will be dealt with pending the next hearing and enter include appropriate orders in its disposition decree.

v. If the child is to be placed in the child's own home under agency supervision, what conditions are needed to ensure the child's safety and welfare in the home?

If the child is to be placed in the child's own home under agency supervision, it is essential that the decree specifically identify the conditions that will ensure the child's health and welfare while in the home. The conditions may include services that the agency is to provide and in which the parents are required to participate. The conditions may include specific behavioral directives for the parents and specific means by which the agency will monitor compliance with those directives. For example, in neglect cases, emergency homemakers, day care, in-home babysitters, or intensive home-based services in which professionals spend long periods of time in the home can sharply reduce the potential harm to the child. If drug use or abuse is an issue, drug treatment and random drug testing may be appropriate.

[59] 45 C.F.R. §11356.71(d)(1).
[60] *See* question and answer no. 13 at www.acf.dhhs.gov/programs/cb/laws/qsett1.htm
[61] Idaho Code § 16-1628 expressly provides for the entry of support orders in CPA cases.

The decree should specifically order all parties to comply with the conditions and state the consequences for failure to comply. The consequences may include, for example, contempt sanctions, removal of the child from the home without prior hearing, or removal of the child from the home following motion and hearing.

vi. Is there a continuing danger to the child and is it in the best interests of the child to enter a protective order? If so, under what terms and conditions?

In cases where a child has been abused by only one parent, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order that ensures the safety of the child while in the custody of the non-abusing parent. The protective order may expel the abusive parent from the home, restrain contact between the abusive parent and the child, and/or restrain contact between the abusive parent and the non-abusive parent.

Protective orders may also be appropriate where the child is placed in the custody of IDHW. When a parent has threatened or attempted to disrupt the child's foster care placement, or when the parent presents a credible threat to the foster family or to the child while with the foster family, it may be appropriate to enter protective orders restraining contact between the parent and the child or between the parent and the foster family.

vii. What services are the agency to provide to the child, the child's parents, or the foster parents pending the next hearing? In what services will the parent(s) be required to participate?

The next step in a child protection case is the case plan and the planning hearing, if aggravated circumstances are not found, or the permanency plan and the permanency hearing, if aggravated circumstances are found. One of the key elements of the case plan or the permanency plan is to identify the services the agency is to provide to the child and the foster family, to address the child's special needs, and to assist the child and the foster family in adjusting to the placement, ensuring the stability of the placement. A key element of the case plan is to identify the problems that need to be resolved before the child can be returned home, and to identify the tasks to be completed by the agency, the parents, or others to address each issue, including the services to be made available by the agency and in which the parent is to be required to participate. (There is more information in Chapters VI and VII regarding the case plan and the planning hearing and the permanency plan and the permanency hearing.)

By the time of the adjudicatory hearing, information regarding these issues will be available that will enable the parties to move forward with activities necessary for a successful resolution of the case. To the extent this information is known at the adjudicatory hearing, the court's disposition decree should specify the services to be provided to the child and the family, and the services in which the family is to be required to participate, pending the next hearing. The purpose is to keep the case moving forward, as there is often no good reason to wait for the case planning or permanency hearing when some information is already available that will enable the parties to start making progress on some of the issues.

For example, it may already be known that a parent has drug abuse issues. Thus one of the necessary steps will be a drug and alcohol evaluation to determine the nature and extent of the

problem and the treatment options available to address the problem. Or, it may already be known that the child has developmental problems or behavioral problems, so one of the necessary steps will be evaluations of the child to determine the nature and extent of the child's special needs and the options available to address those needs. The court's order can require that the evaluations be completed and the options identified prior to the next hearing and that the recommended or agreed upon option be included in the case plan or permanency plan.

Sometimes the determination of these issues by the parties can be the key to reaching an appropriate settlement at the adjudicatory hearing. If the agency has identified services it will provide to assist the family in resolving the problems that resulted in the child protection case, the parents may be willing to agree to adjudication and disposition issues to enable them to quickly access those services and to resolve the problems. If the parents demonstrate a commitment to participating in the services and resolving the problems, then requirements for the parents to participate in the services and to comply with specific behavioral directives may be conditions that would enable the child to safely remain at home under agency supervision.

viii. If the child is to be placed in the custody of the agency, did the agency make reasonable efforts to prevent or eliminate the need for placement of the child in the custody of the agency (foster care)?

If the child is to be placed in the custody of the agency, state law requires the court to make a series of reasonable efforts determinations. First, the court should determine whether the agency made reasonable efforts to prevent or eliminate the need to place the child in foster care.[62] Under state law, the reasonable efforts finding is not required if the court determines that the parent subjected the child to aggravated circumstances.[63] State law requires a case-specific written finding of reasonable efforts. This requirement can be met by incorporating by reference an agency report describing the efforts that were made and why those efforts were reasonable under the circumstances. In lieu of this finding, under state law, the court may find that reasonable efforts to prevent removal were not made because of immediate danger to the child.[64] Finally, state law requires the court to find that reasonable efforts to place the child with related persons were made but were not successful.[65]

c. Other key state law decisions to be made at the adjudicatory hearing

i. Are further efforts needed to identify, locate, and serve essential parties?

As repeatedly noted throughout this Manual, it is essential that the court actively monitor efforts to identify, locate, and serve all essential parties, including putative fathers and non-custodial parents. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree.

[62] Idaho Code §16-1619(6)(a); 42 U.S.C §671(a)(15); 45 C.F.R. §1356.21(b) through (d).
[63] Idaho Code §16-1619(6)(d).
[64] Idaho Code §16-1619(6)(b).
[65] Idaho Code §16-1610(6)(c).

ii. Date and time for case planning or permanency hearing and whether any orders are needed to prepare for the next hearing.

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory hearing. Because there are so many participants in child protection cases, and so many proceedings with strict deadlines, scheduling can be extremely difficult. These difficulties can be minimized by scheduling the next hearing on the record when all the participants are present with their calendars available. Also, if a party fails to appear, scheduling the next hearing on the record forecloses any potential excuse that the party did not have notice or did not know of the date and time for the hearing.

The next hearing to be scheduled depends on whether the court found aggravated circumstances. If aggravated circumstances are not found and the child is placed in the custody of IDHW, then IDHW must prepare a written case plan. The case plan must be filed with the court no later than 60 days from the date the child was removed from the home, or thirty days after the adjudicatory hearing, whichever occurs first. The planning hearing must be set for a date within five days of the filing of the case plan.[66] At the hearing, the court decides whether to approve, modify, or reject the plan. It is not clear whether the statute requires a case plan and a case plan hearing if the child is placed in the child's own home under agency supervision, but the recommended best practice is for the court to require it.[67]

If aggravated circumstances are found, then the court must hold a permanency hearing within 30 days after the court made the determination of aggravated circumstances. IDHW must prepare a written permanency plan and file and serve the plan at least five days before the permanency hearing. At the hearing, the court decides whether to approve, modify, or reject the plan.[68]

The guardian *ad litem* is not required to file a written report for the planning hearing or the permanency hearing. The guardian *ad litem* is, however, required to monitor the circumstances of the child and to perform such other duties as expressly required by court order.[69] The recommended best practice is to require the guardian *ad litem* to file a written report with the court prior to the hearing, with recommendations regarding the key decisions to be made by the court at the hearing and the information upon which those recommendations are based.

When the court schedules the next hearing, it should also enter any orders needed for the next hearing. This should include an order requiring the filing of the agency's plan and the guardian's report and the deadlines for filing them. Transport orders may also be needed if a parent is in jail or prison or the child is in detention or the custody of juvenile corrections. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to be appear by telephone.

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[66] Idaho Code §16-1621.

[67] Idaho Code §16-1621, IJR 44. There is more information about the case plan and the planning hearing in Chapter VI.

[68] Idaho Code §16-1620; I.RJ. 44. There is more information about permanency planning and the permanency hearings in Chapters VI and VII.

[69] Idaho Code §16-1633(3),(8).

Idaho law specifically provides that foster parents are entitled to notice of the planning hearing but are not parties to the child protection case.[70] If the child is placed in the custody of the state, the court should ensure that notice is given to the foster parents (by the court, the agency, or the attorney representing the state's interests) of the date and time for the planning hearing.

2. Federal Law Requirements

a. Is the child an Indian child? Are further efforts needed to determine if the child is an Indian child? If the child is an Indian child, has notice been given as required by ICWA? Are further efforts needed to comply with the notice requirements of ICWA?

As repeatedly noted throughout this Manual, it is essential that the court actively monitor the case to ensure compliance with the Indian Child Welfare Act, both for the sake of the child and for the progress of the proceedings.[71] Chapter XI of the Manual contains a detailed discussion of the Indian Child Welfare Act. At the adjudicatory hearing, the court should make specific findings as to whether the child is an Indian child or whether further efforts are needed to determine if the child is an Indian child. If the child is an Indian child, the court should make specific findings as to whether notice has been given as required by ICWA, and whether further efforts are needed to comply with the notice requirements of ICWA. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree.

b. Adoption and Safe Families Act requirements

i. Best interests/contrary to the welfare decision

If the court's decree at the adjudicatory hearing is the first court order sanctioning removal of the child from the home, federal law requires that the court document in its order a case-specific finding that is it contrary to the welfare of the child to remain in the home. If this finding is not made, the child will not be eligible for federal funds, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an agency or guardian *ad litem* report that describes the specific circumstances making removal of the child in the child's best interests. If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific best interests/contrary to the welfare finding.

> ★★★If the order at the adjudicatory hearing is the *first order sanctioning removal of the child from the home*, a **case-specific, documented** finding of **contrary to the welfare/best interests is required** to preserve the child's eligibility for federal IV-E funding.

ii. Reasonable efforts finding

If the child is to be placed in the custody of the agency, federal law requires the court to determine if IDHW made reasonable efforts to prevent or eliminate the need to place the child in foster care.[72] Under federal law, the reasonable efforts finding is not required if the court determines that the parent subjected the child to aggravated circumstances. Federal law requires

[70] Idaho Code §16-1621(2).
[71] 25 U.S.C. §1901 *et seq*.
[72] 42 U.S.C §671(a)(15); 45 C.F.R. §1356.21(b) through (d).

a case-specific, written finding of reasonable efforts. This requirement can be met by incorporating by reference an agency report describing the efforts that were made and why those efforts were reasonable under the circumstances.

Federal law requires that the documented, case-specific finding be made within 60 days of the date the child is removed from the home. If the finding is not made within the deadline, the child may lose eligibility for federal funding. The omission cannot be corrected at a later date to reinstate the child's eligibility. If the finding is made on the record, but is not documented in the order, it can be later be corrected by preparation of a transcript.

★★★Federal law **requires** that the court find that IDHW made **reasonable efforts to avoid removal within the first 60 days after removal** occurs. Failure to make this finding will **jeopardize** the child's eligibility for federal **IV-E funding.**

This Manual has recommended that this reasonable efforts finding be made either when an order to remove the ghild is place on the summons[73] or at the shelter care hearing.[74] Nonetheless, assuming the Adjudicatory Hearing is held within 60 days of the child's removal from the home, it is likely to be the last opportunity for the court to correct the record if the reasonable efforts finding has been previously omitted. The court should review prior orders in the case carefully to avoid omitting this crucial finding.

I. The Court's Written Findings of Fact and Conclusions of Law at the Adjudicatory Hearing

The court should make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or guardian *ad litem*. It is particularly important that the written findings, conclusions, order, and decree include the following:

- If any necessary parties were not present, a finding that proper notice was given.
- If the decree/orders are entered based on the stipulation of the parties, findings that the stipulation is reasonable and appropriate and that the parties entered into it knowingly and voluntarily.
- State Law Adjudication findings and conclusions:
  - If the child is found to be within the jurisdiction of the act, adjudication findings that accurately reflect the reasons for state intervention; and
  - If aggravated circumstances are found, adjudication findings that accurately reflect the nature of the aggravated circumstances.
- Federal Law Adjudication findings and conclusions:
  - The court should make findings as to the child's status as an Indian Child. If the child is an Indian child, the court should make a finding that the Indian Child's tribe and Indian custodian have received notice of the case. If the court has jurisdiction over the case, and if the case will not be transferred to tribal court, the court should make findings as to the facts that led to this result.

[73] *See* Chapter II.A.2.
[74] *See* Chapter IV.D.7.

- If the order is the first sanctioning removal of the child from the home, the court should make findings that removal is in the child's best interests and that it is contrary to the welfare of the child to remain in the home. This finding must be case-specific and documented. It may incorporate by reference an affidavit that describes the specific circumstances. Federal funding is contingent upon this finding.
- If the adjudicatory hearing is within 60 days of the child's removal, and if, after reviewing prior orders in the case, the court determines that this finding was not made when an order to remove the child was on summons or the shelter care hearing, the court must find that IDHW made reasonable efforts to prevent removal of the child from the home. This finding is not necessary if the parent subjected the child to aggravated circumstances. If this finding is required, it must be case-specific and documented. It may incorporate by reference an affidavit that describes the specific circumstances. Federal funding is contingent upon this finding.

♦ Disposition findings and conclusions:
  - Decree placing child in the custody of the agency or in the child's own home under agency supervision, until the child's eighteenth birthday (or until otherwise ordered by the court prior to the child's eighteenth birthday).
  - If child is placed in custody of agency, case-specific best interests and reasonable efforts findings.
  - If the child is to be placed in the custody of the agency, orders as to visitation and child support, where appropriate.
  - If the child is to be placed in the child's own home under agency supervision, the conditions needed to ensure the child's safety and welfare in the home.
  - Services the agency is to provide to the child, the child's parents, and the foster parents, and services in which the parent(s) will be required to participate.

♦ Protective order(s), including terms and conditions.

♦ An order scheduling the next hearing, and any orders necessary to prepare for the next hearing.

J. Conclusion

For many reasons, a timely, careful, and complete adjudicatory hearing can benefit each child and family before the court.

♦ By resolving disputed issues of fact in a timely manner and by addressing all the allegations in the petition, the court avoids unnecessary delays that arise when the parents and the agency cannot agree on what problems need to be resolved for reunification to occur or for the child to remain safely at home.

♦ By making a timely decision as to whether the agency is able to prove its case, the court reduces the time that children may unnecessarily spend in foster care in those cases where the case is ultimately dismissed.

♦ By making a thorough and timely decision on disposition, the court protects the well-being of the child and expedites the case planning and/or permanency planning processes necessary for the successful resolution of the case, either through safe and permanent reunification of the family or alternative permanent placement of the child.

- By conducting a timely hearing, the court emphasizes by its example the importance of time in the lives of the children involved and the need to move the case towards successful completion as soon as practicable.

CHAPTER VI: PERMANENCY PLANNING: THE CASE PLAN AND CASE PLAN HEARING

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Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Permanency Planning: Children Can't Wait

The premise of this chapter is that the court has conducted the adjudicatory hearing and has found the child to be within the jurisdiction of the Child Protective Act (CPA).[1] The next phase in a CPA case is the permanency planning process. This chapter begins with information about fundamental permanency planning concepts. Later sections address the specific steps in the permanency planning process. These concepts, and these steps in the permanency planning process, are **crucial** to achieving timely permanency for the child.

The policy of the State of Idaho,[2] and the purpose of permanency planning, is to ensure that every child has a safe, healthy, and permanent home and to ensure that the child has that home as soon as possible. Permanency for the child means either a safe and permanent return to the parent(s) or a safe and permanent placement with a new family. It is essential that permanency be achieved in a timely manner. The child's formative years and future are at stake.

To achieve permanency for the child, the court must assume substantially increased duties and functions in the process. The traditional role of the court is neutral and detached, generally limited to deciding the contested issues as they are framed by the parties, when they are brought before the court by the parties, and based on the evidence the parties choose to present. A more activist model is required for successful permanency – one in which the judge conducts thorough inquiry, addresses the full spectrum of issues affecting permanency for child, determines permanency goals, establishes plans for meeting those goals, and enforces deadlines for achieving those goals.

To achieve timely permanency for the child, the focus on permanency planning must begin when the child welfare agency and the court first become involved with the family. Certain critical elements must be thoroughly examined and *clearly documented in the court record* well before the permanency hearing or their oversight can seriously impede timely permanency for a child.

Child welfare agencies should immediately implement certain practices that have a dramatic, positive impact on a child's options for permanency and the timeliness of the permanent plan. Judges must understand these practices to ensure that they are implemented well before the permanency hearing.

Finally, when judges must make permanency planning decisions, it is important that they understand three concepts – what are the preferred options for permanency, what makes a home permanent, and what does ASFA mean by "compelling reasons" why it would not be in the best interests of child to proceed with adoption or legal guardianship.

Because of the importance of these preparatory elements to successful permanency hearings, this section will:

- Summarize the critical elements courts must fully explore early in the case so that the permanency process is not stalled;

[1] Idaho Code §§ 16-1601 *et seq*: *see particularly* §§16-1619, and 16-1621.
[2] *See* Idaho Code §16-1601.

- Review child welfare practices of concurrent planning, use of foster-adopt homes, and family decision-making; and
- Explain the permanency concepts of preferred options for permanency, what makes a home permanent, and compelling reasons.

1. Court Best Practices Prior to Case Plan and Permanency Hearings (From the Beginning of a Child Protection Case)

Earlier chapters provide important detail about critical steps in a child protection case, from the time a child is removed from the home through the determination of whether reunification can occur. The following five issues can cause significant delays at the time of the permanency hearing if they are not adequately addressed early in the case. These five issues are:

- Early identification and involvement of absent parents
- Early identification and involvement of relatives
- Ensuring quality plans and services are available to the family to assist with reunification
- Complying with the Interstate Compact on the Placement of Children
- Complying with the Indian Child Welfare Act

a. Early identification and involvement of absent parents

At the very first hearing on a petition alleging abuse or neglect, the court should require efforts to identify, notify, and include all parents of the child. Absent parents and putative fathers must be identified, located, and brought into the court process as quickly as possible.[3] Timely resolution of paternity issues is both in the best interests of the child and essential to avoiding delays at subsequent points in the court process. The case law is replete with examples of cases in which permanency is delayed because an absent parent was not brought into the litigation in a timely fashion.[4] The court must ensure that the efforts of the child welfare agency are thorough and diligent in locating and involving all legal and putative parents.

b. Early identification and involvement of relatives

It is equally important that the agency identify all relatives of the mother, father, and putative father(s) of the child and that it thoroughly investigate the appropriateness of these relatives as potential caretakers for the child. It should not be assumed that because the parents have serious problems, all of the relatives must also have serious problems. Nor should it be assumed that a willing relative is an appropriate caretaker for the child. Investigation of potential caretakers is essential to ensure the safety of the child. Identification and investigation of all potential caretakers is essential to ensure that the placement selected is the one that best meets the needs of the child.[5]

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[3] Idaho Code §16-1611(3) requires notice to each parent or guardian of the child.

[4] *See. e.g.,* In re Doe, 143 Idaho 760, 9 P. 3d 1226, 1228 (2000)(putative father not contacted until child protection case had been pending for two years leading to conflict between grandparent/foster parent and birth father).

[5] If the child is an Indian child, the Indian Child Welfare Act establishes a clear placement preference with members of the child's extended or tribal family. 25 U.S.C. §1915. ICWA is discussed in detail in Chapter XI of this Manual.

When courts and agencies have not conducted thorough relative searches and reunification is ruled out, they can be faced with the difficulty of deciding between adoption by a foster parent with whom the child has bonded and a relative who is appropriate but did not previously know of the child's need for a permanent home. If, however, the relative search was thorough and a relative who has previously chosen not to come forward changes his or her mind, the potential arguments in favor of keeping the child with a relative are less persuasive. When agencies and courts do their job thoroughly, they should not have to choose between a foster parent adoption and a relative adoption.

c. Ensuring quality plans and services are available to the family to assist with reunification

Thorough assessment should be made both of the child's needs and the parent's needs, as well as the services available to meet those needs. If the needs of a child and family have not been thoroughly assessed and appropriate services made available to families to assist with reunification, a valid argument could be made at the permanency hearing that reasonable efforts have not been made to reunify parent and child. The tardy provision of services will cause a significant delay in achieving permanency for the child, by delaying reunification of the family or by delaying the court's ability to terminate parental rights.

d. Complying with the Interstate Compact on the Placement of Children (ICPC)

Problems arise when the proposed placement for a child is in another state. Jurisdiction of a state court or a state agency ends at the state line. The agency in the other state has no obligation to make pre-placement investigations, to supervise placements, or to provide services to promote the long-term success of the placement. At the same time, the sending state is not financially or legally responsible for a child outside its jurisdiction. There is a tremendous risk that a child placed in another state will "fall between the cracks" of the two state systems. However, given the geographic mobility of current society, a child's best option for temporary or permanent placement may be in another state.

The ICPC is a statutory law, enacted uniformly by state legislatures in all 50 states, the District of Columbia and the U.S. Virgin Islands, for the purpose of ensuring that children are protected when placed between states.[6] The agency in the sending state must submit a written application to the agency in the receiving state, which decides whether or not to accept the placement. Once accepted, the agencies in the two states can enter into agreements as to what services the agency in the receiving state will provide on behalf of the agency in the sending state. The sending state remains financially responsible for the cost of the services. The court in the sending state retains jurisdiction over the child, and may order the child returned to the sending state. The ICPC placement terminates when the child returns to the sending state, when the child is adopted or the child reaches the age of majority, or when the receiving state agrees to be discharged.

A child may not be placed out-of-state without a court order.[7] The court should require that the placement be made in accordance with the ICPC and that the placement agreement specify the services to be provided by the receiving state. Those services should include a written report of

[6] *See* Idaho Code §§16-2101 *et seq*.
[7] Idaho Code §16-1629(8).

pre-placement investigations and written monthly reports as to the status and welfare of the child while in the out-of-state placement. Because the ICPC process can be time consuming, it should be implemented as early as possible in the CPA process when an out-of-state placement for a child is contemplated.

"Courtesy supervision" is **not** an ICPC placement. It is an informal representation by an agency in another state that it will supervise the placement of the child in the other state as a courtesy to the agency in the home state. It has no legal effect whatsoever and therefore offers none of the benefits or protections of the ICPC. The best practice recommendation is that such informal arrangements be avoided. They can result in the failure of services for the child and family and in delays in obtaining permanency for the child.

e. Complying with the Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act of 1978 (ICWA) was passed to address the removal of Indian children from their homes and their placement with non-Indian families.[8] ICWA is discussed in detail in Chapter XI of this Manual. If the child is an Indian Child, the lawyers, judge, guardian and social workers involved in the case must be familiar with the provisions of ICWA. The Act establishes special procedural and substantive safeguards to protect the interests of Indian children and families, including tribal determination of who is an Indian child, full tribal participation in planning and decision-making in the child protection case, placement preferences for extended family members and other Indian families identified by the child's tribe, and, when requested, transfer of the child protection case to the child's tribal court.

To prevent these procedures from causing Indian children to linger in foster care, the courts should:

- Identify at the earliest possible opportunity whether ICWA applies to one or more children in a case;[9]
- Have procedures in place for immediate notice of the pendency of a case to the child's Indian tribe;
- Open lines of communication with the tribal representative to ensure that complete information is exchanged and that time delays are avoided;
- Be familiar with and follow the procedural and substantive requirements set out in ICWA; and
- Make sure that all notices, consents, and "active efforts" are documented in accordance with the requirements of the act.

When courts fail to ensure that Indian children are identified and the requirements of ICWA are followed from the beginning of the court process, and issues concerning ICWA are then raised

[8] 25 U.S.C. §§1901-1963

[9] Determining whether ICWA applies means not only determining whether the child is a member of a tribe, but also whether the child is *eligible* for membership in a tribe. So, whenever the court has reason to believe that the child may be an Indian child, the court should require the agency to investigate and to determine whether the child is eligible for membership in an Indian tribe. Each Indian tribe establishes the requirements that must be met to be a member of that tribe. The tribe's determination of membership is final and is entitled to full faith and credit under §1911(d) of ICWA and federal case law. *See e.g.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

for the first time at a permanency hearing, the court may have failed to identify appropriate care options for the child. This oversight may delay the court's ability to terminate parental rights or otherwise provide for a permanent plan for the child and may set up the possibility of reversal of termination on appeal.[10]

2. Child Welfare Best Practices Prior to the Planning and Permanency Hearing

In recent years, the practices of concurrent planning, use of foster-adopt homes, and family decision-making have been implemented in many jurisdictions. These child welfare agency tools have the capacity to significantly reduce the length of time children spend in limbo waiting for the court to make a decision on their permanent plan. They also have the capacity to create options for permanency that might not otherwise be available.

a. Concurrent planning

Concurrent planning is based on the concept that it is possible to predict risk of failure of reunification for a family. Risk assessment testing instruments are available to agencies, which should be administered in each case to assess the risk of failure of reunification. The results of the test should be made available to the court as part of the planning process.

Issues such as abandonment, serious physical abuse, previous history of termination of parental rights, previous births of drug-affected newborns, numerous convictions for serious crimes, and other factors jndicate a high risk against reunification. When the risk is high, concurrent plans of reunification and an alternative permanent placement should be pursued. When reunification is either likely or is not indicated, a single-outcome plan should be implemented.[11]

Concurrent planning is also based on the concept that it is possible to plan for two different outcomes at the same time. The reunification plan identifies the issues that need to be resolved and the tasks necessary to resolve those issues to enable the child to be safely returned home. The alternative permanency plan is the plan to identify all other options for permanent placement of the child, to assess the child's needs and the options for permanent placement in light of the child's needs, to determine which option best meets the child's needs, and to implement that option. The purpose of the alternative permanency plan is to have a back-up plan in place in case the reunification plan fails.

The model of concurrent planning was developed with the expectation that social workers involved in the process would have very low caseloads.[12] It is designed for implementation during the first 90 days of a case. Some of the key elements of concurrent planning are:

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[10] *See* Indian Tribe v. Doe, 123 Idaho 464, 849 P.2d 925 (1993) and Doe v. Doe, 127 Idaho 452, 902 P.2d 477 (1995) for Idaho decisions applying ICWA.

[11] Under Idaho law, a concurrent plan is required when aggravated circumstances are not found and the child is placed in the custody of the state. A reunification plan is not required when aggravated circumstances are found. An alternative permanency plan is not required when the child is returned home under agency supervision. Idaho Code §§16-1610(b), 16-1608(e)(4).

[12] Linda Katz, of Lutheran Social Services in Washington State, is the creator of this model. The social workers of her agency who were involved in concurrent planning had caseloads of approximately 10.

- Full disclosure of the concurrent plans to parents as soon as the decision is made (in the case of an Indian child, full disclosure must also be made to Indian custodians and the child's tribe);
- Placement of the child in a relative-adopt or foster-adopt home to reduce the number of times the child must move;[13]
- Strict time limits on case progress and scheduling of hearings;
- Active efforts to have regular and meaningful visitation between parent and child;
- Involving parents in planning for the future of their children if they cannot be with their children;
- Detailed small steps to accomplish the plan, in weekly and monthly increments, accompanied by parental record-keeping and frequent court reviews;
- Progress measured by behavior, documented in reports submitted to the court;
- Excellent social work, supported by training, consultation, and reasonable case loads; and
- Defining success by timely permanency, whether it is reunification or the alternate plan.

To ensure the occurrence of good faith efforts at reunification under concurrent planning, it is critical that foster and relative families receive additional training and that interaction between the foster family or relative, the birth family, and the child are carefully monitored. Using family decision-making or other means of actively involving the extended family will help to ensure that active and reasonable efforts are made to reunify and that the focus on the child's best interests is maintained.

When concurrent planning is used, either the parents should be ready for the child's return or the agency should be prepared to proceed with filing for termination of parental rights, prior to the time of the permanency hearing. If reunification fails, the child should already be in the home that will become the adoptive home.

The court should, however, be wary of "easy" permanency planning decisions, in which adoption by the foster family becomes the alternative permanency plan because the child is "doing alright" with the foster family. The purpose of the alternative plan for the permanent placement of the child is to identify **all** options for the child's placement and to **thoroughly** assess the child's needs and the potential placements, and to locate the adoptive placement that will best meet the child's needs. The purpose of concurrent planning is to make those efforts as early as possible in the process. Concurrent planning should therefore trigger the following agency processes:

- Preparation of the child's full social history,
- Identification of the child's needs, and
- A search for adoptive home studies that appear to match the child's needs.

[13] According to the United States General Accounting Office report *FOSTER CARE: HHS Could Better Facilitate the Interjurisdictional Adoption Process*, November 1999, "of those foster children who are adopted, about 78 percent are adopted by their foster parents or relatives."

b. Use of foster-adopt homes[14]

The dominant feature of the special needs[15] adoptive family is that the vast majority of them have been foster parents first."[16] This is a vast change over practice in the 1950s, when foster parents were discouraged from forming attachments with foster children and children were moved regularly to avoid such attachments. We now know that multiple moves can break the bonds of trust and attachment formed by the child; consequently, multiple moves harm the child. Multiple moves compound the original trauma of abuse and neglect, often leading to long-term adjustment and attachment difficulties.

Multiple placements can be avoided for a child who cannot be placed with relatives by using foster-adopt homes, also called legal risk homes or resource homes. These parents have been licensed to provide a temporary foster home, but if the child cannot be reunified with the birth family, then the home becomes the adoptive home for the child.

The use of foster-adopt and relative-adopt homes can, however, present their own dilemmas. The foster family or relative family face a difficult conflict when reunification is the long-term goal, and yet the family wants to adopt the child if reunification fails. In such cases, the foster family or relative family may intentionally or unintentionally present obstacles to reunification.

As noted in the previous section, it is critical that foster and relative families receive additional training and that interaction between the foster family or relative, the birth family and the child are carefully monitored, to ensure the occurrence of good faith efforts at reunification under concurrent planning.

The use of foster-adopt and relative-adopt homes also requires that the planning for the child's alternative permanent placement be "front-loaded." Alternative permanency planning means more than finding any available home for the child. It means identifying all the potential options for the child's placement, assessing the child's needs and the potential placements, and selecting the option that best meets the child's needs. If a child's temporary home may become the child's permanent home, then this planning must be done as early as possible in the process, to ensure that the home is the one that best meets the child's needs.

c. Family decision-making

The purpose of this best practice technique is to build better alliances among the family, the child welfare agency, the child's tribe (where applicable), and the court for the purpose of providing a safe and permanent home for the child. To avoid the dynamic of the "system" telling the family

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[14] Although relative homes can be licensed as foster homes, there are significantly different dynamics in foster families that are relatives and those that are not. Consequently, the term "foster home" is used to mean the licensed home of a non-relative and the term "relative home" is used to mean the home of a relative, whether or not the home is licensed as a foster home.

[15] "Special needs" is a term defined by state policy that refers to factors which may make it difficult to place a child for adoption. The factors might include older age at adoption (often six years of age or older); membership in a sibling group; emotional, developmental, or behavior problems; and serious medical conditions. *See* Id. Admin Code 16.06.12.004(27).

[16] Judith. McKenzie, A*doption of Children with Special Needs, the Future of Children*, 3 THE FUTURE OF CHILDREN 62 (1996).

what they need to do to fix their problems and the family then resisting the intrusion, family decision-making builds communication, cooperation, and collaboration between the family, the child's tribe (when applicable), and child welfare professionals.

Family decision-making (also referred to as family group conferencing and family unity meetings) recognizes that families have the most information about themselves and have the ability to make well-informed decisions. Instead of acting as adversaries trying to keep information from the authorities, family members become active participants in the decision-making process.

The Idaho Department of Health and Welfare uses the family unity meeting for case plan preparation.[17] It is a pre-ASFA concept, and is based on a consensus model.

Common values across all models reflect that the process is family-focused, strengths-based, community-based, and culturally appropriate. Details of models vary to some decree but generally involve the following:

- All family members who wish to be present at the family meeting are invited. Assistance, if needed, is provided to enable their attendance. Some models give the parents veto power over which family members may attend. If the child is an Indian child, a representative from the child's tribe should be invited to attend.
- The family can identify other non-family supportive individuals who are also invited.
- An independent coordinator arranges the meeting. The caseworker is present but does not lead the meeting.
- Information is shared by all present, usually starting with the caseworker who presents the facts of the neglect or abuse and related information to the family. The family asks questions of the caseworker and others to make sure they have full information regarding the issues.
- In most models, the professionals leave the room and allow the family to discuss the case in private. The family's job is to create a plan to ensure that the child is cared for and protected from future harm. In some models, the professionals are permitted to remain in the room.
- The family presents and explains their plan to the professionals, who have veto power. Consensus can usually be reached.[18]
- The court must ultimately approve the plan.[19]

Use of family decision-making, in addition to assisting the family with timely reunification, can assist the family to understand when reunification is not possible. Family decision-making can also help overcome resistance to severance of parental ties. By giving the family the opportunity to understand the need for permanency and security for the child in one stable home, family

[17] Id Admin. Code 16.06.01.401.

[18] In New Zealand, where the Family Group Decision-Making model originated and is required in all cases of neglect and abuse, agreement is produced in approximately 90 to 95% of the cases, according to Lisa Merkel-Holguin, *Putting Families Back into the Child Protection Partnership: Family Group Decision-Making*, 12:3 PROTECTING CHILDREN 4-7 (1996).

[19] Idaho Code §§16-1622(3)(4), 16-1621(4), 16-1619(7).

Judges often face the difficult decision of choosing among options for a child's permanent family. Three concepts assist in evaluating such options:

- Preferred options for permanency
- Permanency characteristics
- Compelling reasons

decision-making can open the door for relative and third-party adoption and, when appropriate, create a proposed plan that includes adoption with contact. Because family decision-making usually creates an agreed upon plan, lengthy trials of termination of parental rights and lengthy appeals can be avoided.

3. Important Permanency Definitions

a. Preferred options for permanency

Some permanent options are preferred over others.[20] The first preferred option for permanency is reunification with the biological parents. The next preferred option is termination of parental rights and adoption. Permanent guardianship or permanent custody is the final preferred option for permanency when adoption is not possible or exceptional circumstances exist, but only if the relationship meets the legally-secure components described in the next section.

b. Permanency characteristics

When a judge must decide whether a non-adoptive relationship with a relative or non-relative is an acceptable permanent plan, the judge should consider whether the permanency option meets the following characteristics:

- Is the permanency option a judicially-created relationship that is intended to be permanent and self-sustaining; will it result in a relationship that will last through the child's minority and continue with lifetime family relationships;
- Will it create a legal relationship that is binding on the adults who are awarded care, custody, and control of the child;
- Do the parents in the permanent family have the right to protect, educate, have care and control of the child, and do they have decision-making authority including medical care, discipline, and the power to represent the child in legal proceedings;
- Is the family free from supervision by the child welfare agency and monitoring by the court;
- Are biological parents prohibited from petitioning the court to terminate the relationship; and
- Will the court only consider a change of custody if there is clear and convincing evidence that the custodian is unfit or has abused or neglected the child?[21]

[20] For Indian children, as required by ICWA, if the child cannot be reunited with the biological parents or Indian custodian, the next preferred option is permanent placement with an extended family member, regardless of whether the child has an attachment to the foster family. The next preferred option is placement with a member of the child's tribe, and lastly, with any other placement approved by the child's tribe. 25 U.S.C. §1915. *See* Chapter XI of this Manual for discussion of the ICWA Permanency Options.

[21] Taken in part from STEVE CHRISTIAN & LIZA EKMAN, A PLACE TO CALL HOME, ADOPTION AND GUARDIANSHIP FOR CHILDREN IN FOSTER CARE, (National Conferences of State Legislatures, 2000).

Some states have statutes that create permanent relationships in addition to the biological parent relationship or adoption that encompass all of these characteristics. These legal relationships are usually called permanent guardianship or permanent custody.

In contrast, some state statutes provide for temporary custody and allow biological parents to file for a return of custody without any significant change of circumstance of the child. Such statutes do **not** meet the standard of permanency.

The Idaho guardianship statute does **not** meet the standard of permanency, primarily because any interested party can seek modification or termination at any time.[22]

Even in states that provide legally permanent options of permanent guardianship and permanent relative custody, such relationships may not be eligible for the same subsidies and assistance that would be available with adoption. Lack of such resources could create future instability for a child with special needs.

c. Compelling reasons

The third and final permanency planning concept is the ASFA requirement of "compelling reasons." If the child has been in the custody of the agency for 15 of 22 months, if the child is an abandoned infant, or if the court has found aggravated circumstances, the agency must file a petition to terminate parental rights, unless the child is in the care of a relative, the agency has not made reasonable efforts to reunify the family, or the agency documents compelling reasons why termination would not be in the best interests of the child.[23] The provisions of Idaho law are similar, but state law requires the court to make the determination of compelling reasons.[24] Put another way, if the court decides that the permanent plan for the child is something **other** than its own family or a new permanent family, it must explain why.

Courts must be very careful that they do not abuse the option of compelling reasons and use it as an excuse for their failure or reluctance to move forward with permanency. Only in rare circumstances should the court agree to accept compelling reasons. A safe, nurturing, permanent home is in the best interests of all children. The following have been suggested as circumstances that might warrant a court's acceptance of compelling reasons not to order the filing of a termination of parental rights petition at the permanency hearing:[25]

- Services identified in the case plan were not provided in a timely fashion, the services are available, and the services make it possible for the child to return home safely within several months. If this happens, there has been a breakdown not only with the child welfare agency but also in the court's review of the case.
- The parents have made substantial progress in eliminating the problems causing the child's continued placement and it is likely that the child will be able to return home

[22] Idaho Code §15-5-212, *see generally* Idaho Code §§ 15-5-201 to 15-5-212.
[23] 42 U.S.C. §675(5)(E).
[24] Idaho Code §§16-1629(9), 16-1624.
[25] These concepts have been taken in part from MARK HARDIN, MANDATORY TERMINATION OF PARENTAL RIGHTS PETITIONS: "COMPELLING REASONS" AND OTHER EXCEPTIONS UNDER THE ADOPTION AND SAFE FAMILIES ACT (ABA Center on Children and the Law 1999).

safely within several months. In this instance, the court should continue the permanency hearing for up to 90 days, at which time either the child returns home or another permanent plan is determined.

- A relative with whom the child has resided for an extended period in a stable relationship is willing and capable of providing permanent care for the child. However, the relative is opposed to termination and adoption and the state does not have a permanent guardianship or permanent relative custody statute. In this situation, the court should make additional efforts to assist the relative and family in understanding the importance of permanency and the option of adoption with contact.
- The Indian child's tribe is culturally opposed to the concept of termination of parental rights and has offered a safe plan for the child in a home approved by the tribe. This situation is acceptable because it complies with ICWA.[26]
- A teenager is firmly opposed to termination of parental rights and adoption and is likely to disrupt any adoptive placement. In this circumstance, the court should frequently review the child's current attitudes toward termination and look for every opportunity to revisit the question of adoption. The court should ask the youth whether she/he would like a permanent family and discuss the concept of adoption with contact with the youth.
- A child is not capable of functioning in a family setting. This exception should require review every 90 days. Even though the child cannot currently live with a family, the court should seek a family who will visit the child and provide a home for visitation and possible future adoption.
- A child has complex and expensive medical or other special needs and the state's adoption subsidy and other benefits are insufficient to reliably cover the costs of the child's present or anticipated care or treatment. Careful inquiry should be made into the adoption subsidy and other available benefits (such as Medicaid or assistance for the developmentally disabled). Given the benefits available, this situation should be rare. If the child is not in a foster or relative home, the child still needs a committed family who will visit the child and open their home for visits from the child.

4. Idaho Law and Procedure for Permanency Planning

The portion of the Idaho Child Protective Act and the Idaho court rules governing permanency are found at Idaho Code §§ 16-1619 through16-1624, 16-1629(9), and Idaho Juvenile Rules 41-48. This section summarizes those provisions. The child welfare agency in Idaho is the Idaho Department of Health and Welfare (IDHW).

At the adjudicatory hearing, the court determines whether the child comes within the jurisdiction of the Child Protective Act, i.e. if the child is abandoned, abused, neglected, homeless, or lacks a stable home environment. If the court determines that the child comes within the jurisdiction of the Act, then the court decides the child's placement – whether the child is to be placed in the legal custody of the agency or placed in the child's own home under agency supervision.

If the court determines that the child comes within the jurisdiction of the Act, and if the CPA petition alleges aggravated circumstances, then the court also determines whether the parent(s)

[26] *See* 25 U.S.C. §1915, discussed in Chapter XI of this Manual.

subjected the child to aggravated circumstances. If the court determines that the child comes within the jurisdiction of the CPA, then the nature and timing of the procedures following the adjudicatory hearing depend on whether the court finds that the parent(s) subjected the child to aggravated circumstances.[27]

a. Cases where aggravated circumstances are not found

If aggravated circumstances are not found and the child is placed in the legal custody of IDHW, then IDHW must prepare a written case plan.[28] The case plan must be filed with the court no later than 60 days from the date the child was removed from the home or thirty days after the adjudicatory hearing, whichever occurs first. The case plan hearing must be set for a date within five days of the filing of the case plan. The case plan must include a reunification plan and an alternative permanent placement plan. At the planning hearing, the court decides whether to approve, modify, or reject the case plan.

After the case plan hearing, the court must hold regular review hearings.[29] The review hearings must be held within six months of the adjudicatory hearing and every six months thereafter. At the review hearings, the court reviews the status of the case and the case plan and may enter orders as necessary to ensure the progress of the case.

If the child remains in the custody of IDHW, then the court must hold a permanency hearing.[30] The permanency hearing must be held prior to twelve months from the date the child was removed from the home or from the date of the adjudicatory hearing, whichever occurs first. The permanency hearing can be combined with a review hearing. IDHW must prepare a written permanency plan and file and serve the report at least five days before the hearing. At the hearing, the court decides whether to approve, modify, or reject the permanency plan.

After the permanency hearing, the court continues to hold periodic review hearings.[31] The court holds periodic review hearings until the child is permanently returned home and the CPA case is closed or until an alternative permanent placement for the child is finalized and the CPA case is closed. If the child continues to remain in custody after the permanency hearing, federal law requires the court to hold annual permanency hearings until the child is permanently returned home or until an alternative permanent placement for the child is finalized.[32]

b. Cases where protective supervision is ordered

If aggravated circumstances are not found and the child is placed in the child's home under the protective supervision of the agency rather than in the custody of the agency, a case plan must be

[27] Aggravated circumstances include but are not limited to: abandonment; torture; chronic abuse; sexual abuse; murder or voluntary manslaughter; aiding, abetting, attempting, soliciting, or conspiring to commit murder; felony assault resulting in serious bodily injury to any child of the parent; or prior involuntary termination of parental rights. Idaho Code §16-1608(e)(4).
[28] Idaho Code § 16-1612.
[29] Idaho Code 16-1622(3).
[30] Idaho Code § 16-1622(4).
[31] Idaho Code § 16-1622(3).
[32] 42 U.S.C. §675(5)(C). Idaho Code §16-1622(4) provides for such a hearing.

prepared.[33] When a child is placed in the child's home under the protection supervision of the agency, there should be a detailed plan to promote the successful and permanent resolution of the case and an alternate plan in case protective supervision proves insufficient.

Idaho law provides a procedure similar to a shelter care hearing should the child be removed from the home during the pendancy of a plan for protective supervision.[34] The practice prior to 2005 for removal of the child from the home after an order for protective varied from court to court. In some courts no special process was provided to review such removals based on the rationale that the child was already within the jurisdiction of the court. Other courts required the filing of a new petition – essentially starting the case over again, with possibly long delays in the child's permanency. The 2005 revisions provide an expedited review process similar to a shelter care hearing to determine whether it is appropriate to vest legal custody with IDHW, and these revisions clarify that no new determination of jurisdiction is require – the case should not be "started over" under this provision.

c. Cases where aggravated circumstances are found

If aggravated circumstances are found, reasonable efforts to reunify the child with its parents are not required.[35] The court must hold a permanency hearing within 30 days after the adjudicatory hearing.[36] IDHW must prepare a written permanency plan and file and serve the plan at least five days before the permanency hearing. At the hearing, the court must decide whether to approve, modify, or reject the plan.[37]

After the permanency hearing, the court must hold regular review hearings.[38] The review hearings must be held within six months of the adjudicatory hearing and every six months thereafter. At the review hearings, the court reviews the status of the case and the permanency plan and may enter orders as necessary to ensure the progress of the case. The court continues to hold review hearings until the permanent placement for the child is finalized and the CPA case is closed. Federal law requires the court to hold annual permanency hearings until the permanent placement for the child is finalized.[39]

5. Federal Funding for Foster Care and Adoption

The bulk of funding available for child protection services in Idaho comes from federal funds. A state whose child protection procedures are not in substantial compliance with ASFA can lose

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[33] *See* Idaho Code §16-1621(1), which requires the preparation of a case plan "in every case in which the child is determined to be within the jurisdiction of the court." Prior to 2005, Idaho law did not clearly require such a case plan. The inclusion of this requirement was one of the significant refinements of the 2005 revisions to the CPA.

[34] Idaho Code § 16-1623.

[35] Idaho Code § 16-1619(6)(d).

[36] The statute provides that the permanency hearing must be within 30 days after the court made the determination of aggravated circumstances. Idaho Code §16-1619(6)(d). In most cases, this determination would be made at the adjudicatory hearing. It is conceivable that there might be circumstances in which the state might petition for a finding of aggravated circumstances after the adjudicatory hearing or in which the parties may stipulate to a finding of aggravated circumstances prior to the adjudicatory hearing.

[37] Idaho Code § 16-1620.

[38] Idaho Code § 16-1622(4).

[39] 42 U.S.C. §675(5)(C). Idaho Law provides that such review hearings must continue as long as the child is in the legal custody of IDHW. Idaho Code § 16-1622(3).

access to federal funding.[40] In addition, a child can lose eligibility for federal funding if certain ASFA requirements are not met in that child's case.

The court must make case-specific findings, documented in the court records, that the agency made reasonable efforts to finalize a child's permanent placement within deadlines set by ASFA. If the court does not make the necessary findings by the deadline, the child will lose eligibility for federal funding. The funding can be reinstated once the required findings can be made.[41] "Reasonable efforts" is discussed in further detail in later sections of this chapter.

In addition, when the court places a child in the custody of the agency, state law vests authority for the placement decision in the agency, subject to review by the court.[42] Federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.[43] It is unclear whether the child will lose eligibility for federal funds if the court orders a particular placement for a child when custody of the child is vested in the agency.

Presumably the child would not lose eligibility if the placement is contested and the court determined the issue based on evidence in the record or on a reasonable agreement of the parties. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[44] The court can also require the agency to include the child's foster care placement in the case plan or the permanency plan and can reject a plan that includes an inappropriate placement. The case plan and permanency plan are discussed in further detail in later sections of this chapter.

B. The Case Plan and Case Plan Hearing

1. Purpose of the Case Plan Hearing

If aggravated circumstances are not found, the agency must prepare a written case plan.[45] The case plan must be filed with the court no later than 60 days from the date the child was removed from the home or thirty days after the adjudicatory hearing, whichever occurs first. The case plan hearing must be set for a date within five days of the filing of the case plan.[46]

If legal custody of the child is vested in the agency, then the case plan must be a concurrent plan. It must include both a reunification plan and an alternative permanent placement plan.[47] The agency must consult with the parents and the guardian *ad litem* in developing the plan.[48]

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[40] *See* 45 C.F.R. §§ 1355, 1356, and 1357.
[41] 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).
[42] Idaho Code §16-1629(8).
[43] *See* 45 C.F.R. §1356.71(d)(1).
[44] See question and answer no. 13 at www.acf.dhhs.gov/programs/cb/laws/qsett1.htm .
[45] Idaho Code §16-1612(1).
[46] Idaho Code §16-1621(1).
[47] Idaho Code §16-1621(3).
[48] IJR 41(g).

At the case plan hearing, the court must decide whether to approve, modify, or reject the case plan.[49] The case plan must be incorporated in an order directing the agency and the parents to comply with the plan.[50] Other parties or participants may also be required to comply with the plan, in appropriate circumstances.

2. Timing of the Hearing

As indicated above, the written case plan must be filed no later than 60 days from the date the child was removed from the home or 30 days from the date of the adjudicatory hearing, whichever is first. The case plan hearing must be held within five days after the plan is filed.[51] The deadline for filing the plan and the date and time of the case plan hearing should be set by the court on the record at the adjudicatory hearing.

As in all child protective proceedings, the court should have a "just say no" policy on continuances. If a continuance is necessary, it should be for a short period of time, and the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

3. Agreements by the Parties

The parties may wish to submit a stipulated case plan at the case plan hearing.

The court should ensure that the case plan has been thoroughly considered by all participants, especially both parents, if involved. With respect to the parents' responsibilities identified in the case plan, the court should specifically ask the parents, on the record, whether they are willing and able to comply, and whether there are any services they need or want that will enable them to address the issues that need to be resolved before the child can be safely returned home.

The court should ensure that the stipulated case plan is comprehensive and that it addresses all the essential elements of a case plan. (The essential elements of a case plan are described in the introduction to this section, in part B.1, above.) If the stipulated case plan is not comprehensive, the court should address any omitted elements. The court might also adjourn the hearing for a short time (such as one day) to give the parties time to address the omitted elements.

4. Who Should be Present

a. Judge

Case Plan hearings should be conducted by the same judge who hears other stages of the proceedings. The involvement of one judge creates consistency in the directions given to the family and to the agency, avoids rehashing old arguments, and allows the judge who presides over the case plan hearing to be thoroughly familiar with facts presented at previous hearings.

b. Parents whose rights have not been terminated, including putative fathers

Since the goal of the case plan is family reunification, it is essential that the parents participate in the process, including a parent who did not previously live with the child. The parents can

[49] Idaho Code § 16-1621(1).
[50] Idaho Code § 16-1621(4).
[51] Idaho Code § 16-1621(1).

provide information that is important to the successful development and implementation of the case plan. In addition, once the plan is approved by the court, it will define parental responsibilities. The failure to comply with the plan may result in termination of parental rights.

c. Age-appropriate children

Children should be present at some point during the hearing to give the judge the opportunity to observe them. Age-appropriate children can provide the court with information as to their perception of their needs, interests, and concerns. Older children will often have questions regarding their circumstances and their future. Some of their questions may be answered at the case plan hearing, and the opportunity to participate may allow a child to have a greater sense of self-determination. A court may choose to have children present only during portions of the case plan hearing. Special circumstances may infrequently justify the absence of children from an entire hearing.

Persons who should always be present at the planning hearing:

- Judge
- Parents whose rights have not been terminated, including putative fathers
- Age-appropriate children
- Indian custodian, the child's tribe, and attorney, if applicable
- Foster parents
- Assigned caseworker
- Attorney for parents (separate attorneys, if conflict warrants)
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter or suitable technology
- Security personnel
- Interpreter(s), if applicable

d. Indian custodian, child's tribe, and attorney, if applicable

An Indian child's tribe has the right to notice and the opportunity to participate in all hearings concerning the child.[52] For Indian children, the tribe often has information regarding the child and family that is critical in assisting the court in good decision-making regarding the child.

e. Foster parents

Foster parents who care for and observe children on a daily basis are often in the best position to describe the present status of a child. Foster parents should be present both to make this information available to the judge and to give the judge the opportunity to observe the foster parents.

Idaho law requires that the foster parents be given notice of the case plan hearing, but also specifically provides that they are not parties to the action.[53]

f. Assigned caseworker

The caseworker with primary responsibility for the case must be present to provide the court with complete, accurate, and up-to-date information at the hearing. Judges should **not** continue or delay a review hearing due to lack of information or case involvement by a caseworker.

[52] ICWA, 25 U.S.C. §§ 1912(a), 1911(c). *See* Chapter XI of this Manual.
[53] Idaho Code § 16-1621(2).

When important facts are not known, the hearing should be reset for an early date, and, if necessary, appropriate subpoenas should be issued.

g. County prosecutor or deputy attorney general

It is important that the agency have effective representation at the hearing because the court's decisions concerning the case plan are crucial to its success. Important information is elicited at the case plan hearing and the record established at that time can be critical to later case outcomes; an attorney is needed to help develop the record and note important evidence. The agency attorney can further help the case progress by moving for court-ordered evaluations, excluding a perpetrator from a household, or obtaining information important to the case. The agency may be represented by the county prosecutor or by the state attorney general.[54]

h. Attorneys for parents (separate attorneys, if conflict warrants)

The presence of the parents' attorney at the hearing is vital to make sure that the agency is carrying out its responsibility to assist the parents. The attorney needs to correct the record to avoid negative or inaccurate information about the parents. The attorney needs to make sure that the parents' interests and views are taken into account in all decisions on placement, visitation, services, and case plan modifications.

i. Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child

A well-trained legal advocate for the guardian *ad litem* and/or the child must be present to make sure that the child's interests are being protected and are not being subordinated to the organizational needs of the agency or the convenience of agency personnel. The advocate also needs to ensure that the views of children are considered by the court.[55]

j. Court reporter or suitable technology, security personnel, and interpreters

As in other stages of the CPA process, these staffing and equipment resources should be available for all planning hearings. If a parent or other essential participant is not fluent in English, a qualified interpreter must be present.

k. Persons whose presence may also be needed at the planning hearing:

- Extended family members
- Other custodial adults (such as a representative from a residential facility where a child is placed)
- Prospective adoptive parents (if other than the foster parents)
- Adult or juvenile probation officer or parole officer
- Service providers
- School officials
- Other witnesses

Extended family members, service providers, and others who work with the family can provide valuable information and recommendations to the court, and it can be helpful for all persons who

[54] *See* Idaho Code § 16-1610(1).

[55] *See* Idaho Code § 16-1614, which provides for appointment of a guardian *ad litem* for the child, appointment of an attorney for the guardian *ad litem*, and/or appointment of an attorney for the child.

are involved with the family to meet with each other. But their presence may be needed only if they will play a role in the case plan or if their testimony is needed for a disputed issue.

5. Submission of the Case Plan and Guardian *ad Litem's* Report to the Court

The written case plan must be filed no later than 60 days from the date the child was removed from the home or 30 days from the date of the adjudicatory hearing, whichever is first. The case plan must be delivered to the parents, legal guardians, and the guardian *ad litem* and/or the attorney for the child. As a matter of best practice, the plan should be verified and in the form of an affidavit.

In addition, the court may require the report of the guardian *ad litem* to address some or all of the planning hearing issues. If required, the GAL reports should be filed and served on all parties five days before the planning hearing as required for the case plan. As with the case plan, the GAL report should be verified and in the form of an affidavit.

6. The Case Plan

The most important and most obvious function of the case plan is its planning function. ***Careful planning is an essential prerequisite to successfully resolving the case and successfully protecting the interests of the child***. Careful planning includes diligent investigation and implementation and appropriate modification based on new information or changed circumstances. (Timely review hearings are also necessary to assess progress on the case plan and to make appropriate changes. Review hearings are discussed in Part D, below.)

The case plan provides the road map for timely resolution of the case—to safely return the child home or to provide the child with a new and permanent family. Formulation of the case plan requires the agency to systematically analyze the issues that need to be resolved and the actions necessary to address those issues, including services to be made available to the family and the child. The consultation and hearing requirements ensure that the parents and the guardian *ad litem* have a genuine opportunity for input on the plan. The requirements for filing a written plan prior to the hearing, the hearing, and court approval of the plan promote systematic analysis of the issues and options for resolution of those issues by all participants, their attorneys, and the judge.

An equally important but less obvious function of the case plan is its enforcement function. It provides the benchmark for objectively measuring the parties' progress toward completion of the CPA case. ***The case plan thus becomes the primary mechanism for holding the agency and the parents accountable in CPA cases.*** If the court-ordered plan is specific as to the parents' responsibilities and the parents do not comply, then it makes contempt sanctions available, and it provides a record to support commencement of proceedings to terminate parental rights. If the court-ordered plan is specific as to the agency's responsibilities and the agency does not comply, then it makes contempt sanctions available. It also provides a record for a finding that the agency has not made reasonable efforts to reunify the family or to finalize an alternative permanent placement for the child, which in turn affects the federal funding available to the agency.

The case plan should:

- Identify the current foster care placement for the child, including a statement of why that placement is the least disruptive environment and most family-like setting that meets the needs of the child.[56]
- Specifically identify the services to be provided to the child and the foster family, including services to identify and meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, or to ensure the stability of the placement.

The reunification portion of the case plan should:

- Identify all issues that need to be addressed before the child can safely be returned home without agency supervision.[57]
- Specifically identify the tasks to be completed by the agency, the parents, or others to address each issue, including services to be made available by the agency to the parents and in which the parents are required to participate and deadlines for completion of each task.
- Identify terms for visitation, supervision of visitation, and child support, where appropriate.

The purpose of the alternative permanency plan is to have a backup plan in place, ready for implementation, and ideally, already in the process of implementation, in case the reunification plan fails. A child's stay in foster care will be unnecessarily lengthened if alternative permanency planning is not initiated until after reunification fails. The alternative permanency plan should:

- Address all options for permanent placement of the child.
- Assess the advantages and disadvantages of each option, in light of the child's best interests.
- Include recommendations as to which option is in the child's best interests.
- Specifically identify the actions necessary to implement the recommended option and deadlines for those actions.
- Address options for maintaining the child's connection to the community (including individuals with a significant relationship to the child), organizations, or community activities with whom the child has a significant connection.
- Identify further investigation necessary to identify and/or assess other options for permanent placement, to identify or implement actions necessary to implement the recommended placement, or to identify or implement options for maintaining the child's significant connections.

Ideally, the child's foster family placement during the reunification process will become the child's permanent placement if reunification fails. It is therefore essential that alternative

[56] There may be instances under which the name and identify of the specific foster family should be kept confidential, for the safety of the child and the foster family. In such instances, the plan should sufficiently identify the nature of the foster care placement to enable the court to assess whether the placement is the least disruptive environment and most family-like setting for the child.
[57] Idaho Code § 16-1621(2).

permanency investigation and planning begin at the outset of the CPA case and diligently continue, concurrent with the participants' efforts at reunification.

7. Key Decisions the Court Should Make at the Planning Hearing

The essential decision that the court must make at the planning hearing is whether to approve, modify, or reject the case plan. To make that decision, the court should decide the following:

a. Whether the current foster care placement is the least disruptive environment

IDHW is required to make reasonable efforts to place the child in the least disruptive environment to the child. Idaho law specifically authorizes IDHW to consider placement of the child with relatives.[58] The court should determine whether IDHW has made such efforts. In making this inquiry, the court should also determine whether there is another foster care placement available that would better meet the needs of the child.

Placement with individuals who already have positive relationships with the child helps to provide the child with a greater sense of safety, security, and continuity. The child's extended family is the most likely, but not the only, source for such individuals. In addition, placement with a family member may offer the opportunity for an agreed-upon solution to the problem, as a parent may be willing to stipulate to placement of the child in foster care if the parent knows the child will be with a family member.

There can, however, be problems with the placement of a child with a family member. First, because of the family member's relationship to the parent, and given the sometimes intergenerational aspects of neglect and abuse, the family member may unduly minimize the extent or the effects of the abuse or neglect, may be partly or primarily motivated by a desire to protect the parent from governmental intervention, or may also have a history of abusing or neglecting children.

Second, the family member may underestimate the potential difficulties in providing a home for the child, particularly since an abused or neglected child will likely have emotional, developmental, or behavioral problems that do not simply disappear when the child is removed from the abusive or neglectful parent. The family member may later seek to withdraw as a foster parent when unanticipated problems become apparent, creating further trauma for the child.

The court should make careful inquiry of the family member with whom the child will be living to ensure that the family member understands the nature and extent of the commitment the family member is making. In addition, the process of licensing the family member as a foster care provider should assist in addressing these potential problems.

Whenever possible, siblings should be placed together. A child who has been removed from his or her parents should not also suffer the loss of being separated from brothers and sisters. If siblings can't be placed together, then the plan should address the provisions that will be made so that the siblings can maintain contact with each other. Separate placement of siblings may be

[58] Idaho Code § 16-1629(11).

necessary where one sibling is a juvenile offender and the other children are at risk of harm from the juvenile.

ICWA has detailed provisions governing preferences for both foster and adoptive placement of Indian children. Priority is given to members of the child's extended family, other members of the child's Indian tribe, or placements given priority by the child's Indian tribe.[59] One of the purposes of ICWA is to recognize the unique relationship between the United States and the Indian tribes;[60] another purpose is to enable the child to develop and/or maintain the child's ties to his or her cultural heritage.[61] These provisions of ICWA are discussed in detail in Chapter XI of this Manual.

Issues of race, ethnicity, and national and cultural heritage in foster and adoptive placements are highly controversial. ICWA establishes preferences for placement of Indian children with Indian families. There is no law establishing similar preferences for other groups. The Multiethnic Placement Act of 1994, as amended, points the other way; it limits the extent to which race, ethnicity, national, or cultural heritage may be considered in placement decisions.[62] The purpose of that Act was to remove barriers to permanency by prohibiting discrimination against children or prospective parents based on race or national origin. Specifically, the Act sought to do away with the practice of "race-matching," which resulted in large numbers of children spending long periods of time in foster care, waiting for prospective adoptive parents of the same race.

Ultimately, the resolution in any case will depend on the individual circumstances of that case. Although preferences may provide useful tools for analysis, ultimately the successful placement of the child depends on thorough efforts to identify all possible placements and thorough assessment of the advantages and disadvantages of each placement based on the child's individual needs. *IDHW has a best practices manual that identifies the long-term interests of the child and the many considerations involved.*

When the court places a child in the custody of the IDHW, state law vests authority for the placement decision in the department, subject to review by the court.[63] Federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.[64] It is unclear whether the child will lose eligibility for federal funds if the court orders a particular placement for a child when custody of the child is vested in the agency.

Presumably the child would not lose eligibility if the placement were a contested issue, and the court determined the issue based on evidence in the record or on a reasonable agreement of the parties. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care

[59] 42 U.S.C. § 1915.
[60] 42 U.S.C. § 1901.
[61] 25 U.S.C. § 1902.
[62] 42 U.S.C. §§ 1996(b). This provision is discussed in Chapter X, Adoption, of this Manual.
[63] Idaho Code § 15-1629(8).
[64] *See* 45 C.F.R. 1356.71(d)(1).

responsibility, to make appropriate placement decisions, we will not disallow payments."[65] The court can also require IDHW to include the child's foster care placement in the case plan and can reject a plan that includes an inappropriate placement.

The plan should also address the options for maintaining the child's ties to family, friends, or organizations that have a significant role in the child's life. Idaho law specifically provides that "[w]henever possible, the child's connections to the community, including individuals with a significant relationship to the child, religious organizations and community activities, will be maintained. . . ."[66] The child's placement may afford the means for maintaining these significant connections. If not, then other means to maintain the child's significant connections should be explored, identified, and implemented.

b. Whether the plan specifically identifies the services to be provided to the child and the foster family

The agency should assess whether the child has any special needs and identify the services to be provided to address those needs. For example, the child may have special emotional, physical, educational, or developmental needs. The court should inquire whether evaluations need to be done by medical health professionals, mental health professionals, or child development specialists to determine whether the child has special needs and what services are available to address those needs. The child may have behavioral problems as a result of the parents' abuse or neglect, or may need services to assist in adjusting to a new home. The child may have delinquency issues, and the plan may need to incorporate measures for agency personnel to coordinate with the child's juvenile probation officer or a representative from juvenile corrections agency.

In investigating the resources available to meet the child's needs, efforts should be made to identify all the potential sources of services or assistance, including other programs available through the same agency, programs available through other agencies, or programs available through private foundations. Resources available from other agencies or private foundations are often overlooked. For example:

- When the child reaches age 15½ , IDHW is required to assess the child for independent living skills and special programs available under the independent living grant money that IDHW administers.[67]
- A child with developmental disabilities qualifies for numerous services funded by Medicaid. The Adult and Child Developmental Centers offer services for developmentally disabled children and adults.[68]
- Children with developmental disabilities and children approaching the age of 18 may qualify for services from the Division of Vocational Rehabilitation, part of the Idaho Department of Education.[69]

[65] See question and answer no. 13 at www.acf.dhhs.gov/programs/cb/laws/qsett1.htm .
[66] Idaho Code § 16-1612(3).
[67] Idaho Admin. Code 16.06.01.030(10).
[68] *See, e.g.*, Idaho Admin Code 16-04.11.010 *et seq*.
[69] *See* Idaho Admin. Code 47.01.01.700 *et seq*.

- The Casey Program is a private foundation in Idaho, operating primarily in Ada County. In addition to providing adoptive and temporary homes for teenagers and services for Casey families, the program also provides resources to other children in foster care.[70]

IDHW should also address services to be made available to the foster parents. Just as the child may need assistance in adjusting to a new home, the foster family may need assistance in adjusting to a new member in the home. The foster parents may need education or counseling as to the effects of abandonment, abuse, and neglect to deal with the problem behaviors that can arise and to assist the child in emotional healing and in adjusting to a new home. If the child has special needs, the foster parents may need assistance in obtaining information, skills, or services to assist them in meeting those needs.

c. Whether the reunification plan identifies all issues that need to be resolved before the child can safely be returned home without agency supervision

The issues might include, for example: parenting skills; anger management; drug/alcohol education, counseling, or treatment; drug testing; mental health evaluation, counseling, or treatment; home-keeping skills; home inspection; seeking/maintaining employment; vocational rehabilitation or job-related education; medical examination or treatment; etc.

d. Whether the reunification plan specifically identifies the tasks to be completed by the agency, the parents, or others

It is essential that the reunification plan specifically identify all services to be made available by the agency to the parents and in which the parent is required to participate, so that the parents' issues are resolved and the child is safely able to return to the home without agency supervision. It is this portion of the plan that will either enable the safe return of the child, or provide the basis for proceeding with termination. It is this portion of the plan that will provide the basis for a later finding of whether the agency made reasonable efforts to reunify. Specificity is essential to enforceability.

With respect to parents' responsibilities identified in the case plan, the court should specifically ask the parents on the record whether they are willing and able to comply and whether there are any services they need or want that will enable them to resolve the issues that need to be resolved before the child can safely be returned home.

Agency personnel may be resistant to specificity, concerned that it may deprive the agency of needed flexibility or that it may result in the judge (who is not a child welfare specialist) attempting to micromanage the caseworker (who is). These are legitimate concerns. The judge may be able to alleviate some of those concerns by clearly communicating the judge's intentions and expectations to the participants and by using a cooperative problem-solving approach to case planning. Concerns about flexibility can also be met through regular and timely review hearings, discussed in Chapter VIII (Review Hearings), below.

[70] Information about the Boise field office of Casey Family Programs is available at http://www.casey.org/FriendsAndFamilies/Communities/CaseyOffices/Boise/default.htm

Drug and alcohol abuse is a frequent issue in child protection cases. A case plan that states that the parent will participate in drug or alcohol treatment is not sufficient. It is essential to identify the treatment provider, the treatment schedule, how the costs of treatment will be paid, and transportation for the parent, if necessary. Omission of these details can leave the door open for too many excuses for a parent's failure to complete treatment or for the agency's failure to provide treatment services.

e. Whether the reunification plan includes appropriate terms for visitation and child support

To maintain the parent-child relationship while efforts at reunification proceed, it is important that the child have the opportunity for regular and meaningful contact with the parent. It is equally important that visitation include appropriate terms and conditions, to protect the child's safety, and to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid undue disruption of the child's foster placement.

The plan should set forth provisions as to the frequency, duration, location, or other terms of visitation. Depending on the circumstances of the case, it may be appropriate to require supervised visitation, including therapeutic supervised visitation (in which a parenting skills counselor assists the parent in properly interacting with the child during visitation).

Parents who are able to pay should be expected to help cover the costs of foster care, and the amount and frequency of child support payments should be addressed in the case plan. The court should take care to avoid financial burdens that interfere with family reunification. Particularly inexpedient are delays in setting support followed by retroactive lump sum support orders. These often make it impossible for parents to maintain or to obtain residential living situations in preparation for the child's return home.

f. What further efforts are needed to address any element of the case plan?

Of course, the court should not simply determine whether the plan includes every appropriate component or whether it includes appropriate provisions in each component. To the extent the plan is inadequate in any respect, the court should either modify the plan or reject the plan and identify the respects in which the plan is inadequate. The agency and other participants can be more effective in meeting the judge's expectations if they know what those expectations are.

g. Whether the alternative permanency plan addresses all options for permanent placement of the child

h. Whether the alternative permanency plan assesses the advantages and disadvantages of each option in light of the child's best interests

i. Whether the recommended option is in the child's best interests

j. Whether the alternative permanency plan specifically identifies the actions necessary to implement the recommended option, and deadlines for those actions

k. Whether the permanency plan addresses options for maintaining the child's connection to the community, including individuals with a significant relationship to the child, organizations, or community activities with whom the child has a significant connection

l. What further efforts are necessary to finalize or implement the alternative permanency plan

These decisions regarding the alternative permanency plan are the same as the decisions regarding a permanency plan, which are addressed later in this chapter. Please refer to Part C. 5 for a detailed discussion of these decisions. As noted earlier, it is essential that alternative permanency planning begin as early as possible in proceedings. The alternative permanency plan not only ensures that there is a back-up plan in place if the reunification plan fails, but it promotes the careful selection of a foster placement that will fully meet both the child's short-term needs, in the event reunification is successful, and the child's long-term needs, in the event that reunification is not successful.

m. The time and date for the next hearing, and whether any orders are needed to prepare for the next hearing

Idaho law requires the court to conduct a review hearing no later than six months after entry of the order finding the child to be within the jurisdiction of the Child Protective Act and every six months thereafter, so long as the child is in the custody of the agency.[71] Recommended best practice is to hold review hearings every three months. Recommended best practice is for the court to conduct regular review hearings in all cases where the child is found to be within the jurisdiction of the act, whether the child is placed in the legal custody of the agency or placed under protective supervision of the agency in the child's own home. For more on review hearings, please see Chapter VIII, below.

The court should set the date and time for the review hearing on the record prior to the conclusion of the planning hearing. The court should also enter any orders necessary to ensure that all participants are prepared for the next hearing. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or in county jail or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

8. Submission of Reports to the Court

The case plan is, in effect, the written report of the agency for the planning hearing. The case plan should include all the elements listed in the introduction to this section, in Part B.1. The court may also require the guardian *ad litem* to prepare a report for the planning hearing, to address in writing all or part of the issues to be addressed at the case plan hearing.[72] If the court requires the guardian *ad litem* to prepare a written report, recommended best practice is to require the guardian *ad litem* to file and serve copies of the report on the parties at least five days prior to the hearing. If the court intends to require a written report of the guardian *ad litem* at the planning hearing, the order for the report should be entered at the adjudicatory hearing.

[71] Idaho Code § 16-1623(3).
[72] *See* Idaho Code § 16-1634.

9. The Court's Written Findings of Fact, Conclusions of Law, and Order at the Planning Hearing

The court should make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can by sharply reduced by incorporating well-prepared reports submitted by the agency or other participants. Once a plan is approved, or approved with modifications, the court must enter an order incorporating the plan and directing all participants to comply with the plan.[73] It is particularly important that the written findings, conclusions, and order include the following:

- If any necessary parties were not present, a finding that proper notice was given.
- An order approving the case plan and ordering the participants to comply with the plan; an order modifying the case plan and ordering the parties to comply with the plan as modified; or an order rejecting the case plan and ordering the preparation and filing of a new plan by a specified date, with findings as to the defects to be remedied in the new plan.
- An order scheduling the next hearing and any other orders necessary to prepare for the next hearing.

At the conclusion of the hearing, the court should advise both the parents and the agency of the consequences for failure to comply with the case plan, including the following:

- Warn the parents and the agency that failure to comply with the plan is subject to contempt, including the potential penalties for contempt.
- Warn the parents that failure to comply with the plan could result in the filing of a petition to terminate parental rights.
- Warn the agency that failure to comply with the plan could result in a finding that the agency failed to make reasonable efforts to reunify the family or to finalize a permanent placement for the child.

10. Conclusion

The case plan is **fundamental** to the child protection process. It provides the framework for analyzing what needs to be done, when it needs to be done, and by whom it needs to be done. It provides the road map to either a safe and timely reunification of the child and the family or to the safe and timely permanent placement of the child with a new family. It sets the benchmark against which future progress will be measured, and it provides the primary mechanism for holding the parents and the agency accountable.

[73] Idaho Code § 16-1621(4).

Chapter VII: The Permanency Plan and Permanency Hearing

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Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. The Permanency Plan and the Permanency Hearing

1. Cases Where Aggravated Circumstances Are Found

At the adjudicatory hearing, if the court finds that the child comes within the jurisdiction of the Child Protective Act, and if aggravated circumstances are found, then reasonable efforts to reunify the child with its parents are not required. The court must hold a permanency hearing within 30 days of the adjudicatory hearing, and the agency must file a written permanency plan at least five days prior to the permanency hearing. At the permanency hearing, the court decides whether to approve, modify, or reject the plan.[1]

The most important and most obvious function of the permanency plan is its planning function. The permanency plan provides the road map for resolving the case—for providing the child with a new and permanent family, in as timely a manner as possible. Formulation of the plan requires the agency to systematically analyze the child's needs, the options for the child's placement, and

[1] Idaho Code §§ 16-162; IJR 44.

the advantages and disadvantages of the placement options in light of the child's needs. The requirements for filing a written plan prior to the hearing, the hearing, and court approval of the plan promote systematic analysis of the issues and options by all participants, their attorneys, and the judge. Careful planning is an essential prerequisite to successfully resolving the case and successfully protecting the interests of the child. Careful planning includes diligent investigation and implementation and appropriate modification based on new information or changed circumstances.

An equally important but less obvious function of the permanency plan is its enforcement function. The permanency plan provides the benchmark for objectively measuring the agency's progress toward completing the plan, and it is the primary mechanism for holding the agency accountable. If the court-ordered plan is specific as to the agency's responsibilities, and the agency does not comply, then it makes contempt sanctions available. It also provides a record for a finding that the agency has not made reasonable efforts to finalize a permanent placement for the child, which in turn affects the federal funding available to the agency.

The permanency plan should:

- Identify the current foster care placement for the child, including a statement of why that placement is the least disruptive environment and most family-like setting that meets the needs of the child. (Where the parent has subjected the child to aggravated circumstances, it may be appropriate, for the safety of the child and the foster family, to keep the identity of the foster family confidential. In such instances, the plan should sufficiently describe the nature of the foster case placement to enable the court to assess whether the placement is the least disruptive environment and most family-like setting for the child.)
- Identify the services to be provided to the child and the foster family, including services to identify and meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, or to ensure the stability of the placement.
- Identify terms for visitation, supervision of visitation, and child support, where appropriate.
- Address all options for permanent placement of the child.
- Assess the advantages and disadvantages of each option, in light of the child's best interests.
- Include recommendations as to which option is in the child's best interests.
- Specifically identify the actions necessary to implement the recommended option and deadlines for those actions.
- Address options for maintaining the child's connection to the community, including individuals with a significant relationship to the child, organizations, or community activities with whom the child has a significant connection.
- Identify further efforts necessary to finalize or implement the plan.

2. Cases Where Aggravated Circumstances Are Not Found

At the adjudicatory hearing, if the court finds that the child comes within the jurisdiction of the Child Protective Act, and if the court does not find aggravated circumstances, then the next step in the case is the planning hearing. IDHW must file a written case plan with the court that includes both a reunification plan and an alternative permanency plan. At the case plan hearing,

the court decides whether to approve, modify, or reject the plan.[2] Once the case plan is approved, the court must hold regular review hearings, where the court reviews the status of the case and the case plan and where the court may enter orders as necessary to ensure the parties' progress on all aspects of the case plan.[3]

If the child continues in state custody, then both state and federal law set deadlines for a permanency hearing. State law requires that a permanency hearing be held within one year from the date the child is removed from the home or the date the child is found to be within the jurisdiction of the CPA, whichever occurs first. The permanency hearing can be combined with the review hearing.[4]

Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter. The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first. If the deadline for the hearing is not met, the child may lose eligibility for federal funds. Eligibility may be reinstated once the federal requirements are met.[5]

The functions of the review hearing and the permanency hearing overlap somewhat. The case plan is itself a permanency plan, intended to achieve either the permanent reunification of the child with the family or an alternative permanent placement for the child. The purpose of the case plan is to set deadlines for achieving the overall goal of permanent placement, as well as deadlines for the specific tasks necessary to achieve that goal. One of the purposes of the review hearing is to assess the parties' progress on the plan, to enter orders as necessary to ensure the parties' progress on the plan, and to modify the plan as appropriate.

At the permanency hearing, however, the emphasis is more on the time deadlines. The purpose of a child protection proceeding is not only to achieve permanency for the child, but to achieve permanency in as timely a manner as possible. The key function of the permanency hearing is to set a deadline for determining the permanent placement of the child, to determine the permanent placement of the child, and to set a deadline for implementing that placement.

At the permanency hearing, the judge should decide whether a child should be permanently returned home. In most cases, either the child will have been returned home (either with or without agency supervision) by the time of the permanency hearing or efforts to return the child home should cease. In some cases, however, where a family has made substantial progress but the issues have not been fully resolved, reunification may be designated as the permanent plan for the child, with a specific date for the child to return home (either with or without agency supervision) within a short time after the permanency hearing.

In some cases, it is appropriate to schedule permanency planning hearings well before statutory deadlines. Statutory deadlines should be seen as the maximum, rather than standard, deadliines.

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[2] Idaho Code § 16-1621; IJR 44. The case plan and hearing are discussed in more detail earlier in Chapter VI.

[3] Idaho Code §16-1622; IJR 45. Review Hearings are discussed in detail in Chapter VIII of this Manual.

[4] Idaho Code §16-1622.

[5] 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).

For example, where both parents are persistently uncooperative in spite of diligent agency efforts to help them and where there has been no discernable progress within the first six months of placement, an early permanency planning hearing is appropriate. In some cases, a permanency planning hearing is appropriate even sooner.

When the agency does little to assist the family prior to the permanency planning hearing, the permanency planning hearing should not be allowed to function as an ordinary review hearing. Rather, the court should hold frequent review hearings and, when necessary, compel timely agency action to help the family while it is still practical.

3. Timing of the Hearing

In cases where aggravated circumstances were found at the adjudicatory hearing, state law requires the court to hold a permanency hearing within 30 days of the adjudicatory hearing. In cases were aggravated circumstances were not found at the adjudicatory hearing, state law requires that a permanency hearing be held within one year from the date the child is removed from the home or from the date of the adjudicatory hearing, whichever occurs first.[6]

Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter. The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first. If the deadline is not met, the child may lose eligibility for federal funds. Eligibility may be reinstated once the federal requirements are met.[7]

These deadlines should be seen as maximum, rather than standard, deadlines. A case may move to the permanency hearing whenever it is clear that reasonable efforts to reunify need no longer be made.

As in all child protective proceedings, the court should have a “just say no” policy on continuances. If a continuance is necessary, it should be for a short period of time, and the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

4. Agreements by the Parties

The parties may wish to submit a stipulated permanency plan at the permanency hearing. The Idaho Juvenile Rules require that stipulations be made part of the court record and that they areto be subject to court approval. The court may enter orders and decrees based on stipulations only after making reasonable inquiry to confirm that the parties have entered into the stipulation knowingly and voluntarily, that the stipulation is based on fact, and that the stipulation is in the child’s best interests.[8]

The court should ensure that the permanency plan has been thoroughly considered by all participants, including both parents, if involved. The court should ensure that the stipulated permanency plan is comprehensive and that it addresses all the essential elements of a

[6] Idaho Code §§ 16-1619(6)(d), 16-1620.
[7] 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(d).
[8] IJR 38.

permanency plan. The essential elements of a permanency plan are described earlier in this chapter, in Part A.1. If the stipulated case plan is not comprehensive, the court should address any omitted elements. The court might also adjourn the hearing for a short time (such as one day) to give the parties time to address the omitted elements.

For example, a permanency plan that simply states that the parties agree that long-term guardianship with a particular relative is the permanency plan, is insufficient in several respects:

- It does not provide a factual basis for a determination that this option is in the child's best interests – such as why the more permanent option, termination of parental rights and adoption, is either not available or not in the best interests of the child, or whether the relative is able and willing to provide a permanent home for the child.
- It does not provide a factual basis for a case-specific finding that the agency made reasonable efforts to finalize the permanency plan.
- It does not provide a plan, with the specific actions necessary to implement the proposed option and deadlines for those actions, to ensure that the permanent placement is finalized in a timely manner.
- It does not address whether the child has any special needs, or the services to be provided to meet those needs, while the child is in foster care pending the finalization of the permanent placement.

5. Who Should Be Present

Persons who should always be present at the permanency hearing:

- Judge
- Parents whose rights have not been terminated, including putative fathers
- Age-appropriate children
- Indian custodian, the child's tribe, and attorney, if applicable
- Foster parents
- Assigned caseworker
- Prosecutor or deputy attorney general
- Attorney for parents (separate attorneys if conflict warrants)
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter or suitable technology
- Security personnel
- Interpreter(s), if applicable

a. Judge

It is important that permanency hearings are conducted by the same judge who hears other stages of the proceedings. The involvement of one judge creates consistency in the directions given to the family and to the agency, avoids rehashing old arguments, and allows the judge or judicial officer who presides over the permanency hearing to be thoroughly familiar with the facts presented at previous hearings.

b. Parents whose rights have not been terminated, including putative fathers

Parents can provide the court with information that is important to the successful development and implementation of the permanency plan. Even if aggravated circumstances have been found, and no efforts are to be made toward reunification, their participation can be important to the planning process. Until their parental rights are terminated, they have the right to participate in the permanency hearing.

c. Age-appropriate children

Children should be present at some point during the hearing to give the judge the opportunity to observe them. Age-appropriate children can provide the court with information as to their perception of their needs, interests, and concerns. Older children will often have questions regarding their circumstances and their future. Their questions may be answered at the permanency hearing, and the opportunity to participate may allow the child a greater sense of self-determination. A court may choose to have children present only during portions of a hearing. Special circumstances may infrequently justify the absence of children from an entire hearing.

d. Indian custodian, child's tribe, and attorney, if applicable

An Indian child's tribe has the right to notice and the opportunity to participate in all hearings concerning the child.[9] For Indian children, the tribe often has information regarding the child and family that is critical to assisting the court in good decision-making regarding the child.

e. Foster parents

Foster parents who care for and observe children on a daily basis are often in the best position to describe the present status of a child. Foster parents should be present both to make this information available to the judge and to give the judge the opportunity to observe the foster parents.

Idaho law requires the foster parents to be given notice of the case plan hearing, but specifically provides that they are not parties to the action.[10] Because the permanency hearing is part of the planning process, foster parents should be given notice of the permanency hearing as well as the case plan hearing.

f. Assigned caseworker

The caseworker with primary responsibility for the case must be present to provide the court with complete, accurate, and up-to-date information at the hearing. Judges should not continue or delay a review hearing due to lack of information or case involvement by a caseworker. When important facts are not known, the hearing should be reset for an early date, and, if necessary, appropriate subpoenas should be issued.

g. Prosecutor or deputy attorney general

It is important that the IDHW have effective representation at the hearing as the court's decisions concerning the permanency plan are crucial to its success. Important information is elicited at the permanency hearing, and the record established at that time can be critical to later case outcomes; an attorney is needed to help develop the record and to note important evidence. The agency attorney can further help the case to progress by moving for court-ordered evaluations, excluding a perpetrator from a household, or obtaining information important to the case. Depending on the jurisdiction, the agency may be represented by the county prosecutor or the state attorney general.[11]

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[9] ICWA, 25 U.S.C. §§ 1912(a), 1911(c). *See* Chapter XI of this Manual.

[10] Idaho Code §16-1621(2).

[11] Idaho Code §16-1610.

h. Attorneys for parents (separate attorneys, if conflict warrants)

The presence of the parents' attorney at the permanency hearing is vital to make sure that the agency is carrying out its responsibility to assist the parents. The attorney needs to correct the record to avoid negative or inaccurate information about the parents. The attorney needs to make sure that the parents' interests and views are taken into account in all decisions regarding the permanency plan, including placement, visitation (where appropriate), and services.

i. Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child

A well-trained legal advocate for the guardian *ad litem* and/or the child must be present to make sure that the child's interests are being protected and are not being subordinated to the organizational needs of the agency or to the convenience of agency personnel. The advocate also needs to ensure that the views of children are considered by the court.[12]

j. Court reporter or suitable technology, security personnel, interpreter

As in other stages of the hearing process, these staffing and equipment resources should be available for all permanency hearings. If a parent or other essential participant is not fluent in English, a qualified interpreter must be present.

k. Persons whose presence may also be needed at the permanency hearing:

- Extended family members
- Other custodial adults (such as a representative from a residential facility where a child is placed)
- Prospective adoptive parents (if other than the foster parents)
- Adult or juvenile probation officer or parole officer
- Service providers
- School officials
- Other witnesses

Extended family members, service providers, and others who work with the family can provide valuable information and recommendations to the court, and it can be helpful for all persons who are involved with the child to meet with each other. However, their presence may be needed only if they will play a role in the permanency plan or if their testimony is needed on a disputed issue.

6. Key Decisions the Court Should Make at the Permanency Hearing

The essential decision the court must make at the permanency hearing is whether to approve, modify, or reject the permanency plan. To make that decision, the court should decide the following.

[12] *See* Idaho Code §16-1614, which provides for appointment of a guardian ad litem for the child, appointment of an attorney for the guardian ad litem, and/or appointment of an attorney for the child.

a. Whether the current foster care placement is the least disruptive and most family-like setting that meets the needs of the child

If a child will not be permanently reunified with his or her parents, the child's foster family placement will ideally become the child's permanent placement. It is therefore essential to assess the foster care placement both in terms of the child's immediate needs and the child's long-term needs.

Placement with an individual or couple who already has a positive relationship with the child helps to provide the child with a greater sense of safety, security, and continuity. The extended family is the most likely, but not the only, source for such individuals or couples. Placement with a family member may also offer the opportunity for an agreed-upon solution to the problem, as a parent may be willing to stipulate to placement of the child if the parent knows the child will be with a family member.

There can, however, be problems with the placement of a child with a family member. First, because of the family member's relationship to the parent, and given the sometimes intergenerational aspects of neglect and abuse, the family member may unduly minimize the extent or the effects of the abuse or neglect, may be partly or primarily motivated by a desire to protect the parent from governmental intervention, or may also have a history of abusing or neglecting children.

Second, the family member may underestimate the potential difficulties in providing a home for the child, particularly since an abused or neglected child will likely have emotional, developmental, or behavioral problems that do not simply disappear when the child is removed from the abusive or neglectful parent. The family member may later seek to withdraw as a foster parent when unanticipated problems become apparent, creating further trauma for the child.

The court should make careful inquiry of the family member with whom the child will be living, ensuring that the family member understands the nature and extent of the commitment the family member is making. In addition, the process of licensing the family member as a foster care provider should assist in addressing these potential problems.

There is a preference for keeping siblings together. A child who has been removed from his or her parents should not also suffer the loss of being separated from brothers and sisters. If siblings can't be placed together, then the plan should address the provisions that will be made so that the siblings can maintain contact with each other. Separate placement of siblings may be necessary where one sibling is a juvenile offender and the other children are at risk of harm from the juvenile.

ICWA has detailed provisions governing preferences for both foster and adoptive placement of Indian children. Priority is given to members of the child's extended family, other members of the child's Indian tribe, or placements given priority by the child's Indian tribe.[13] One of the purposes of ICWA is to recognize the unique relationship between the United States and the

[13] 42 U.S.C. §1915.

Indian tribes;[14] another purpose is to enable the child to develop and/or maintain the child's ties to his or her cultural heritage.[15] ICWA is discussed in detail in Chapter XI of this Manual.

Issues of race, ethnicity, and national and cultural heritage in foster and adoptive placements are highly controversial. ICWA establishes preferences for placement of Indian children with Indian families. There is no law establishing similar preferences for other groups. The Multiethnic Placement Act of 1994, as amended, points the other way; it limits the extent to which race, ethnicity, national, or cultural heritage may be considered in placement decisions.[16] The purpose of that Act was to remove barriers to permanency by prohibiting discrimination against children or prospective parents based on race or national origin. Specifically, the Act sought to do away with the practice of "race-matching," which resulted in large numbers of children spending long periods of time in foster care, waiting for prospective adoptive parents of the same race.

Ultimately, the resolution in any case will depend on the individual circumstances of that case. Although preferences may provide useful tools for analysis, the successful placement of the child ultimately depends on thorough efforts to identify all possible placements and thorough assessment of the advantages and disadvantages of each placement based on the child's individual needs. *IDHW has a best practices manual that identifies the long-term interests of the child and the many considerations involved.*

When the court places a child in the custody of the agency, state law vests authority for the placement decision in the agency, subject to review by the court.[17] Federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.[18] It is unclear whether the child will lose eligibility for federal funds if the court orders a particular placement for a child when custody of the child is vested in the agency.

Presumably the child would not lose eligibility if the placement were a contested issue and the court determined the issue based on evidence in the record or on a reasonable agreement of the parties. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[19] The court can also require the agency to include the child's foster care placement in the permanency plan and can then reject a plan that includes an inappropriate placement.

The plan should address the options for maintaining the child's ties to family, friends, or organizations that have a significant role in the child's life. The child's placement may afford the means for maintaining these significant connections. If not, then other means to maintain the child's significant connections should be explored and identified.

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[14] 42 U.S.C. §1901.
[15] 25 U.S.C. §1902.
[16] 42 U.S.C. §§ 1996(b). MEPA is discussed in Chapter X of this Manual dealing with adoption.
[17] Idaho Code §15-1629(8).
[18] *See* 45 C.F.R. 1356.71(d)(1).
[19] See question and answer no. 13 at www.acf.dhhs.gov/programs/cb/laws/qsett1.htm .

b. Whether the plan specifically identifies the services to be provided to the child and/or the foster family

The agency should assess whether the child has any special needs and identify the services to be provided to address those needs. For example, the child may have special emotional, physical, educational or developmental needs. The court should inquire whether evaluations need to be performed by medical health professionals, mental health professionals, or child development specialists to determine whether the child has special needs and what services are available to address those needs. The child may also have behavioral problems as a result of the parents' abuse or neglect or may need services to assist in adjusting to a new home. The child may have delinquency issues, and the plan may need to incorporate measures for agency personnel to coordinate with the child's juvenile probation officer or a representative from the juvenile corrections agency.

In investigating the resources available to meet the child's needs, efforts should be made to identify all the potential sources of services or assistance, including other programs available through the same agency, programs available through other agencies, or programs available through private foundations. Resources available from other agencies or private foundations are often overlooked. For example:

- When the child reaches age 15½ , IDHW is required to assess the child for independent living skills and special programs available under the independent living grant money that IDHW administers.[20]
- A child with developmental disabilities qualifies for numerous services funded by Medicaid. The Adult and Child Development Centers offer services for developmentally disabled children and adults. [21]
- Children with developmental disabilities and children approaching the age of 18 may qualify for services from the Division of Vocational Rehabilitation, part of the Idaho Department of Education.[22]
- The Casey Program is a private foundation in Idaho, operating primarily in Ada County. In addition to providing adoptive and temporary homes for teenagers and services for Casey families, the program also provides resources to other children in foster care.[23]

The agency should also address services to be made available to the foster parents. Just as the child may need assistance in adjusting to a new home, the foster family may need assistance in adjusting to a new member in the home. The foster parents pay need education or counseling as to the effects of abandonment, abuse, and neglect to deal with the problem behaviors that can arise and to assist the child in emotional healing and in adjusting to a new home. If the child has special needs, the foster parents may need assistance in obtaining information, skills, or services to assist them in meeting those needs.

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[20] Idaho Admin. Code § 16.06.01.030(10).
[21] *See, e.g.*, Idaho Admin Code § 16-04.11.010 *et seq*.
[22] *See* Idaho Admin. Code § 47.01.01.700 *et seq*.
[23] Information about the Boise field office of Casey Family Programs is available at http://www.casey.org/FriendsAndFamilies/Communities/CaseyOffices/Boise/default.htm.

c. Whether the plan includes appropriate terms for visitation and child support, if appropriate

To the extent that maintaining the relationship is in the child's best interests and is consistent with the permanent plan for the child, it is important that the child have the opportunity for regular and meaningful contact with the parent, . It is equally important that visitation include appropriate terms and conditions to protect the child's safety, to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid disruption of the child's foster care placement.

The plan should set forth provisions as to the frequency, duration, location, supervision, or other terms or conditions of visitation. Parents who are able to pay should be expected to help cover the costs of foster care, and the amount and frequency of child support should be addressed in the permanency plan.

d. Whether the permanency plan addresses all options for permanent placement of the child

The options for permanency fall into the following general categories: reunification with the parents, adoption and termination of parental rights, long-term guardianship, and long-term foster care. In addition to addressing these general options, the plan should address specific options within each category. For example, with respect to termination of parental rights and adoption, the plan should include an assessment of each potential adoptive family.

i. Reunification

The most preferred option for permanency is the safe and permanent reunification of the child with its parents. The preference for reunification is embodied in the requirement that the agency must make reasonable efforts to reunify the child with the family, unless the court finds that the parent(s) subjected the child to aggravated circumstances.[24]

If the court has found aggravated circumstances, then the permanency plan will not include reunification as an option. If the court did not find aggravated circumstances at the adjudicatory hearing, then by the time of the permanency hearing, in most cases the child will either have been returned home or efforts to return the child home should have ceased.

In some cases, it may be appropriate to approve an extended period of foster care for a specific time, with a continued plan of reunification. This may be an appropriate plan where:

- the parent has made substantial progress toward reunification,
- the parent has maintained a close and positive relationship with the child, and
- it is likely that the child can safely return home in the near future.

In such cases, the court should carefully review the progress the parties have made in resolving the issues identified in the case plan. The court should carefully specify the further efforts necessary to fully resolve the issues, including the specific actions to be completed by the parties (short deadlines for their completion) to avoid repeated decisions to leave a child in foster care with a goal of reunification.

[24] Idaho Code §16-1608(6)(d). The determination of aggravated circumstances would normally be made at the adjudicatory hearing.

ii. Termination of parental rights and adoption

The second preferred option for permanency is termination of parental rights and adoption. The goal of permanency is to provide the child with a family relationship that will last throughout the child's life, with full and permanent responsibility to the new parents that is legally secure from modification and without ongoing state intervention and/or monitoring.

Termination of parental rights is the second-most preferred option because it meets all the goals of permanency. In addition, adoption subsidy benefits are available to assist the adoptive parents and to meet the child's needs.

The preference for termination of parental rights and adoption is embodied in two provisions of state law:

- Where the parent subjected the child to aggravated circumstances or where the child is an abandoned infant, the state is required to file a petition to terminate parental rights unless there are compelling reasons why it would not be in the child's best interests.[25]
- Where a child has been in the custody of the agency for 15 of the last 22 months, the state is required to file a petition to terminate parental rights, unless the court finds that it is not in the best interests of the child, that reasonable efforts have not been provided to reunite the child with its parents, or the child is placed permanently with a relative.[26]

In determining whether the plan identifies all the options for permanent placement, the court should inquire as to the efforts the agency has made to identify and assess potential adoptive parents, including both relatives and non-relatives, both locally and in other jurisdictions. There is a preference for placement with family members, and among family members, there is a preference for those who already have a positive relationship with the child. The ultimate criteria, nonetheless, remains the child's best interests, so the preference for a family member can be outweighed by other factors.

Adoption should not be quickly dismissed simply because a child is older or has special needs. Adoption subsidies, compacts for interstate placements, and other programs, including programs specifically for older children and special needs children, have greatly increased the number of families who are both willing and able to provide a safe home and a loving family for an older child or a special needs child. *With rare exceptions, there should no longer be children labeled "unadoptable."*

"Adoption with contact" can be an option in some cases. Adoption with contact may be the practical result where the child is adopted by a family member. In other cases, a voluntary agreement between the adoptive parents and the birth parents for post-adoption contact may promote an agreed-upon resolution of the case and be in the best interests of the child. A post-adoption contact agreement is purely voluntary and rarely enforceable in court. Despite this

[25] Idaho Code §16-1624.
[26] Idaho Code §16-1629(9).

uncertainty, voluntary arrangements for post-adoption contact may be a good solution in some cases.[27]

Post-adoption contact agreements are more likely to be of benefit in situations where there is a substantial degree of mutual trust between the birth parents and the adoptive parents. The contract should specifically provide that any rights the parent(s) may have under the contract are based solely on the contract and not on the continued existence of any parental rights and that the adoption is irrevocable, even if the post-adoption contact agreement is violated, modified, or set aside.

iii. Guardianship

The third option for permanent placement is long-term guardianship. In appropriate circumstances, guardianship can have several advantages over termination of parental rights and adoption.

First, guardianship does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, or Social Security. Second, a guardianship is flexible. The order appointing the guardian can include whatever provisions are appropriate for the child to have continuing contact with either or both parents (to the extent that continuing contact is in the child's best interests) and can readily be modified as circumstances change.

Finally, guardianship may thus offer the potential for an agreed-upon solution that has the active support of all parties and avoids contested termination proceedings. For example:

- A parent might be threatened by the loss of the sense of identify from having his or her parental rights terminated, yet at the same time be unable or unwilling to actually fulfill the role of a parent. If the threat to the parent's sense of identity is removed, the parent may be supportive of an alternative arrangement that allows the child to develop a parental relationship with the guardian.
- A family member may be committed to providing the child with a parental relationship through guardianship, but may object to adoption, feeling that the guardian's responsibility already arises through the family relationship without the need for termination and adoption.
- The potential guardian may be willing to take on the challenge of a troubled child, but not willing to take the risk of financial responsibility for the child's negligent or criminal actions.
- An older child may object to adoption and may rebel against an adoptive placement, but may accept the same placement if it is in the form of a guardianship.

Guardianship also has significant disadvantages. Most importantly, guardianship fails to achieve most of the aspects of permanency. As previously discussed, the goal of permanency is to provide the child with a family relationship that will last throughout the child's life, and will vest full and permanent responsibility to the new caregiver without ongoing state intervention and/or monitoring. Guardianship automatically terminates when the child reaches majority, and in

[27] *See* ADOPTION 2000: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN (U.S. Department of Health and Human Services, June 1999).

some instances before. Guardianship is subject to modification at any time, which can also make it subject to repeated litigation. It is also subject to ongoing monitoring until the guardianship is terminated.

Although guardianship may offer the potential for settlement, it is too often used as a quick and easy means to settlement, and the placement does not receive the careful scrutiny necessary to ensure that the placement is in the child's best interests. For example, although relative placements are generally favored, guardianship by a relative should receive the same scrutiny as adoption by a non-relative. Because of the proposed guardian's relationship to the parent, and given the sometimes intergenerational aspects of neglect and abuse, the relative may unduly minimize the extent or effects of the abuse or neglect, may be partly or primarily motivated by a desire to protect the parent from governmental intervention, or may also have a history of abusing or neglecting children.

In addition, a person who is willing to undertake guardianship but is not willing to undertake adoption may be underestimating the responsibilities of guardianship, sometimes with damaging consequences for the child. A guardian may not be fully aware of the difficulties, particularly since an abused or neglected child is likely to have emotional, developmental, or behavioral problems that do not simply disappear when the child is removed from the abusive or neglectful parent. The guardian may later seek to resign when unanticipated problems become apparent. A well-meaning but ill-prepared guardian who decides he or she no longer wants the child will exacerbate the child's feelings of rejection and further contribute to the child's emotional, developmental, or behavioral problems.

The financial benefits or assistance that are available in adoption are **not** available in guardianship. The adoption subsidies that are available to assist adoptive families and special needs children are not available in guardianships. Most insurance policies that will cover a guardian's biological or adoptive child, such as medical or life insurance policies, will not cover a ward.

Finally, the guardian is appointed in a proceeding separate from the child protection proceeding, and many of the protections available in CPA cases are not available in guardianship proceedings. The parents do not have the right to court-appointed counsel. The child does not have the right to a court-appointed guardian *ad litem*. The services of the agency and the guardian *ad litem* are not available to monitor the child's welfare while in the care of the guardian, or to find a new placement for the child if the guardian resigns, both of which may be necessary in some circumstances. Services may not be available to assist the guardian or the child, except to the extent the guardian or child qualifies under other programs independent of the CPA proceedings. In some cases, such services may be appropriate or necessary to ensure the success of the placement, particularly where the child has special needs and the guardian has limited resources.

Before guardianship is selected as the placement for the child, the parties and the court should thoroughly explore termination of parental rights and adoption as an option. The appropriateness of a proposed guardian should be scrutinized as carefully as proposed adoptive parents. The court should ensure through careful inquiry that both the parents and the guardian understand

that upon appointment, the guardian will be undertaking a responsibility that is intended to be as permanent and complete as parental responsibilities, subject only to the rights that are reserved to the parents under the guardianship statute or in the order appointing the guardians.

If guardianship is selected, the court should make findings as to why a guardianship is more appropriate for the needs of this child than termination of parental rights and adoption. If the child has not previously resided with the guardian for a substantial period of time, the court may keep the CPA case open and schedule a further review hearing to ensure that the placement will be successful and to maintain jurisdiction of the case in the event the placement is not successful.

iv. Long-term foster care

Long-term foster care is the least preferred option for permanent placement, and the situations in which it is appropriate are limited. Long-term foster care may include placement with a foster family, a group home, or a residential facility. The court must find compelling reasons for approving long-term foster care as the permanent placement for the child. There are three types of situations in which long-term foster care is likely to be the best or only option.

The first situation is where the child is a violent juvenile offender or a juvenile sex offender. In these cases, even if a willing family could be found, placement of the child in a family setting may place the other family members at risk. In such cases, the permanency plan should include provisions for coordination with personnel from the juvenile corrections agency and for rehabilitation of the juvenile in a secure residential setting, in the hope that the child may later be able to function outside an institutional setting.

The second situation is where the child has such serious and chronic disabilities that the child cannot function in a family setting or requires more care than can be provided in a family setting. The permanency plan should include provisions for services to address the child's special needs, particularly those needs that may enable the child to someday function in a more family-like setting. Even if the child cannot currently function in a family setting, the agency should seek a family who will visit the child and open their home to visits from the child.

The third situation is where long-term care is part of a transitional living situation to prepare a youth for adulthood. Where long-term foster care with emancipation is the proposed permanency plan, the court should examine why long-term foster care is the most appropriate way of preparing the youth for adulthood and maintaining family ties.

A child should not, however, be left in foster care simply because a child is older or has special needs. Adoption subsidies, compacts for interstate placements, and other programs, including programs specifically for older children and special needs children, have greatly increased the number of families who are both willing and able to provide a safe home and a loving family for an older child or a special needs child. *With rare exceptions, there should no longer be children labeled "unadoptable."*

If long-term foster care will be the permanent plan for the child, the permanency hearing should be followed by frequent review hearings to ensure that appropriate services are provided to the

child and to determine if circumstances have changed sufficiently so as to allow the child to function in a family setting. Review hearings are discussed in Chapter VIII, below.

e. Whether the plan assesses the advantages and disadvantages of each option, in light of the child's best interests

The ultimate standard for selecting the permanent placement for the child is the child's best interests. The purpose of permanency planning is to systematically identify the options and select the option that is in the child's best interests. The purpose of the written permanency plan is to promote systematic analysis by all participants. The permanency plan should therefore include an assessment of the advantages and disadvantages of each option, in light of the child's best interests.

f. Whether the recommended option for permanent placement of the child is in the child's best interests

If the proposed permanent placement for the child is a short extension of foster care with a permanent plan of reunification, the court should ask, and the participants should answer the following questions:

g. How has each of the issues identified in the case plan been resolved?

h. How often is visitation occurring, and what is the impact on the child?

i. What is the date for the child's return home and the detailed plan for supervision after the child is returned home?

j. What services are to be provided to the child and the family after the child returns home? In what services will the parents be required to participate?

k. Why is this plan in the best interests of the child?

Ideally, as the efforts of the parents and the agency resolve the issues identified in the case plan, state intervention should be "stepped down" —from placing the child in the legal custody of the agency, to placement in the child's home subject to agency supervision, to allowing the child to remain in the home without agency supervision, and finally to closing the case. The case should not be "dropped down" from placing the child in the legal custody of the agency to returning the child home and immediately closing the case.

Continued agency supervision after the child is returned home is necessary to ensure that reunification is successful and to avoid the "revolving door" phenomena. The revolving door is where a child is returned home and a case is closed, only to have a new petition filed when the child is again subjected to parental neglect or abuse. It may be appropriate to place conditions that must be satisfied for the child to remain in the home, such as home inspections, drug testing, or continued participation in counseling or other services. It may also be appropriate to "transition" the child's return home with longer or more frequent visitations prior to the permanent return home.

i. Special concerns if proposed permanent placement is TPR and adoption

If the proposed permanent placement of the child is termination of parental rights and adoption, the court should ask, and the participants should answer, the following questions:

- What are the facts and circumstances supporting grounds for termination of parental rights?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were these efforts reasonable?
- Why is this plan in the best interests of the child?
- Has the petition to terminate parental rights been filed, and if not, by what date will it be filed?
- Are there relatives who will adopt the child if termination is granted? If not, why not? Are further efforts needed to identify and assess relatives as potential adoptive parents? If so, what?
- If adoption by a relative is not the plan, is adoption by foster parents the plan? If not, why not?
- Are there other adults with whom the child has or has had a positive relationship, and are they potential adoptive families?
- If an adoptive home must be recruited, what efforts are being made to identify potential adoptive families, both locally and in other jurisdictions?
- Will adoption with contact be recommended? Why or why not?
- If the child is an Indian child, have ICWA requirements been met?
- Does the parent want to relinquish parental rights at this time?

If the parent wants to relinquish parental rights, the court should be prepared to go forward with voluntary termination at the permanency hearing. To voluntarily terminate parental rights, the parent must sign a consent to termination, in the form required by statute, in the presence of the judge.[28] The judge should make careful inquiry to make a record that the consent to termination was signed knowingly and voluntarily. A list of proposed questions for voluntary termination is included at the end of this chapter.

With respect to Indian children, ICWA does not permit the agency to stop making efforts to reunify the child with the family unless the court finds, beyond a reasonable doubt, and including testimony by an expert witness, that continued custody by the parent or Indian custodian will likely result in serious emotional or physical damage to the child. ICWA further requires that efforts to reunify be not only reasonable, but active.[29] As previously noted, ICWA also sets forth detailed provisions for preferences in both the foster and adoptive placement of Indian children.[30] Before any permanent placement of an Indian Child is undertaken by the court, Chapter XI of this Manual regarding ICWA should be consulted.

ii. Special concerns if the proposed permanent placement is guardianship

If the proposed permanent placement of the child is guardianship, the court should ask, and the participants should answer, the following questions:

[28] Idaho Code §16-2005(f).
[29] 25 U.S.C. §1912(f).
[30] 25 U.S.C. 1915.

- What are the facts and circumstances supporting grounds for termination? What are the facts and circumstances refuting the grounds for termination?
- Why is this plan in the best interests of the child? What are the facts and circumstances showing that guardianship is more in the best interests of the child than termination of parental rights and adoption?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were those efforts reasonable?
- What are the facts and circumstances demonstrating that the individual or couple with whom the child is to be placed is the most appropriate to serve as a permanent family to the child?
- Is the child living with the proposed guardian? If not, why not?
- Has there been full disclosure to the proposed guardian of the child's circumstances and special needs?
- What is the detailed plan to ensure that this placement will be stable?
- What are the plans to continue any necessary services to the child or the child's guardian, and how will those services be funded after the guardianship is finalized?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members?
- What financial support will be provided by the birth parents?

Because guardianship does not have the same permanency as termination of parental rights and adoption, the plan to ensure the stability of the placement is an important consideration in determining whether the placement is in the child's best interests. Similarly, because there are subsidies available to adoptive parents that are not available to guardians, the plan for post-guardianship services, including funding those services, is an important consideration in determining whether the placement is in the child's best interests.

iii. Special concerns if the proposed permanent placement is long-term foster care

If the proposed permanent placement of the child is long-term foster care, the court should ask, and the participants should answer, the following questions:

- What are the compelling reasons not to proceed with reunification, termination of parental rights and adoption, or guardianship?
- What is the long-term plan for the care of this child, and why is that plan in the best interests of the child? How will this plan provide stability and permanency for the child?
- Is the child already living in the home that will be the child's long-term placement? If not, why not?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were those efforts reasonable?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members? How often is visitation with the parents occurring, and what is the impact on the child?
- What financial support will be provided by the birth parents?
- If the child is a teenager, what is the plan to prepare the child for independent living?

If the child is a teenager, it is particularly important that the plan identify the independent living services that are to be provided to the child *before the child reaches the age of eighteen*.

Independent living services can be available after the child turns eighteen, but once the child turns eighteen, the court loses jurisdiction and can no longer ensure that the child receives the services.

l. Whether the permanency plan specifically identifies the actions necessary to implement the recommended option and the deadlines for those actions

The permanency plan should not be a bare statement of the intended long-term placement of the child, such as "termination of parental rights and adoption" or "guardianship." The permanency plan should be an actual plan, which specifically identifies the actions necessary to implement the child's permanent placement and the deadlines for those actions. Following the approval of the permanency plan, the court must hold regular review hearings. The detailed plan provides the benchmark for ensuring that the participants make diligent efforts to implement and finalize the child's permanent placement. Review hearings are discussed in Chapter VIII, below.

If the permanency plan will be termination of parental rights and adoption, the plan should include a deadline for filing the termination of parental rights and deadlines for the studies that must be done to finalize an adoption.[31] Because these studies can take some time to complete, *adoption studies should be initiated as early in the process as possible, and the court should monitor the progress on completion of the studies*. The petition to terminate will be filed in the CPA proceedings, so the same judge will be able to monitor the progress of the termination case.

If the permanency plan will be guardianship, the plan should include a deadline for filing the petition for guardianship. If the guardianship proceeding will be filed in the same county as the CPA case, the guardianship case should be assigned to the same judge, and the same judge will be able to monitor the progress of the guardianship case. In some instances, however, the guardianship will then be filed in another jurisdiction in the same state or in a different state. In those cases, the judge in the CPA case should communicate with the judge in the guardianship case to enlist the assistance of the judge in the guardianship case in calendaring the guardianship case as promptly as possible.

m. Whether the permanency plan includes options for maintaining the child's connection to the community

The permanency plan should contain options for maintaining the child's connection to the community, including individuals with a significant relationship to the child, organizations, or community activities with whom the child has a significant connection.

Maintaining connections that are significant to the child is important to the child's sense of safety and security and to the child's ability to adjust to a new placement. Ideally, the child's permanent placement will provide this type of continuity for the child. Maintaining a child's significant connections is one of the reasons for the placement preference for family members or other adults with whom the child has a positive relationship. Sadly, the placement that is in the child's best interests will sometimes result in the severance of some connections that are important to the child. It is therefore essential that the plan identify means to maintain the child's other significant connections.

[31] *See* Idaho Code §16-1506(3).

n. Whether further efforts are needed to finalize or implement the plan, and if so, what efforts

Of course, the court should not simply determine whether the plan includes every appropriate component or whether it includes appropriate provisions in each component. To the extent the plan is inadequate in any respect, the court should either modify the plan or reject the plan and identify the respects in which the plan is inadequate. The agency and other participants can be more effective in meeting the judge's expectations if they know what those expectations are.

★★★Federal Law requires a case-specific documented finding that IDHW made reasonable efforts to finalize the child's permanent placement. If this finding is not made the child's **IV-E funding is jeopardized.**

o. Whether the agency has made reasonable efforts to finalize the permanency plan

The court must make a case-specific finding that the agency made reasonable efforts to finalize the child's permanent placement, and the finding must be documented in the court records. As stressed throughout this Manual, this finding is required by federal and state law. If the findings are not made, the child may lose eligibility for federal funds. Eligibility may be reinstated once the required finding is made.[32] In cases where aggravated circumstances have not been found, reasonable efforts to finalize the child's permanent placement would include reasonable efforts to reunify the family.

The court's consideration of the previous issues will provide the basis for the court's determination of this issue. For example, in assessing the child's options for permanent placement, it will become apparent whether or not the agency has made reasonable efforts to identify and assess potential options for placement; in assessing the plan for implementing the recommended placement, it will become apparent whether or not the agency made reasonable efforts to identify the specific actions necessary to implement the placement and the deadlines for those actions.

There may be instances where the court identifies further efforts to be made by the agency to finalize the permanency plan, such as further investigation to identify or assess potential adoptive families or potential guardians. The fact that further efforts are necessary does not necessarily mean that the agency has failed to make reasonable efforts. For example, the need for further efforts may be the result of new information that was not previously available to the agency or changed circumstances that the agency could not reasonably anticipate and not the result of lack of effort by the agency.

p. The time and date for the next hearing, and whether any orders are needed to prepare for the next hearing

Idaho law requires the court to conduct a review hearing no later than six months after entry of the order finding the child to be within the jurisdiction of the Child Protective Act and every six months thereafter, so long as the child is in the custody of the agency.[33] Recommended best practice is for the court to hold review hearings every three months. Recommended best practice

[32] 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).
[33] Idaho Code §16-162(3).

is for the court to conduct regular review hearings in all cases where the child is found to be within the jurisdiction of the Act, whether the child is in the legal custody of the agency or placed under the protective supervision of the agency in the child's own home. More information regarding review hearings is found in Chapter VIII, below.

The court should set the date and time for the review hearing on the record prior to the conclusion of the permanency hearing. The court should also enter any orders necessary to ensure that all participants are prepared for the next hearing. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or in county jail or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

7. Submission of Reports to the Court

The permanency plan is, in effect, the written report of the agency for the permanency hearing. The permanency plan should include all the elements described in the introduction to this section. The court may also require the guardian *ad litem* to prepare a report for the permanency hearing addressing all or part of the issues to be addressed at the permanency hearing.[34] If the court requires the guardian *ad litem* to file a report, recommended best practice is to require the guardian *ad litem* to file and serve copies of the report on the parties at least five days prior to the hearing. If the court intends to require a written report of the guardian *ad litem* at the permanency hearing, the order for a report should be entered at the hearing where the permanency hearing is scheduled (normally, the adjudicatory hearing, if aggravated circumstances are found, or the review hearing, if aggravated circumstances are not found).

8. The Court's Written Findings of Fact, Conclusions of Law, and Order at the Permanency Hearing

The court should make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support later court actions. As in other stages of the proceedings, the burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or other participants. Once a plan is approved, or approved with modifications, the court should enter an order incorporating the plan and directing all participants to comply with the plan.[35] It is particularly important that the written findings, conclusions, and order include the following.

- If any necessary parties were not present, a finding that proper notice was given.
- An order approving the permanency plan and ordering the participants to comply with the plan; an order modifying the permanency plan and ordering the participants to comply with the plan as modified; or an order rejecting the permanency plan, ordering the preparation and filing or a new plan by a specified date, and with findings as to the defects to be remedied in the new plan.
- A case-specific finding as to whether the agency made reasonable efforts to reunify the family (where aggravated circumstances were not found) and whether the agency made reasonable efforts to finalize a permanency plan. If this finding is not made, the child may lose eligibility for federal funding. Eligibility may be reinstated once the required finding is made.[36]

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[34] *See* Idaho Code §16-1634.
[35] C.f. Idaho Code §16-1621(4).
[36] 25 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).

- A case-specific finding as to why the permanent plan for the child is in the child's best interests.
- If aggravated circumstances were found at the adjudicatory hearing, and if the permanent plan for the child is not termination of parental rights and adoption, case-specific finding as to the compelling reasons why termination of parental rights and adoption is not in the child's best interests.
- If long-term foster care is the permanent plan for the child, a case-specific finding as to the compelling reasons why reunification, termination of parental rights and adoption, or guardianship is not in the best interests of the child.
- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

B. Conclusion

The permanency plan is **essential** to achieving timely permanency for the child. The key function of permanency planning is to promote the systematic investigation and assessment of the child's options for permanent placement, in light of the child's best interests. The key functions of the permanency hearing are to establish a deadline for determining the child's permanent placement, to determine the child's permanent placement, and to determine the plan for implementing that placement. The key functions of the permanency plan are to identify the actions necessary to implement the placement and to set deadlines for those actions. The plan, incorporated in the court's order, sets the benchmark against which future progress will be measured and provides the primary mechanism for holding the participants accountable for their responsibilities in implementing in the plan.

CHAPTER VIII: REVIEW HEARINGS

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Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Introduction

Review hearings are critical to timely completion of case plans and permanency plans.They aid in the timely recognition of those familes for whom reunification will be obtained and in those families for whom, sadly, reunification will not be available (and thus allowing for a timely permanent placement of the child with a new family).

Review hearings are the court proceedings which take place after approval of the case plan or permanency plan and in which the court comprehensively reviews the status of the case. Review is vital to cases involving each child within the court's jurisdiction, whether the child is placed in the custody of IDHW or under the supervision of the IDHW in the child's own home.

If the court did not find that the parents subjected the child to aggravated circumstances,[1] then the original case plan (approved at the case plan hearing included) both a reunification plan and an alternative permanency plan.[2] The case plan and the case plan hearing are discussed in Chapter VI, above.

If the court did find that the parents subjected the child to aggravated circumstances, then a permanency plan was approved at the permanency hearing that does not include reunification.[3] The permanency plan and the permanency hearing are discussed in Chapter VII, above.

[1] Idaho Code § 16-1619(6)(d), discussed in this Manual in Chapter V.
[2] Idaho Code § 16-1621; IJR 44.
[3] Idaho Code § 16-1620; IJR 44.

The reunification component of the case plan should have identified the reasonable efforts that are necessary for the child to safely be returned to the home; the specific tasks to be completed by the parties to address those issues, including services to be provided and deadlines for completing the tasks, and other appropriate details. [4] The permanency plan should have identified the options for other permanent placement of the child, the advantages and disadvantages of the options for placement, recommendations as to the placement that is in the child's best interests, the actions necessary to implement that placement, and deadlines for those actions.[5]

Idaho law requires that the court hold a review hearing within six months after taking jurisdiction under the Act and at least every six months thereafter.[6] Review hearings examine progress made by the participants on the plan. They also provide an opportunity for correction and revision of the plan. The purpose of review hearings is to make sure that cases progress and that children spend as little a time as possible in foster care. No matter how carefully initial case planning is examined at the planning hearing, periodic review is needed to keep cases moving toward successful completion.

Review hearings should re-examine long-term case goals and change any which are no longer appropriate. Just as review hearings should hasten family reunification when possible, they should also help identify cases in which reunification should be discarded as a goal because a child cannot safely be returned home in a timely fashion.

Review hearings are necessary because continuation of a child in foster care for an extended time has a negative affect on a child and the family. A child in foster care forms new relationships which may weaken his or her emotional ties to biological family members. A child shifted among foster homes may lose the ability to form strong emotional bonds with a permanent family.[7] A careful decision concerning the future of every child is needed as soon as possible. Review hearings can help ensure that decisions concerning a child's future are made at regular intervals and implemented expeditiously.

Review hearings provide regular judicial oversight of children in foster care and can help judges identify inadequacies in the government's response to child abuse and neglect. For example, incomplete case plans can prolong foster care placement by failing to clearly specify what each party must do to facilitate family reunification. Agency case plans may be based on boilerplate forms which fail to adequately document a case. A plan may be developed solely by agency staff, without the collaboration of the parents, the child, or the guardian *ad litem*. A plan may fail to specify agency services or particular behaviors and changes expected of the parents.

Unresolved case disputes may block case planning progress. Each party may be proceeding unilaterally without confronting a disputed issue, although the dispute may constitute a

[4] Idaho Code § 16-1621(3); IJR 44(2).
[5] Idaho Code § 16-16121(3); IJR 44(3).
[6] Idaho Code § 16-1622(3); IJR 44.
[7] M. RUTTER, MATERNAL DEPRIVATION REASSESSED, 179-197 (England: Harmondsworth, Penguin, 1981); J. BOWLBY, ATTACHMENT AND LOSS (New York: Basic Books, 1973); J. GOLDSTEIN, A FREUD AND A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (New York: Free Press, Macmillan, 2d ed. 1979).

roadblock to family reunification. When agency caseloads are high, cases may be neglected. If things are going "smoothly" in a child's foster home, appropriate attention may not be paid to family rehabilitation and progress toward reunification.

The agency may unnecessarily restrict parent-child contacts, accelerating breakdown of the parent-child relationship. Frequent parental visitation is essential, but it can burden agency caseworkers. Parents may be unaware that they can challenge visitation arrangements and may become discouraged by the terms imposed.

Agencies may fail to take timely action to move children out of foster care. Such inertia may be due to caution, indecision, or subtle incentives to maintain the legal status quo. Bringing a termination of parental rights proceeding is time consuming and may even appear forbidding to individual caseworkers. Without prodding by foster care review, workers may forego legal action.

Effective review hearings can address each of these problems and can improve planning for children. Judicial review helps a case progress by requiring the participants to set timetables, take specific action, and make decisions. Review hearings provide a forum for the parents, helping to assure that their viewpoint is considered in case planning. Through careful scrutiny of the case plan by the attorneys and the court, case content and planning problems can be identified. Terms of the plan can be specified so that all parties understand their obligations and the court can assess progress.

Regular and thorough review hearings create incentives for the agency to make decisions concerning the permanent status of a child. When the review hearing is challenging and demanding, greater consideration is given to the examination of all placement options. Review hearings also create a valuable record of the actions of the parents and agency. Current information is put on the record and is more likely to be freely exchanged at a review than in proceedings to terminate parental rights or to compel family reunification.

Unfortunately, there are a number of formidable pitfalls that can thwart effective review hearings. Regular review hearings consume a great deal of time. Careful docket management and appropriate judicial caseloads are needed to prevent caseworkers, parents, attorneys, and other participants from having to spend long hours in the courthouse waiting for review.

Reviews can malfunction if they come rubber stamps of agency recommendations or produce arbitrary decisions based on inadequate information. Effective review requires adequate court time and properly paid and trained lawyers to collectively determine what information comes before the court. Lawyers must be expected to do their job and come to court with a clear position on the case. Guardians *ad litem* should be prepared to make a recommendation as to the best interests of the child.

Irregular review may inhibit agency case planning. Long delays between court hearings and unnecessarily complex court orders may deprive the agency and the parents of the flexibility needed to move forward. For example, if a court orders parents to participate in a particular program, which later proves to be inappropriate, the parent is under a continuing obligation to

remain in the program until the case is brought back to court. The participants must have the means to obtain timely review.

Federal law requires that reviews be conducted by either a court or an "administrative body," such as an agency team or a panel of volunteer citizen reviewers. It is optional under federal law whether courts conduct the routine review hearings.[8] Federal law contemplates a routine but thorough review of case progress to make sure cases are not neglected and, if necessary, to refine case plans. Specifically, review is:

> …to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating a placement in foster care and to project a likely date by which the child may be returned to the home or placed for adoption or legal custody.[9]

Idaho law requires the court to conduct a review hearing no later than six months after entry of the order finding the child to be within the jurisdiction of the Child Protective Act and every six months thereafter so long as the child is in the custody of the agency.[10] Recommended best practice is for the court to conduct regular review hearings in all cases where the child is found to be within the jurisdiction of the Act, whether the child is placed in the legal custody of the agency or placed under protective supervision of the agency in the child's own home.

B. Timing of Review

Timetables for review hearings are governed by both federal and state statute. Federal law specifies that review of children in foster care, by a court or administrative body, must occur at least once every six months.[11]

Idaho law requires that courts hold a hearing for review of the child's case plan or permanency plan no later than six months after entry of the decree finding the child within the jurisdiction of the Child Protective Act and every six months thereafter so long as the child is in the custody of the agency.[12] The court has the discretion to conduct review hearings more frequently.

Idaho law also places the primary responsibility for carrying out the purposes of the Child Protective Act on IDHW in conjunction with the courts and other public and private agencies.[13] Idaho law requires that children within the jurisdiction of the CPA receive the care, guidance, and control that is necessary to promote the child's welfare.[14] The Child Protective Act requires IDHW to report to the court at least every six months on its evaluation of all children in its custody.[15] This responsibility to report coincides with the courts' responsibility to review cases under their jurisdiction.

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[8] *See* 42 U.S.C. §§ 675(5)(B), 675(6).
[9] *See* 42 USC §675(5)(B).
[10] Idaho Code § 16-1622(3).
[11] *See* 42 U.S.C. § 675(5)(B).
[12] Idaho Code § 16-1622(3).
[13] Idaho Code § 16-1629.
[14] Idaho Code § 16-1601.
[15] Idaho Code § 16-1629(4).

Recommended best practice is to conduct review hearings at least once every three months, unless there is good reason in a particular case to schedule reviews less frequently. Recommended best practice is to conduct regular review hearings in all cases where the child is found to be within the jurisdiction of the Child Protective Act, including those where the child is placed under IDHW in the child's home.

As in all child protective proceedings, the court should have a "just say no" policy on continuances. If a continuance is necessary, it should be for a short period of time, and the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

C. Agreements by the Parties

Whenever issues presented at a review are stipulated rather than heard by the court, the court should take the time to thoroughly review the agreement with the participants. The court should ensure that all review issues have been thoroughly considered by all participants, especially both parents, if involved. If the parties' agreement is not comprehensive, the court may need to hear evidence to resolve the disputes. The court might also adjourn the hearing for a short time (such as one day) to give the parties time to resolve issues or present them to the court for consideration.

If the court conducts frequent review hearings, any agreed upon statement of facts should convey the recent history of the case. The history should include an agreed upon statement concerning services provided to the child and family since the last hearing, actions taken by the parents in accord with the case plan, and progress made toward ending state intervention. This provides a definitive record of what has occurred since the previous hearing. This record will be invaluable later in the case when it is necessary to decide whether to reunite the family or terminate parental rights.

If the parties have reached agreement as to future steps to be taken, the court should either make sure that the agreement is comprehensive or resolve any issues not considered. A comprehensive agreement might include such issues as placement, services to the child, services to the family, visitation (where applicable), agency oversight of the family, location of missing parents, determination of paternity, etc. There is a more complete listing and discussion of issues to be addressed during review later in this chapter, at Part D.5, below.)

D. Who Should be Present

1. Judge

It is important that review hearings are conducted by the same judge who hears other stages of the proceedings. The involvement of one judge creates consistency in the directions given to the family and the agency, avoids rehashing old arguments, and allows the judge who presides over the review hearing to be thoroughly familiar with the facts produced at previous hearings.

***2.* Parents whose Rights have not been Terminated, Including Putative Fathers**

If the court-approved plan is to reunify the child with a parent, whether or not the child lived with the parent prior to placement into foster care, it is essential for that parent to participate in

the review. Parents can provide the court with important information concerning their perception of problems encountered in completing tasks or obtaining services, difficulties encountered in working with the agency, concerns they may have regarding the care of their children, and information about potential foster or adoptive placements. In addition, parents must be present in court to receive information from the court and agency. Finally, one of the purposes of the review hearing is to modify the case plan as appropriate, which affects the rights and responsibilities of the parents.

Persons who should always be present at review hearings:

- Judge
- Parents whose rights have not been terminated, including putative fathers
- Age-appropriate children
- Indian custodian, child's tribe, and attorney, if applicable
- Foster parents
- Assigned caseworker
- Prosecutor or deputy attorney general
- Attorney for parents (separate attorneys if conflict warrants)
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter or suitable technology
- Security personnel

Even where no efforts are to be made toward reunification, the parents' participation can be important to the planning process, and until their rights are terminated, they have the right to participate in the review hearing.

Information may become available as to a parent whose identity or whereabouts were previously unknown. An absent parent or putative father should be brought into the court process as soon as possible, and issues as to paternity should also be resolved as soon as possible, to avoid later delays that could prolong a child's placement in foster care. In any case, where a parent has not been brought into the proceedings, the court should inquire as to whether any new information has been discovered that would warrant further efforts to identify or locate the absent parent.

3. Age-Appropriate Children

Children and youths often feel a strong need to be involved in the court process concerning their welfare. In addition, children and youths should be present at some point during the hearing to give the judge the opportunity to observe them. Age-appropriate children and youths can provide the court with information as to their perception of their needs, interests, and concerns. Youths will often have questions regarding their circumstances, and their future. Their questions may be answered at the review, and the opportunity to participate may allow a youth to have a greater sense of self-determination. A court may choose to have children and youths present only during portions of a hearing. Special circumstances may infrequently justify the absence of children and youths from an entire hearing.

4. Indian Custodian, Child's Tribe, and Attorney, if Applicable

An Indian child's tribe has the right to notice and the opportunity to participate in all hearings concerning the child.[y16] For Indian children, the tribe often has information regarding the child and family that is critical to assisting the court in good decision-making regarding the child. As the case progresses, information may become available as to a child's possible Indian heritage. In any case, where the court has reason to believe that the child may be of Indian heritage, the

[16] ICWA, 25 U.S.C. §§1912(a), 1911(c). For a detailed discussion of ICWA see Chapter XI of this Manual.

court should require IDHW to investigate to determine whether the child is eligible for membership in an Indian tribe.

5. Foster Parents

Foster parents who care for and observe children on a daily basis are often in the best position to describe the present status of a child. Foster parents should be present both to make this information available to the judge, and to give the judge the opportunity to observe the foster parents.

Idaho law requires the foster parents to be given notice of the case plan hearing, but specifically provides that they are not parties to the action.[17] Because the review hearing is part of the planning process, the review hearing should be considered a planning hearing.

6. Assigned Caseworker

The caseworker with primary responsibility for the case must be present to provide the court with complete, accurate, and up-to-date information at the hearing. Judges should not continue or delay a review hearing due to lack of information or case involvement by a caseworker. When important facts are not known, the hearing should be reset for an early date, and, if necessary, appropriate subpoenas should be issued.

7. Prosecutor or Deputy Attorney General

It is important that IDHW have effective representation at the hearing because the court's decisions concerning the case plan or permanency plan are crucial to its success. Important information is elicited at the review hearing and the record established at that time can be critical to later case outcomes; an attorney is needed to help develop the record and note important evidence. The attorney representing IDHW can further help the case to progress by moving for court-ordered evaluations, excluding a perpetrator from a household, or obtaining information important to the case. Depending on the jurisdiction, IDHW may be represented by the county prosecutor or the state attorney general.[18]

8. Attorneys for Parents (Separate Attorneys if Conflict Warrants)

The presence of the parents' attorney at the review hearing is vital to make sure that the agency is carrying out its responsibility to assist the parents. The attorney needs to correct the record to avoid negative or inaccurate information about the parents. The attorney needs to make sure that the parents' interests and views are taken into account in all decisions on placement, visitation, services, and case plan modifications.

9. Guardian *ad Litem*, Attorney for Guardian *ad Litem*, and/or Attorney for Child

A well-trained legal advocate for the guardian *ad litem* and/or the child must be present to make sure that the child's interests are being protected and are not being subordinated to the organizational needs of the agency or to the convenience of agency personnel. The advocate also needs to ensure that the views of children are considered by the court.[19]

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[17] Idaho Code §16-1621(2).

[18] *See* Idaho Code §§16-1610(1)(b); 16-1631(1)(c).

[19] *See* Idaho Code §16-1618, which provides for appointment of a guardian *ad litem* for the child, appointment of an attorney for the guardian *ad litem*, and/or appointment of an attorney for the child.

10. Court Reporter or Suitable Technology, Security Personnel, and Interpreter

As in other stages of the hearing process, these staffing and equipment resources should be available for all review hearings. If a parent or other essential participant is not fluent in English, a qualified interpreter must be present.

11. Persons whose Presence may also be Needed at Reviews:

- Extended family members
- Other custodial adults (such as representatives from residential facilities where a child is placed)
- Prospective adoptive parents (if other than the foster parents)
- Adult or juvenile probation officer or parole officer
- School officials
- Other witnesses

12. Service Providers

Persons who provide services to the parents and children, such as therapists, teachers, and parenting instructors, can provide valuable information to the court concerning the family's progress and recommendations for additional services.

If a particular service provider is not available to attend the hearing, the court should make certain that the agency caseworker has obtained detailed information on the participation and progress of the parents in that service. Ideally, written reports should be provided to the court.

It is often helpful for all persons who are involved with the family to meet with each other at the review so that everyone understands case plan or permanency plan goals and the treatment needs of the family. The involvement of service providers at reviews helps to coordinate services with court-approved treatment goals.

E. Key Decisions that the Court Should Make at the Review Hearing

1. If Legal Custody of the Child is Vested in IDHW

a. Is the child in an appropriate foster care placement that adequately meets the child's physical, emotional, educational, and developmental needs?

The court should review information on the behavior and overall adjustment of each child to his or her placement and school. The court should also be informed of the specific services being provided to meet each child's physical, emotional, educational, and developmental needs.

At review, the court may receive information indicating that the needs of a child are not being met in the child's placement. For example, if the child's behavior is causing the possible disruption of a second foster home placement, it may be necessary for the court to direct the agency to pursue placement at a more specialized therapeutic foster home.

In some cases, a child experiencing difficulty in placement may be successfully maintained in that placement if additional services are provided. The child may require mental health

counseling, a special education program at school, or other specialized services. The foster parent may benefit from respite care or training in managing difficult behaviors. If such services were not identified in the initial case plan or permanency plan, they should be court-ordered at the review.

When the court places a child in the custody of IDHW, state law vests authority for the placement decision in the agency, subject to review by the court.[20] Federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.[21] It is unclear whether the child will lose eligibility for federal funds if the court orders a particular placement for a child when custody of the child is vested in the agency.

Presumably the child would not lose eligibility if the placement were a contested issue, and the court determined the issue based on evidence in the record or on a reasonable agreement of the parties. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[22] The court can also require the agency to include the child's foster care placement in the case plan or the permanency plan, and can then reject a plan that includes an inappropriate placement. The case plan and permanency plan are discussed in further detail in earlier chapters.

b. What services are being provided to the child and the foster family, including services to identify and meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, and to ensure the stability of the placement?

In order to ensure the stability of the foster care placement and to ensure positive outcomes for children, the court should monitor and review the services being provided to the child and the foster family. This review should include whether the child is participating in counseling and treatment services contemplated by the case plan. The court should consider whether those services are meeting their objectives or whether they need to be reconsidered. In addition the court should monitor and review the child's educational needs. To assist courts in this evaluation, an Educational Needs Benchcard is provided with the Child Protection Benchcards available at http://www.isc.idaho.gov/childapx.htm . .

In addition to evaluating the services provided directly to the child, the court should also monitor and review any services that may be provided to the foster family to support their care and nurturing of the child.

c. Do terms for visitation (including parent and sibling visitation) and support need to be established or modified?

Where reunification is a goal, and as parents successfully engage in services and modify their behavior, it may be appropriate to provide less restrictive, more extensive visitation. As the time for reunification approaches, there is a need to expand visits to include overnight visits in the

[20] Idaho Code §16-1629(11).
[21] *See* 45 C.F.R. §1356.71(d)(1).
[22] See question and answer no. 13 at www.acf.dhhs.gov/programs/cb/laws/qsett1.htm .

parents' home. The court should review the terms of visitation at review to determine whether terms and conditions of visits should be modified. Even where reunification is not a goal, there may be instances where some contact between the parent and the child is in the child's best interests.

If visits to the parents home exceed forty-eight (48) hours, the court must approve the visit in writing in advance. An extended home visit may be terminated by IDHW if it determines that continuance of the visit is not in the best interests of the child. If an extended home visit is terminated, IDHW must prepare a written statement stating when the visit was terminated and the reasons for terminating the visit. This statement must be filed with the court within forty-eight hours of terminating the visit. [23]

In addition to considering visitation, the court should also review child support. Parents who are able to pay should be expected to help cover the costs of foster care. Idaho law provides for the entry of support orders for children in the child protection system.[24] Support amounts should either be reviewed or adjusted during review hearings. The court should take care to avoid financial burdens that interfere with family reunification. Particularly inexpedient are delays in setting support followed by retroactive lump sum support orders. These often make it impossible for parents to maintain or to obtain residential space in preparation for the child's return home.

2. Review of the Reunification Portion of the Plan

a. Have the parents complied with the case plan?

The court should review information on the extent to which the parents have complied with the case plan. If the parents have not complied with the case plan, the court should review information on why the parents have not complied. If the reasons for non-compliance indicate a lack of effort on the part of the parents, it may be necessary to remind them of the prior court order and to explain that their continued non-cooperation may result in termination of their parental rights. The judge should also consider initiating contempt of court proceedings.

The reasons for non-compliance may indicate a need to modify or clarify the case plan. At the review, the court can correct any misunderstood expectations. Before making the decision whether and how to revise the case plan, the court should specifically ask the parents on the record, whether they are willing and able to comply, and whether there are any changes they need that will enable them to address the issues that need to be resolved before the child can safely be returned home. Again, parents should also be informed of the risk of termination of parental rights or other permanent loss of custody should they fail to meet their responsibilities under the plan.

Reviewing the parents' progress on the case plan should be a two-step inquiry. For example, a parent may be required to participate in anger management classes. The first part of the inquiry is whether the parent completed the class. The second part of the inquiry is whether the parent is using the skills learned in the class to modify the parent's behavior. The review hearing should not be reduced to a simple checklist of services provided and services attended.

[23] IJR 42.
[24] Idaho Code § 16-1628(1).

Good progress on the case plan may indicate a need to modify the placement of the child. For example, where the child was previously placed in the legal custody of the agency, but the parents have engaged in services and modified their behavior, it may be appropriate to return the child home under agency supervision. Poor progress on the case plan may indicate a need to modify the long-term goal for the child.

b. Do the services set forth in the case plan or the responsibilities of the parents or other participants need to be clarified or modified due to new information or changed circumstances?

It often becomes obvious at a review that the case plan should be changed to reflect changed circumstances or new information. Additional or different services those identified in the original case plan may now be needed. And, as noted above, non-compliance with the plan and the reasons for non-compliance may indicate a need to clarify or modify the plan.

c. Should the child's placement (in IDHW custody or at home under IDHW supervision) be modified?

At the review hearings, the court should review the continued appropriateness of the original disposition. Ideally, as the efforts of the parents and agency resolve the problems identified in the case plan, state intervention can be "stepped down" – from placing the child in the legal custody of the agency, to placement in the child's home under the protective supervision of the agency, to allowing the child to remain in the home without agency supervision, and, finally, to closing the case.

If the child is to be returned home under agency supervision, it may be appropriate to place conditions that must be satisfied for the child to remain in the home. They may include, for example, home inspections, drug testing, or continued participation in counseling or other services.

IJR 42 provides a procedure for "extended home visits." The rule requires that such visits take place only upon 48 hours prior approval of the court. Rule 42 also provides a procedure if the extended home visit is terminated prematurely, requiring notice to the court of when the visit was terminated and the reasons for termination. The report of a termination of extended home visit must be filed with the court within 48 hours of the termination of the visit.

If a more permanent change in the case plan is anticipated involving a move from legal custody to protective supervision, the court's original order after the adjudicatory hearing granting legal custody to IDHW must be modified.[25] Such a modification requires that all persons required to be summoned or given notice of the original petition receive notice of the motion to modify the court's order.

The case should not be "dropped down" from placing the child in the legal custody of the agency, to returning the child home and immediately closing the case. Continued agency supervision after the child is returned home is necessary to ensure that reunification is successful and to avoid the "revolving door" phenomena. This is a child is returned home and the case is

[25] Idaho Code § 16-1622(1).

closed, only to have a new petition filed when the child is again subjected to parental neglect or abuse.

In other cases, state intervention may need to be "stepped up" – from placement of the child in the child's own home under agency supervision, to placing the child in the legal custody of the agency. This may be necessary if there have been new incidents of abuse or neglect, where the parent has violated the terms or conditions of the child's placement in the home, or where the parent is not complying with the aspects of the case plan intended to ensure the child's safety and well-being while in the home.

Idaho Code § 16-1623 governs the procedure for removing from the home a child who has been placed under protective supervision and then vesting legal custody with IDHW. In such a situation, the child may be removed under the following circumstances: 1) pursuant to a declaration of imminent danger by a peace officer, or 2) pursuant to a court order based on facts indicating that continuation of the child in his or her present circumstances would be contrary to the child's welfare and that vesting legal custody would be in the child's best interests.[26] Upon removal after protective custody, the court must hold a hearing with in 48 hours to determine whether to vest legal custody in IDHW. The court must make detailed, written findings based on the facts in the record to support its order. Finally, upon removal after protective supervision, IDHW must prepare a new case plan and hold a case plan hearing within thirty days.[27]

In deciding whether the family can be safely reunited, the court should consider the following:

- the extent to which the parents have engaged in and benefited from services outlined in the case plan;
- the capacity and willingness of the parents to care for the child;
- the extent to which changed parental behavior allows for the child's safe return home;
- the extent to which parental behavior may continue to endanger the child;
- the appropriateness of interactions between parents and children during visitation; and
- the recommendations of service providers.

If the court determines that a child should not be returned home, the court should identify the additional progress which would allow a safe family reunification.

d. Is IDHW making reasonable efforts to rehabilitate the family and to eliminate the need for placement of the child?

When the case plan goal is family reunification, IDHW should be held accountable for meeting its obligation to provide services to the family. The court should make specific factual findings as to what efforts the agency is making to eliminate the need for placement of the child and whether such efforts are reasonable. The court should identify any areas in which agency efforts are inadequate and set forth orders to address those inadequacies.

[26] Idaho Code § 16-1623(1).
[27] Idaho Code § 16-1623 (2)-(5).

e. Should reunification continue to be a long-term goal for the child?

Not every case requires the same period of time to determine whether family reunification is possible. At review, it may immediately become clear that the case plan is no longer feasible. For example, a plan of reunification with a parent would no longer be feasible if the whereabouts of the parent were unknown for a substantial period of time, if the parent were subject to long-term incarceration, or if the parent failed continuously over an extended period to remedy the problems that caused a child to be removed from the home. To avoid unnecessary foster care, judges should not continue a goal of reunification after it is apparent that the goal cannot be achieved or cannot assure the safety of the child.

f. What time frame should be allowed to achieve reunification?

The court should be conscious of the passage of time and the child's need for permanency. The court should evaluate the allowable time frame for achieving reunification in light of the child's situation and need for permanency. At the conclusion of the review, the court should always determine what additional actions are necessary to successfully complete the case plan goals and set forth reasonable time frames in which such actions should be completed. By setting deadlines, the court emphasizes the importance of time in the lives of children and makes clear the court's expectations. The time frames set by the court can later be used by the court to hold all parties accountable by requiring explanations when reasonable deadlines are not met.

3. Review of the Alternate Permanency Portion of the Plan

a. Does the permanency plan need to be modified as a result of new information or changed circumstances?

The permanency plan should have identified the options for alternative permanent placement of the child, the advantages and disadvantages of each option, the option that is in the child's best interests, the actions necessary to implement that option, and deadlines for completing those actions. Often in the course of the case, new information arises, or circumstances change, resulting in a need to reassess the plan.

The new information or circumstances may result in a need for a broad reassessment, considering new options and re-determining which option for permanent placement is in the child's best interests. Or, the new information or circumstances may instead result in the need for fine-tuning the implementation plan for a previously identified placement goal, by modifying or clarifying the tasks to be completed and deadlines for completion.

b. Is IDHW making reasonable efforts to finalize a permanency plan for the child.

Idaho law requires a permanency plan in every CPA case where the child is placed in the legal custody of the agency. If aggravated circumstances were not found, then the case plan must include an alternative permanency plan, so that there is an alternative plan in place if the reunification plan fails.[28] If aggravated circumstances were found, then the case proceeds immediately with planning for the alternative permanent placement of the child.[29] A permanency hearing must be held within one year from the date the child is removed from the home or the date the child is found to be within the jurisdiction of the CPA, whichever occurs first. The

[28] Idaho Code § 16-1612(3).
[29] Idaho Code §§ 16-1619(6)(d), 16-1620.

permanency hearing can be combined with the review hearing. The agency is required to file a permanency plan with the court at least five days before the hearing.[30]

Federal law requires the court to make case-specific findings as to whether the agency has made reasonable efforts to finalize the child's permanent placement at or before the due date for the permanency hearing. Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter.[31] The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first. If the deadline is not met, the child may lose eligibility for federal funds. Eligibility may be reinstated once the required findings have been made.[32]

IDHW should be held accountable for meeting its obligation to finalize an alternative permanent placement for the child. The court should make specific findings as to what efforts the agency is making to finalize a permanency plan and whether such efforts are reasonable. The court should identify any areas in which agency efforts are inadequate and set forth orders to address those inadequacies. As in any case, new information or changed circumstances may result in the need to modify the plan as the case progresses.

c. What time frame should be allowed to achieve permanency

As with the plan for reunification, the Court should monitor and evaluate the time frame contemplated in the plan for the accomplishment of permanency for the child. Through evaluation of the time frames in the plan, the court can be a crucial force to ensure that concurrent planning is taking place and that progress is being made on the alternative permanency plan even while reunification efforts are ongoing. At the conclusion of the review, the court should always determine what additional actions are necessary to successfully complete the permanency plan goals and set forth reasonable time frames in which such actions should be completed. By setting deadlines, the court emphasizes the importance of time in the lives of children and makes clear the court's expectations. The time frames set by the court can later be used by the court to hold all parties accountable by requiring explanations when reasonable deadlines are not met.

4. Additional Matters the Court Should Consider

a. Are any additional court orders necessary to move the case toward successful completion?

Additional orders may be needed to move the case toward successful completion. For example, if one parent has successfully completed services but the other has not, it may be possible to return the child to the one parent who has completed the case plan, subject to a protective order limiting the contact of the other parent.

[30] Idaho Code §§ 16-1622(4).
[31] The permanency hearing is discussed in the Manual in Chapter VII.
[32] 42 U.S.C. §675(5)(c); 45 C.F.R. 1356.21(b)(2).

b. The time and date for the next hearing, and whether any orders are needed to prepare for the next hearing.

As discussed above, both federal and state law require reasonable efforts to reach permanency and impose strict time deadlines on IDHW.

If the federal deadline is not approaching, then the court should schedule another review hearing. If the deadline is approaching, then the court should order the agency to prepare and file a permanency plan, and schedule a permanency hearing prior to the deadline. There is more information about permanency hearings in Chapter VII, above.

The court should also enter any orders necessary to prepare for the next hearing. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or county jail or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

F. Submission of Reports to the Court

The submission of pre-review reports by the agency and the guardian *ad litem* can serve the same purpose as predisposition reports. Report writing and submission assist the parties in analyzing the case, help the judge reach a decision, and help to document the facts and history of the case. It is important that reports be distributed to the parties well in advance of the review. This allows time for the parties to consider agency proposals and allows the parties time to prepare for the hearing.

Recommended best practice is to require the agency and the guardian *ad litem* to file a written report with the court and to serve copies of the report, at least five days prior to the review hearing. This requirement should be included in the order setting the review hearing. Recommended best practice is for the report to be verified or in the form of an affidavit.[33]

The report should address each of the issues identified in the preceding section of this chapter, in Part E. Forms for pre-review reports should be carefully designed to assist judges in completing written findings of fact and conclusions of law. If judges are required to cover particular issues in orders of findings, the report should address each such issue. Accordingly, the form used for agency pre-review reports should be worded as precisely as possible to address the exact issues that need to be addressed by the judge.

G. The Court's Written Findings of Fact, Conclusions of Law, and Order at the Review Hearing

The court should make written findings of fact and conclusions of law, in language understandable by the parties, with enough detail to document the progress of the participants on the case plan or permanency plan and to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or other participants. It is particularly important that

[33] Idaho Code §16-1629(9), governing the duties of the agency, provides for the agency to submit information to the court that the court may at any time require. Idaho Code §16-1633, governing the duties of the guardian *ad litem*, makes specific provision only as to the disposition report, but includes provision for "such other and further duties as may be expressly imposed by court order."

the court include an order modifying the case plan or permanency plan as appropriate, ordering the participants to comply with the plan, and setting further proceedings. The court should include a finding as to which participants were present, and if any necessary participants were not present, a finding that proper notice was given.

H. Conclusion

Review hearings are critical to the successful completion of the case plan or permanency plan. The key functions of the review hearing are to comprehensively assess the status of the case, to document the participants' progress on the case plan or the permanency plan, and to modify the case plan or the permanency plan based on the progress, or lack of progress, made by the participants. A well-devised plan, together with effective review, enables the court to ensure that the case moves forward to a timely and successful resolution that protects the rights of the parties and the best interests of the child.

CHAPTER IX: TERMINATION OF PARENTAL RIGHTS

Revised: 5/29/2007
Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Purpose

The voluntary or involuntary termination of parental rights severs all legal familial rights and ties between a child and the birth parents, freeing the child for adoption. After termination, parents are no longer entitled to notice of future court proceedings concerning the child. Termination of parental rights ends the duty to provide continuing child support and the legal right to visit the child.[1]

> Termination creates a possibility for a new parental relationship and permanent family for children who cannot be safely reunified with their biological parents. It is consistent with the key foundational principle that *"all children have the right to a healthy and safe childhood in a nurturing, permanent family…"*

About one-third of foster children do not return to their birth parents. Approximately 21%, or one in five, adjudicated neglected and abused children experience the severing of parental rights and adoption. Furthermore, the Unites States Department of Health and Human Services (USDHHS) estimates that of the foster children who are adopted, 78% will be adopted by their foster parents or relatives.[2] Clearly, there is a significant percentage of children in the child protection system who require the termination of parental rights in order to see to their best interests, safety, health and well-being.

Termination of parental rights cases are among the most difficult and challenging a judge can face. Termination proceedings must be conducted with great care and with full procedural protections for parents and children. When judges have carefully followed the preparatory steps described in this Manual, the court has prepared a solid foundation upon which to build the justification of termination of parental rights for children who cannot be reunified and to provide the child with a new family through adoption.

Under ASFA, the court must make reasonable efforts toward adoption findings from the permanency hearing until permanency is achieved. This suggests that the termination of parental rights trial becomes a *two-part consecutive process:* first, termination issues are addressed; second, if termination of parental rights is granted, reasonable efforts toward adoption findings should be made.

B. Timing of the Process

1. Timing Issues Regarding the Decision to Pursue Termination of Parental Rights (TPR)

There are certain circumstances under which it is appropriate to proceed directly to termination of parental rights when the original complaint of neglect or abuse is adjudicated. Reasonable

[1] Adoption with contact agreements can be made between adopting parents and birth parents; however, birth parents are not legally entitled to such an agreement and such agreements are not enforceable by a court in Idaho.

[2] UNITED STATES GENERAL ACCOUNTING OFFICE, *FOSTER CARE: HHS COULD BETTER FACILITATE THE INTERJURISDICTIONAL ADOPTION PROCESS* (1999).

efforts to reunify the family need not be pursued if aggravating circumstances have been found.[3] In such a situation, Idaho law requires that the petition to terminate parental rights must be filed within 60 days of the finding of aggravated circumstances. In addition, if the court finds that an infant has been abandoned, a petition to terminate parental rights must be filed within 60 days.[4]

Under ASFA, termination of parental rights proceedings must be filed or joined (if filed by another party) *by the state* for any child who has been in foster care for 15 of the most recent 22 months.[5] This requirement was included because of the documented substantial and unjustified delays in many states in legally freeing children for adoption—delays caused by both child welfare agencies as well as juvenile and family courts.[6]

Termination of parental rights petitions should be filed at any time in a case when it is clear that reunification cannot occur. The petition to terminate parental rights must be filed as a motion in the pending child protection case.[7] A new case should not be initiated. Moreover, it is not appropriate to wait for the permanency hearing to file the TPR petition when it can be documented well in advance of the scheduled hearing date that termination is the necessary direction of the case.

> Under ASFA, at the same time that the state is filing a termination petition under any grounds, the social services agency is required to concurrently identify, recruit, process, and approve a qualified adoptive family.

The purpose of this requirement is to expedite the process of locating a new family for the child by eliminating any delay between the agency recommendation for termination of parental rights and the agency initiation of the recruitment process.

These timing requirements should not be misinterpreted, however, to mean that ASFA requires an adopting family to be found prior to the court's decision regarding termination of parental rights. Although some judges and other professionals have been disinclined in the past to terminate parental rights unless they could be sure that a new family would be found for the child, *terminations should not be delayed while waiting for adoptive families to be identified.* There are several reasons for not delaying:

- Many families interested in adopting hesitate to commit to a specific child if the child is not yet legally free for adoption.
- There is a significant difference between terminating rights and terminating relationships, and one does not necessarily require the other. Adoption with contact is often in the best interests of the child and enables relationships to continue with family members and other significant persons in the child's life after termination of parental rights has occurred.

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[3] Idaho Code § 16-1619(6)(d). More information about aggravated circumstances is found in Chapter V. Note that for ICWA cases, it is never appropriate or legally permissible to proceed in this manner unless active efforts to rehabilitate the family have been offered and have subsequently failed.
[4] Idaho Code § 16-1624.
[5] 42 U.S.C. § 675(5)(F).
[6] MARK HARDIN, MANDATORY TERMINATION OF PARENTAL RIGHTS PETITIONS: "COMPELLING REASONS" AND OTHER EXCEPTIONS UNDER THE ADOPTION AND SAFE FAMILIES ACT (ABA Center on Children and the Law, January 1999).
[7] Idaho Code § 16-1624.

- Given the many examples of successful recruitment of adopting families for all types of children with all types of needs, it is reasonable to believe in the adoptability of all children. If an adopting family has been found for a child with similar characteristics, why not believe that a family can be found for this child?

2. Timing Issues Regarding Filing and Hearing the TPR Petition

Good practice dictates that the petition to terminate parental rights be filed with the court and served on all parties *no later than* 30 days after the agency or court makes a determination that the filing is appropriate. Good practice dictates that the trial, if necessary, should begin within 90 days of the date the petition is filed and that the court deliver its written decision to all parties *no later than* 14 days after the completion of the trial.

As previously noted, where there has been a finding of aggravated circumstances, the termination of parental rights petition must be filed within 60 days of the finding under Idaho law.

In addition, where a child has been taken to a safe haven under the Idaho Safe Haven Act, IDHW must petition to terminate parental rights as soon as possible after the initial thirty (30) day investigation period.[8]

C. Best Practices for Reducing Delays from Trials and Appeals

There are two additional best practices that courts can use to expedite the achievement of timely permanency and to design the best possible permanent plan for a child who cannot be reunified. Various jurisdictions have demonstrated significant success in avoiding trials on termination of parental rights when using these practices. These practices help a family accept adoption as being in the best interests of the child, thereby avoiding appeals after termination of parental rights. These practices are mediation (and other types of pretrial negotiations) and consideration of adoption with contact.

1. Mediation and other Pretrial Negotiations

Although there are technical variations between mediation and pretrial (or settlement) conferences, all have the potential to accomplish the same purpose -- to achieve voluntary termination of parental rights and settlement of related issues and to avoid costly and time consuming trials and subsequent appeals. These results are achieved by:

- Providing parents with factual information that offers a realistic prospect of trial outcome and helping to separate personal issues and biases from factual information;
- Giving parents a sense of participation in future planning for the child and a sense of significance and closure with dignity that will no longer be available if the case goes to trial;
- Helping the child, parents, and relatives to understand the importance of one stable home for the child and to overcome objections to terminating parental rights, opening the door to relative adoption; and
- Providing a forum to discuss the appropriateness of adoption with contact and to develop a proposed plan for the contact.

[8] Idaho Code § 39-8205(5).

> In some jurisdictions, mediation programs have produced full or partial pretrial agreements in 90% of mediated cases.

Of these negotiating options, mediation has the best chance of achieving all of these results. Mediators must be highly-trained, experienced and skilled professionals who have credibility with the court and related professionals. Family members and other participants must perceive them as neutral and as having the best interests of the child and family at heart. All parties, their attorneys, and other relevant case participants, including the child if developmentally appropriate, are included in the mediation process.

When used at the point of termination of parental rights, mediation programs should be court-based or court-supervised and have strong judicial and interdisciplinary support. Mediated agreements must be specific and detailed and made a part of the court record.

Pretrial and settlement conferences can occur with or without judicial supervision. When there are disputes concerning discovery, evidentiary, or other legal issues, judicial involvement is preferred. As with mediation, all parties, including age-appropriate children and their attorneys, should be involved.

Even when mediation and other negotiations fail to produce agreement and avoid trial, they can help narrow the focus of the trial, shorten its duration, and ensure that all parties are prepared well in advance of the trial.

2. Adoption With Contact

Adoption with contact is the second practice that courts can use to design the best possible permanent plan for a child, and often, in the process, avoid a trial. Historically, adoptions have varied in the degree of confidentiality that has existed between birth parents, adopting parents, and the child. Prior to the 1930s, confidentiality was the exception. From the1930s forward, the practice of confidentiality among all parties became the norm. Even when older children were adopted, courts and child welfare agencies often attempted to maintain total separation between the child, the biological parents, and the adopting family.

When older children are adopted, however, the question of confidentiality is often moot as the child knows his or her parents and relatives and where they live. The question often becomes whether or not the child, birth parent, and relatives are going to have sanctioned or unsanctioned contact.

Because this Manual deals with neglected and abused children who are often old enough to remember their biological parents, relatives, and others with whom they have had relationships, the recommendation is that adoption with contact always be *considered.*

Adoption with contact describes a wide variety of arrangements among birth parents, siblings, relatives (and other significant individuals from the child's past relationships), the child, and the adopting family. This contact can occur both prior to and after the adoption. Examples of this range of contact include:

- Biological parents do not know who the adopting family is but send cards or letters using an intermediary. The adopting family decides whether to share the communications from the biological parent(s) with the child. The child may also send return letters and pictures through the intermediary.
- Biological parents receive pictures and annual progress reports from the adopting family.
- Biological parents know the identity of the adopting family and are permitted occasional or regular visitation with the child.

Small degrees of contact are often sufficient to facilitate obtaining voluntary relinquishments of parental rights and to consequently avoid trials and lengthy appeals. In most of the jurisdictions that regularly permit some type of adoption with contact, the parent understands that going to trial probably means losing any opportunity for contact. However, the determining factor as to whether adoption with contact is appropriate *must always be the best interests of the child and not the desires of the adults or the hope of avoiding a trial.*

Examples of situations where continued contact with the birth parents after adoption may be in the child's best interests are:[9]

- A child has a good relationship with a developmentally, emotionally, or physically disabled parent who is not able to care for the child.
- An older child wishes to continue a relationship with birth parents and the child will benefit from ongoing communication or visits.
- The adopting foster parents have a cooperative relationship with the birth parent that is likely to continue after the adoption.
- A child has siblings still living with the birth parents.

When considering adoption with contact, it is important to consider the enforceability of any agreement. Less than a third of the states have adoption statutes that permit contact between birth parents and the child after adoption. Idaho does not have a specific statute providing for post-adoption contact at this time. Nonetheless, contact arrangements between birth parents and adopting parents may be entered into voluntarily.

It is important to note that adoption with contact does not change the fact that the adopting parents are the legal parents of the child and are ultimately in control. If either the adopting parents, the biological parents, or any other person violates the contact agreement, mediation is a recommended method to resolve disputes. The mediation process would require the adopting family to agree to participate in the mediation session. It would not, however, require the adopting family to accept any proposed outcome.

The most effective adoption with contact agreements include the following characteristics:

- legally approved by case law or statute;
- negotiated based upon full disclosure to all parties;
- agreed to by a child of sufficient age and maturity to specify a position on the matter (or by the guardian *ad litem* for the child if of insufficient age);

[9] D. Baker and C. Vick, *The Child Advocate's Legal Guide* (North American Council on Adoptable Children, 1995).

- clearly set out in writing and incorporated into the adoption decree;
- modifiable based upon changes in circumstance's and the best interests of the child; and
- enforceable, but not grounds for setting aside the adoption.

Idaho law does not specifically provide for adoption with contact agreements. As a result, these agreements are purely voluntary and cannot be later enforced by a court if one of the parties violates the provisions of the agreement.

D. Filing the Termination of Parental Rights Petition

1. Content of the Petition

The termination of parental rights petition must be complete and definite and provide fair notice to the parties. Petitions typically address issues such as agency efforts to work with parents; parents' cooperation with the agency; parents' condition, behavior progress, and improvements; and the effects of foster placement on the child. Although facts may be alleged in summary form due to the breadth of material at issue, the allegations must be sufficiently precise to give the parties notice of the issues at stake. The court should require that the petition cite the statutory grounds relied upon and provide a summary of facts in support of each statutory ground. When the child is an Indian child, the petition must rely upon 25 U.S.C. §1912[10] and should include a summary of facts supporting those requisite findings. The petition must be filed with the court and served on all parties.

Idaho law requires the petition to contain the following information:[11]

- the name and place of residence of the petitioner;
- the name, sex, date and place of birth, and residence of the child;
- the basis for the court's jurisdiction;
- the relationship of the petitioner to the child or the fact that no relationship exists;
- the names, addresses, dates of birth of the parents; and where the child is illegitimate, the names, addresses, and dates of birth of both parents if known to the petitioner;
- where the child's parent is a minor, the names and addresses of the minor's parents or guardian; and where the child has no parent or guardian, "the relatives of the child to and including the second degree of kindred";
- the name and address of the person having legal custody or guardianship of the person or acting in loco parentis to the child or the authorized agency having legal custody or providing care for the child;
- the grounds on which termination of the parental relationship is sought;
- the names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred; and
- a list of the assets of the child together with a statement of the value thereof.

Where IDHW is the petitioner in the termination of parental case, the petition must be accompanied by a written report of the department's investigation.[12] This social study should

[10] *See* Chapter XI on the Indian Child Welfare Act, below.
[11] Idaho Code § 16-2006

include the circumstances of the petition, results of the investigation and the present condition of the child and parents, proposed plans for the child, and other relevant facts. The report should include recommendations with supporting reasons as to why the parent-child relationship should be terminated. Where the parent is a minor, the report should contain an explanation of the child's contact with the parents of the minor.

2. Notice and Hearing

Once a petition has been filed, the court must set a time and place for hearing and must notify the appropriate individuals. The hearing may not be scheduled more than ten days prior to the service of notice on the parents or ten days after the last date that notice is provided by publication.[13] The question of who is entitled to notice of a parental termination action is complex. Idaho Code section 16-2007 establishes the notice requirements for parental termination actions. In addition to specifying notice to certain specifed persons and entities, section16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding under Idaho Code section16-1505. The adoption notice provision, §16-1505, provides for notice of an adoption proceeding to certain specified individuals, but also provides that any person or agency whose consent to an adoption proceeding would be required under Idaho Code §15-1504 is also entitled to notice of the proceeding. The upshot of this web of notice proceedings is that any person or entity named in the parental termination notice provision (Idaho Code §16-2007), the adoption notice provision (Idaho Code §16-1505), or the adoption consent provision (Idaho Code §16-1505) is entitled to notice of a parental termination action.[14]

Idaho law provides for the execution of a Consent to Termination of Parental Rights and a Waiver of Notice and Appearance in a termination of parental rights proceeding.[15] When the overlapping notice provisions of the adoption and parental termination provisions are considered together, and assuming a prospective party has not signed a Consent to Termination or a Waiver of Notice and Appearance, notice must be provided to:

- ✓ the petitioner;
- ✓ the child, if he or she is over age 12;
- ✓ the mother of the child if the parents are unmarried;
- ✓ the father or putative father of the child who has not signed a consent to termination pursuant to Idaho Code § 16-2005(4) or a Waiver of Notice and Appearance pursuant to Idaho Code § 16-1007(3) and whose rights have not been previously terminated, if he
  - ♦ is currently married to the mother or was married to the mother at the time she executed a Consent to Termination of Parental Rights or otherwise relinquished the child;
  - ♦ has been adjudicated the father of the child prior to the execution of a Consent to Termination by the mother;
  - ♦ has filed notice of the commencement of a paternity action and complied with Idaho Code § 16-1513;

[12] Idaho Code § 16-2008.
[13] Idaho Code §§ 16-1504, 16-1505 and 16-2007.
[14] Idaho Code § 16-2007.
[15] Idaho Code § 16-2005(4) and Idaho Code § 16-2007(3).

- ♦ is recorded on the birth certificate as the child's father with the knowledge and consent of the mother;
- ♦ is openly living in the same household with the child and holding himself out as the child's father at the time the mother executes a consent or relinquishment;
- ♦ has filed a voluntary acknowledgment of paternity pursuant to Idaho Code § 7-1106;
- ♦ has developed a substantial relationship with the child who is more than 6 months old and has taken responsibility for the child's future and financial support pursuant to Idaho Code § 16-1504(2)(a); or
- ♦ has developed a substantial relationship with a child under the age of 6 months and has commenced paternity proceedings and complied with Idaho Code § 16-1504(b).

✓ the legally-appointed guardian of the person or custodian of the child;
✓ the guardian *ad litem* for the child or for any other party;
✓ any person "standing in loco parentis" to the child;
✓ the child's nearest blood relative named in the petition if service cannot be had on the parent or guardian;[16]
✓ IDHW.

Notice to the parents or guardians must be by personal service. If personal service is unsuccessful, the court should order service by registered or certified mail to the last known address of the person and by publication once a week for three consecutive weeks in a newspaper designated by the court. The hearing should take place no sooner than 10 days after service of the notice or 10 days after the last date of publication.

Notice may be waived by a parent in an acknowledged writing so long as the parent has been apprised of the consequences of termination.

3. The Court's Response to the Filing of the Petition

a. Appointment of Counsel

The court must ensure that all parties are represented by counsel. Athough the United States Supreme Court has held that parents do not have a constitutionally protected right to counsel under the U.S. Constitution in parental termination actions,[17] Idaho law provides for appointment of counsel for parents who are indigent and guardians in such actions.[18]

Idaho law confers exclusive jurisdiction over the parental termination action upon the court in a connected Child Protective Act case.[19] Furthermore, Idaho Code § 16-1624 provides that a parental termination petition "shall" be filed in the Child Protective Act case. All counsel representing the parties in the CPA proceeding should still be assigned to the case. Because the Parental termination proceeding is part and parcel of the CPA proceeding, the appointment of the

[16] The provisions for notice to a person standing "in loco parentis" and to near blood relatives are found in Idaho Code § 16-2007.
[17] Lassiter v. Dept. of Soc. Servs., 542 U.S. 18 (1981).
[18] Idaho Code § 16-2009.
[19] Idaho Code § 16-2003.

child's guardian *ad litem* should also be continued. If for some reason these appointments are not continued, the court must expeditiously appoint new counsel for any indigent parties and guardians *ad litem* for the child and others, where appropriate. Because of the court's review of this issue at the recent permanency hearing, another hearing should not be necessary to make these determinations. Immediately upon the filing of the petition, the court should review issues of counsel so that counsel can be present at the first pretrial hearing.

b. Pretrial

The court should immediately set a pretrial date within 30 days. The pretrial and all of the subsequent hearings, unless prohibited by statute, should be scheduled before the same judge who has handled the case since the original filing. At the pretrial, the court should establish all of the following additional dates:

- The date for discovery to be completed, which is sufficiently in advance of the mediation or settlement conference to allow all parties to review the material in full.
- The date for mediation, pretrial, or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made, but another meeting is required to reach full agreement, there is adequate time for a second meeting. The recommended time frame for this meeting is two to four weeks prior to the trial date. Counsel must notify the court immediately following the meeting as to whether agreement was reached or whether the trial will proceed as scheduled.
- A final pretrial date, if necessary.
- The trial dates. Trial dates should be consecutive and the trial should begin within 90 days of the filing of the petition.[20]
- The judge should also reserve time on his or her personal calendar within seven days after the final trial day for the writing of the TPR findings and conclusions.

The court must establish and enforce strict expectations with regards to all parties committing to the dates scheduled at the pretrial. Barring extraordinary circumstance, such as serious illness or death of close relatives, everyone should be held to these dates.

In addition, if a petition for adoption is not filed in conjunction with the parental termination action, the court may order IDHW Bureau of Child Support Enforcement to submit a written financial analysis report within 30 days detailing the un-reimbursed public assistance monies paid by the state of Idaho on behalf of the child.[21] The report, if ordered, should contain recommendations for repayment and provisions for the future support of the child.

E. Conducting the Hearing

At this point in the court process, one of two circumstances will exist—either the parents will have voluntarily relinquished their parental rights or the case will move to trial. In each instance, the court should address questions of whether parental rights should be terminated,

[20] If the trial cannot be completed in the alloted time, judges should give priority to finishing the trial as soon as possible. Dates for completion should be set before the parties leave the courtroom. If judges are able to hold one or two days open each month for such "emergencies," no trial should have to be continued more than 30 days.
[21] Idaho Code § 16-2008.

whether termination and adoption are in the best interests of the child, and whether reasonable efforts are being made toward adoption and to finalize the permanent plan.

It is important to note that when pretrial negotiations result in an agreement that the patients will voluntarily relinquish parental rights, counsel must notify the court immediately. The court can then use the beginning portion of the dates previously set for the final pretrial or the trial for the final hearing on the motion to terminate parental rights to take the parents' voluntary consent. Remaining trial dates and time can be freed for other court business.

Idaho law provides that the termination of parental rights case should be heard by the court without a jury and that it must be closed to the general public. Stenographic or mechanical recording of the hearing is required. Furthermore, the court's findings must be be based on clear and convincing evidence.[22] However, Idaho law also provides that "relevant and material information of any sort," including reports, studies, and examinations may be relied on to the extent of its probative value.[23]

1. Information the Court Should Have

In both instances of voluntary relinquishment and trial, the background information the court needs before going into the hearing is the same. Prior to the hearing, the judicial officer should review the court file, which should provide the following information for each child and parent in the case:

- reports, case plan, findings, orders, and a chronology of the child's out-of-home placements and treatment;
- the age of the child and needs at removal;
- a current report of the child's status and well being;
- circumstances leading to the filing of a termination of parental rights petition; and
- an IDHW report of concurrent efforts to identify, recruit, and place the child with an adoptive family.

2. Who Should be Present

The following list of persons to be present applies to both voluntary relinquishments and trials (with the one exception that when the case goes to trial, all trial witnesses are also included):

- the judge who has monitored the case from the first hearing;
- the child;
- parent(s);
- attorneys for the parent(s);
- if an Indian child, the child's tribe, the attorney for the child's tribe, if any, and the Indian custodian;
- assigned IDHW caseworker(s);[24]
- prosecuting attorney or deputy attorney general;

[22] Idaho Code § 16-2009.
[23] Idaho Code § 16-2009.
[24] If an adoption caseworker has been assigned to the case, that person should be present along with the ongoing caseworker.

- guardian *ad litem* for the child, whether attorney, social worker or other paid non-attorney, or CASA;
- attorney for the child, if applicable;
- foster parent(s),[25] legal risk foster parent(s), or adoptive parent(s);
- relatives who are caretakers of the child or who are involved in an adoption with contact agreement, when applicable;
- court reporter or suitable recording technology; and
- court security and other court staff.

F. Questions That Must be Answered to Determine Whether Grounds Exist for Termination of Parental Rights and Whether Termination and Adoption are in the Best Interests of The Child

1. When Mediation Results in Consent to Terminate Parental Rights

The seriousness of termination of parental rights and the importance of avoiding collateral attacks on the decree make it important to make sure that whenever the court is involved in voluntary relinquishment of parental rights, the court ensures that the consent is *voluntary and informed.* At the hearing, the judge should take the time to make sure that each parent understands the consequences of termination and the right to a trial. Among the questions judges should ask are:

- Was the parental consent to relinquishment voluntary and informed?
- Have both biological parents consented to relinquishment?
- Why is relinquishment and adoption in the best interests of the child?
- Is there a recommendation for adoption with contact? How is this recommendation, or lack thereof, in the best interests of the child?

For Indian children, the court must comply with the requirements of the ICWA, 25 U.S.C. § 1913, which states that voluntary relinquishments must be:

- Executed in writing;
- Recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
- Certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood; and
- Any consent given prior to or within 10 days after the birth of the child shall not be valid.[26]

2. When the Case Goes to Trial

When mediation or other pretrial negotiations have not produced an agreement for voluntary relinquishment of parental rights, the court must be ready to proceed with the trial. The

[25] Per ASFA, foster parents are entitled to notice and an opportunity to be heard. They are often the most informed individuals to provide a day-by-day report of the child's status, health, and well-being.
[26] These provisions of ICWA are discussed in detail in Chapter XI of this Manual.

concurrent dates for the trial have already been set, counsel has been appointed, and discovery completed (see section D: Filing the TPR Petition).

Terminations of parental rights should be based upon clear and convincing evidence.[27] Pursuant to Idaho Code § 16-2005, the grounds for termination in Idaho are:

- abandonment of the child by willfully having failed to maintain a normal relationship, including failure to maintain reasonable support and regular personal contact;
- failure to maintain a normal relationship without just cause for one year is prima facie evidence of abandonment;[28]
- neglect or abuse of the child such that the child "lacks the parental care necessary for his health, morals and well-being";
- the parent is unable to discharge her or his parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that the condition will continue for a prolonged period of time and will be injurious to the child's health, morals, or well-being; or
- where termination is filed by a parent or through an authorized agency, if termination is found to be in the best interests of the child.

Idaho law provides that there is a rebuttable presumption that termination of parental rights is in the child's best interests in any of the following situations:[29]

- the parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under 16, or sexual abuse of a child under 16;
- a parent murdered or intentionally killed the other parent of the child;
- a parent has been convicted of murder or voluntary manslaughter of a sibling of the child or has aided, abetted, conspired or solicited to commit such murder of voluntary manslaughter;
- a parent has been convicted of a felony assault and battery which resulted in serious bodily injury to the child or a sibling;
- a parent is incarcerated with no possibility of parole; or
- a court determines the child is an abandoned infant.

Questions that must be answered when termination motions go to trial include:

- Were all parties properly identified and served?
- Does the evidence presented show that statutory grounds for termination of parental rights exist?[30]
- Were reasonable efforts made to reunify?[31]

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[27] ICWA requires the burden of proof in a termination proceeding to be beyond a reasonable doubt.

[28] Idaho Code § 16-2005(a) also provides that where termination is sought by a grandparent seeking to adopt the child, willful failure to maintain a normal parental relationship for 6 months is pima facie evidence of abandonment.

[29] Idaho Code § 16-2005(h)

[30] Under ICWA, if the child is an Indian child, in addition to any state requirements the court must determine beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

[31] Under ICWA, if the child is an Indian child, in addition to any state requirements the court must determine that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.

- Is termination of parental rights in the best interests of the child?

G. Special Provisions for Terminating Parental Rights of Unwed Fathers

Pursuant to Idaho law, if the child is born out of wedlock, the father of the child is required to file a notice of commencement of paternity action with the Vital Statistics Unit of IDHW.[32] This notice may be filed before the birth of the child. It must be filed before the child is placed for adoption in the home of prospective adoptive parents or before the commencement of any action to terminate parental rights, whichever comes first. In addition to filing the notice, the unwed father must commence a paternity action.

If an unwed father fails to file the notice of commencement of paternity actions he is deemed to have surrendered his rights to paternity of the child. Failure to file the notices constitutes an abandonment of the child. Filing of the notice and commencement of the action constitutes prima facie evidence of paternity in an action to establish paternity.

In a situation in which the unwed father has established a relationship with the child at some point during the child's life or where the unwed father has not had meaningful opportunity to establish such a relationship, it would be dangerous to rely on his failure to file the notice prescribed by §16-1513 because of its questionable constitutionality. A discussion of the potential constitutional issues with the statute is included in Appendix B. In such a situation, the recommended best practice would be to provide notice and to proceed with parental termination as if §16-1513 had not been adopted. As a result, abandonment by an unwed father should be established under the provisions of §16-2005 and should not be presumed under§ 16-1513.

H. Questions that Must be Answered to Determine Whether Reasonable Efforts are Being Made Toward Adoption and to Finalize the Permanent Plan

At this point in the proceedings, the court has addressed the first set of necessary questions—it has determined whether grounds exist for termination of parental rights and whether termination and adoption are in the best interests of the child. Upon finding that facts exist to meet these two criteria, termination of parental rights should be granted.

Then, in a follow-up hearing without the birth parents present, the court should proceed to the second question determining whether reasonable efforts have been and will be made toward adoption and finalization of the permanent plan by asking the following sets of questions (depending on the child's situation):

1. In All Cases, What are the Child's Special Needs?

- Current health and educational information;
- A description of the child's current placement;
- Description of the services that have been provided to the child, the progress the child has made, and the issues still to be addressed, including cultural needs; and
- Has the child received counseling with regard to termination of parental rights and how is the child adjusting to the plan of adoption?

[32] Idaho Code § 16-1513.

2. If the Plan is Relative or Foster Home Adoption

- What, if anything, remains to be done before the home is approved as the adoptive home?
- Can the adoption home study be waived and replaced with the kinship care or foster home study?
- Is there another person who spends significant time in the home involved with the family, and if so, has that individual been interviewed for appropriateness?
- Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- What is the time frame for finalization?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies?
- Will services follow the family if they move out of state?
- Is the adopting family aware of the details of all appropriate subsidy issues?

3. If an Adoptive Home has been Recruited

- A detailed description of the family. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness?
- If the child is an Indian child, does the home meet the placement preferences list in ICWA, and if not, why not? What efforts have the agency made to identify a placement under ICWA?
- Has there been full disclosure to the adopting family of the child's circumstances and special needs?
- What remains to be done, if anything, to process and approve the home?
- What is the visitation and placement plan and its time frame? If visits have begun, how are the child and the adopting family adjusting?
- If the family's ethnicity is different from the child's, what efforts will be made to ensure relationships between the child and others of the same ethnicity? Does the adopting family understand the special aspects of the child's ethnicity?
- If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?
- After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adopting family agreeable to any contact plan with the biological parent(s) that may have been Recommended?

4. If an Adoptive Home must be Recruited

- What efforts are being made to identify potential adoptive homes, both locally and in other jurisdictions? On what adoption exchanges and internet sites is the child listed?
- What other efforts such as newspapers, television spots, and match parties are being made?

- If the child is an Indian child, what efforts are being made to identify potential adopting homes in the child's tribal community and what efforts are being made by IDHW to comply with ICWA placement preferences?
- What is the status of investigating adults with whom the child has or has had a positive relationship with regard to their potential to become adopting families?
- How many potential families have expressed interest in the child, and what is the status of the investigation of each family?

I. Findings and Conclusions

Because of the complexity of findings and conclusions in a termination of parental rights case, it will probably not be possible to write and distribute the findings to parties in the courtroom at the end of the hearing. However, when possible, it is recommended that the court give a verbal statement at the end of the hearing as to how it intends to rule. The final order arising from the termination of parental rights trial should be issued within 14 days of the close of the hearing. This time frame is achievable when the judge has already reserved time on the calendar (e.g. when the case was set for trial) to write its decision.

Findings of fact and conclusions of law should be set forth in language understandable by the parties and with clear and complete detail that is sufficient to withstand appellate review. Termination of parental rights hearing entries should be divided into two separate sets of findings. The first set of findings should include:

- Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present.
- If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment was voluntary and informed.[33]
- Whether reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that *based on family circumstances and child health and safety, all reasonable efforts were made.*[34]
- If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.
- Why termination of parental rights and adoption is in the best interests of the child.

When termination of parental rights is granted, the following additional findings addressing the plans to finalize a permanent placement should be made in a separate entry:

- What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and time frames that are to occur.
- A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing each service.
- The date and time of the next review to be set within 90 days.[35]

[33] For Indian children, this must include the special requirements of ICWA described in section F of this chapter.
[34] *Id.*

J. Avoiding Appeals

Termination of parental rights has been compared to a death penalty in terms of impact and severity on birth parents. Even with fairness in procedures, competent attorneys, and full disclosure of facts related to the case, a significant percentage of involuntary termination cases will be appealed. By their nature, appeals create another layer of process and potential for delay in achieving permanence for the child. Delays can occur in preparation of transcripts and assembling the record for appeal. Even though a number of appellate courts have instituted 'fast tracking' of termination cases through direct appeal to a designated court and expedited hearings, the process still takes months.[36] All of these issues delay permanence for a child and extend the period of uncertainty for the child and the adopting family.

The best way to avoid the delay of appeals is to avoid the appeal being filed. The following list summarizes points made throughout this Manual that can help to avoid appeals:

- institute relinquishment counseling for parents beginning early in a case;
- require mediation or another alternative dispute resolution process after termination of parental rights becomes part of the permanent plan;
- conduct procedurally correct hearings and be scrupulous about due process and evidentiary rulings;
- ensure competent representation of parties throughout the child protection case; and
- make clear and legally-sufficient findings of fact, including reasonable efforts findings and conclusions of law, at each hearing (including all ICWA requirements).

K. Termination of Parental Rights Hearing Checklist

Who should be present

- the judge who has monitored the case from the first hearing;
- the child;
- parent(s);
- attorneys for the parent(s);
- if an Indian child, the child's tribe, the attorney for the child's tribe, if any, and the Indian custodian;
- assigned IDHW caseworker(s);
- prosecuting attorney or deputy attorney general;
- guardian *ad litem* for the child, whether attorney, social worker, or other paid non-attorney, or CASA;
- attorney for the child, if applicable;
- foster parent(s), legal risk foster parent(s), or adoptive parent(s);
- relatives who are caretakers of the child or who are involved in an adoption with contact agreement, when applicable;
- court reporter or suitable recording technology; and

[35] The review hearing process described in this manual must continue as long as the child continues in the custody of IDHW. Idaho Code § 16-1611.

[36] As thisa manual goes to press, the Idaho Appeallate Rules committee is considering an expedited appeals process for child protection and termination cases.

- court security and other court staff.

Questions that must be answered to determine whether grounds exist for termination of parental rights and whether termination and adoption are in the best interests of the child.

- When mediation results in voluntary relinquishment of parental rights:
  - Was the parental consent to relinquishment voluntary and informed?
  - Have both biological parents consented to relinquishment?
  - Why is relinquishment and adoption in the best interests of the child?
  - Is there a recommendation for adoption with contact?
  - How is this recommendation, or lack thereof, in the best interests of the child?

- For Indian children, the court must comply with the requirements of ICWA, 25 U.S.C. § 1913, which states that voluntary relinquishments must be:
  - Executed in writing;
  - Recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
  - Certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood; and
  - Any consent given prior to or within 10 days after the birth of the child shall not be valid.

- When the case goes to trial pursuant to Idaho Code § 16-2005, the grounds for termination in Idaho are:
  - abandonment of the child by willfully having failed to maintain a normal relationship, including failure to maintain reasonable support and regular personal contact;
  - failure to maintain a normal relationship without just cause for one year is prima facie evidence of abandonment;
  - neglect or abuse of the child such that the child “lacks the parental care necessary for his health, morals and well-being”;
  - the parent is unable to discharge her or his parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that the condition will continue for a prolonged period of time and will be injurious to the child’s health, morals, or well-being; or
  - where termination is filed by a parent or through an authorized agency, if termination is found to be in the bests interests of the child.

- Idaho Code § 16-2005(h) provides that there is a rebuttable presumption that termination of parental rights is in the child’s best interests in any of the following situations:
  - the parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under 16, or sexual abuse of a child under 16;
  - a parent murdered or intentionally killed the other parent of the child;
  - a parent has been convicted of murder or voluntary manslaughter of a sibling of the child or has aided, abetted, conspired, or solicited to commit such murder of voluntary manslaughter;

- a parent has been convicted of a felony assault and battery which resulted in serious bodily injury to the child or a sibling;
- a parent is incarcerated with no possibility of parole; or
- a court determines the child is an abandoned infant.

♦ Additional questions that must be answered when termination motions go to trial include:

- Were all parties properly identified and served?
- Does the evidence presented show that statutory grounds for termination of parental rights exist?
- Were reasonable efforts made to reunify?
- Is termination of parental rights in the best interests of the child?

Questions that must be answered to determine whether reasonable efforts are being made toward adoption and to finalize the permanent plan.

♦ In all Cases, What are the Child's Special Needs?

- Current health and educational information;
- A description of the child's current placement;
- Description of the services that have been provided to the child, the progress the child has made, and the issues still to be addressed, including cultural needs; and
- Has the child received counseling with regard to termination of parental rights, and how is the child adjusting to the plan of adoption?

♦ If the Plan is Relative or Foster Home Adoption

- What, if anything, remains to be done before the home is approved as the adoptive home?
- Can the adoption home study be waived and replaced with the kinship care or foster home study?
- Is there another person who spends significant time in the home involved with the family, and if so, has that individual been interviewed for appropriateness?
- Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- What is the time frame for finalization?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies?
- Will services follow the family if they move out of state?
- Is the adopting family aware of the details of all appropriate subsidy issues?

♦ If an Adoptive Home has been Recruited

- A detailed description of the family. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness?
- If the child is an Indian child, does the home meet the placement preferences list in ICWA, and if not, why not? What efforts have the agency made to identify a placement under ICWA?
- Has there been full disclosure to the adopting family of the child's circumstances and special needs?

- What remains to be done, if anything, to process and approve the home?
- What is the visitation and placement plan and its time frame? If visits have begun, how are the child and the adopting family adjusting?
- If the family's ethnicity is different from the child's, what efforts will be made to ensure relationships between the child and others of the same ethnicity? Does the adopting family understand the special aspects of the child's ethnicity?
- If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?
- After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adopting family agreeable to any contact plan with the biological parent(s) that may have been Recommended?

♦ If an Adoptive Home must be Recruited
- What efforts are being made to identify potential adoptive homes, both locally and in other jurisdictions? On what adoption exchanges and internet sites is the child listed?
- What other efforts such as newspapers, television spots, and match parties are being made?
- What is the status of investigating adults with whom the child has or has had a positive relationship with regard to their potential to become adopting families?
- How many potential families have expressed interest in the child and what is the status of the investigation of each family?

Findings and Conclusions

♦ Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present.

♦ If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment was voluntary and informed.

♦ Whether reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that *based on family circumstances and child health and safety, all reasonable efforts were made.*

♦ If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.

♦ Why termination of parental rights and adoption is in the best interests of the child.

When termination of parental rights is granted, the following additional findings addressing the plans to finalize a permanent placement should be made in a separate entry:

- What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and time frames that are to occur.
- A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing each service.
- The date and time of the next review to be set within 90 days.

L. Suggested Questions For Voluntary Termination Of Parental Rights

Are you the birth parent of the child named in the consent form?

When and where was the child born?
(May be advisable to wait at least 72 hours after birth, to establish that the parent was not rushed into courtroom while still under the emotional stress of childbirth.)

How old are you? What is your educational background? What do you do for a living?

Do you understand why you are here today? Can you tell me in your own words what you are here to do?

Are you under the influence of any medicine, drug, alcohol, or any other substance that might affect your state of mind?

Do you have any mental or physical illness that might affect your ability to decide what you want to do?

Did you see the child after birth? (Or, have you seen the child recently?)

If not, did someone prevent you from seeing the child, or did you make your own decision not to see the child?

If so, were you satisfied about the child's health, condition, and appearance? Did seeing the child make you change your mind about giving up the child?

When did you decide to sign the consent to termination? Have you had enough time to think about it? Do you want more time to think about it?

Has anyone in any way tried to improperly pressure you into signing the consent to terminate?
(Note: Threats to take lawful action, such as enforcement of child support, do not constitute duress.)

Have you talked to a lawyer to get legal advice about this? If not, do you want to?
(Some judges offer to find an attorney who will talk to them without charging a fee. They are seldom taken up on the offer, and on the rare occasion when they are, can usually find one fairly easily.)

Do you have a friend or family member that you like to talk to when you need to make an important decision? Did you talk to them? Is there someone you want to talk to before you do this?

Do you understand that you will be giving up ALL your rights concerning this child? You will not have the right to contact the child, to be notified of anything concerning the child, or to be involved in any decisions concerning the child, NOT ANYTHING.

Do you understand that you will be giving up all your rights to your child FOREVER? Once you sign this document, if you later change your mind, it will be extremely difficult, and maybe impossible, to undo the termination.

Do you understand that by terminating your rights as a parent, you are opening the door for someone else to adopt the child? Do you understand that unless it is an open adoption, you will not know who the adopting parents are?

Do you think this is in the child's best interests? Why?

Do you think this is in your best interests? Why?

Are you a member of an Indian tribe, or are you eligible for membership in an Indian tribe? If so, what tribe? If it is possible that the child might be of Indian heritage, is there anyone who might have more information about the child's Indian heritage? How can that person be contacted?

Have you seen and carefully read the consent form? Would you read it again now? Take as much time as you need to read it carefully.

Is there anything in the form that you don't understand or with which you do not agree?

Do you still want to terminate your parental rights?

CHAPTER X: ADOPTION

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Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Introduction

When parental rights have been terminated and the permanent plan for a child is adoption, there are a number of issues that must be considered in order to conduct thorough and effective review hearings, ensure funding for the child and the adoptive family (where appropriate), and complete the adoption. These issues include:

- The Multiethnic Placement Act;
- Adoption Recruitment Best Practices;
- Inter-jurisdictional Adoptions and Interstate Compact on the Placement of Children;
- Adoption Assistance Subsidies;
- Non-Recurring Adoption
- Expenses and Medical Expenses;
- Post-Adoptive Services;
- Adoption Assistance Agreements; and
- Compliance with Idaho's Adoption Statute.

All ICWA related issues should have been identified and addressed substantially earlier in the process. However, because parties may have overlooked ICWA and failed to identify an Indian child and interested Indian caregivers early in the case, it is critical to inquire at each hearing whether ICWA applies and has been complied with. Failure to do so may cause substantial delays even at this point in the process![1]

B. The Multiethnic Placement Act

For each child with special needs who is adopted, another child is still waiting for a family.[2] Children of color represent a higher number of those who are waiting. A 1992 study entitled Adoption Services for Waiting Minority and Non-minority Children[3] found that ethnicity was the single strongest predictor of whether a child was in an adoptive placement. This study found that African-American children constituted about 37% of the children who are free for adoption but who have not yet been placed. Overall, African-American, Hispanic, and Native American children were found in the child protection system at three times their proportion to the nation's population.

> At any given time, an estimated 1.5 % of foster children - about 8,000 - are available for adoption and, as yet, no adoptive family has been identified for them.

More current data shows that in 1998, 30% of the children waiting for adoptive homes were white and 40% were black, while in 1999, 40% of the children adopted were white and 43% of the children adopted were black.[4]

The general population in Idaho is not particularly diverse. According to 2000 Census statistics, Idaho's population is 91% white. The largest racial minority in Idaho is American Indians, representing approximately 1.4% of the state's population. Approximately 7.9% of the population is Hispanic or Latino (of any race).[5] In 2001, just over 9% of the children entering out-of-home care were racial minorities. During that same year, well over 10% of the children entering care were Hispanic.[6]

Because of the disproportionate lack of homes for minority youth throughout the country, ethnicity was categorized as a "special need" factor for agency adoption purposes and also resulted in passage of the Multiethnic Placement Act of 1994 (MEPA).[7] MEPA was intended to strengthen child protection practice relative to children of color and to remove barriers to interethnic adoption. MEPA was amended by the Interethnic Placement Act (IEPA) in 1996. As amended, the Act

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[1] ICWA is discussed extensively in Chapter XI of this Manual.
[2] J. ROSENTHAL, V. GROVE, ADOPTION, RACE AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE (1992).
[3] Submitted under contact to DHHS, Office of Human Development Services, Rockville MD 1996.
[4] Data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) was provided by Dr. Penelope L. Maza, Senior Policy Research Analyst, the Children's Bureau.
[5] U.S. Census Bureau, Idaho Fact Sheet, *available at* http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=&_cityTown=&_state=04000US16&_zip=&_lang=en&_sse=on (visited on February 1, 2005).
[6] Child Welfare League of America, National Data Analysis System, available at http://ndas.cwla.org/data_stats (visited February 1, 2005).
[7] 42 U.S.C. § 1996(b).

provides that states and state entities that receive federal funds and are involved in adoption and foster care may not:

> ... (A) deny to any individual the opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the individual or of the child involved; or (B) delay or deny the placement of a child for adoption or into foster care on the basis of the race, color or national origin of the adoptive or foster parent or the child involved[8]

MEPA makes clear that agencies receiving federal funding are required to make special efforts to recruit minority foster care and adoptive homes.[9] The Act prohibits agency practices that routinely require ethnic matching of' child and family, and it prohibits delays resulting from attempts to find same-ethnicity placements.[10] MEPA allows consideration of ethnicity, color or national origin based on facts of specific cases but gives no clear guidelines for such consideration.[11]

Statistics from 1998 suggest that approximately 15% of adoptions are transracial.[12] Until clearer guidelines emerge regarding when ethnicity can be considered as a factor, the North American Council on Adoptable Children (NACAC) suggests that when transethnic placements occur (approximately 18% to 20% of adoptions are transethnic),[13] agencies must prepare families to handle the unique responsibilities of transethnic parenting. Transethnic adopting families need access to information and resources so they can effectively teach their children how to take pride in their heritage and prosper as a member of a minority culture.

IDHW, lawyers, and judges working on cases must ensure that policies and practices do not deter reunification services and relative placements for families of color. IDHW and judges monitoring cases must work to ensure that that there are adequate programs for the recruitment of foster families and adoptive families that are reflective of the ethnicity of the children needing such placements. In addition, when an adoptive home must be recruited for a minority child, IDHW and the court should ensure that all available specialized placement agencies are being used. Consistent with MEPA, courts must ensure that ethnicity does not delay or deny a child an appropriate foster or adoptive placement. Finally, when a transethnic placement occurs, IDHW and the court must ensure that the child and the parents receive adequate preparation, information, and resources to make the placement a success.

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[8] *Id.*

[9] 42 U.S.C. § 622(b). *See* Michelle-Marie Mendez & Frank E. Vandervort, *The Multi-Ethnic Placement Act, available at* http://www.ssw.umich.edu/tpcws/articles/legal_MEPA.pdf (visited February 1, 2005).

[10] *See* 42 U.S.C. § 1996b. MEPA expressly excludes ICWA from its requirements. *Id.*

[11] This interpretation of the act has been consistently followed by the U.S. Dept. of Health and Human Services, Office for Civil Rights in its guidance on MEPA. *See OCR Guidance* available at http://www.hhs.gov/ocr/mepa/ocrguidance.html (visited February 1, 2005).

[12] National Adoption Information Clearinghouse (August 2000) available at http://www.calib.com/naic/pubs/s_number.htm (visited February 1, 2005).

[13] Data reported by Jack Kroll, Director NACAC. *See* SUSAN CUNNINGHAM & JENETTE WIEDEMEIER, TRANSRACIAL PARENTING PROJECT: PARENTING RESOURCE MANUAL (National Council on Adoptable Children 1998)

C. Adoption Recruitment Best Practices

ASFA requires that reasonable efforts extend beyond the permanency planning hearing to achievement of permanency for a child and closure of the case.[14] Adoption recruitment is one of the activities that judges must now determine to be "reasonable."[15] This determination includes whether the child welfare agency has:

- adequate programs to recruit and identify prospective adoptive parents, both locally and beyond state boundaries;
- adequate staff to complete home studies in a timely manner and to prepare adoption assistance agreement and interstate documentation; and
- appropriate and accessible services to place and stabilize a child in the permanent home.

Adoption recruitment must encourage collaboration with other agencies and the community. For an Indian child, it is essential that recruitment include the child's tribal community in order to maximize the possibility of recruiting a Native American home.[16] Recruiters must reach out to families, bring families forward who express interest, and design the recruitment processes to retain the families' interest by assisting them through a timely process of application, approval, full disclosure, and placement. Components of effective adoption recruitment include:[17]

- a clear understanding of the demographics of children awaiting adoption;
- a strong agency reputation in the community with validation by respected community organizations and leaders (or, in the alternative, collaboration with agencies who do have a strong community reputation and who will serve as the "front door" to the recruitment process);
- excellent "customer service" to families who express interest, starting with a timely and supportive response to the initial inquiry and extending to access to supports and services both before and after achievement of permanence and closure of the case;
- a consistent agency-wide philosophical approach to adoption, including foster care units and adoption units who can communicate and work together effectively, necessary staff resources (including staff training), and accessibility of offices and services to targeted communities;
- cultural competence, with a congruent set of behaviors, policies, and attitudes, and community outreach that understands and is respectful of the community's culture;
- programs that make sure that foster parents are encouraged and supported, when appropriate, to become adopting families;
- recruitment programs that include both public awareness and information and child-specific components such as television, newspaper, billboards, and adoption exchanges;

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[14] 45 C.F.R. §1356.21(c)(2)(ii)("The State agency must obtain a judicial determination that it has made reasonable efforts to *finalize* the permanency plan . . .")(emphasis added). *See also* CECELIA FIERMONTE & JENNIFER L. RENNE, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 39 (2002)("The purpose of the reasonable efforts inquiry is to (1) ensure that the agency is working diligently to secure a child's adoption, and (2) ensure the adoption process is thorough to reduce the risk of disruption later.).

[15] 42 U.S.C. § 675(5)(E). *See* MAKING IT PERMANENT, *supra* note 14 at 40-41 ("Under ASFA, when the permanency plan has been changed to adoption, the agency is required to identify recruit, and process prospective adoptive homes.").

[16] If there is a possibility that a child may be a member of a tribe or that the child may be eligible for membership in a tribe, the case is governed by the Indian Child Welfare Act. The requirements of that act are covered in detail in Chapter XI of this manual.

[17] Taken in part from D. LAKIN & L. WHITFIELD, ADOPTION RECRUITMENT: MEETING THE NEEDS OF WAITING CHILDREN, ADOPTION POLICY AND SPECIAL NEEDS CHILDREN (1997).

- printed materials, public information announcements, adoption events, and community outreach;
- internet sites and other means by which adoption information can be made readily available both locally and nationally;
- contracts with other states and non-profit organizations to conduct recruitment activities in geographic areas outside of the agency's jurisdiction;
- good relations with previous adoptive and foster parents, since word of mouth is such an effective recruitment tool;
- use of parents who have already adopted children as "parent buddies" to help guide prospective adoptive parents through the process; and
- strong and active collaboration between agencies and jurisdictions, so that children waiting for adoption may be placed with a family in another agency, county, or state, if appropriate.

In order to make meaningful reasonable efforts findings, judges must understand the agency's overall adoption policies and processes as well as know how these processes are working in an individual case. Not only is it important for judges to make reasonable efforts findings in individual cases, but judges must also advocate and collaborate with IDHW and community leaders to ensure that all components of effective adoptive recruitment exist for the neglected and abused children in their community.

D. Inter-jurisdictional Adoptions and Interstate Compact on the Placement of Children (ICPC)[18]

ASFA contains two provisions that relate to interjurisdictional adoption issues. ASFA requires that state child welfare plans:[19]

- specify that the state will not deny or delay the placement of a child for adoption when an approved family is available outside of the court jurisdiction that has the responsibility for handling the child's case; and
- contain assurances that the state will develop plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children.

Furthermore, ASFA establishes a penalty to be assessed against federal foster care funds for states that are found to deny or delay the placement of a child for adoption when an approved family is available outside of the jurisdiction.

ICPC provides the legal framework for the placement of children across state lines, including adoptive placement. All interjurisdictional adoptive placements must be approved by the ICPC with the exception of those occurring within Indian reservations. Idaho has codified the IPCP at Idaho Code § 16-2101 *et seq*.

Because the children for whom adoptive homes must be recruited are among the most difficult to place (due, in part, to an older age, their need to be placed with siblings or other special

[18]Information condensed from the GAO report, Foster Care: HHS Could Better Facilitate the Interjurisdictional Adoption Process, November 1999. The Interstate Compact on the Placement of Children has been codified in Idaho at Idaho Code § 16-2101 – 2107.

[19]42 U.S.C. § 622. These plans are required in order to receive federal foster care funds for maintenance of foster children, specific administration costs associated with foster care programs, and adoption assistance.

considerations), such children are likely candidates for adoptive placement across jurisdictions. Searching across jurisdictional lines for an adoptive family for hard-to-place children may increase the likelihood that they will be matched with an appropriate family.

While the number of interjurisdictional adoptions is relatively small, the process is longer and more complex than the adoption process within a jurisdiction. Consequently, courts must watch for potential problem areas and ensure that these problems are being addressed. These problems and potential solutions include:

- There is no nationally accepted standard for home studies, and public child welfare agencies do not have the authority to specify the contents of a home study prepared in another jurisdiction. Consequently, the home study from the other jurisdiction may not meet the requirements of the jurisdiction that holds custody of the child.

- However, if the requesting agency notifies the agency preparing the home study of its specific requirements in advance, it is probable that the agency doing the home study will be willing to ensure that all requirements are covered.[20]

- Although the Constitution sets the framework for states to accept the court orders of other states, neither the Congress nor case law has specifically addressed acceptance of termination of parental rights orders or adoption decrees. The Supreme Court has ruled that states are not obligated to accept judicial actions of other states in situations where minimum standards of due process have not been provided to those affected.

- There are two methods to deal with this issue. First, if a court has implemented the recommendations of this Manual regarding due process issues, minimum standards of due process should be easily met—and even surpassed. Second, some states specify in their adoption statutes that the state will accept such orders from any other state.

- Finally, states may need to improve procedures for administering and implementing the ICPC. Delays caused by the sending or receiving of a state's preparation of the ICPC approval request could cause unnecessary delays in the adoptive placement of a child.

- Judges must advocate to ensure that their state's ICPC requests are promptly processed. Ideally, an ICPC request related to adoption would be processed through the state's ICPC division within 3 days. For jurisdictions that routinely place children in a neighboring jurisdiction, border agreements can be worked out to alleviate delays in beginning home studies requested through the ICPC office.

P.L. 96-272 directed states to protect the interstate interests of adopted children. The Interstate Compact on Adoption and Medical Assistance (ICAMA) was established in 1986 to meet the P.L. 96-272 mandate. Once an interstate adopting home is found and approved for a child, ICAMA provides assistance by formalizing the delivery of medical and other services to children and their adopting families on an interstate basis. The compact recognizes that adopting parents may move

[20] For Indian children, the child's tribe establishes community standards for home studies. *See* Chapter XI of this manual for detailed discussion of ICWA

from one state to another while under adoption assistance agreements and that many special needs children will be placed with families across state lines. Operation of ICAMA is the responsibility of a designated compact administrator in each state. This administrator is located in the Title IV-E agency that coordinates with in-state and out-of-state officials to facilitate the provision of benefits and services for special needs adopted children. Approximately two-thirds of the states, including Idaho,[21] are members of ICAMA.

E. Adoption Assistance Subsidies

For many special needs children, adoption assistance subsidies can make adoption feasible where it might otherwise not be possible. All 50 states and the District of Columbia have both federally-funded and state-funded adoption assistance programs. These programs are designed to ensure that families who adopt are provided with the financial resources and necessary services to meet a child's often costly special needs.

The Federal Adoption Assistance Program was established by the Adoption Assistance and Child Welfare Act of 1980[22] as an open ended entitlement program. It provides payments for IV-E eligible children with special needs who are adopted through public child welfare agencies.[23] The federal reimbursement rate is 50% to 75%, with the match covered by state and/or county funds.[24] Children who are receiving federal maintenance subsidies are counted as IV-E children in determining the state's IV-E penetration rate. Adoption assistance payments may continue until the child is age 18, or, at state option, until the age of 21 if the child is mentally or physically disabled.[25]

To be eligible for this funding, a state must have a plan describing how it will provide this assistance to adopting families. The state plan describes what adoption assistance is available and the eligibility criteria, what efforts must be undertaken to place a child without assistance before eligibility applies, when assistance will begin (i.e. on placement of the child in a prospective adoptive home), and when it will end.[26] IDHW has formulated an adoption assistance plan for Idaho.[27]

There are two conditions a child must meet in order to be eligible for the federally-funded assistance program. First, the child must be IV-E eligible. Second, the child must have special needs. IV-E eligibility is based on the birth parent's financial eligibility for AFDC or the child's eligibility for SSI. Income of the adopting parent(s) is not a factor.[28] In order to be IV-E eligible, the court must have made determinations of “best interests” and “reasonable efforts” before ruling out a plan of reunification and approving a plan of adoption.[29]

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[21] Idaho Code § 39-7501
[22] 42 U.S.C. § 673.
[23] 42 U.S.C. § 673(b)(2).
[24] 42 U.S.C. § 674(a)(3).
[25] 42 U.S.C. § 673(b)(4).
[26] 42 U.S.C. § 671, 45 CFR 1356.20.
[27] IDAPA 16.01.06.900 *et seq*.
[28] 45 C.F.R. 1356.40 (c).
[29] 45 C.F.R. 1356.21 (b)(1).

Federal regulations define a child with special needs as a child who has a specific condition or factor that makes a child difficult to place for adoption. This definition leaves room for states to develop their own detailed definitions of special needs. IDHW has defined special needs to include the following factors:[30]

- The child cannot or should not be returned to the home to the parents;
- The child has a physical, mental, emotional, or medical disability, or is at risk of developing such a disability based on known information about the birth family and child's history;
- The child's age makes it difficult to find an adoptive home;
- The child is a member of a sibling group that cannot be placed apart;
- The child has developed such close emotional ties with a foster family or relative family that replacement is likely to be as traumatic to the child as removal from a natural family; or
- Except in the case of foster parent or relative adoption, the child must have been listed with a state, regional or national adoption exchange.

> It is important for judges to know the details of their state plan and which components are federally mandated as opposed to choices made by the state child welfare agency.

Regarding the amount of assistance available to adopting parents, federal law allows federally funded adoption assistance to be up to the amount that the adopting parent received as the fostering subsidy. This means that when states reduce the amount paid to an adopting parent after the adoption is finalized, they are doing so at their own choice. In addition, nothing in federal law prevents states from providing, at their own expense, additional benefits beyond the federal assistance.

Federal regulations require that states receiving federal dollars for adoption assistance must also offer the same assistance options to children with special needs who are not IV-E eligible, with one exception. The exception is that means testing of the adopting family is permitted as eligibility criteria for non-IV-E eligible children. Assistance to non-IV-E eligible special needs children is totally funded by state and/or county dollars. Since all 50 states and the District of Columbia are involved in the federal adoption assistance program, all states must provide adoption assistance to all special needs children.

This information is particularly important for judges who may believe that it is appropriate to make a finding that reasonable efforts to find an adopting family have not been made but are concerned that doing so will prevent an adopting family, when located, from being able to receive adoption assistance subsidy. Such, a finding will not prevent the child from being eligible for adoption assistance when an adopting family is finally recruited.

F. Idaho's Adoption Assistance Regulations

The regulatory framework for Idaho's Adoption Assistance program can be found at IDAPA 16.06.01.900. That section provides:

[30] IDAPA 16.01.06.900.02.

The purpose of the adoption assistance program is to encourage the legal adoption of children with special needs who would not be able to have the security of a permanent home without support payments. Applications are made through the Division of Family and Community Services, Resource Development Unit for a determination of eligibility. Once an application for adoption assistance is submitted to the Division of Family and Community Service's, the Division shall respond with a determination of the child's eligibility within forty-five (45) days.

01. Determination Of Eligibility For Title IV-E Adoption Assistance. The Bureau of Family and Children's Services shall determine whether a child is a child with special needs. Children applying for adoption assistance benefits must meet Idaho's definition of a child with special needs according to Section 473 (c) of P.L. 96- 272 (The Adoption Assistance and Child Welfare Act of 1980). There are five (5) ways a child can be eligible for Title IV-E adoption assistance:

a. Child is Aid to Families with Dependent Children (AFDC) eligible, is in the custody or care of the public child welfare agency or an Indian tribe with whom the state has a IV-E agreement and meets the definition of a child with special needs. For children whose adoption assistance eligibility is based on the child's AFDC eligibility, the child must meet the AFDC criteria both at the time of removal from his home and in the month the adoption petition is filed.

i. If the child is removed from his home pursuant to the first judicial determination, such determination must indicate that it was contrary to the welfare of the child to remain in the home.

ii. If the child is removed from the home pursuant to a voluntary out-of-home placement agreement, the child must receive at least one (1) Title IV-E foster care payment to be eligible for Title IV-E adoption assistance.

b. Child is eligible for Supplemental Security Income (SSI) benefits and meets the definition of a child with special needs.

i. A child is eligible for adoption assistance if, at the time the adoption petition is filed, the child has met the requirements for Title XVI (SSI) benefits;

ii. The circumstances of a child's removal from his home or whether the public child welfare agency has responsibility for the child's placement and care is not relevant.

c. Child has been voluntarily relinquished to a private non-profit adoption agency and meets the definition of a child with special needs.

i. The child must meet the requirements, or would have met the requirements, of the AFDC program as such sections were in effect on July 16, 1996, in or for the month in which the relinquishment occurred, or court proceedings were held which lead to the removal of the child from his home;

ii. At the time of the voluntary placement or relinquishment, the court must make a judicial determination that it would be contrary to the welfare of the child for the child to remain in the home.

d. Child is eligible for Title IV-E adoption assistance as a child of a minor parent and at the time of the adoption petition the child meets the definition of a child with special needs.

i. The child's parent is in foster care and receiving Title IV-E foster care maintenance payments that cover both the minor parent and child at the time the adoption petition is filed; and

ii. The child continues to reside in the foster home with his minor parent until the adoption petition has been filed. If the child and minor parent have been separated in foster care prior to the time of the adoption petition, the child's eligibility for Title IV-E adoption assistance must be determined based on the child's current and individual circumstances.

e. Child is eligible due to prior Title IV-E adoption assistance eligibility and meets the definition of a child with special needs.

i. A child whose adoption later dissolves or the adoptive parent(s) die, may continue to be eligible for Title IV-E adoption assistance in a subsequent adoption.

ii. The subsequent adoption of a child may be arranged through an independent adoption, private agency, or state agency.

iii. No needs or eligibility redetermination is to be made upon a subsequent adoption. The child's need and eligibility remain unchanged from what they were prior to the initial adoption.

iv. It is the responsibility of the placing state to determine whether the child meets the definition of special needs and to pay the subsidy in a subsequent adoption.

02. Factors Considered. The definition of special needs includes the following factors:

a. The child cannot or should not be returned to the home of the parents; and

b. The child has a physical, mental, emotional or medical disability, or is at risk of developing such disability based on known information regarding the birth family and child's history, or

c. The child's age makes it difficult to find an adoptive home; or

d. The child is a member of a sibling group that must not be placed apart; and

e. State must make a reasonable but unsuccessful effort to place the child with special needs without a subsidy, except in cases where it is not in the best interests of the child due to his significant emotional ties with the foster parent(s) or relative(s) who are willing to adopt the child.

03. Determination Of Eligibility For State Funded Adoption Assistance. Children who meet the special needs criteria found in Subsection 900.02 of these rules and do not meet any of the criteria for Title IV-E adoption assistance found at Subsection 900.01 in these rules, may be eligible for state funded adoption assistance benefits. If the child is determined ineligible for Title IV-E adoption assistance, the application will be evaluated for a state-funded subsidy.

04. Interjurisdictional Adoptions. When a child's adoption is arranged through the care and placement of a private non-profit adoption agency in another state and the adoptive family are residents of Idaho, the state of Idaho shall be responsible for the eligibility determination, negotiation, and payment of any subsequent Title IV-E or state-funded adoption assistance benefits.

G. Non-Recurring Adoption Expenses and Medical Expenses

The Federal Adoption Assistance Program also provides matching funds for non-recurring adoption expenses for both IV-E and non-IV-E eligible special needs children. State or county funds cover the portion of the costs that the match does not cover. Generally, this reimbursement is available to the adopting parent at a 50% matching rate for state expenditures up to $2,000 for the actual expenses of the adoption.[31] Eligible expenses include, but are not limited, to attorney's fees, the adoption home study, adoption fees, and may include other expenses directly related to the legal adoption of the child.[32]

All children who receive adoption assistance under Title IV-E are categorically eligible to receive Title XIX Medicaid in the state in which they live, whether or not it is the state that is party to an adoption assistance agreement. Children who receive state-funded adoption assistance are not automatically eligible for Medicaid. However, states have the option of choosing to extend Title XIX Medicaid to these children, without regard to the income of their adopting parents, if they meet eligibility criteria.[33] Since ASFA requires that states provide health insurance to children for whom there is an adoption assistance agreement and who need medical assistance for physical, mental, or rehabilitative care, most states have elected the option to make children under state-funded adoption assistance agreements Medicaid eligible.

H. Post-Adoptive Services

Many families who adopt children with special needs will require supportive services throughout childhood and adolescence. The availability of these supportive services can be the determining factor in the long-term success of many adoptions of children with special needs.

> Adopting families for special needs children are likely to have continuing needs that peak at certain developmental periods or at times of family stress.

While adoption subsidies provide financial and medical assistance, many adopting parents find themselves with very troubled children, for whom their repertoire of parenting techniques and the

[31] 45 C.F.R. § 1356.41(f)(1).
[32] 45 C.F.R. § 1356.41(i) .
[33] This option was established by the Consolidated Omnibus Reconciliation Act of 1985.

usual configuration of community services are inadequate. Often the special needs of children are not obvious at the time of their adoptive placement. The damage to children from prenatal substance exposure or maltreatment may not manifest itself until well after the adoption is finalized.

Finalizing an adoption does not end the impact of the child's abusive and neglectful history. The adoption process can also have a substantial impact on family dynamics.

Many of these children, even though placed in the most loving, nurturing adoptive homes, are likely to have ongoing problems. In order to provide the full range of services to families adopting special needs children, post-adoptive service systems should include:

- **Clearinghouse** -- A clearinghouse should include information on all aspects of the adoption process, special needs, and adoption search. Parents and professionals should be able to easily access information on upcoming training and conferences, parent support groups, therapists, etc., through a website.
- **Help Line** -- A toll-free telephone help line should exist with trained staff to provide support and assistance to families seeking general information on adoption and special needs. It should provide crisis intervention and information and referral regarding available services, as well as names of specific service providers who have a special proficiency in working with adopting families and adopted children. Currently IDHW operates Idaho Care Line at 1-800-926-2588 (TDD #208 332-7205). This line is a general service referral line. Plans are also underway and have been partially implemented in Ada County to create a statewide referral line using a 211 service similar to 911.
- **Parent Training and Education** -- Parents need on-going training and education on adoption issues, including separation, grief, loss, and attachment, as well as education on the specific special needs of their children such as attention deficit hyperactivity disorder, fetal alcohol syndrome and fetal alcohol effect, learning disabilities, and the long-term effects of neglect and abuse.
- **Parent Support Groups** -- The experiences of other adopting parents are invaluable to special needs adopting parents. Parent groups offer support through the sharing of experiences that are unique to special needs adoption. By offering education and support, parent groups help keep families together and may become an excellent resource for prospective adoptive parents.
- **Individual and Family Counseling** -- Few parents are prepared to rear children who come from the foster care system. Many of these vulnerable children have experienced physical and emotional trauma as well as multiple placements and will need ongoing therapy in order to integrate into a permanent family.
- **Advocacy** -- When interacting with the educational, social services, and medical communities, adoptive families often become intimidated and frustrated trying to secure needed services for their children. Providing a trained advocate and offering advocacy training to parents enables them to communicate effectively on behalf of their children.
- **Respite Care** -- Families often face many challenges rearing their special needs children and need time away from the daily pressures and ongoing stress. Respite care comes in many forms, including hourly care, in-home respite care, and residential programs.
- **Intensive Home Based Services and Day Treatment Programs** -- Some children with multiple and severe needs may need extra in-home supports. Specially trained workers can come into the home or school to help teach the parent and teacher better methods of managing

Juvenile and family courts should have a vested interest in the quality and quantity of post-adoptive services available to the families who step forward to adopt abused and neglected children with special needs.

the child's problem behaviors. Some children's problems may be so severe they require special programming in a day treatment environment.

- **Residential treatment** -- For certain periods of time in their development, some children require more care than can be provided in a family setting. Residential programs can encompass psychological, emotional, behavioral, and medical treatment.

Judges should have information about the post-adoptive service system that exists in their jurisdictions, not only for effective review of an individual case, but also to advocate for a comprehensive and effective system for all children. Many states do not offer adequate funding for post-adoptive services. Courts need to be satisfied that the necessary services will be available to support these families so they can achieve successful permanence for their adopted children.

IDHW regulations (IDAPA 16.6.01.701.09) provide for the following post-adoptive services:
Services after an adoption is final are provided within available resources. Children with negotiated adoption assistance agreements (whether from Idaho or from another state) are eligible for any **services** available to Idaho children. Children with adoption assistance either IV-E or state adoption assistance agreements are eligible for Medicaid in Idaho. A referral from an Interstate Compact on Adoption and Medical Assistance member state shall serve as a formal application for services in Idaho. Applications for Medicaid are made through Central Office.

Judges should assess the adequacy of the system in their jurisdiction by asking the following questions:

- Are funds available for needed services in addition to routine maintenance payments?
- Are regulations interpreted broadly to expand eligibility to the maximum appropriate degree?
- If funds are provided directly to the adoptive parent to purchase services, are the needed services available for purchase?
- If the funds are provided directly to the adopting parent(s) to purchase services, can funds be made available upfront when needed?
- If funds are provided directly to service providers, are the services consumer friendly and easily accessible to the child and adopting family?
- Is there a mechanism to collect consumer satisfaction information from the adopting parents who are purchasing or using the post-adoptive service? If so, what does the information identify as the strengths and weaknesses of the post-adoptive service system?
- Does the service system include all of the necessary services listed on the preceding pages to provide a full range of services to adopting families?
- Are funds flexible enough to allow the purchase and installation of items such as wheelchair ramps, special vans for the handicapped, etc., and for emergency needs when there is no other source of such funding and when lack of such funding could result in the breakup of the adopting family?

If judges find the post-adoptive services system in their jurisdiction lacking, they should make the consequences of the lack of services known to policymakers and then advocate for improved systems of post-adoptive services.

I. Adoption Assistance Agreements

Prior to finalization of a special needs adoption, an adoption assistance agreement should be made in writing between the adopting parent(s) and the social services agency. This agreement should include:

- the nature and amount of adoption assistance to be provided to the child and adopting parent(s) after the adoption is finalized;
- agreed services that will be provided to the child and the family post-finalization and the method of funding for these services;
- how medical needs of the child will be covered;
- under what circumstances the agreement can be modified either to increase or decrease payments or services;
- the continued effectiveness of the agreement if the adoptive parents move out of state; and
- names and phone numbers of persons adopting parents can contact for assistance if additional questions or needs arise.

The court should be aware of this information during review hearings to ensure that these issues are resolved with the adopting parent(s) well before the adoption is ready to be finalized.

J. The Adoption Action

1. Consent

Consent to adoption is required from the following individuals:[34]

- The child to be adopted, if the child is over 12 years of age;
- Both parents or the surviving parent of a child who was conceived or born within a marriage;
- The mother of a child born outside of marriage;
- Any person who has been adjudicated to be the child's biological father prior to the mother's execution of consent;
- An unmarried biological father who has complied with Idaho Code § 16-1504(2);[35]
- Any legally appointed custodian or guardian of the child;
- An unmarried, biological father who has filed a voluntary acknowledgement of paternity with the vital statistics division of IDHW pursuant to Idaho Code § 7-1106; and
- The father of an illegitimate child who has adopted the child by acknowledgement pursuant to Idaho Code § 16-1510.

If the child to be placed for adoption was abandoned pursuant to the Idaho Safe Haven Act,[36] parental consent does not *appear* to be possible and therefore is arguably not necessary. That Act provides for IDHW to move to terminate parental rights without notice to parents. If a putative parent does not move to assert parental rights pursuant to §39-8206(3) of that Act, and if no claim of parental rights has been filed with the Vital Statistics Unit of IDHW and a certificate to that effect is filed with the court, the court may terminate the parental rights of the unknown parents. Although the Safe Haven Act does not directly address the question of consent to adoption, presumably such consent is not necessary once the parents' rights have been terminated pursuant to

[34] Idaho Code § 16-1504.

[35] Idaho Code §§16-1504(2), (3) and Idaho Code §16-1513 purport to eliminate the necessity of obtaining consent from an unmarried biological father whose fails to comply with certain statutory preconditions. Recommended best practice is to not rely on Idaho Code §§ 16-1504(2), (3) and §16-1513 until questions regarding their constitutionality are resolved. Appendix B contains a discussion of the constitutional issues raised by these provisions.

[36] Idaho Code §§ 39-8201-- 8206.

the Act. To the extent thisAct would permit the termination or parental rights without notice, it may be subject to constitutional challenge.[37]

Persons whose consent is requires must execute such consent in writing.[38] The form of the consent is prescribed by Idaho law.[39] The consent must be filed in the court in which the adoption petition is filed. Best practice is to sign the consent in the presence of the judge at the hearing on the adoption petition. This is particularly important with the consent of a child twelve years of age or older. With regard to the consent that may be required from IDHW, standard practice is that the Director of IDHW signs a consent that is filed with the court in advance and the assigned caseworker signs a second consent at the adoption hearing.

2. Notice

Notice of the adoption action must be provided to the following persons:[40]

- Any person whose consent is required under Idaho Code §16-1504, unless that person's parental rights have been terminated or otherwise relinquished;
- Any person who has registered notice pursuant to Idaho Code §16-1513;
- The spouse of the person petitioning to adopt the child, if he or she has not joined in the petition;
- Any person who is recorded on the birth certificate as the child's father, with the knowledge and consent of the child's mother, unless such person's parental rights have been terminated or otherwise relinquished;
- Any person openly living in the same household with the child at the time the mother's consent is executed or relinquishment made, and who is holding himself out as the child's father, unless such person's parental rights have been terminated or otherwise relinquished; and
- Any person who is married to the child's mother at the time she executes her consent to the adoption or at the time she relinquishes the child for adoption.

The notice need not disclose the name of the mother of the child who is the subject of the adoption proceeding. It must be served as least twenty (20) days prior to the final dispositional hearing. The notice must also state that if the person being served wishes to object to the adoption she or he must do so within twenty (20) days of being served. If a person fails to make objection within the twenty day period, she or he waives the right to further notice.

3. Service

Notice of adoption proceedings must be personally served on individuals whose consent is necessary for the adoption. If reasonable efforts to effect personal service are unsuccessful, a court may order service by registered or certified mail to the last know address of the person to be notified and by publication.[41]

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[37] *See* the discussion of the constitutionality of the putative father statute in Appendix B.
[38] Idaho Code § 16-1506(2).
[39] Idaho Code § 16-2005(f).
[40] Idaho Code § 16-1505.
[41] Idaho Code § 16-1505(6).

For others entitled to notice, service by certified mail, return receipt requested, is sufficient.[42]

4. The Adoption Petition

The adoption proceeding is initiated when the person or persons proposing to adopt the child file a petion in the district court of the county in which they reside. Idaho law requires that the petitioners have resided in the state for at least six consecutive months before the filing of the petition.[43]

The adoption petition must contain the following information:[44]

- the name(s) and address(s) of the petitioner(s);
- name of the child to be adopted;
- the name by which the adopted child will be know if the adoption is granted;
- the degree of relationship, if any, of the child to the petitioner(s); and
- the names of any person or agency whose consent to the adoption is necessary.

5. Social Investigation/Home Study

Idaho Law also requires that prior to the placement for adoption of a child in the home of prospective adoptive parents, a thorough social investigation of all members of the prospective adoptive family must take place.[45] This investigation must lead to a positive recommendation for adoption in order for the adoption to go forward.

In exigent circumstances where a court finds that a social investigation could not be completed before the child is placed in the home, the child may remain in the home, unless the court finds that the best interests of the child are served by other placement. The social investigation must then be initiated within five days of placement.[46]

The pre-placement social investigation must be completed within sixty (60) days.

If no private social investigation is conducted, IDHW must verify the allegations of the petition within (3) days after service of the petition and must make a thorough investigation including the date and place of the child's birth, and the parentage of the child. The investigative report must include all reasonably known medical and genetic information regarding the child and the biological parents.[47]

The pre-placement investigation and recommendation and the investigative report of IDHW must be filed with the court.[48]

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[42] *Id*. at § 16-1505((6) and (7).
[43] Idaho Code § 16-1506(1).
[44] Idaho Code § 16-1506(1).
[45] *See* IDAPA § 16.06.01.750 *et seq.* for regulations regarding the investigation process.
[46] Idaho Code § 16-1506(3).
[47] *Id.*
[48] *Id*.

6. Hearings

The prospective adoptive parents and the child must appear in person at the hearing on the adoption petition. At the time of the hearing, the prospective adoptive parents must execute an agreement "to the effect that the child shall be adopted and treated in all respects as . . . [their] own lawful child should be treated."[49] In addition, the hearing on an adoption petition may be consolidated with the proceedings for termination of parental rights assuming all the requirements of the parental termination and adoption statutes are complied with.[50]

At the hearing, the judge must examine each of the parties appearing at the hearing separately and must review the investigative report. The court must find that the interests of the child will be promoted by the adoption.

Finally, the adoptive parents must file an application with the Vital Statistics Unit of IDHW to have a new birth certificate issued for the child.

[49] Idaho Code § 16-1506(1).
[50] Idaho Code § 16-1506(4).

CHAPTER XI: Indian Child Welfare Act

Revised May 29, 2007

Click here http://www.isc.idaho.gov/childapx.htm to check for updates of this chapter

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A. Introduction

The Indian Child Welfare Act is a federal statute that was adopted to protect Indian families and to preserve the ties between Indian children and their tribes.[1] At the time ICWA was passed, an extraordinary number of Indian children were being removed from their families by state courts and social services agencies and placed in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970's 92.5% of adopted American Indian children in California had been placed with non-Indian families. This ratio for out-of-culture placement was six times more than that of any other minority group in the country. The adoption rate for Indian children was 8.4 times greater than the adoption rate for non-Indian children. There were 2.7 times as many Indian children in foster care as non-Indian children.[2]

Often state and local officials did not understand, ignored, or rejected the cultural or social customs of the child's tribal community. B.J. Jones, author of the American Bar Association's *Indian Child Welfare Act Handbook*, reports that "[i]n Minnesota, for example, an average of one of every four Indian children younger than age one was removed from his or her Indian home and adopted by a non-Indian couple. A number of these children were taken from their homes simply because a paternalistic state system failed to recognize traditional Indian culture and expected Indian families to conform to non-Indian ways."[3]

In addition, research indicated that Indian children who were cut off from their tribal communities and cultures had high rates of behavioral and emotional problems. While there is

[1] 25 U.S.C. §1901 *et seq.*
[2] *About ICWA*, American Indian Child Resource Center, http://www.aicrc.org/icwa.html (visited February 2, 2004).
[3] B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (Chicago, Ill.: American Bar Association, 1996).

little hard research on the impact of non-Indian placement on Indian children, studies indicate that the negative effects of such placements on children may be serious. Surveys indicate that these children spend a disproportionate amount of time in remedial education programs and are often labeled "learning disabled." Often children experience difficulty reading that contributes to a lack of academic success and high school dropout rates.[4]

B. Scope of ICWA

ICWA applies to any "child custody proceeding" involving an "Indian child" in any state court.[5]

1. "Child Custody Proceedings" under ICWA

ICWA defines "child custody proceedings" to include any action involving a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement.[6]

a. "Foster care placement"

The Act defines "foster care placement" as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated."[7] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian.

b. "Termination of parental rights," "pre-adoptive placements," and "adoptive placements"

ICWA applies to any action involving an Indian child in which the termination of parental rights is sought. The Act applies both to private and agency adoptions and to actions to terminate parental rights. Official state involvement through, for example, a child protection action, is not required.

> Child Custody Proceedings under ICWA include:
> - ✓ Foster Care Placements
> - ✓ Termination of Parental Rights Actions
> - ✓ Pre-Adoptive Placements
> - ✓ Adoptive Placements

"Pre-adoptive placement" is defined by ICWA to include "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement."[8]

Finally, ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[9]

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[4] *See* Carol Locust, *Split Feathers… Adult American Indians Who Were Placed in Non-Indian Families as Children*, 13 PATHWAYS 11 (September/October 1998), *available at* http://www.oacas.org/resources/OACASJournals/2000October/Feathers.pdf (visited August 20, 2004).
[5] 25 U.S.C. § 1903.
[6] 25 U.S.C. § 1903(1).
[7] 25 U.S.C. § 1903(1)(i)
[8] 25 U.S.C. § 1901(1)(iii).
[9] 25 U.S.C. § 1901(1)(iv).

c. Private custody actions

Generally, ICWA does not apply to custody disputes between parents. However, ICWA is triggered if custody of an Indian child is to be awarded to a non-parent as a result of private custody litigation. ICWA is also triggered if a non-parent family member independently seeks guardianship or custody of a child.[10] ICWA may be triggered if a de facto custodian seeks custody of a child.[11]

In addition, ICWA does not apply to most juvenile corrections cases.[12] However, placements of juveniles resulting from juvenile status offenses where the juvenile conduct would not be criminal if the juvenile were an adult are covered by the Act.[13] Voluntary placements in which the parent or Indian custodian can regain custody of the child upon demand are also excluded from ICWA. Thus, for example, a placement under Idaho's parenting power of attorney provision[14] would not be covered by ICWA.

2. Definition of "Indian child" under ICWA

IWCA applies to "Indian children." The Act defines an Indian child as one who is a member of or who is eligible to be a member of an Indian tribe and who is a biological child of a tribal member.[15] Whether a child is a member of or eligible for membership in a tribe is determined by the tribe. Tribal determinations of membership are entitled to deference in state courts and are entitled to full faith and credit under ICWA.[16]

> ICWA applies whenever a child is *eligible* for membership in an Indian tribe.

ICWA applies only to federally-recognized tribes and to Alaska native villages and corporations. Because many tribes are seeking federal recognition, the list of covered tribes and Alaskan native groups is constantly changing. The Department of Interior maintains up-to-date records of federally-recognized tribes.[17]

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[10] *See* B. J. JONES, INDIAN CHILD WELFARE ACT HANDBOOK 14 (1995) ("ICWA HANDBOOK") and cases cited therein. *See also* In the Matter of Mahaney, 146 Wash.2d 878, 51 P.3d 776 (2002)(finding that permanent award of custody to grandmother constituted a "foster placement" under ICWA), J.W. v. R.J., 951 P.2d 1206 (Alaska 1998)(award of custody to non-Indian step-parent constituted a "foster placement" under ICWA).

[11] Idaho Code §15-5-213, adopted in 2004, provides that "the court shall give the [de facto custodian] the same standing that is given to each parent under this act." It is not clear from this language whether a de facto custodian may seek any formal relationship with a child other than a guardianship. However, because a court order recognizing a de facto custodian would not be a voluntary arrangement that a parent could reverse without going to court, any action establishing such a relationship would be covered by ICWA.

[12] The Act does not apply to placements outside the home if the placement is the result of an "act, which, if committed by an adult would be deemed a crime . . .." 25 U.S.C. § 1903(1).

[13] Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg. No. 228, 67584 at B.3 (Nov. 26, 1979)("BIA Guidelines"). These guidelines, adopted by the Secretary of the Interior, do not have the force of administrative regulations. Despite the command of the Act, 25 U.S.C. §1952, the Secretary had not adopted administrative regulations. Nonetheless, because the Guidelines are the only instruction by the Secretary on the interpretation of ICWA, many courts have closely followed them. *See* ICWA HANDBOOK, *supra* note 5 at 14.

[14] Idaho Code § 15-5-104.

[15] 25 U.S.C. § 1904(4).

[16] 25 U.S.C. § 1911(d). The federal courts have long recognized that sovereignty concerns requiring tribal determinations of members are binding on state and federal courts. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The BIA Guidelines also provide that tribal determinations of membership are conclusive. BIA Guidelines, *supra* note 7 at § B.1(b)(i).

Each tribe has its own rules for determining tribal membership.[18] Thus it is imperative that the court consult the tribe directly to determine if a child is a tribal member or is eligible for tribal membership. The BIA Guidelines provide that if the tribe fails to make a determination of membership or eligibility, then determination may be made by the Department of the Interior, with its determination to be conclusive in the state court.[19] The Idaho Supreme court has held that where the tribe and the BIA are unable to make the determination of tribal membership, the state court must then make the determination.[20]

In order to ensure that the provisions of ICWA are complied with, steps must be taken in every case to determine whether the child is an Indian child. The following best practice recommendations should be followed in every case to determine a child's status:

- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is of Indian or native ancestry. Alaska Natives often use terms other than "Indian" to describe their ancestry. For this reason, inquiry should be made about "native" ancestry as well as Indian ancestry.
- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is or has been under the jurisdiction of any Tribal Court.

If there is any reason to believe that the child is an Indian child, the child's status must be verified. Thus the BIA Guidelines recommend that notice be provided to tribes for the purpose of determining whether the child is an Indian child under the following circumstances:

- ✓ A party, tribe, or private agency informs the court that the child may be an Indian child;
- ✓ A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- ✓ The child believes s/he is an Indian child;
- ✓ The child's residence or domicile is an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- ✓ An officer of the court has information suggesting that the child is an Indian child.[21]

If the identity of the child's tribe is unknown, all possible tribes should be contacted as soon as possible to seek verification of the child's Indian status.

3. Existing Indian Family Exception

In addition to the actions excluded from ICWA by its express language, a number of courts have recognized an additional exception to the Act. These courts have held that the policies of the Act are not implicated if the child is not being removed from an "existing Indian family. In

[17] An up-to-date list of federally-recognized tribes is available on the Bureau of Indian Affairs website at http://www.doi.gov/bureau-indian-affairs.html (last visited October 10, 2005).
[18] Determining tribal membership is a fundamental incident of tribal sovereignty. Determinations of tribal membership or eligibility for membership are not subject to review or question by non-tribal courts or by the courts of other tribes. BIA Guidelines § B.2.
[19] BIA Guidelines § B.1(b)(ii).
[20] In re Baby Boy Doe, 123, Idaho at 469-70, 849 P. 2d at 930-31.
[21] BIA Guidelines § B.5.

Mississippi Band of Choctaw Indians v. Holyfield,[22] the United States Supreme Court considered a case in which the state court had recognized the "existing Indian family" exception to jurisdiction. Although the Court did not directly address the exception, it reversed the Mississippi court's order upholding an adoption of an Indian child. The court held that the "fact that the parents gave up the child did not defeat the application of ICWA, especially since the Choctaw Tribe had rights under ICWA that could not be frustrated by the parents' actions."[23]

Despite the holding in *Holyfield*, state courts have continued to recognize this exception.[24] Relying on *Holyfield*, the Idaho Supreme Court, however, has declined to recognize the "existing Indian family" exception.[25]

4. Definition of Parent Under ICWA

ICWA defines a parent as "any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child even under Indian law or custom." However, the definition expressly excludes an "unwed father whose paternity has not be acknowledged or established."[26]

Under this definition, non-Indian adoptive parents are not included in the definition of parents. These individuals would, of course, be consider parents under state law. This distinction is important because only "parents" under ICWA may object to a transfer of jurisdiction to tribal court. Thus, non-Indian biological parents may enter such an objection but non-Indian adoptive parents may not.

5. Definition of "Indian Custodian"

ICWA defines Indian custodian as "any person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent" of an Indian child.[27] The child's Indian custodian has virtually the same standing as a parent in ICWA cases. As the definition indicates, Indian custodians may exist as the result of informal arrangements made by parents or pursuant to tribal custom. Congress intended to recognize the important role played by the extended family in most tribal cultures. While an Indian custodian can request a transfer of a case to tribal court, the custodian cannot object to such a transfer. The only other situation in which the Indian custodian is treated differently from a parent under ICWA is where the child is removed from the custodian and returned to the natural parent under either state or tribal law.

The standing conferred by ICWA to Indian custodians differs substantially from the approach of most states. Outside ICWA, an extended family member such as a grandparent or older sibling

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[22] 490 U.S. 30 (1989).
[23] ICWA HANDBOOK, *supra* note 6, at 16.
[24] State Court resistance to ICWA is discussed in Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).
[25] In re Baby Boy Doe, 123 Idaho 464,471, 849 P 2d 925, 932(1993)("[A]pplication of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.")
[26] 25 U.S.C. § 1903(9)
[27] 25 U.S.C. § 1903(6).

would generally only have standing to participate in a child protection case if that person had legal custody or visitation with a child pursuant to a court order.

C. Jurisdictional Provisions of ICWA

1. Exclusive Jurisdiction of Indian Children Domiciled Within the Reservation

ICWA provides that tribal courts have exclusive jurisdiction over any Indian child domiciled within the reservation of the tribe asserting jurisdiction.[28] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[29] In addition, the tribal court retains exclusive jurisdiction over any Indian child who remains a "ward" of the tribal court, notwithstanding the child's domicile.[30] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Holyfield v. Mississippi Band of Choctaws*.[31]

a. Domicile on the reservation

In *Holyfield*, the United States Supreme Court held that the term "domicile" in the ICWA exclusive jurisdiction provision has the same meaning as it does for purposes of diversity jurisdiction – that is, a person is domiciled in a location if she/he resides in that location and intends to remain or, if temporarily away, to return.[32] Furthermore, the Court reasoned that the jurisdiction provisions of ICWA must be interpreted to accomplish the purpose of the Act. Thus, even a child who is temporarily residing off the reservation but who intends to return to the reservation is domiciled on the reservation. Moreover, in *Holyfield*, the Court held that twin infants born off the reservation after their mother left to escape the reach of ICWA, were "domiciled on the reservation" for purposes of ICWA because their mother was a reservation domiciliary.

For purposes of ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[33] Thus the reservation includes any territory within the exterior boundaries of the reservation, including fee-held land, any dependent Indian community, and any Indian allotment and the rights-of-way running through them.

b. Exceptions to exclusive jurisdiction

i. State court emergency jurisdiction

State courts may exercise emergency temporary jurisdiction while the child is off the reservation in order to prevent immediate physical damage or harm to the child.[34] ICWA provides that such a temporary emergency placement should "terminate immediately when it is no longer necessary

[28] The only other exception to exclusive jurisdiction for reservation domiciled Indian children arises if a state has assumed jurisdiction under Public Law 280. 18 U.S.C. §1162.
[29] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990).
[30] 25 U.S.C. § 1911(a).
[31] 490 U.S. 30 (1989).
[32] 490 U.S. at 43.
[33] 25 U.S.C. 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act.
[34] 25 U.S.C. § 1922.

to prevent imminent physical damage or harm to the child."[35] Moreover, ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with ICWA, transfer jurisdiction to the appropriate tribe, or restore the child to the parent or Indian custodian.[36]

ii. Public Law 280

Some ambiguity regarding the exclusivity of tribal court jurisdiction exists in states governed by Public Law 280. Public Law 280 is a 1950's Congressional enactment granting states the option to extend their jurisdiction over reservations within their borders.[37] In 1963 Idaho adopted legislation pursuant to Public Law 280 purporting to exercise jurisdiction over "dependent, neglected and abused children."[38] The ICWA jurisdictional provisions appear to be a revision of P.L. 280 with regard to Indian child welfare cases. Thus to the extent that ICWA and state jurisdiction under P.L. 280 appear to conflict, the ICWA jurisdictional provisions should control.

2. Transfer jurisdiction

If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe my request that the case be transferred to tribal court.[39] The transfer jurisdiction provisions do not apply to pre-adoptive or adoption proceedings that are not also foster care placements or termination of parental rights proceedings.

The court may decline to transfer the case if either parent objects to the transfer. In addition the state court may retain the case if the tribal court declines to accept jurisdiction. Finally, the court may decline to transfer the case if it finds good cause not to transfer.

a. Good cause not to transfer

The burden of proving good cause to decline a transfer is on the party opposing the transfer. Good cause not to transfer a case must be shown by clear and convincing evidence. The legislative history suggests that the good cause requirement should be treated as a "modified doctrine of *forum non conveniens*."[40] Courts should consider the rights of the child as an Indian, the rights of the Indian parents or custodian, and the rights of the Tribe in making the good cause determination.[41]

The BIA Guidelines suggest that good cause not to transfer a case exists under the following circumstances:

- ✓ The Indian child's tribe does not have a tribal court as defined by ICWA;
- ✓ The proceeding was in an advanced state when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
- ✓ The Indian child is over twelve years of age and objects to the transfer;

[35] *Id*.
[36] *Id.*
[37] 67 Statutes at Large 588 (1953).
[38] Idaho Code § 67-5101.
[39] 25 U.S.C. §1911(b).
[40] H.R. REP. NO. 1386, 95th CONG., 2d SESS. 21 (1978)(hereinafter House Report).
[41] *Id.*

- ✓ The evidence necessary to try the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
- ✓ The parents of a child over five years of age are not available and the child has little or no contact with the tribe or members of the tribe.[42]

The BIA Guidelines specifically provide that "[s]ocioeconomic conditions and the perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."[43]

i. Advanced nature of the proceeding

The BIA Guidelines suggest that good cause to decline transfer exists when a) the proceedings are at an advanced stage when the request is made and b) the party requesting the transfer did not act promptly after receiving notice of the proceedings. Tribes often do not seek transfer of cases while they are in the child protection system and before they reach the parental termination stage. While the practice varies from tribe to tribe, the adjudication and disposition in the child protection arena is expensive and time consuming for many tribal court and social service systems. If, however, parental termination appears likely, many tribes will either intervene or seek transfer of the case at that time. For many tribes the concept of parental termination is a culturally foreign notion. Tribal leaders and the social workers will often say that even if a state court terminates parental rights, in tribe's view that family relationship is still intact. Because the parental termination is generally treated as a separate action, courts routinely transfer at this stage. The possibility of such a transfer underscores the importance of active tribal involvement in child protection cases.

ii. Child over twelve years of age objects

The BIA Guidelines suggest that a court should decline transfer if the Indian child is over 12 years of age and objects to the transfer. This ground for denying transfer jurisdiction was rejected by the drafters of ICWA. The child does not have standing in an ICWA case to directly request transfer or to object to transfer. ICWA does not give the child a formal voice in placement. This approach contrasts sharply with the approach of many states which give older children a voice in decisions made about them. The drafters of ICWA were concerned about defeating the goal of the Act through a child's veto of jurisdiction, especially given the malleability of even older children.

The BIA included this ground for denying transfer in the Guidelines because it clearly believed that an older child should play a role in decisions affecting his or her placement. As the Guidelines have not been adopted as regulations by the Department of the Interior, a court should not feel compelled by the Guidelines to decline transfer jurisdiction based on the child's objection. While the child's objection, by itself, may not be a basis for transfer under the Act, a court should consider an older child's views as a factor when making a decision about transfer.

iii. Child has little contact with tribal members

The BIA Guidelines suggest that where the natural parents of a child are unavailable, such as where their parental rights have already been terminated, and where the child is over five years

[42] BIA Guidelines § C.3.
[43] *Id.*

of age and has had little or no contact with the tribe or its members, a court may find good cause to decline transfer. The reasoning behind this provision appears to be that a younger child has a greater ability to adapt to the new culture context of the Tribe.

iv. Inconvenient forum

Finally, the BIA Guidelines support a finding of good cause not to transfer where the evidence in the case could not be adequately presented without undue hardship to parties or witnesses. This is the most common basis upon which courts decline to transfer jurisdiction. Care should be taken that this ground is not used inappropriately to defeat the purpose of ICWA. The BIA Guidelines advise that neither the perceived inadequacy of tribal court systems nor the socio-economic conditions on the reservation may be a basis for declining transfer. Thus a court should ensure that transfer to tribal court will in fact wreak undue hardship and cannot be abated through the use of standard procedures, such as the taking of testimony telephonically.

b. Best interests of the Indian child

Some courts have declined to transfer a case to tribal court based on the best interests of the Indian child.[44] Neither the express language of the statute, the BIA Guidelines, nor the legislative history support the notion that the best interests of the child is a basis for finding good cause to decline to transfer a case to tribal court.

State courts rejecting the use of the best interests of the child standard to defeat transfer jurisdiction have reasoned that the purpose of ICWA was to limit the role of state courts in the placement of Indian children. These courts have recognized that ICWA imposes a legislative presumption that it is in the best interests of an Indian child to maintain contact and ties with his or her tribe and tribal community.[45]

D. Notice of an ICWA Action

Notice must be provided to the parents, the Indian custodian, the Indian child's tribe, or, if the tribe is not identified, to the Department of the Interior. ICWA requires that notice must be by registered mail and must be received at least ten days prior to the proceeding. The BIA Guidelines provide for personal service in lieu of registered mail.[46] Finally, notice and service must also comply with state requirements. Thus, in Idaho, personal service is required, just as it is in child protection, termination of parental rights and adoption cases.[47]

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[44] In the Interest of J.L., 654 N.W. 2d 786 (S.D. 2002); In re Appeal in Maricopa County Juvenile Action No JS-8287, 828P. 2d 1245 (Ariz. App. 1991)(best interests of child are relevant consideration in good cause determination); In re Robert T, 246 Cal. Rptr. 168(App. 1988)(Court may consider best interests of the child in deciding whether to decline transfer); In Matter of Adoption of T.R.M., 525 N.W. 2d 298 (Ind. 1988)(finding that national policy of protecting best interests of children required consideration of best interests as grounds to decline to transfer jurisdiction); In re M.E.M., 635 P. 2d 1313 (Mont. 1981)(clear and convincing evidence of best interests of the child could constitute good cause to decline transfer jurisdiction).

[45] In the Interest of Eleanor Armell, 550 N.E. 2d 1060 (Ill. App. 1990)(considering state best interest of the child test as a basis for denying transfer to tribal court would be contrary to the legislative intent of ICWA and would frustrate the act's purpose); Yavapai-Apache Tribe v. Meja, 906 S.W. 2d 152 (Tex. App. 1995)(consideration of best interests of the child as a basis for denying transfer jurisdiction was an abuse of discretion, inconsistent with the purposes of ICWA); In the Interest of J.L.P., 870 P. 2d 1252 (Colo. App. 1994)(best interests of the child standard inapplicable to decisions to transfer jurisdiction).

[46] BIA Guidelines § B.5(e).

[47] *See* Idaho Code §§ 16-1611, 16-2007 and 16-1506.

ICWA provides that the notice must contain the following information:

- ✓ Name of child;
- ✓ Tribal affiliation;
- ✓ A copy of the petition or other document initiating the action;
- ✓ Name of the petitioner and attorney;
- ✓ Right to intervene;
- ✓ Right to appointed counsel;
- ✓ Right to 20 additional days to prepare;
- ✓ Location, address, and phone of the court;
- ✓ Right to transfer to tribal court;
- ✓ Consequences of action; and
- ✓ Confidentiality.

1. Notice to the Indian Child's Tribe

The child's tribe has the right to notice in any involuntary foster care or termination of parental rights proceeding involving an Indian child.[48]

Failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[49] However, courts have held that if the need for notice is not discovered until after the proceeding has begun, rulings of the court to that point are not void. For example, where the proceeding begins as a voluntary proceeding but becomes involuntary, notice must be sent at the time the case becomes involuntary. Likewise, if it is discovered during the proceedings that the child is an Indian child, notice must be given at that point. Even where notice should have been provided but wasn't, courts do not typically invalidate all actions taken in the potentially-defective proceedings. Rather, those actions may be validated if, upon providing notice it turns out that the child was not an Indian child, or, if the tribe does not intervene in the action or seek transfer.[50]

Finding that the child is an Indian child is not a prerequisite to providing notice. ICWA provides for notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child. The drafters of ICWA anticipated that the tribe should participate in the determination of whether the child was eligible for membership in an Indian tribe. The BIA Guidelines suggest that notice to a tribe be provided if any of the following facts are present in a case:

- ✓ A party, tribe, or private agency informs the court that the child may be an Indian child;
- ✓ A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- ✓ The child believes s/he is an Indian child;
- ✓ The child resides or is domiciled in an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- ✓ An officer of the court has information that the child is an Indian child.[51]

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[48] 25 U.S.C. § 1912(a).
[49] *See, e.g.*, In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982); In re M.C.P., 571 A. 2d 627 (Vt. 1989).
[50] *See, e.g.* Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 2999).
[51] BIA Guidelines § B.5.

E. Notice to the child's parents or Indian custodian

Upon receiving notice, ICWA provides that the child's parents (regardless of whether they are Indian) or Indian custodian may request and are automatically entitled to an additional twenty days to prepare for the proceeding.

F. Tribal Intervention in State Court Proceeding

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.[52] The right to intervene is not limited to "involuntary" proceedings even though the Act only provides for notice in "involuntary" proceedings. Because of the right of intervention and the right to seek transfer of the case, the best practice should be to provide notice to the tribe in every case.

G. Emergency Removal of an Indian Child

ICWA permits the emergency removal (from a parent or living situation) of a child who is domiciled on the reservation only where the child is temporarily off the reservation.[53] When a child is removed under this provision, the BIA Guidelines provide that :

- ✓ Immediate inquiry into the child's residence and domicile should be made;
- ✓ Affidavit accompanying request for continued physical custody should contain detailed information regarding the people involved and circumstances justifying the removal;
- ✓ Absent extraordinary circumstances, temporary emergency custody should not last more than 90 days.[54]

H. Right to Counsel

ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[55] This right to counsel applies whether the case initiated by the state or a private party. Furthermore, the right to counsel applies to pre-adoptive, adoption, foster care placements, and TPR proceedings.

If there is no state right to counsel in all the circumstances covered by ICWA, a state court can apply to the Department of Interior for reimbursement of the cost of providing counsel.

Appointment of an attorney for the Indian child is not required.

I. Full Faith and Credit

ICWA requires that state and federal courts accord full faith and credit to the "public acts, records and judicial proceedings of any Indian tribe relating to any child custody proceedings to the same extent states would accord credit to proceedings of other states."[56] Thus, at least as to child custody proceedings, ICWA eliminated confusion in the case law about whether tribal court determinations are entitled to full faith and credit.

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[52] 25 U.S.C.§1911(c).
[53] 25 U.S.C. § 1922.
[54] BIA Guidelines §B.7.
[55] 25 U.S.C. § 1912(b).
[56] 25 U.S.C. §1911(d).

An Indian tribe's determination that a child is a member of the tribe or is eligible for membership in the tribe is entitled to absolute allegiance. Courts have recognized this principle even where the child did not have any Indian blood.

J. Substantive Requirements of ICWA

1. Involuntary Foster Care Placements

In order to remove an Indian child from his or her home in an involuntary foster care proceeding, a court must find, under ICWA, that "active" efforts to provide remedial and/or rehabilitative services to prevent breakup of the Indian family have been unsuccessful.[57] In addition, a court must find by clear and convincing evidence, supported by qualified expert witnesses, that continued custody with the Indian parents or custodian is likely to result in serious emotional or physical damage to the child.[58]

a. Active efforts

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under the state law and the Adoption and Safe Families Act.[59]

> The ICWA standard requiring active efforts to prevent breakup of the Indian family is a higher standard than the ASFA reasonable efforts standard.

The comments to the BIA Guidelines make clear that "breakup" means more than divorce. The Comments state that "Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health."[60]

The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that that efforts be culturally relevant. The BIA Guidelines provide that active efforts "shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers."[61]

> Under ICWA, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child – the child must be likely to suffer serious emotional or physical damage.

Section 1912(d) does not include a specific burden of proof. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. Thus, in an involuntary foster care placement the burden of proof would be clear and convincing.[62]

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[57] 25 U.S.C. § 1912(d).
[58] 25 U.S.C. § 1912(e).
[59] ICWA HANDBOOK, *supra* note 6, at 57-58 (1995).
[60] BIA Guideline § D.2, comment.
[61] BIA Guidelines § D.2.
[62] ICWA HANDBOOK, *supra* note 6 at 58.

b. Serious emotional and physical damage

As previously stated, Congress intended the threat to the child be substantial before the state can break up an Indian family by removing a child. Addressing the type of evidence necessary to meet the standard, the BIA Guidelines state that "evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding."[63] Rather, the Guidelines suggest that the evidence must show a "causal relationship between the conditions that exist and the damage [to the child] that is likely to result."[64]

The serious emotional or physical damage test of ICWA was intended to replace the best interests of the child test and other similar standards. Under this test, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child *unless* the child is in danger.

Prior to the enactment of ICWA, Indian children were often removed when they were in the care of relatives, receiving medical care from a tribal member, or receiving a non-traditional tribal education. By enacting the serious emotional damage standard, Congress intended to prevent removal under such circumstances.

c. Qualified expert witness

ICWA requires that the court's finding of likely serious emotional or physical damage to a child be supported by the testimony of a qualified expert witness.[65] The legislative history of ICWA establishes that a qualified expert must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[66] Congress envisioned that the qualified expert would be more than a normal social worker.[67] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices. Thus courts should ensure that ICWA experts have sufficient knowledge related to tribes to fulfill the role intended by Congress.

The BIA guidelines suggest that an ICWA expert should be:

- ✓ a member of child's tribe with knowledge of tribal customs relating to family organization and child rearing; or
- ✓ a lay person with "substantial experience" delivering services to Indians and "extensive knowledge" of tribal customs and practices; or
- ✓ a professional w/ "substantial education and experience in his or her area of specialty."[68]

[63] BIA Guidelines § D.3(c).
[64] *Id.*
[65] 25 U.S.C. § 1912(e).
[66] House Report at 22.
[67] House Report at 21.
[68] BIA Guidelines §D.4

In *In re Baby Boy Doe*,[69] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness under ICWA.

2. Involuntary Termination of Parental Rights

Involuntary Termination of parental rights under ICWA requires proof ***beyond a reasonable doubt.***

Like involuntary foster care proceedings, involuntary actions to terminate parental rights must be supported by the testimony of a qualified expert witness. In addition, involuntary termination of parental rights under ICWA requires proof "beyond a reasonable doubt" that continued custody would result in "serious emotional or physical harm."[70] The extremely high standard of proof for termination of parental rights in ICWA cases reflects the fact that for most Indian people, termination of parental rights is literally a foreign concept. In many instances, tribal members will either refuse or be unable to recognize parental termination orders entered by state courts.

In addition to terminating the rights of parents of an Indian child, the rights of the Indian custodian must also be terminated in applicable cases.[71]

3. Consent to Termination of Parental Rights

ICWA provides that a parent of an Indian child may consent to termination of his or her parental rights. The consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such a consent must certify that the consequences of consenting to voluntary termination of parental rights were fully explained and were understood by the parent. Thus the parent consenting to termination of parental rights must be present before the judge so that he or she may be questioned regarding the circumstances of the termination. Such a consent must be executed more than ten days after the birth of a child.

ICWA also provides for the withdrawal of consent. The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. The right to withdraw consent to termination applies even when the parent may not have the right to immediate custody of the child. The rights of a parent to withdraw consent expires upon the entry of the order terminating parental rights or upon the entry of an order of adoption.

However, even after a final decree has been entered in the case, consent can be withdrawn and custody regained based on fraud and duress. This right to withdraw consent based on fraud and duress exists unless the child has been adopted for more than two years.

4. Federal non-ICWA Findings Required

In addition to meeting the requirements of ICWA, in a Child Protective Act case, the court must also make all the necessary state and federal findings necessary to preserve Title IV-E funding for the child. Federal law requires the court to make a documented, case-specific finding within 60 days of the child's removal from the home that IDHW has made reasonable efforts to avoid

[69] 902 P. 2d 477 (Idaho 1996).
[70] 25 U.S.C. § 1912(f).
[71] See 25 U.S.C. §§ 1912(f), 1913

removal. This finding is required to preserve the child's IV-E funding. The federal requirement is discussed in detail in Chapter IV.D.2 of this Manual. In addition, federal law requires a documented, case-specific finding at the first hearing sanctioning removal of the child from the home that remaining in the home is contrary to the welfare of the child and that removal is in the child's best interests. Again, This finding is necessary to preserve the child's IV-E finding.

5. Voluntary Proceedings Under ICWA

The purpose of ICWA is not only to eliminate unwarranted involuntary removals of Indian children, but also to make voluntary displacement of children more difficult. As a result, ICWA applies both to voluntary and involuntary proceedings that may result in the removal of an Indian child from his or her home. It also applies not only to public proceedings but may also apply to many private proceedings, whether voluntary or involuntary.

a. Voluntary foster care placements

ICWA uses the term "voluntary" in two distinct ways. The first situation, which this Manual refers to as a "voluntary placement," is an out-of-home placement in which parents may demand immediate return of the child. This first type of voluntary placement is not governed by ICWA. The second situation, referred to as a "voluntary *foster care* placement," is were the parent voluntarily enters into an arrangement in which the parent may *not* demand immediate return of the child. This type of placement is governed by ICWA, and the parent's consent to the placement must comply with ICWA.

i. Voluntary placements where parent can demand immediate return of child

The ICWA definition of "child custody proceeding" excludes voluntary placements of an Indian child where the parent can regain custody of the child on demand and without resorting to a formal court process. However, even in a situation where such a voluntary placement is intended, if the third party refuses to return the child, the situation may be governed by ICWA.[72]

> When parents voluntarily place a child with a third party, that party is an Indian Custodian under ICWA—even if the placement is temporary

This type of voluntary placement can arise under a number of circumstances. Many voluntary placements are truly private arrangements made by families for the care of children. Such voluntary arrangements – leaving children in the care of grandparents or other close relatives or friends, for example – are excluded from the Act. The caregiver in such a voluntary inter-familial setting probably qualifies as an Indian Custodian for purposes of any future ICWA action.

> **Best Practice Recommendation:**
> Agency-supervised voluntary placements of Indian children should be treated as if ICWA applies:
> - The child's tribe should be notified of such placements, and
> - The placement should comply with the ICWA placement preferences.

In addition to such purely private placements,

[72] 25 U.S.C. § 1903(1). The definition of "foster care placement" turns on whether the parent may have the child returned upon demand. *See, e.g.* In re Adoption of K.L. R. F., 515 A. 2d 33 (Pa. Super. 1986).

[73]however, voluntary placement of Indian children may arise through a voluntary agreement with IDHW.[74] If the agreement is structured so that the parent may demand return of the child at any time, ICWA does not apply to the placement. Even so, such voluntary placements of Indian children can easily become involuntary if the family situation continues to deteriorate and the decision is made to decline to return the child to the parents. As a result, the best practice is to treat agency-supervised placements of Indian children under a voluntary agreement as if ICWA applies. Thus, the child's tribe should be notified of the voluntary placement, and the placement should comply with the ICWA placement preferences. If these practices are not followed and the case becomes involuntary, the placement of the child may need to be disrupted in order to meet the requirements of the Act.

b. Consent to voluntary foster care placements

A parent may consent to a voluntary foster care placement in which the parent may not demand immediate return of the child. ICWA applies to such placements and requires that the consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such a consent must certify that the consequences of consenting to voluntary foster care placement were fully explained and were understood by the parent. Thus, as with consents to parental termination, the parent must appear before the judge for questioning. Such a consent must be executed more than ten days after the birth of a child.[75]

Because the parent cannot demand return of the child, the child's tribe must be notified of this type of placement, and the placement must comply with ICWA.

ICWA also provides for the withdrawal of consent at any time in a foster care placement.[76] The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. If consent is withdrawn, the parent has an unqualified right to regain custody of the child *unless* an involuntary action is then initiated.[77]

Finally, ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[78]

K. Placement Provisions of ICWA

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture." In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[79] Congress recognized that even where the child was removed from his or her parents, the child's best interests and the interests of the tribe would be

[73] 25 U.S.C. § 1902
[74] Voluntary agreements are discussed in this Manual in the materials dealing with Shelter Care and the Adjudicatory Hearing – Chapters IV and V.
[75] 25 U.S.C. § 1913(a).
[76] 25 U.S.C. § 1013(b).
[77] ICWA HANDBOOK, *supra* note 6 at 69-71.
[78] 25 U.S.C. § 1913(d).
[79] 430 U.S. at 36.

served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[80]

1. Foster Care and Pre-Adoptive Placements

The placement preferences of ICWA apply to both voluntary and involuntary placements, to pre-adoptive placements, and to placements made in contemplation of termination of parental rights.[81] Section 1915 of the Act requires that the child be placed in the "least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home."[82]

Under the Act, the standard for whether a particular placement is acceptable is that it is within the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides" or with which the parent or extended family "maintain social or cultural ties."[83] The ICWA foster care placement preferences apply even where the child has not resided in an Indian family.[84]

Thus, in the absence of good cause to the contrary, ICWA imposes the following placement preference, in the order of their applicability:

- ✓ A member of Indian child's extended family (whether Indian or non-Indian);
- ✓ A foster home licensed, approved, or specified by child's tribe;
- ✓ An Indian foster home licensed or approved by an authorized non-Indian agency; or
- ✓ An institution for children approved by an Indian tribe or operated by an Indian organization and that is suitable to meet the child's needs.[85]

ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally-altered preferences. The tribal resolution must comply with the ICWA mandate that the placement be the "least restrictive setting … ."[86]

ICWA provides that the court may consider the preference of the child's parents for placement, but such parental preferences are not dispositive of placement issues.[87]

2. Good Cause to Deviate from the Foster Care Placement Preferences

The Act provides that courts may deviate from the placement preferences if there is "good cause" to do so. State courts are in conflict regarding whether the level of proof for good cause is a preponderance of the evidence or clear and convincing evidence. At the appellate level, the standard of review of trial court decisions deviating from the preferences is abuse of discretion.

ICWA does not define "good cause". However, the BIA Guidelines provide that good cause may be found under the following circumstances:

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[80] 25 U.S.C. § 1902.
[81] 25 U.S.C. § 1915(b).
[82] 25 U.S.C. § 1915.
[83] 25 U.S.C. § 1915(d).
[84] *See* ICWA HANDBOOK, *supra* note 6 at 84-85.
[85] 25 U.S.C. § 1915(b).
[86] 25 U.S.C.§ 1915(c).
[87] 25 U.S.C. §1915(c) .

- ✓ At the request of the biological parents or the child, when the child is of sufficient age.
- ✓ When mandated by the extraordinary physical or emotional needs of the child, as established by testimony of a qualified expert witness; or
- ✓ When the unavailability of suitable families for placement persists, even after a diligent search has been completed for families meeting the preference criteria.[88]

a. Request of the biological parents or child.

Section 1915(c) of ICWA provides that a state court should consider the wishes of the parent, where appropriate, when making placement decisions. This first ground for deviating from the placement preferences in the BIA Guidelines appears to be an attempt to implement this section of the Act. Where a foster care placement is being made, the wishes of the parent might carry significant weight, where appropriate. However, in cases involving an adoptive placement where the parent's rights have been terminated, a parent's wishes regarding the adoptive placement should not be entitled to significant weight. This is especially true where the parent's wishes would not serve the purposes of the Act. The United States Supreme Court made clear in *Holyfield* that a parent should not be able to unilaterally defeat the intent of the Act. [89] Finally, the Comments to this section of the Guidelines suggest that parental requests should be weighed to protect the confidentiality of parents who request deviations from the Guidelines.[90]

In addition to the wishes of the parents, the BIA Guidelines suggest that the wishes of an older child might be the basis for deviating from the placement preferences of the Act. The Guidelines do not define "older child." In other contexts (e.g. objections to transfer jurisdiction), ICWA provides for the consideration of the wishes of a child older than twelve years of age.

b. Extraordinary emotional or physical needs of the child

The BIA Guidelines provide that where the child is in need of "highly specialized treatment services that are unavailable in the community where families who meet the preference criteria reside," a court may deviate from the placement preferences. The Guidelines require that the opinion of a qualified expert witness support this ground for deviation.[91]

c. Inability to comply with the placement preferences

The Guidelines permit deviation from the placement preferences where, after a diligent search, a placement complying with the preferences cannot be located. The Guidelines define a diligent attempt as "at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs with available placement resources."[92]

3. Adoptive Placement Preferences

The placement preferences for adoptive placements differ from the preferences for foster care placements and pre-adoptive placements. Pursuant to §1915(a), preference must be given for the adoption of an Indian child to:

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[88] BIA Guidelines §F.3.
[89] 430 U.S. at 38.
[90] BIA Guidelines §F.3 commentary.
[91] BIA Guidelines §F.3 and commentary
[92] *Id.*.

- ✓ a member of the Indian child's extended family;
- ✓ other members of the Indian child's tribe; and
- ✓ other Indian families.[93]

As with the preferences in foster care placements, the court must follow these preferences in adoptions unless the tribe has altered the preferences by resolution or good cause exists to deviate from the preferences.

4. Removal from a Foster Home

Every placement of an Indian child must be made in accordance with the placement preferences. Thus, if an Indian child is removed from a foster home or other institution, the placement preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[94]

5. Vacation of an Adoption Decree

If an adoption decree is set aside or the adoptive parents voluntarily terminate their parental rights, the biological parents or prior Indian custodian may petition the court for return of custody. ICWA provides that custody shall be restored unless return would not be in the child's best interests.[95]

[93] 25 U.S.C. § 1915(a).
[94] 25 U.S.C. § 1916(b).
[95] 25 U.S.C. § 1915(a).