IDAHO CHILD PROTECTION MANUAL

A practical guide for judges and attorneys

Third Edition

The Supreme Court of the State of Idaho
Administrative Office of the Court
2011

ACKNOWLEDGEMENTS

The 2011 Third Edition of the Idaho Supreme Court Child Protection Committee's "Idaho Child Protection Manual" was a long, time consuming, labor intensive project that was, in reality, a rewrite of the Manual . The Committee would like to acknowledge those individuals who made this project a reality.

We express our appreciation to Patti Tobias and Corrie Keller for their support of this project.

We are grateful to the child protection practitioners who shared their time and expertise, and assisted in drafting chapters for the Manual. Specifically, we are grateful to: James T. Baird, Andrew Ellis, Diane Helton, Ty Ketlinski, Adam Kimball, Deena Layne, Stephanie Miller, Dr. Kathy Morris, Erika Wainaina, and Joe Welsh. Their contributions to the rewrite of the Manual ensure that it is useful for practitioners "in the field" and includes the many "best practices" that have been developed around the state.

We extend a special thank you to the University of Idaho College of Law's Associate Dean for Faculty Affairs and James E. Wilson Distinguished Professor, Elizabeth Brandt, who shaped and guided the overall project and who edited the Manual in its entirety.

We thank Judge Bryan Murray, Shirley Alexander, Nanci Thaemert, Kim Halbig-Sparks, and Debra Alsaker-Burke for drafting chapters for the Manual and for generously contributing their time and expertise to review and revise the many drafts. Our appreciation also extends to Judge Brandelle Whitworth of the Shoshone-Bannock Tribe and Judge Cynthia Jordan of the Coeur d'Alene Tribe for their thoughtful review of and comments regarding the Indian Child Welfare Act material presented in the Manual.

We also thank Tara Wright for her extraordinary work proofreading the Manual. Her attention to detail is very much appreciated.

We appreciate students Brandon Brown, Brett Maupin, and Katie Edburg from the University of Idaho College of Law who undertook the daunting task of cite checking the Manual.

Finally, we extend a very special thank you to Janice Beller for her administrative support of this project. Janice transcribed our thoughts and comments in every meeting, and wove the revisions from many sources into the final version of the Manual.

CONTENTS

Chapter 1: Introduction

1.1 Key Principles Guiding Child Protection Cases in Idaho 1
1.2 Attorneys 4
1.3 Guardians *ad Litem* / Court Appointed Special Advocates (GALs/CASAs) 5
1.4 Organization of this Manual 5
1.5 Idaho Child Protection Act Flow Chart 7

Chapter 2: Referral and Investigation

2.1 Referrals of Child Maltreatment
A. Mandatory Reporting 8
B. Other Sources of Child Protective Reports 9
C. Response to Referrals 9
D. Multi-Disciplinary Teams 11
2.2 Investigation
A. Risk and Safety 13
B. Assessment of Child Safety 13
C. Safety Decision 16
D. Efforts to Prevent Removal of the Child 18

Chapter 3: Initiating a Child Protection Act Case

3.1 Initiating a Child Protection Case 20
A. Declaration of Imminent Danger 21
B. Methods of Removing a Child 22
3.2 Evaluating a Possible CPA Case 25
3.3 Filing a Child Protection Case 26
A. Petition 27
B. Summons 28
C. Supporting Affidavit(s) 28
3.4 Notice and Service of Process
A. Manner of Service 29
B. Persons to be Served 30
C. Notice to the Child's Tribe, Parents, or Indian Custodian(s) 30
3.5 Facts Supporting the Filing of a CPA Case
A. Jurisdiction 31
B. Aggravated Circumstances 34

Chapter 4: Shelter Care

4.1 Purpose and Goals of the Shelter Care Hearing 35
4.2 Procedural Considerations at the Shelter Care Hearing
A. Timing 36
B. Evidentiary Considerations 36
C. Exclusive Jurisdiction/Ongoing Duty to Disclose 36
D. Who Should Be Present at the Shelter Care Hearing 37
E. Persons Whose Presence May also be Required at the Shelter Care Hearing 40
4.3 Key Findings at Shelter Care Hearings
A. Petition 41
B. Jurisdiction 42
C. Contrary to the Welfare/Best Interests 42
D. Background Information Relevant to the Child's Safety 43
E. Elements of Safety Decision Making: Threats, Child Vulnerability, and Parental Protective Capacity 44
F. Reasonable Efforts to Eliminate the Need for Shelter Care 45
4.4 Parent Having Joint Legal or Physical Custody 46
4.5 Protective Order to Ensure Safe Return Home 46
4.6 Out-of-State Placement 47
4.7 Least Restrictive Setting and Placement Priorities for Relatives 48
4.8 Additional Considerations That May be Required or Appropriate
A. Indian Child Welfare Act (ICWA) 48
B. Examinations, Evaluations, or Immediate Services 49
C. Parental Visitation 49
D. Maintaining the Child's Connection to the Community 49
E. Child Support 50
4.9 Additional Activities at the Shelter Care Hearing
A. Serving the Parties with a Copy of the Petition 50
B. Advising Parties of Their Rights 50
C. The Time and Date for the Next Hearing and any Orders Needed to Prepare for the Next Hearing 51
D. Agreements by the Parties 52

Chapter 5: The Adjudicatory Hearing

5.1 Introduction 53
5.2 Timing of the Adjudicatory Hearing and Pretrial Conference 53
5.3 Submission of Reports to the Court 54
5.4 Agreements by the Parties 55
5.5 Evidentiary Issues at the Adjudicatory Hearing 56
5.6 Who Should be Present 56
5.7 Witnesses
A. In General 57
B. Child Witnesses 57

5.8 Key Decisions the Court Should Make at the Adjudicatory Hearing
A. Phase 1: Adjudication 57
B. Phase 2: Disposition 59
C. Role of the Court in Reviewing the Placement Decision 62
5.9 The Court's Written Findings of Fact and Conclusions of Law at the Adjudicatory Hearing 64

Chapter 6: The Case Plan and the Case Plan Hearing

6.1 The Case Plan
A. IDHW Preparation of the Case Plan 66
B. Requirements of Federal Law Governing the Alternate Care Plan 67
C. Requirements of Idaho Law for the Court-Approved Case Plan 67
6.2 Goals and Elements of Effective Case Planning From a Social Work Perspective
A. Key Decisions of the Department During Case Planning 70
B. The Case Planning Process 70
C. Family Participation in Case Planning 71
6.3 The Case Planning Hearing
A. Purpose of the Case Plan Hearing 72
B. Case Plans Where Aggravated Circumstances Apply 73
C. Submission of the Case Plan to the Court 73
D. Timing of the Hearing 73
E. Notice 74
6.4 Best Practices to Reduce Delays and to Achieve Timely Permanency for Children Before the Case Plan Hearing
A. Early Identification and Involvement of Absent Parents 75
B. Early Identification and Involvement of Relatives 75
C. Compliance with the Interstate Compact on the Placement of Children (ICPC) 76
D. Compliance with the Indian Child Welfare Act (ICWA) 76

Chapter 7: The Permanency Plan and Permanency Hearing

7.1 Introduction 77
7.2 The Permanency Plan 77
A. Required Contents of the Permanency Plan 78
B. Best Practice Recommendations of the Permanency Plan 79
C. The Permanency Plan in Cases Involving Aggravated Circumstances 79
7.3 The Permanency Hearing
A. Timing of the Hearing 79
B. Submission of the Permanency Plan and Guardian *ad Litem* Reports to the Court 80
7.4 Key Findings at the Permanency Hearing 80
7.5 Agreement by the Parties 81

7.6 Permanency Goals
A. Reunification 81
B. Termination of Parental Rights and Adoption 81
C. Guardianship 82
D. Another Planned Permanent Living Arrangement 82
7.7 Reasonable Efforts to Finalize Permanency
A. Federal 83
B. State Finding 83
7.8 Other Factors the Court Should Consider at the Permanency Hearing
A. Keeping Siblings Together 83
B. Visitation and Child Support 84
C. Maintaining the Child's Connection to the Community 84
D. Time and Date for the Next Hearing; Orders Needed 85

Chapter 8: Review Hearings

8.1 Overview of Review Hearings 86
8.2 Timing of Review 87
8.3 Submission of Reports to the Court 88
8.4 Key Decisions That the Court Should Make at the Review Hearing
A. Is the Child in an Appropriate Foster Care Placement That Adequately Meets the Child's Physical, Emotional, Educational, and Developmental Needs? 88
B. What Services are Being Provided to Assist the Child in Adjusting to the Placement and to Ensure the Stability of the Placement? 89
C. Is Child Support Appropriate? 90
D. Are Children Engaged in the Proceedings in an Age Appropriate Manner? 91
E. Are the Needs of the Foster Parents Being Addressed? 91
F. Have the Parents Complied with the Case Plan? 91
G. Is IDHW Making Reasonable Efforts to Reunify the Family and to Eliminate the Need for Placement of the Child? 92
H. Did IDHW Make Reasonable Efforts to Finalize a Permanency Plan for the Child? 92
8.5 Post-Permanency Review 92
8.6 Additional Matters the Court Should Consider
A. Are Any Additional Court Orders Necessary to Move the Case Towards Successful Completion? 93
B. Has the Time and Date for the Next Hearing Been Set, and Are Any Orders Needed to Prepare for the Next Hearing? 93
8.7 Agreements by the Parties 93
8.8 The Court's Written Findings of Fact, Conclusions of Law, and Order at the Review Hearing 94

Chapter 9: Termination of Parental Rights

9.1 Purpose of Termination of Parental Rights 95

9.2 Timing of TPR Proceedings Within a CPA Case
A. Generally 95
B. Exceptions to Time Standards 96

9.3 Procedural Issues Governing TPR Proceedings 96

9.4 Voluntary Termination of Parental Rights 97

9.5 Involuntary Termination of Parental Rights
A. Content of the Petition 99

9.6 Grounds for Involuntary Termination of Parental Rights
A. Abandonment 100
B. Neglected 101
C. Abused 102
D. The Presumptive Parent is Not the Biological Parent of the Child 103
E. Parent is Unable to Discharge Parental Responsibilities 103
F. Parent is Incarcerated 104
G. Child Conceived as a Result of Rape or Other Sexual Misconduct 104
H. Torture, Chronic Abuse, Murder, *et. al* 104
I. Abandoned Infant 104
J. Best Interests of Parent and Child 104

9.7 Notice and Hearing 105

9.8 Post-Petition Duties
A. Appointment of Counsel 107
B. Pretrial 107

9.9 Conducting the Hearing 108

9.10 Findings and Conclusions 109

9.11 Appeals 110

Chapter 10: Adoption

10.1 Introduction 111

10.2 The Adoption Process
A. Jurisdiction 111
B. Social Investigation/Home Study 112
C. Consent to Adopt 113
D. Notice of the Adoption Proceeding 114
E. Service 115
F. Petition 115
G. Objections to the Adoption 116
H. Hearings 116
I. Order of Adoption 116

10.3 Finalizing Permanency and Adoption Assistance
A. Federal Requirements Regarding Finalization of Permanency 117
B. Adoption Assistance: Federal Adoption Assistance for Special Needs Children 117
C. State Adoption Assistance 119

10.4 Special Considerations for Private Counsel Representing Prospective Adoptive Parents in a CPA Connected Adoption
A. Retention of Counsel by the Adoptive Parents to Finalize the Adoption 119
B. Preparing for the Adoption Action: The "Attorney Letter" from the Department 120
10.5 Post-Filing Recommendations 121
10.6 The Adoption Hearing 122
10.7 Post-Hearing Best Practices 122
10.8 Securing the New Birth Certificate 123

Chapter 11: The Indian Child Welfare Act (ICWA)
11.1 Introduction 125
11.2 Defining Terms Relevant to ICWA 125
A. Indian Child 126
B. Parent 127
C. Indian Custodian 127
D. Extended Family Member 127
E. Child Custody Proceedings 127
F. Foster Care Placement 128
G. Termination of Parental Rights 128
H. Pre-Adoptive Placements; Adoptive Placements 128
I. Private Custody Actions 129
J. Juvenile Corrections Act Proceedings 129
K. Voluntary Mental Health Placements Pursuant to Idaho Code § 20-511A 129
L. Voluntary Foster Care Placements 129
11.3 When ICWA Applies, What Changes in the CPA Case?
A. Procedural Requirements of ICWA 130
B. Jurisdictional Provisions of ICWA 130
C. Notice of an ICWA Action 134
D. Tribal Intervention in State Court Proceedings 136
E. Right to Counsel 136

11.4 Substantive Requirements of ICWA Covering the Removal of Indian Children from Their Homes
A. Active Efforts 137
B. Serious Emotional and Physical Damage 138
C. Qualified Expert Witness 138
D. Additional Substantive Requirements for Involuntary Termination of Parental Rights 139
E. Consent to Termination of Parental Rights 139
F. Placement Preferences of ICWA 140
G. Adoptive Placement Preferences 142
H. Removal from a Foster Home 142
I. Return of a Child to Parent or Indian Custodian 143

11.5 The Idaho Child Protection Act and ICWA Integrated
A. Referral and Investigation 143
B. Initiation of the Case 143
C. Shelter Care 144
D. Adjudicatory Hearing 145
E. Case Plan Hearing and Review Hearings 142
F. Permanency Hearing 146

Chapter 12: Special Topics

12.1 Relevant Federal Statutes 148
12.2 Idaho Juvenile Rule Expansions 149
12.3 Notifying and Including Unwed Fathers in Child Protective Act Proceedings
A. Idaho Statutory Provisions Regarding the Definition of "Parent" 152
B. Termination of Parental-Child Relationship Statute 156
C. U.S. Supreme Court Authority Relevant to the Constitutional Rights of Unmarried Fathers 157
D. Idaho Supreme Court and Court of Appeals Cases Relevant to the Rights of Unmarried Fathers 159
E. Best Practice Recommendations in CPA Proceedings Based on the Idaho Statutory Scheme 163

12.4 The Idaho Safe Haven Statute
A. Who May Leave a Baby at a Safe Haven 164
B. Safe Havens 164
C. Responsibility of a Safe Haven 164
D. Permanency for the Relinquished Child 165
E. Parental Rights 166

12.5 DeFacto Custodians and Child Protective Act Proceedings 169

12.6 Findings Required to Establish and/or Maintain a Child's Eligibility for Federal IV-E Funding
A. Contrary to the Welfare 170
B. Reasonable Efforts to Prevent Removal 171
C. Removal from Protective Supervision 172
D. Extended Home Visit 173
E. Reasonable Efforts to Finalize the Permanency Plan 174
F. Placement and Care Authority 175
12.7 Interstate Compact on the Placement of Children (ICPC)
A. Introduction 177
B. Goals of the ICPC 177
C. Situations Where the ICPC Applies 178
D. Placement and Maintaining Jurisdiction 178
E. Timeframes 179
F. Special Cases 179
12.8 Idaho Juvenile Rule 40: Involving Children and Foster Parents in Court 181
12.9 Educational Needs of Children
A. Overview 183
B. Legal Framework for Assessing Educational Needs 184
C. Idaho Law 185
D. Issues for Social Workers Regarding Education Needs of Children 186
E. Suggested Questions for Judges to Assess a Child's Educational Needs 187
12.10 Independent Living 188
12.11 Guardianships 191

INTRODUCTION

REFERRAL AND INVESTIGATION

INITIATING A CHILD PROTECTION ACT CASE

SHELTER CARE

THE ADJUDICATORY HEARING

THE CASE PLAN AND THE CASE PLAN HEARING

THE PERMANENCY PLAN AND PERMANENCY HEARING

REVIEW HEARINGS

TERMINATION OF PARENTAL RIGHTS

ADOPTION

THE INDIAN CHILD WELFARE ACT (ICWA)

SPECIAL TOPICS

CHAPTER 1
Introduction

This manual is published by the Idaho Supreme Court Child Protection Committee. The committee was convened to study ways to strengthen and enhance Idaho court processes in the area of child protection and to work with judges, the Idaho Department of Health and Welfare (IDHW), the Idaho Department of Juvenile Corrections, the Idaho Attorney General's Office, prosecutors, and public defenders to improve outcomes for children in the child protection system in Idaho. The committee's membership is both professionally and geographically diverse.[1]

1.1 KEY PRINCIPLES GUIDING CHILD PROTECTION CASES IN IDAHO

The work of the Child Protection Committee has been guided by state and federal law governing child protection cases and is informed by the following principles:

1. *Ensure the Safety of the Child.* The policy of the State of Idaho is that "[a]t all times the health and safety of the child shall be the primary concern" in Child Protective Act (CPA) cases.[2]

2. *Avoid Unnecessary Separation of Children and Families.* Consistent with the Idaho Child Protective Act, "[t]he state of Idaho shall . . . seek to preserve, protect, enhance and reunite the family relationship."[3] The court system and other stakeholders should use their authority to ensure that social and protective services are immediately available to families whose children may be abused or neglected 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 the first choice for permanency.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] For more information on the Child Protection Committee, please visit the Idaho Supreme Court website: http://www.isc.idaho.gov/.

[2] IDAHO CODE ANN. §16-1601 (2011).

[3] *Id.*

3. *Make Timely Decisions in Child Protection 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 mental health and emotional development. All stakeholders in the child protection system should be attentive to the statutory time deadlines in child protection cases and should move cases forward as expeditiously as possible. To achieve better outcomes in cases, the services should be "front-loaded." This means that all stakeholders must move quickly to assess the facts of the case, identify the appropriate parties, and provide the appropriate services for the family at the earliest possible stage. Effective practice includes early identification and involvement of fathers and other relatives, early engagement of parents in the court process, as well as early voluntary involvement of the family in remedial services. Other important court practices include establishing firm court dates and times with tight control over continuances and rapid distribution of the court's orders to all parties.

4. *Identify Indian Children as Quickly as Possible to Ensure Compliance with the Indian Child Welfare Act.* Permanency delays for children can often be caused because the child is not identified as an Indian Child early in the case. When the child is not accurately identified as an Indian Child, Indian Child Welfare Act requirements are not complied with and permanency for the child is at risk. Throughout this manual ICWA requirements are discussed. A thorough overview of ICWA is provided in Chapter 11.

5. *Provide Close Judicial Oversight of Child Protection Cases and Practice One Family/One Judge.* The best practice is that one judge presides over the entire child protection case from the shelter care hearing through permanency (including, where appropriate, termination and adoption). Following a case from start to finish offers the judge an opportunity to monitor the impact of decisions on the child, creates the best possibility of ensuring that case plans are family centered, and helps ensure that the needs of the child and family are met in a timely way. The child's case must be monitored until a permanent home is finalized. Judges should use the full extent of their authority to ensure that the child is safe. The court is the focal point for ensuring that all participants in the proceedings, including IDHW and other agencies, are accountable for providing reasonable and necessary services to children and families.

6. *Provide Access to Competent Representation in Child Protection Cases.* In child protection proceedings, attorneys for the state, the parents, the guardian *ad litem*, and the children should be well trained and culturally competent. Representation should be available to parents, the child's guardian *ad litem*, and/or to the child at the earliest opportunity (preferably at the first hearing but no later than the second hearing). The Magistrate Judge in a CPA case should take active steps to ensure that the parties have access to competent representation. Attorneys and other advocates identify key legal issues and determine, to a large extent, what information is presented to a judge. All parties must be competently and diligently represented in order for juvenile and family courts to function effectively.

7. *Gather, Analyze, and Use Data to Improve Court and Child Welfare Processes.* Decisions regarding processes in the Idaho child protection system should be based on accurate information and thorough study and research. Information gathered from the Idaho Courts' Case Management Information System (ISTARS) and from the Idaho Department of Health and Welfare should be analyzed to assist the child welfare system in strengthening and enhancing outcomes for children. These systems must be continually monitored and enhanced to ensure compliance with statutory time limits, track compliance with goals, analyze trends, and evaluate the effectiveness of programs and policies.

8. *Promote Collaboration with Child Welfare Professionals and the Community.* The court should encourage and promote collaboration, cross-training, and mutual respect among all participants in the child welfare system, including IDHW, other social service agencies, attorneys, guardians *ad litem*, tribal representatives and staff, community members, court staff, foster parents, and any other relevant participants. Judges and other professionals in the system should help the larger community to understand that child protection is a community responsibility.

9. *Recognize Permanency Priorities.* Reunification is usually the primary goal in a child protective case. Options that maximize permanency for a child are preferred. If a child cannot be safely reunified with his/her parents, the order of options which provide the most permanency for children, in descending order, are:

    a. Termination of parental rights and adoption
    b. Long-term guardianship
    c. Another permanent planned living arrangement (APPLA)

10. *Ensure Timely Decision Making and Placement Stability.* Timely decision making at all stages of the child protection case, from shelter care through the reunification or implementation of another permanency plan, should be ensured by the courts. Placement in foster care often has long-term negative consequences for children. Methods to reduce unnecessary delays in achieving permanency include:

    - *Avoiding Continuances.* The court should avoid granting continuances so as to ensure efficient management of the case and timely decision making on behalf of the child.
    - *Ensuring Early Identification of Family Members.* Early identification of family members helps to ensure timely permanency for children. Failure to timely engage parents can delay the court process. In addition, such family members may provide the most appropriate placement for the child.
    - *Confirming Concurrent Planning.* Idaho law requires IDHW to engage in concurrent planning.[4] Such planning is crucial to reduce delays in achieving permanency for a child should reunification efforts fail. It is the responsibility of the court to ensure that IDHW is pursuing concurrent planning.

[4] § 16-1621(3). Concurrent planning is defined as "a planning model that prepares for and implements different outcomes at the same time." § 16-1602(10).

11. *Provide Expedited Appeals.* An expedited appeals process for cases involving termination of parental rights and adoption is crucial to permanency. Idaho Appellate Rules 12.1 and 12.2 provide a framework for expedited appeals in Child Protective Act cases and in related matters involving children. Attorneys and judges should strive to process appeals within the expedited time frames established by these rules and to avoid continuances or extensions of time whenever possible.

12. *Ensure Frequent Review after Termination of Parental Rights to Achieve Timely Permanency.* When parental rights have been terminated, the court should frequently review the case until permanency for the child has been achieved.

13. *Understand the Need for Post-Adoptive Subsidies and Services.* Separating from family and finding permanency with a new family are difficult processes for children. As a result, children and adoptive families often have unique needs. The availability of post-adoptive subsidies and services can be the determining factor in the long-term success of many adoptions. To support adoptive families, participants in the child protection case should be aware of the availability of post-adoptive resources.

14. *Ensure the Availability of IV-E Federal Match Funds.* Judges should make timely, accurate, and complete IV-E findings to ensure the availability of federal IV-E funding for each eligible child. Federal IV-E finding requirements are discussed in detail in Chapter 12.

1.2 ATTORNEYS

The interplay of state and federal laws, the complex legal issues, the upheaval in families, and the need for the case to move quickly through the system all necessitates specialized legal representation in child protection cases. Ideally, attorneys working with the child protective system should be committed, well trained, and experienced.

Idaho law requires appointment of attorneys for parents in child protection cases.[5] In addition, Idaho law requires the appointment of a guardian *ad litem* or an attorney for the child.[6] Where a guardian *ad litem* is appointed, best practice recommends appointing counsel for the guardian *ad litem* as well.

Before becoming involved in an abuse and neglect case, attorneys should be trained in or familiar with:

- state and federal legislation and case law on abuse and neglect;
- foster care, termination of parental rights, and adoption of children with special needs;
- the causes of 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; and
- the structure and functioning of the child welfare agency and court systems.

[5] IDAHO CODE ANN. §16-1611(3) (2011).
[6] §16-1614.

To the extent that courts can strengthen and enhance legal representation in child protection cases, they should do so.

1.3 GUARDIANS *AD LITEM*/COURT APPOINTED SPECIAL ADVOCATES (GALs/CASAs)

The Child Abuse Prevention and Treatment Act of 1974 requires 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.[7] Idaho law requires that a guardian *ad litem* be appointed for the child in a child protection case.[8] The court should consider appointing an attorney for the guardian. If no guardian is available, Idaho law requires that an attorney be appointed for the child.[9] In Idaho, courts generally appoint trained citizen volunteers as GALs through the Court Appointed Special Advocates (CASA) program.[10] GALs are specially screened and trained volunteers appointed by the court to speak 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 they monitor the case until it is resolved.[11] Both trained volunteers and attorneys play a significant role in providing GAL representation for children. Courts should continue to examine methods of using both volunteers and attorneys to improve optimal representation of children involved in CPA proceedings.

1.4 ORGANIZATION OF THIS MANUAL

The manual follows a child protection action through each step in the statutory process and provides substantive information on important issues that may arise in child protection cases. The flowchart at the conclusion of this chapter illustrates the major steps in a typical child protection case. Corresponding chapters are noted on the chart.

Chapters 2 through 11 correspond with the normal process of a child protection case:

- Chapter 2: Referral and Investigation
- Chapter 3: Initiating a Child Protection Act Case
- Chapter 4: Shelter Care
- Chapter 5: The Adjudicatory Hearing
- Chapter 6: The Case Plan and Case Plan Hearing
- Chapter 7: The Permanency Plan and Permanency Hearing
- Chapter 8: Review Hearings
- Chapter 9: Termination of Parental Rights
- Chapter 10: Adoption
- Chapter 11: The Indian Child Welfare Act (ICWA)

[7] 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2011).
[8] IDAHO CODE ANN. §16-1614(1) (2011).
[9] §16-1614 (2011); IDAHO JUV. R. 36. Section 16-1614(1) authorizes the appointment of counsel to represent the guardian *ad litem*. §16-1614(2) requires the appointment of counsel for the child where there is no available Guardian *ad litem* program or where the number of available guardians is insufficient.
[10] The CASA program is authorized by Idaho law. *See generally* §§16-1632 to 1639; *see also* IDAHO JUV. R. 35.
[11] §16-1633.

Each chapter is keyed to a bench card for judges and to annotated court forms.

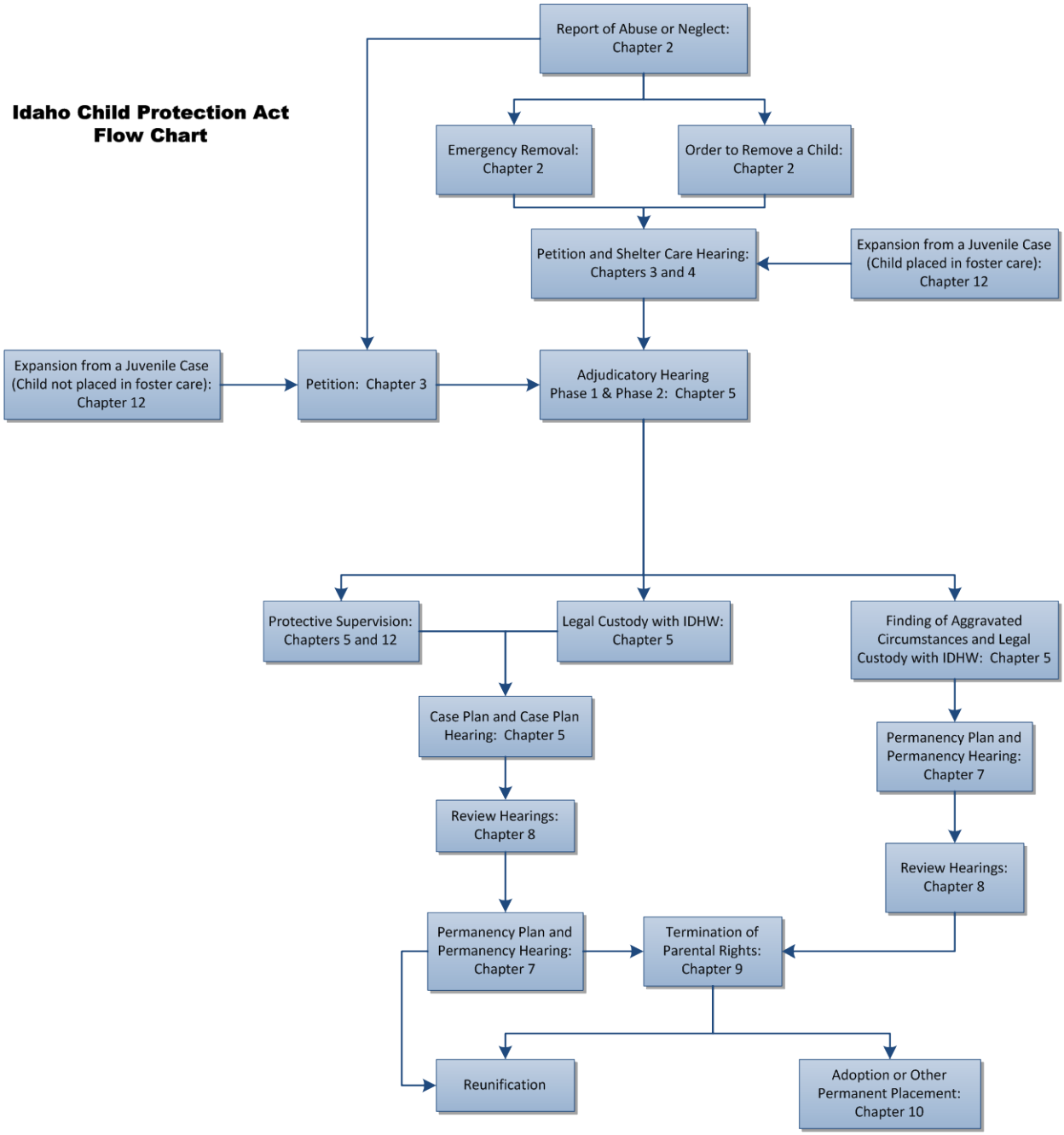
Chapter 12 focuses on specific substantive issues that may arise in CPA cases:

- Relevant Federal Statute Timeline
- Idaho Juvenile Rule Expansions
- Notifying and Including Unwed Fathers in Child Protective Act Proceedings
- The Idaho Safe Haven Statute
- Defacto Custodians and Child Protective Act Proceedings
- Findings Required to Establish and/or Maintain a Child's Eligibility for IV-E Funding
- Interstate Compact on the Placement of Children
- Idaho Juvenile Rule 40: Involving Children and Foster Parents in Court
- Educational Needs of Children
- Independent Living Requirements for Older Youth in Care
- Guardianships

The entire Idaho Child Protection manual, the coordinated Idaho Child Protection Bench Cards, and the annotated Idaho Child Protection Court Forms are updated as statutes and best practices change. The most up-to-date versions of these materials are available in the Child Protection section of the Idaho State Judiciary website at:

http://www.isc.idaho.gov/ChildProtection/main.htm

Idaho Child Protection Act Flow Chart



CHAPTER 2
Referral and Investigation

2.1 REFERRALS OF CHILD MALTREATMENT

A. Mandatory Reporting

The Idaho Child Protective Act (CPA) provides for mandatory reporting of suspected child abuse and neglect.[1] The Act specifically mandates reporting by physicians, residents on a hospital staff, interns, nurses, coroners, school teachers, day care personnel, and social workers. In addition, it requires every person who has reason to believe that a child is being abused, neglected, or abandoned to report the alleged abused. Reports of suspected child abuse and neglect must be made within twenty-four (24) hours to either law enforcement or the Department of Health and Welfare (IDHW).[2]

Any person making a report of child maltreatment in good faith and without malice is immune from civil or criminal liability in making the report.[3] However, any person who knowingly makes a false report or allegation of child abuse, abandonment, or neglect is liable to the party against whom the report was made for the amount of actual damages or up to $2,500, plus attorney's fees and costs of the suit.[4]

The duty to report does not apply to a duly ordained minister of religion, with regard to any confession or confidential communication made to him in his ecclesiastical capacity in the course of discipline enjoined by the church to which he belongs if:

1. The church qualifies as tax-exempt under 26 U.S.C. section 501(c)(3);
2. The confession or confidential communication was made directly to the duly ordained minister of religion; and
3. The confession or confidential communication was made in the manner and context which places the duly ordained minister of religion specifically and strictly under a level

---

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1605(1) (2011).

[2] *Id*. Where a physician, resident, intern, nurse, day care worker, or social worker who obtains information regarding abuse or neglect does so as a member of the staff of a hospital or similar institution, the report can be made to a designated institutional delegate who then makes the necessary reports to law enforcement or IDHW.

[3] § 16-1606.

[4] § 16-1607.

of confidentiality that is considered inviolate by canon law or church doctrine. A confession or confidential communication made under any other circumstances does not fall under this exemption.[5]

B. Other Sources of Child Protective Reports

Regardless of how the initial report is made, IDHW is designated by Idaho law as the official child protection agency of state government and has the duty to intervene in reported situations of child abuse and neglect.[6] The division of IDHW that has primary responsibility in the area of child protection is Family and Community Services (FACS). IDHW is staffed 24 hours a day 7 days a week to respond to reports of child abuse, neglect, and abandonment.

Reports and requests for investigations come from a number of sources, including:

- *Courts.* Judges may order an IDHW investigation as a part of an Idaho Juvenile Rule 16 expansion or in other court proceedings (such as child custody hearings) when the court suspects that abuse or neglect has occurred or is occurring.
- *Safe Havens.* A report is generated by a safe haven which accepts an abandoned infant.[7]
- *Law Enforcement Officers.* In the course of their regular duties, law enforcement officers often encounter children who they have reason to believe have been abused, neglected, or abandoned.

C. Response to Referrals

When IDHW receives a referral of child maltreatment that appears to fall within the CPA's definitions of child abuse, neglect, or abandonment[8], the referral will be assigned a priority. Priority is determined by the Priority Response Guidelines, which classify, report, and organize responses based on the level of threat to the child's safety and well-being.[9] The Priority Response Guidelines require social workers to respond according to the severity described in the referral. Before responding, IDHW social workers search agency records to determine whether other relevant reports regarding the family have been received and the status of those reports. A pattern of referrals indicates a cumulative risk; therefore, a referral of child abuse or neglect should be assigned for safety assessment when the history of referrals indicates potential risk to the child even when that referral would not, in and of itself, meet the standard of assignment.

If the information contained in the referral does not fall within the definitions of the Child Protective Act, the report will be entered into IDHW's data system for information. Every referral of child maltreatment is reviewed by a supervisor to ensure it is correctly screened and prioritized.

---

[5] § 16-1605(3).
[6] IDAHO ADMIN. CODE r. 16.06.01.550 (2010). *See also* IDAHO CODE ANN. §16-1629 (2011) ("The department, working in conjunction with the court and other public and private agencies and persons, shall have the primary responsibility to implement the purpose of this chapter.")
[7] §39-8203 (Idaho Safe Haven Act).
[8] §16-1602 (1), (2), (25).
[9] r. 16.06.01.554 (2010).

Under IDHW's *Priority I Guidelines*:

- If child is in immediate danger involving a life threatening and/or emergency situation, IDHW shall respond immediately;
- Law enforcement must be notified and requested to respond or to accompany the social worker;
- IDHW coordinates the assessment with law enforcement; and
- The child must be seen by a social worker immediately and by medical personnel when deemed appropriate by law enforcement and/or the social worker. [10]

Examples of threats to a child or children that fall within *Priority I Guidelines* include:
- Death of a child
- Life-threatening physical abuse or physical or medical neglect
- Physical abuse of a child who is under 7 years of age
- Sexual abuse if the alleged offender has immediate access to the child
- Infant and/or mother testing positive for drugs at birth
- Preservation of information if there is a risk that the family is leaving the area

The IDHW *Priority II Guidelines*:

- A child is not in immediate danger but allegations of abuse or serious physical or medical neglect are clearly defined in the referral;
- The child must be seen by the social worker within 48 hours of IDHW's receipt of the referral; and
- Law enforcement must be notified within 24 hours of receipt of all Priority II referrals which involve issues of abuse, neglect, or abandonment.

Idaho law requires this notification so that the assessment must be coordinated with law enforcement's investigation.[11]

Examples of threats within the *Priority II Guidelines* include:
- Non-life threatening physical abuse and/or physical or medical neglect
- Sexual abuse when the alleged offender does not have immediate access to the child

Under *Priority III Guidelines*:

- A child is in a vulnerable situation or without parental care necessary for safety, health, and well-being.
- The social worker must respond within three days, and the child must be seen by social worker within 120 hours (5 days) of IDHW's receipt of the referral.[12]

Examples of threats within the *Priority III Guidelines* include:
- Inadequate supervision
- Home health and safety hazards
- Moderate medical neglect
- Educational neglect

[10] r. 16.06.01.554.01 (2010).
[11] r. 16.06.01.554.02.
[12] r. 16.06.01.554.03.

D. Multi-Disciplinary Teams

The CPA provides for the formation and involvement of Multi-Disciplinary Teams (MDTs) in each county to assist in coordinating work in child maltreatment cases.[13] This provision, in part, recognizes that child abuse and neglect are community problems requiring a cooperative response by law enforcement and IDHW's child protection social workers. Although their perspectives and roles are different, both agencies share the same basic goal: the protection of endangered children. Depending on the situation, either agency may benefit from the assistance of the other.

Section §16-1617(1) of Idaho Code requires the prosecuting attorney in each county to be responsible for the development of the county MDT. The statute further provides that, at a minimum, an MDT should consist of a representative from the prosecuting attorney's office, law enforcement personnel, and IDHW child protection risk assessment staff. Members may also include a representative from the guardian *ad litem* program, medical personnel, school officials, and any other persons deemed beneficial because of their roles in cases concerning child abuse and neglect.

MDTs are charged by statute with the responsibility of developing a written protocol for investigating child abuse cases and for interviewing alleged victims of abuse or neglect. Teams are trained in risk assessment, dynamics of child abuse, interviewing, and investigation. They also are required to assess and review a representative selection of cases referred to either the Department or to law enforcement for investigation.[14]

Although social workers, law enforcement, and prosecutors bring different perspectives in investigating child abuse and neglect, working together can ensure a cooperative and coordinated action. Each must recognize the interrelationship among the legal, health, social service, and educational responses that occur in cases of child abuse and neglect.

The roles of core MDT members are determined by each county's protocol. Consistent with the statutory mandate, best practice recommendations[15] concerning the roles of key MDT members include: [16]

1. Prosecutor:
    a. Provide consultation during child abuse investigations
    b. Initiate civil and criminal legal proceedings

---

[13] §16-1617.
[14] §16-1617(2)–(5).
[15] Throughout this Manual "best practice recommendations" are included. These recommendations are not required by Idaho law but represent instead generally accepted guidelines for judge's lawyers and social workers. These recommendations are often based on national, research based recommendations, or on practices that appear to be employed in a majority of jurisdictions.
[16] The benefits and methods of approaching multidisciplinary teams in child welfare cases are described in A. P. Giardino & S. Ludwig, *Interdisciplinary Approaches to Child Maltreatment: Accessing Community Resources*, *in* MEDICAL EVALUATION OF CHILD SEXUAL ABUSE: A PRACTICAL GUIDE 215 (2d ed. Martin A. Finkel & Angelo P. Giardino eds., 2001).

c. Determine what specific charges to file
d. Make decisions regarding plea agreements
e. Work closely with the victim-witness coordinator

2. Law Enforcement:
   a. Gather evidence to support criminal prosecution of crimes against children
   b. Investigate allegations of child abuse, abandonment, or neglect
   c. Enforce laws
   d. Remove perpetrator from the family home in child protection cases, if needed
   e. 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
   f. Interview alleged perpetrator
   g. Interview child victim, if warranted

3. Social Worker:
   a. Make reasonable efforts to prevent the removal of a child when safe to do so
   b. Conduct safety and comprehensive family assessments
   c. Consult with the prosecutor regarding an Order of Removal
   d. Make child placement decisions
   e. Explore kinship placements
   f. Link family with resources
   g. Develop case plan with family
   h. Interview child victims, if appropriate
   i. Monitor family's progress and report to the court

The advantages of MDTs are substantial. Appropriate use of an MDT can increase success in civil and criminal courts, reduce contamination of evidence, and provide more complete and accurate data. In addition, MDTs allow for improved assessment, shared decision making, support, and responsibility, reduced role confusion among disciplines, decreased likelihood of conflicts among agencies, and effective management of difficult cases. Finally, MDTs help ensure increased safety in volatile situations.

MDTs are also advantageous for the child and her or his family. MDTs help provide increased safety for children through improved evaluation of cases. Also, coordination often means that the family is required to participate in fewer interviews. Finally, MDTs help to ensure more comprehensive identification of and access to services for the family.[17]

[17] The benefits and methods of approaching multidisciplinary teams in child welfare cases are described in A. P. Giardino & S. Ludwig, *Interdisciplinary Approaches to Child Maltreatment: Accessing Community Resources, in* MEDICAL EVALUATION OF CHILD SEXUAL ABUSE: A PRACTICAL GUIDE 215 (2d ed. Martin A. Finkel & Angelo P. Giardino eds., 2001).

2.2 INVESTIGATION

A. Risk and Safety

When a referral of child abuse, neglect, or abandonment is received, IDHW and/or law enforcement conducts an investigation to determine whether or not a child is safe. A child's safety depends on the presence or absence of threats of danger, the child's vulnerability, and a family's protective capacities to manage or control threats of danger.

The terms *risk* and *safety* are often used interchangeably. However, within the child protection context, these terms have significantly different meanings. *Safety* refers to threats to a child that are either occurring presently or that are likely to occur in the imminent future, that are likely to result in severe consequences for the child, and that are due to a family member or an out of control family situation or condition. In contrast, *risk* refers to the likelihood that child maltreatment might or might not occur without an intervention. The timeframe for risk is open-ended, and the consequences to a child may be mild to serious.[18]

According to both the federal Child Abuse Prevention Treatment Act[19] and the Idaho CPA,[20] upon the first contact with the family, the social worker must 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 potential criminal investigation. If a criminal investigation is pending, disclosure of any details should be coordinated with law enforcement.

B. Assessment of Child Safety

When a social worker investigates a CPA referral, the focus of the investigation is on signs of present or emerging danger. Present danger is an observable threat that exists at the time of the investigation, requiring prompt IDHW and/or law enforcement response. Emerging danger (sometimes referred to as "impending danger") is the likelihood of serious harm that is not immediately present, but could occur in the immediate to near future. In emerging danger situations, threats are starting to surface or escalate in intensity, pervasiveness, duration and/or frequency, and/or caregiver capacities may be weakening rapidly. Emerging danger is often seen as a "red flag", and the likelihood of serious harm, while not immediate, could present itself at any time, thereby causing a child to be unsafe.

Child safety is assessed by gathering information about the family through interviews with the child, the parents or caregivers, and collateral contacts. The social worker also visits the family home to determine if the environment poses a threat of harm to the child(ren). In gathering information about the family, social workers focus on six background questions to assist in identifying safety threats:

---

[18] *See generally* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY:A GUIDE FOR JUDGES AND ATTORNEYS (2009). BB 4.2(b).
[19] 42 USC§ 5106a(b)(2)(B)(xviii) (2011); 42 USC §§ 5116a–f (2011).
[20] §16-1629(7)(b) (2011).

1. What is the nature and extent of the maltreatment?
2. What circumstances accompany the maltreatment?
3. How does the child function day to day?
4. How does the parent discipline the child?
5. What are the overall parenting practices?
6. How does the parent manage his/her own life?[21]

1. Threats of Danger

In investigating child abuse and neglect, social workers and law enforcement look for threats of danger. A threat of danger is a specific family situation or behavior, emotion, motive, perception, or capacity of a family member that may impact a child's safety status.

The *ABA Child Safety Guidelines for Attorneys and Judges* define a "threat of danger" using the following criteria:

- *Specific and Observable*. The condition is clearly identifiable. It must be in the form of a behavior, emotion, attitude, perception, intent, or situation rather than a "gut feeling."
- *Immediate – A Specific Time Frame*. A belief that threats to child safety are likely to become active or a certainty about occurrence of child safety threats within the immediate to near future.
- *Out of Control*. When a condition is out of control, there is no apparent natural, existing means within the family network that can assure control.
- *Serious or Severe Consequences*. Serious harm could include serious physical injury, significant pain, and suffering.[22]

To guide and document decision making related to child safety, IDHW uses a standardized safety assessment that is to be completed no later than thirty working days after first seeing the child. It contains seventeen specific threats of danger that are used nationally to assess child safety. Some examples of threats of danger on IDHW's safety assessment include:

- A caregiver or alleged offender's behavior is violent and/or out of control.
- The child is fearful of people living in or frequenting the home.
- The caregiver or alleged offender describes or acts toward the child in predominantly negative terms or has extremely unrealistic expectations given the child's age or level of development.
- The current alleged abuse is severe and suggests there may be immediate and urgent risk to the child.
- The caregiver or alleged offender's drug or alcohol use may seriously affect his/her ability to supervise, protect, or care for the child.
- The child's whereabouts cannot be ascertained and/or there is reason to believe the family is about to flee or the family refuses access to the child.

[21] *See* LUND & RENNE, *supra* note 17, at "Benchcard A" (there are "Benchcards A–L" in the front sleeve of this publication for quick reference).
[22] LUND & RENNE, *supra* note 17, at 9.

Present or emerging danger is determined by the nature of threats of danger as illustrated by the accompanying Flowchart of Present and Emerging Danger Assessment.

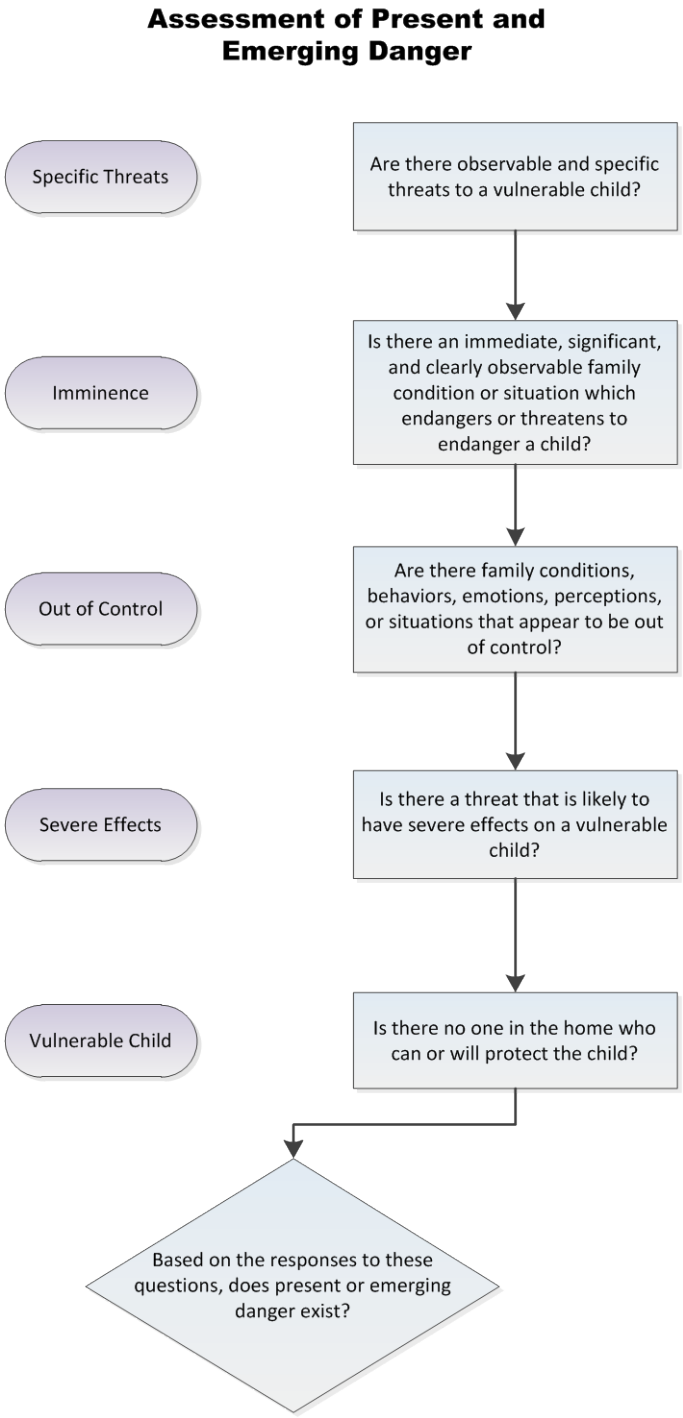


Figure 2.1: Flowchart of Danger Assessment
IDHW Flowchart developed for Idaho by the National Resource Center for Child Protective Services

2. Child Vulnerability

A child is vulnerable when he/she lacks the capacity to protect him or herself. The *ABA Child Safety Guidelines for Attorneys and Judges* states that vulnerability depends on the degree to which a child can avoid, negate, or modify the impact of threats of danger or compensate for a parent/caregiver's lack of protective capacities.[23] The following criteria are considered in assessing a child's vulnerability:

- The child's ability to protect his/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;
- 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.

A child's behavior must also be considered in relation to the caretaker's capacity for patience, tolerance, and coping strategies.

3. Parental Protective Capacities

Protective capacities of the parent/caregiver are family strengths or resources that reduce, control, and/or prevent threats of danger from occurring or from having a negative impact on a child. Protective capacities are strengths that are specifically relevant to child safety. They can include a parent's knowledge, understanding, and perceptions which contribute to how well a parent carries out his/her parental responsibilities.[24] Protective capacities also refer to observable behaviors of a parent that are protective, as well as their feelings, attitudes, and motivation to protect the child.[25]

C. Safety Decision

Social workers and law enforcement must make a safety decision based on an assessment of the threats of danger, the vulnerability of the child, and the protective capabilities of the parents. The following decision tree illustrates the process of the social worker and law enforcement in making this assessment.

[23] *See* LUND & RENNE, *supra* note 17, at "Benchcard C."
[24] LUND & RENNE, *supra* note 17, at "Benchcard D."
[25] LUND & RENNE, *supra* note 17, at "Benchcard D."

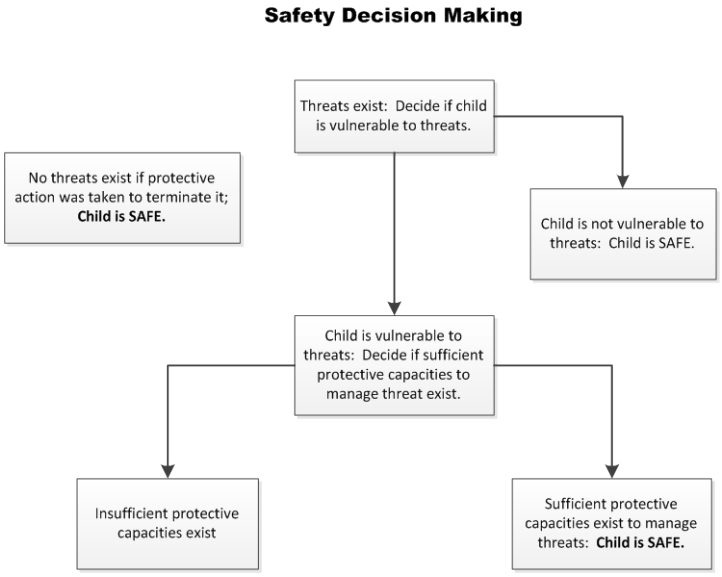


Figure 2.2: Safety Decision Making

Pursuant to IDHW guidelines, a child may be determined to be safe, conditionally safe, or unsafe.[26]

Figure 2.2 displays the choices which are reviewed when a child is determined to be safe, conditionally safe, or unsafe.[27]

A child is considered safe when an assessment of available information leads to the conclusion that there are no threats of danger or that the protective capacities of the family can manage any identified threats to a child.

A child is considered to be conditionally safe when threats of danger exist and a safety plan is being implemented to resolve the threats of danger. For example, a child is conditionally safe in a dangerously unsanitary house when the child stays with a relative until the family cleans the house and the unsanitary conditions no longer exist.

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. If a child is determined to be conditionally safe or unsafe, a safety plan must be developed. A safety plan is a specific and concrete strategy for controlling threats of danger, reducing child vulnerability, and/or supplementing protective capacities. It must be implemented immediately to control those behaviors or conditions that pose a danger to the child. The safety plan should protect the child while a more complete assessment is undertaken and a case plan is established and implemented to remediate the underlying conditions of the threats of danger.[28]

Decisions related to child safety are not to be made alone. Therefore, IDHW has a supervisor review all cases assigned for investigation. The supervisor considers the following:

- Was the assessment completed in a timely manner?
- Does the assessment provide a thorough description of the family's situation so that it can be used to support decision making in the case?
- Were IDHW standards, policies, and rules adhered to in the assessment process?
- Was the assessment documented in IDHW's data system, using best practice documentation standards? [29]

[26] *See, e.g.*, Idaho Department of Health & Welfare Standards Template for Ensuring Child Safety at http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/CWStandard-ImmedSafetyComprehensive&OngoingAssessment.pdf
[27] LUND & RENNE, *supra* note 17, at 19.
[28] LUND & RENNE, *supra* note 17, at 21–3.
[29] *See supra* note 17.

D. Efforts to Prevent Removal of the Child

Under federal and state law, children should remain in their own home with their family whenever safely possible.[30] "If an in-home safety plan would be sufficient, and the agency fails to consider or implement one, then the agency has failed to provide reasonable efforts to prevent removal."[31]

The decision tree in Figure 2.3 was developed by IDHW and the National Resource Center on Child Protective Services. The purpose of the decision tree is to assist Idaho law enforcement and social workers in determining when it is safe to develop an in-home safety plan and to offer in-home services.

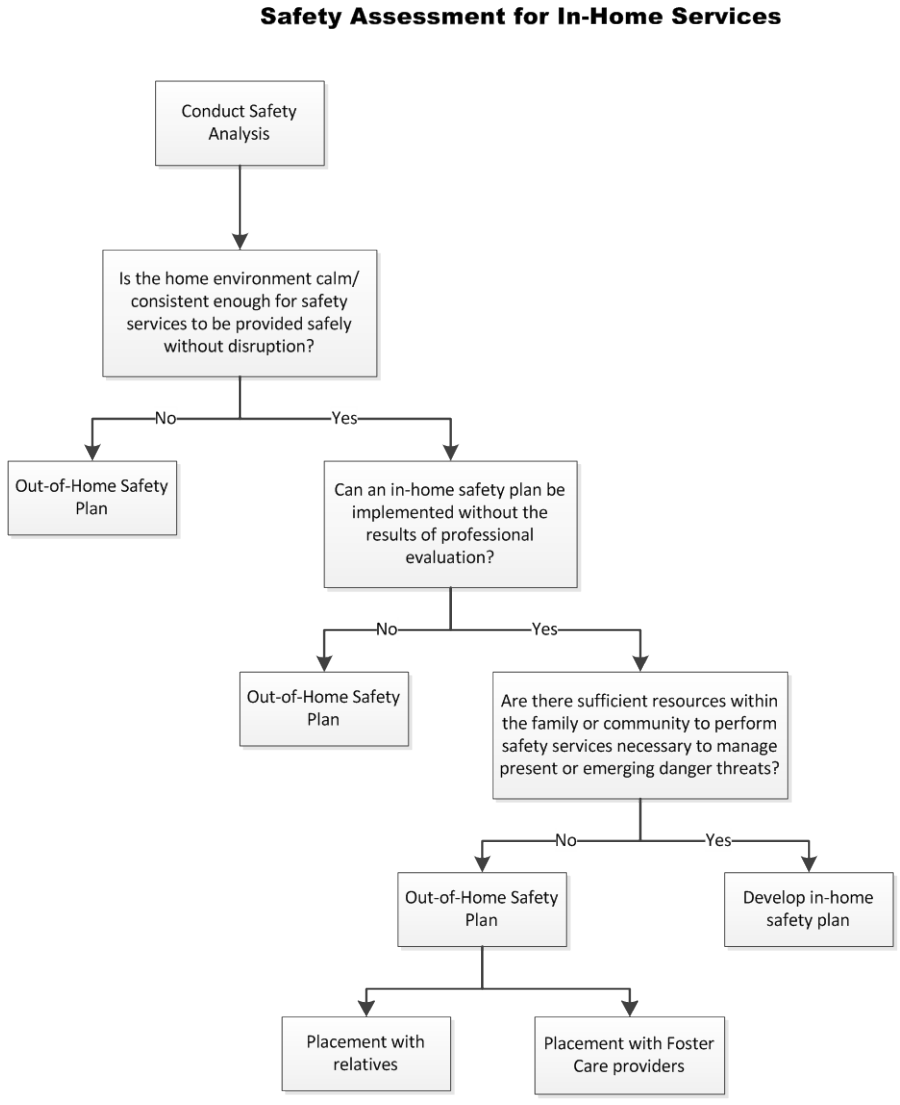


Figure 2.3: Safety Assessment for In-Home Services

In developing safety plans and implementing in-home services for families, it is important to use the strengths and resources of the family. Often the family's greatest resource is extended family, kin, and community supports. Relatives and kin know a great deal about the family situation, often have resources not available to agencies, are more likely to show up to meetings, can create family-specific solutions, and are invested in those solutions which they create. Family Group Decision Making Meetings (FGDM) can assist families in developing and implementing plans that keep children safe.

[30] IDAHO CODE ANN. §16-1601 (2011); 42 U.S.C. § 621.
[31] LUND & RENNE, *supra* note 17, at 25.

Family and kin can:

- Serve as mentors;
- Care for children until parental capacities have been strengthened; and
- Assist in monitoring child safety.

In addition to involving relatives and kin, children can also be maintained safely in their own homes by:

- Law enforcement removing the alleged offender as provided in Idaho Code §16-1608(1)(b); or
- Removal of an offender through Domestic Violence Protection Orders – Idaho Code §16-1602(28) and §16-1611(5).

In situations where a family refuses to work with IDHW on a voluntary basis and the threats of danger do not meet the standard of imminent danger, IDHW can contact the local county prosecutor about a judicial order for protective supervision.[32]

[32] IDAHO CODE ANN. §16-1619(5)(a) (2011); IDAHO JUV. R. 41(h).

CHAPTER 3:
Initiating a Child Protection Act Case

3.1 INITIATING A CHILD PROTECTION CASE

A child protection case can be initiated in five different ways: Law enforcement officers can declare a child to be in imminent danger and remove the child or the alleged offender from the home.[1] The county prosecutor or a deputy attorney general (DAG)[2] can file a petition with the court pursuant to the Child Protective Act (CPA) asking the court for either an Order to Remove the Child from the home, which is included in the summons,[3] or for a protective order removing the alleged offender from the home.[4] The county prosecutor can file a petition with a court pursuant to the CPA without asking for emergency removal of the child pending the adjudicatory hearing on the petition.[5] A court can expand a proceeding under the Juvenile Corrections Act (JCA)[6] into a child protection proceeding.[7] Finally, a CPA proceeding can be initiated under the provisions of the Idaho Safe Haven Act.[8]

No matter how a CPA proceeding begins, the prosecutor must work closely with law enforcement and the Idaho Department of Health and Welfare (IDHW) to fully develop and understand the facts and circumstances of each case. While the prosecutor is responsible for

---

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1608(1)(a) (2011); IDAHO JUV. R. 31. The process for removal pursuant to a declaration of imminent danger is discussed in detail later in this chapter.

[2] Although the attorney general may initiate a CPA proceeding, in most counties in Idaho, CPA petitions are generally initiated by the county prosecutor. For simplicity, this chapter will refer to both prosecutor and the DAG as "the Prosecutor."

[3] §16-1611(4); IDAHO JUV. R. 34. The "Order to Remove a Child" was formerly called an "Endorsement on Summons." The statute was amended in 2007 to more accurately describe the order. This procedure is discussed in detail later in this chapter.

[4] § 16-1611(5). The definition of a "protective order" under the CPA refers to §39-6303 of the Domestic Violence Crime Prevention Act. Thus in order to utilize this option, the facts must support the issuance of such an order. *See* § 16-1602(28) (defining "protective order" under the CPA provisions of the Idaho Code). The use of protective orders in a CPA proceeding is discussed later in this chapter.

[5] § 16-1610 generally governs the petition in a CPA case. CPA petitions are discussed later in this chapter.

[6] § 20-501–49.

[7] IDAHO JUV. R. 16. This procedure is discussed briefly later in this chapter and is discussed in detail in Chapter 12 of this manual.

[8] §39-8203 to 8205. The Safe Haven Act is discussed briefly in this chapter and in detail in Chapter 12 of this manual.

determining whether the facts of the case support the filing of the petition, the Department is responsible for the primary investigation into the safety of the child.[9] In many cases, IDHW social workers have had extensive prior professional contacts with the family, and their knowledge is the principle basis for the case. Even in cases in which IDHW has not previously been involved with the family, social workers are required to undertake the initial investigation of the case and are responsible for the assessment of the child's situation and the delivery of direct services to the child and the child's family. As a result of this central role, the Department should be consulted at all phases of the case. In addition, the Department keeps a detailed database of every family with which it comes in contact; this database often contains information about the child's parents and the child's possible Indian heritage, which is crucial in the initial preparation of the case.

Law enforcement can also provide valuable information regarding the family, particularly regarding prior law enforcement contact with the family. Law enforcement officials may also have had contact with school officials and other persons who can shed light on the facts relevant to the family's situation.

A. Declaration of Imminent Danger

The first and most common way in which a CPA proceeding is initiated occurs when a law enforcement officer declares a child to be in imminent danger pursuant to Idaho Code section §16-1608(1)(a). A declaration of imminent danger can be made "only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child or where the child is an abandoned child . . ."[10]

Generally, a declaration of imminent danger should be used only if the child would be endangered if removal were delayed until a CPA petition can be filed. Otherwise, if the danger to the child is not imminent and immediate removal is not necessary, a petition should be filed and an Order to Remove the Child should be obtained from a court. The declaration of imminent danger is an emergency procedure used at the discretion of law enforcement, while the order of removal is issued by the court in response to a request by the prosecutor.

Law enforcement officers have two options after declaring that a child is in imminent danger. First, the child may be removed from the home and taken into shelter care. Second, law enforcement may remove an alleged offender from the home. In the case of a child's removal, Idaho law provides that a shelter care hearing must be held within 48 hours of removal. In the case of the offender's removal, a shelter care hearing must be held within 24 hours of removal.[11]

Law enforcement officials must prepare a "Notice of Emergency Removal" when a child is declared in imminent danger. The form of this notice is prescribed in the Idaho Juvenile Rules.[12]

---

[9] §16-1629 provides that "[t]he department . . . shall have the primary responsibility to implement the purpose" of the CPA. Furthermore, §16-1631(1) authorizes the Department to act any time it receives information that a child may be abused, neglected, or abandoned.
[10] § 16-1608(1)(a).
[11] § 16-1608(3). More information about the petition and service of process is contained later in this chapter, and more information about the shelter care hearing can be found in Chapter 4 of this manual.
[12] IDAHO JUV. R. 32 sets forth the prescribed form of this notice.

It 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.

Methods for Removing a Child

1. Order to Remove the Child

The second method of initiating a CPA proceeding begins when the prosecutor files a CPA petition and requests that the court issue either an Order to Remove the Child on the summons or a protective order against an offending parent.[13] An Order to Remove the Child directs law enforcement or Department personnel to take the child "to a place of shelter care." The form of the order is set forth in the Idaho Juvenile Rules.[14] A shelter care hearing must be held within 48 hours of such a removal. The court typically issues the Order to Remove the Child based on a verified petition or affidavit, although a hearing may be held. Typically, the best practice is to file with the court an affidavit(s) accompanying the petition and the motion requesting the Order to Remove.

The information provided to the court in the petition and/or the affidavit should support all the findings the court must make under Idaho law to remove a child from the home:

- 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
- "the child should be removed from his present condition and surroundings because continuation in such condition or surroundings would be contrary to the welfare of the child and vesting legal custody with the department . . . would be in the child's best interests."[15]

It is of critical importance that the court make the finding that remaining in the home is contrary to the child's welfare and that vesting custody of the child in the Department is in the child's best interests. This finding is required to preserve the child's eligibility for federal IV-E match funds that are applied to the costs of shelter care.[16] Federal law requires this finding to be made in the first order sanctioning removal of the child from the home. The finding must be case-specific and documented in the court's order. If this finding is not made, an otherwise eligible child will not be eligible for IV-E match funds, nor for adoption assistance. The omission cannot be corrected at a later date. 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 supporting the finding. If the court makes the finding on the record but fails to

[13] § 16-1611(4)–(5); IDAHO JUV. R. 34(a).
[14] IDAHO JUV. R. 34(c).
[15] § 16-1611(4).
[16] 42 U.S.C. §§672(a)(1), 673(a)(2)(A)(i) (2011); 45 C.F.R. §1356.21(c)–(d) (2011). The federal IV-E requirements are discussed in detail in Chapter 12 of this manual.

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.

In addition to the contrary to the welfare/best interests finding, the court should also begin reviewing the efforts made by the Department to prevent the removal of the child from the home. The court should consider making a finding at the shelter care hearing 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 Department'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.[17] Idaho Code requires this finding to be made at both the shelter care hearing and at the adjudicatory hearing.[18] Failure to make a case-specific finding regarding the reasonable efforts of the Department to avoid removal within the first 60 days after removal will result in loss of IV-E match funds for an otherwise eligible child. The failure to make this finding cannot be corrected at a later date. To avoid the unnecessary removal of the child from the home and to ensure that the reasonable efforts findings are timely made, the court should begin the process of reviewing the Department's efforts at the hearing for the Order to Remove the Child.

2. Protective Order

As an alternative to removing the child from the home, the CPA provides for the removal of the alleged offender from the home via a Protective Order. [19] Removal of an abusive parent may be a viable alternative to removing the child, if it enables the child to remain safely at home with a non-abusive, protective parent. If the parents have joint custody of the child, the CPA requires that the protective order state with specificity the rights and responsibilities of each parent.[20]

The scope of the court's authority under this section is ambiguous. The CPA defines "protective order" as "an order created by the court granting relief as delineated in section 39-6306, Idaho Code."[21] The definition further provides that such a protective order "shall be for a period not to exceed three (3) months unless otherwise stated herein." Section 39-6306 is the provision in the Domestic Violence Crime Prevention Act that defines the scope of relief that can be ordered in a protection order under that statute.

Arguably, a CPA protection order may only provide for relief that would be within the scope of § 39-6306. Whether CPA protection orders must be in the form of a domestic violence protection order, or whether the grounds for such a CPA order are limited to those set forth in the domestic violence provisions, are currently open questions of Idaho law.[22] If a protection order under the CPA is utilized to remove the offending parent from the home, the conditions of such removal should be included in the shelter care order and as part of a protective supervision order.

[17] 45 C.F.R. 1356.21(b) (1) (i)-(ii).
[18] § 16-1615(5); § 16-1619(6).
[19] § 16-1611(5); *see also* § 39-6303.
[20] § 16-1611(5).
[21] §16-1602(28).
[22] The grounds for a domestic violence protection order are set forth in § 39-6303.

After the protective order is issued and the prosecutor has served notice, the court must then hold a shelter care hearing. The shelter care hearing must be held within 24 hours of the alleged offender's removal, not including weekends and holidays.[23]

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 immediate removal of the child is not necessary for the child's safety. The court's involvement is sought to ensure that a safety plan is in place to control threats of danger to the child, to ensure the parents' participation in remedial services, and to ensure ongoing review of the case to confirm improvement in the care of the child and the home environment.

Generally, when a CPA petition is filed without seeking prior removal of the child, the state is requesting protective supervision.[24] Even though the child has not been removed from the home in these cases, a petition must be filed, process served, and an adjudicatory hearing must be held. A shelter care hearing is not needed because neither the child nor the alleged offender was removed from the home.[25]

If, while home under protective supervision, removal occurs prior to the adjudicatory hearing because circumstances change and the child is unsafe, a declaration of imminent danger must be made by law enforcement officials or the court must issue an Order to Remove the Child. In either case, a shelter care hearing must be held within 48 hours of the child's removal.[26]

4. *Expansion of Juvenile Corrections Cases*

In Idaho, offenses committed by juveniles are governed by the Juvenile Corrections Act[27] and the Idaho Juvenile Rules.[28] In some cases, a juvenile subject to the JCA may also be abandoned, abused, neglected, or otherwise fall within the jurisdiction of the CPA.[29] 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 comes within the jurisdiction of the Act. Practitioners commonly refer to such cases as "Rule 16 Expansions." Rule 16 Expansions are discussed in detail in Chapter 12 of this manual.

---

[23] § 16-1608(3).
[24] § 16-1619(5)(a) provides for the placement of the child in her or his own home under the protective supervision of the Department.
[25] More information about the petition and service of process is contained later in this chapter, and information about the adjudicatory hearing is contained in Chapter 5 of this manual.
[26] § 16-1615(1).
[27] §§ 20-501 to 549.
[28] IDAHO JUV. R. 1–30 govern Juvenile Corrections Act matters.
[29] Grounds for jurisdiction under the CPA are discussed later in this chapter.

5. Safe Haven Act Proceedings

If a child is abandoned pursuant to the Idaho Safe Haven Act, a safe haven may take temporary custody of a child. [30] The safe haven must immediately notify either law enforcement officials or the individual designated by the court in that county to receive such notifications. Once temporary custody of the child has been assumed by the safe haven, a CPA proceeding must be initiated by the IDHW.[31] The Safe Haven Act is discussed in detail in Chapter 12 of this manual.

3.2 EVALUATING A POSSIBLE CPA CASE

The prosecutor is responsible for evaluating the facts provided by social workers and/or law enforcement to determine first, whether the filing of a petition is appropriate, and second, whether the facts support an earlier declaration of imminent danger or an immediate request for an Order to Remove the Child. The evaluation must be based on the law as it applies to the facts of each case. This evaluation should focus on whether the child is safe or unsafe and must be based on information gathered from credible sources.

In each case, the amount of information available to the prosecutor will vary with the circumstances and with how the child first came to the attention of authorities. The prosecutor should be aware of the highly structured process used by social workers to conduct the investigation and safety assessment. The social worker in each case focuses on six questions in guiding her or his decision-making process.[32] The social worker may not have answers to all of the questions in every case. This is particularly true when the child was removed from the home through a declaration of imminent danger and the Department has not had previous involvement with the family. However, the questions below do provide an outline to guide the prosecutor's expectations of an investigation.

1. *What is the nature and extent of the maltreatment?* The social worker can be expected to identify the child and the parent and to describe a) the type of maltreatment, b) its severity, results and injuries, c) the history of maltreatment or prior similar incidents, d) the events surrounding the maltreatment, and e) the emotional and physical symptoms of maltreatment.

2. *What circumstances accompany the maltreatment?* The social worker can be expected to know or evaluate a) how long the maltreatment has been occurring, b) the parental intent concerning the maltreatment, c) whether the parent was impaired by substances or otherwise out of control when the maltreatment occurred, d) the parent's attitude and whether the parent acknowledges the maltreatment, and e) whether other issues such as mental illness may have contributed to the maltreatment or to the parent's ability to ensure the child's safety.

[30] §§ 39-8201to 8207 (Idaho Safe Haven Act).
[31] §§ 39-8202to8205.
[32] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 3–5 (2009).

3. *How does the child function day to day?* The worker can be expected to know about all of the children in the home, including their general behaviors, emotions, temperaments, and physical capacities. The social worker should be able to provide information about the child in comparison to other children the same age on the following topics a) the child's capacity to form close emotional relationships with parents and siblings as well as the child's expressions of emotions and feelings, b) the child's general mood and temperament, c) the child's intellectual functioning, and d) the child's communication and social skills. The social worker also should have information relating to the child's behavior, peer relations, school performance, independence, motor skills, and physical and mental health.

4. *How does the parent discipline the child?* The social worker may also have information about the parent's approach to guiding and disciplining the child. This information is important in evaluating the child's socialization and the family context. The social worker should know about disciplinary methods, the concept and purpose of discipline in the child's household, the context in which discipline has occurred (e.g. is the parent impaired by drugs and alcohol when disciplining the child), and relevant cultural practices regarding discipline.

5. *What are overall parenting practices?* In addition to discipline, the social worker can be expected to have information regarding the overall parent-child relationship. The social worker should have information regarding the following topics regarding the parent a) reason for being a parent, b) satisfaction in being a parent, c) knowledge of and skill in parenting and child development, d) expectations of and empathy for the child, e) decision-making practices, f) parenting style, g) protectiveness, and h) cultural context for parenting.

6. *How does the parent manage his or her own life?* The investigation should yield information about how the parent feels, thinks, and acts on a daily basis, independent of the alleged maltreatment. Thus, a social worker should have discovered the following information regarding parents employment; substance use, abuse, or addiction; mental health; physical health and abilities; communication and social skills; coping and stress management skills; self-control; problem-solving abilities; judgment and decision-making abilities; independence; home and financial management skills; community involvement; rationality; and, self-care and self-preservation abilities.

The prosecutor is responsible for evaluating this information and determining whether the filing of a CPA petition is warranted, and, most importantly, whether the child is unsafe, and if so, whether a safety plan can be implemented that will allow the child to remain safely at home.

3.3 FILING A CHILD PROTECTION CASE

To file a child protection case, the county prosecutor or DAG should prepare the following documents: 1) Petition, 2) Summons, and 3) 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.

A. Petition

The contents of the petition are specified by statute.[33] Careful attention to the preparation of the petition will help avoid defects in the petition, which can result in a great deal of time spent on motions to dismiss, motions to clarify, and motions to amend. Pursuant to Idaho Code §16-1610, 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. 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.[34] Care should be taken that the affidavits and/or verification of a petition are signed by the individual(s) with personal knowledge of the facts being attested to.

The petition must include the following:

- The facts that bring the child within the jurisdiction of the CPA, including a description of the actions of each parent.
- 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 mother and father, guardian, and/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 allege that:
  1. remaining in the home was contrary to the welfare of the child,
  2. it is in the best interests of the child to be placed in the custody of IDHW or other authorized agency, and
  3. 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 Department's assessment accurately determined that no preventative services could have been safely offered, or reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.[35]

[33] § 16-1610.
[34] § 16-1610(h).
[35] § 16-1619(6)(d). Aggravated circumstances are discussed later in this chapter.

- Whether the parent(s) with joint legal custody or a non-custodial parent has been notified of the placement.[36]

The petition should also include the following in applicable cases:

- An allegation or statement of the grounds and the facts that bring the parent's actions within the definition of aggravated circumstances.
- If there is reason to believe that the child is an Indian child, the petition should include additional substantive allegations required by the Indian Child Welfare Act.[37]

B. 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.[38] A summons may be issued for and served on any other person whose presence is required by the child (for emotional support) or any other person whose presence, in the opinion of the court, is necessary.[39] A separate summons must be prepared for each person to be served. The form of the summons is set forth in the Idaho Juvenile Rules.[40] The summons should be prepared by the attorney filing the petition and signed by the court clerk. The summons provides essential information to the parents, most importantly:

- The date and time of the 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
- Notice 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 as set forth in Idaho Juvenile Rule 33 does not include language for the Order to Remove the Child. If the prosecutor is seeking an Order to Remove the Child, the language for such an order is governed by Idaho Juvenile Rule 34 and must be included on the summons.[41]

C. Supporting Affidavit(s)

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

---

[36] §16-1610(j).
[37] 25 U.S.C. §§ 1911–1923 (2011). These additional elements may be pled conditionally. See Chapter 11 of this manual for more information on cases under ICWA.
[38] §16-1611(1)–(3).
[39] §16-1611(1).
[40] IDAHO JUV. R. 33(b).
[41] IDAHO JUV. R. 34, *see also* § 16-1611(4).

preparation of the petition. Second, it can tighten the analysis of the evidence and the case. Third, the availability of an affidavit that thoroughly documents the current information promotes the potential for informed settlement and appropriate stipulations.

The affidavit should contain all the information necessary to support the findings and conclusions the court is required to make.[42] 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;[43]
- 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 Department'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.[44]

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 IV-E match funds.[45] The supporting affidavits should be attached to the petition to ensure service of process of the affidavits along with the petition and summons.

3.4 NOTICE AND SERVICE OF PROCESS

A. Manner of Service

Service of process must be made by personal delivery of an attested copy of the summons, with the petition and accompanying affidavits attached. Service of process must be completed at least 48 hours prior to the time set in the summons for the adjudicatory hearing. 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.[46] In addition to the requirement of 48 hours service for the summons, it should be noted that notice of the shelter care hearing must be provided 24 hours prior to the hearing.[47]

---

[42] The required factual allegations for the petition are set forth above. The Shelter Care Hearing is discussed in detail in Chapter 4 of this manual.
[43] The grounds for jurisdiction, such as abuse, neglect, etc. are set forth in Idaho Code §16-1603 and discussed later in this chapter.
[44] §16-1615(5).
[45] 42 U.S.C. §§ 672(a)(1), 673(a)(2)(A)(i) (2011); 45 C.F.R. §1356.21(c)(d) (2011). 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.
[46] § 16-1612(3).
[47] § 16-1615(2). It should be noted that only 24 hours' notice is needed for a summon to a shelter care hearing, where the child has been removed from the home.

Where personal service is impracticable, the county prosecutor may seek court approval of service by registered mail and publication and should do so as soon as possible, so that service can be completed prior to the hearing. Best practice is to file a motion. The motion should either be verified or accompanied by a supporting affidavit and include the following information:

- 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 of why that newspaper is most likely to achieve actual notice.[48]

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.

B. Persons to be Served

Service of process must be made to each of the child's parents, [49] legal guardian, or custodian. This includes non-custodial parents and adoptive parents but does not include a parent whose parental rights have been terminated.[50] Early identification and participation 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 significant disruption, both to judicial proceedings and to timely permanency for 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, the best practice is to identify the child's father, establish paternity, and confer party status as early as possible in the proceedings.

C. Notice to the Child's Tribe, Parents, or Indian Custodian(s)

The Indian Child Welfare Act[51] establishes special notice requirements for Indian children in CPA cases. If the child is an Indian child, the parent or Indian custodian and the child's Indian tribe have the right to notice. Notice of the pending proceedings and the tribe's right to intervene must be given by registered mail, return receipt requested, to the parent or Indian custodian and to the Indian child's tribe. If the identity or location of the parent or Indian custodian and the

[48] §§16-1612(1)–(2).
[49] The CPA does not include a definition of "parent." *See* Chapter 12 of this manual regarding the circumstances under which unmarried fathers should be included in a CPA case.
[50] §16-1611(1) provides that the summons may be served on the "person or persons who have custody of the child" and must be served on "[e]ach parent or guardian."
[51] 25 U.S.C. §§ 1901–1963. A detailed discussion of ICWA can be found in Chapter 11 of this manual.

tribe cannot be determined, notice must be given to the Secretary of the Interior, who then has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe.[52]

Identification of Indian children and notice of the child's Indian tribe is not only required by federal law but will also aid in the fastest and most appropriate placement for the child. ICWA protects the unique and substantial interest of the tribe and the Indian child. In addition, the tribe often has information regarding the child and the family that is critical in assisting the court in good decision making regarding the child. 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 timely permanency for 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.

3.5 FACTS SUPPORTING THE FILING OF A CPA CASE

A. Jurisdiction

A child is within the jurisdiction of the CPA if the child lives or is found within the state and is abused, abandoned, neglected, homeless, or lacks a stable home.[53] In addition, a child may be within the jurisdiction of the court if she or he lives or has custodial visitation in a household where another child is subject to the jurisdiction of the court pursuant to the CPA. In the latter situation, the child must be exposed to or at risk of being a victim of abuse, neglect, or abandonment; the child must be named in the petition or amended petition; and appropriate notice must be provided to that child's parents and/or guardians.[54]

1. *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." [55] The statute further provides that failure to maintain this relationship for one year is prima facie evidence of abandonment.

2. *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. [56]

[52] 25 U.S.C. § 1912.
[53] § 16-1603(1)(a)–(b).
[54] § 16-1603(2).
[55] § 16-1602(2).
[56] § 16-1602(1).

3. *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, guardian, or other custodian are unable to discharge their responsibilities to the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or
    c. Who has been placed for care or adoption in violation of law. [57]

    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.[58] 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.[59]

4. *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 detention.

    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 Department 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. If the parents are not able to provide the child with a home despite the Department's 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 CPA.

5. *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.

    Often, the situations that fall in this category also fall into the category of neglect. There are at least two situations that fall into this category, but which might not fit into the category of neglect. One is the "drug house" (where an occupant of the home is a

[57] § 16-1602(25).
[58] § 16-1602(25)(a).
[59] § 16-1627.

manufacturer or distributor of illegal drugs) and the nature of the substances and people frequenting the house endanger the safety of the child or children in the home.

Another situation that might fall within this category is a violent home where the child is not directly abused, but he or she regularly witnesses domestic violence. Like with 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 the purpose is to establish a statutory basis to provide services and shelter to the child when the parent is unable to do so.

Like with homelessness, the reasonable efforts of the Department to provide assistance to the adult victim, and the adult victim's ability and willingness to participate in those services, become issues in the adjudication phase. If the parent who is the adult victim of domestic violence is not able to provide the child with a safe home despite Department 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 CPA. (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 and/or the child.)[60]

It is common practice, in some jurisdictions, to stipulate to lack of a stable home environment as the basis of jurisdiction under the CPA. Care should be taken when entering such stipulations because the jurisdictional basis for the case is relevant in determining the scope of the case plan and possibly the grounds alleged in a petition to terminate parental rights. Also, the jurisdictional basis for the CPA case may be relevant if termination of parental rights is eventually required. Attorneys should consider how stipulating to lack of a stable home environment may influence the case plan or any future termination of parental rights case.

6. *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 some, but not all, of the children are abused, neglected, or abandoned. If one child is abused, neglected, neglected, or abandoned, it cannot simply be presumed that the others are as well. However, it cannot 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. All of the children must be named in the Petition or the amended Petition.[61]

[60] *See supra* note 4 and accompanying text.
[61] §16-1603(2).

B. Aggravated Circumstances

The purpose of the aggravated circumstances provision is to identify those cases in which, as a result of serious maltreatment, no effort will be made at reunification.[62] Aggravated circumstances is a concept that can be used to facilitate earlier permanency for the child. By suspending efforts focused on reunification, attention can be promptly focused on efforts to find the child a safe home, loving family, and permanent placement.[63]

The CPA specifically identifies the following as aggravated circumstances:

- abandonment;
- torture;
- chronic abuse;
- sexual abuse;
- murder;
- the parent has committed murder or voluntary manslaughter of another child;
- the parent has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child;
- the parent has committed a battery or injury to a child that results in serious or great bodily injury to any child of the parent; or,
- the parental rights of the parent to a sibling have been terminated involuntarily. [64]

Ideally, if aggravated circumstances is an issue, it should be alleged in the CPA petition and determined by the court at the adjudicatory hearing.

The statute further provides that aggravated circumstances "include but are not limited to" those specifically listed. In evaluating whether circumstances not specifically listed in the statute constitute aggravated circumstances, prosecutors may want to consider 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.

CONCLUSION

Initiating a child protection case (whether by law enforcement declaring a child in imminent danger, a prosecutor filing a petition for an Order to Remove, a court expanding a case under Juvenile Rule 16, or a parent's actions activating the Safe Haven Act), requires cooperation between the prosecutor, law enforcement, the Department, and any other individual who may have relevant information regarding the child. Ensuring the safety and well-being of the child is paramount when evaluating a CPA case. To the fullest extent possible, actions should be taken as may be necessary and feasible to prevent the abuse, neglect, abandonment, or homelessness of Idaho's children.

---

[62] If the case is governed by ICWA, a finding of aggravated circumstances does not relieve the Department of its responsibility to make active efforts to reunify the Indian family. *See, e.g.*, In Re Interest of Jamyia M., 791 N.W. 2d 343 (Neb. 2010); In the Matter of CR, 646 N.W. 2d 506 (Mich. App. 2001)

[63] Permanency planning, reunification plans, and alternative permanent placement plans are further discussed in Chapters 6 and 7 of this manual.

[64] § 16-1619(6)(d).

CHAPTER 4:
Shelter Care

4.1 PURPOSE AND GOALS OF THE SHELTER CARE HEARING

The purpose of the shelter care hearing is to decide whether a child should be placed in or remain in temporary shelter care pending the adjudicatory hearing under the Child Protective Act (CPA). The hearing is governed by Idaho Code §16-1615 and Idaho Juvenile Rule 39. The shelter care hearing is preliminary in nature and is not intended to resolve the substantive issues that will be addressed at the adjudicatory hearing. The court's decision is comprised of two principal questions. First, a court at the shelter care hearing must determine whether there is reasonable cause to believe that the child is within the jurisdiction of the courts pursuant to the CPA. Second, if there is reasonable cause to believe the child is within the jurisdiction of the court, the court must then determine whether it is in the child's best interests to remain in or be placed in a place of temporary shelter care pending the adjudicatory hearing. While there are other important areas of inquiry at a shelter care hearing, these two questions are the primary matters of focus.

Although they are made on an expedited basis, the court's determinations at shelter care regarding the child's best interests and welfare must be based upon a competent assessment of whether a child can be safe if the child returns to or remains in his or her home. Children are unsafe when three conditions are present: 1) threats of danger exist with the family; 2) the child is vulnerable to such threats; and 3) the parents have insufficient protective capacities to manage or control these threats.[1]

A parallel proceeding - the *re-disposition hearing* - is also discussed in this chapter. The re-disposition hearing takes place when a CPA case is ongoing and the child is removed from his or her home after having been returned there pursuant to an order for protective supervision.[2] In this type of case, the child has previously been found to be within the jurisdiction of the CPA.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare

[1] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 2 (2009).

[2] IDAHO CODE ANN. §16-1623 (2011).

4.2 PROCEDURAL CONSIDERATIONS AT THE SHELTER CARE HEARING

A. Timing

The shelter care hearing is usually the first court hearing in a CPA case, *if* 1) the child has been removed from his or her home by a law enforcement officer; 2) the alleged offender is removed from the home by a law enforcement officer; or 3) the petitioner in a CPA case moves the court for removal of a child or an alleged offender from the home.[3] In addition, the court's order resulting from the shelter care hearing is often the first order sanctioning the removal of the child from the home. This is particularly the case where the child was removed from home without prior court approval pursuant to a declaration of imminent danger.[4] In some situations, however, the shelter care hearing may have been preceded by a motion requesting an Order to Remove the Child and the subsequent removal of the child from the home.[5] In these latter cases, the Order to Remove the Child is the first order sanctioning removal of the child from the home.

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.[6] A re-disposition hearing must be held within 48 hours after the child is removed from protective supervision.[7]

B. Evidentiary Considerations

Both the shelter care hearing and a re-disposition hearing are informal hearings that are closed to the general public.[8] The Idaho Rules of Evidence do not apply in the shelter care hearings.[9] Rather, the court may consider "[a]ny evidence . . . which is of the type which reasonable people may rely upon."[10] Likewise, the Idaho Rules of Evidence do not apply to the re-disposition hearing.[11]

Both the shelter care hearing and the re-disposition hearing must be placed on the record in the CPA proceeding.[12]

C. Exclusive Jurisdiction/Ongoing Duty to Disclose

The court initiating the CP proceeding has exclusive, original jurisdiction over all proceedings arising under the Act.[13] Furthermore, parties have an ongoing duty to inquire, and to inform the court as soon as possible, about any pending actions or current orders involving the child who is

[3] *See* §§ 16-1608(2)–(3), 16-1615(1); IDAHO JUV. R. 39(b).
[4] IDAHO JUV. R. 32; *see also* §16-1609. *See* Chapter 3 of this manual for a discussion of emergency removal of a child or offender from the home.
[5] § 16-1611(4); IDAHO JUV. R. 31. *See* Chapter 3 of this manual for a discussion of the Order to Remove the Child.
[6] §§ 16-1608(2)–(3).
[7] § 16-1623(3); IDAHO JUV. R. 47.
[8] § 16-1613(1).
[9] IDAHO R. EVID. 101(e)(6); IDAHO JUV. R. 39(e), 51(b) (except as to privilege, jurisdiction, and aggravated circumstances determination).
[10] § 16-1615(5).
[11] IDAHO R. EVID. 101(e)(6); *see also* §16-1613(1).
[12] IDAHO JUV. R. 39(h); *see also* §16-1623.
[13] §16-1603.

the subject of a child protection case. If there are conflicting orders, the CPA order is controlling.[14]

D. Who Should Be Present at the Shelter Care Hearing

1. *Judge.* A 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, be familiar with the workings of the child welfare system, and have broad knowledge of and experience with the services and placement options available in the community.

2. *Parents*. The CPA does not define "parent" for purposes of the Act. [15] As a matter of best practice, any person who qualifies as a parent for purposes of the parental termination statute[16] or for the adoption statute[17] should be joined in the CPA proceeding. If reunification is not possible, the rights of these individuals will be implicated in any permanency plan for the child. Their participation in the CPA proceeding will reduce delays in achieving permanency.

   Even where individuals are not formally joined to the CPA action, the Department should assess all parent figures involved in the life of the child, in order to ensure the least disruption for the child. These individuals and/or their family members may be resources for the child.

   Questions regarding paternity should be resolved in a timely fashion in order to meet the best interests of the child and further case processing. The court should order paternity testing where appropriate to establish parentage. In addition, 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 failure to appear should be documented in the file and appropriate findings should be made in the shelter care order.

3. *Child's Guardian or Legal Custodian.* If the child has a guardian who has been appointed under the Idaho Guardianship of Minors statute, that person must be joined in the CPA proceeding.[18] Likewise, an individual who has legal custody of a minor pursuant to a court order must also be joined in the CPA proceeding.[19] This could include a de facto

---

[14] §16-1604(2).
[15] Idaho law *requires* notice to each parent and custodian. § 16-1615(2). *See* Chapter 12 for a discussion of Idaho law regarding unwed fathers.
[16] *See* §§ 16-2002(11), (12), (15), (16) (defining parent for purposes of termination of parental rights) and § 16-2007 (providing for required notice in a termination of parental rights case).
[17] *See* § 16-1505 (providing for required notice in an adoption case) and § 16-1504 (defining who must consent to adoption).
[18] § 16-1611(1), (3) (requiring service of the summons and petition on a legal guardian and requiring notice to guardians). A court may appoint a guardian for a minor under Idaho Code §§ 15-5-201 to 213.
[19] § 16-1611(1), (3).

custodian who has been awarded legal custody of a child and who was appointed prior to the initiation of the CPA proceeding.[20]

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 should 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.[21] An Indian child's tribe has the right to notice and to an opportunity to participate in all hearings involving the child.[22] For Indian children, the tribe often has information regarding the child and the family that is crucial to the court's review of the Department's placement determination regarding the child.

6. *County Prosecutor or Deputy Attorney General*. In child protection cases in Idaho, the state may be represented either by the county prosecutor or a deputy attorney general.[23]

7. *Attorney(s) for Parents*. Because of the critical strategic importance of the shelter care hearing, it is essential that parents have meaningful legal representation at the 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.[24]

   The recommended best practice is to appoint counsel for the parents at the time the petition is filed. At the shelter care hearing, if the court determines that the parents are not indigent, the court can withdraw the appointment at the conclusion of the 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. In support of the court, each county should develop a logistical plan to ensure that representation for parents is available at the shelter care hearing. Effective practices for appointment of counsel will help ensure competent representation for the parents at the shelter care hearing while avoiding routine delays pending appointment of counsel.

---

[20] §§ 32-1701 to 1705. Pursuant to this statute, a petition for appointment as de facto custodian cannot be initiated through intervention in a CPA proceeding. IDAHO. R. CIV. P. 24(d). Moreover, a foster parent may **not** petition to be considered a de facto custodian based on the child residing with the foster parent. § 32-1703(4)(a). Once a CPA proceeding has been filed, the CPA court has exclusive jurisdiction over the child. *See* §16-1603(1). Pursuant to the De Facto Custodian Act, a court can award legal and/or physical custody to a de facto custodian. Pursuant to the CPA, only legal custodians are parties to a CPA proceeding. *See, e.g*. § 16-1611(3).

[21] The requirements of ICWA are discussed in detail in Chapter 11 of this manual.

[22] 25 U.S.C. §§ 1912(a), 1911(c) (2011).

[23] *See* § 16-1610(1)(a). The term "prosecutor" will be used to represent either a county prosecutor or a deputy attorney general.

[24] § 16-1611(3); IDAHO JUV. R. 37(d).

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

8. *Guardian ad litem and Attorney for GAL*. Idaho law requires the appointment of a guardian *ad litem* for the child, to serve at *each stage* of the proceeding. [25] It further provides that the court should also appoint counsel for the guardian *ad litem*.[26] 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* upon the filing of the petition.

9. *Child's Attorney*. 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 *ad litem* is available for appointment.[27] 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.[28] Upon filing the petitions, the recommended best practice is for the court to appoint an attorney for the child where required or when deemed appropriate.

10. *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.

11. *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.

12. *Interpreters, if applicable*. If a parent or other essential participant is not fluent in English or has a requirement for language assistance, a certified 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.

As a matter of best practice, any participant in the case who becomes aware of the need for an interpreter should notify the court as soon as possible in order to avoid delay.

---

[25] § 16-1614(1).
[26] IDAHO JUV. R. 37(a).
[27] § 16-1614(2); IDAHO JUV. R. 37(a)–(c).
[28] 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 representation for children in child abuse actions. 42 U.S.C. § 5106a.

E. Persons Whose Presence May also be Needed at the Shelter Care Hearing

Each party is responsible for securing the attendance of its own witnesses, with the greatest burden on the prosecutor as 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. The prosecutor may not know to what degree the hearing will be contested and therefore may not know which witnesses will actually be needed.

If a witness is unavailable to testify in court, the witness can testify by telephone,[29] 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. Finally, the court may adjourn the hearing for brief periods,[30] 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.

Because shelter care hearings are not open to the public[31], persons not on the list of those whose attendance is required at shelter care hearings should not be present. Nonetheless, a number of additional persons may be required as witnesses and should be available to testify, if needed.

1. *Age-Appropriate Children.* Children may be required as witnesses at a shelter care hearing. Whether their testimony is included should 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 participate in the hearing. If the child's testimony is deemed necessary, alternative means of testifying should be explored.[32] If the child is summoned as a witness, the child may have a friend or person who has a supportive relationship with the child present at the hearing. [33]

2. *Extended Family Members*. The Department has an obligation to contact the child's extended family within thirty (30) days of the child's removal from his or her home.[34] When relatives are either already actively involved with a child or are interested in caring for a child, their testimony 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

[29] IDAHO. R. CIV. P. 7(b)(4).
[30] IDAHO JUV. R. 39(f).
[31] §16-1613(1).
[32] The caseworker's testimony as to the child's statements would be hearsay, but such hearsay is admissible at shelter care hearings. IDAHO JUV. R. 51(b) and IDAHO R. EVID. 101(e)(6) provide that the Rules of Evidence, which include the hearsay rules, do not apply at shelter care hearings. *See* §§ 9-1801, *et seq*. (the Uniform Child Witness Testimony by Alternative Methods Act).
[33] §16-1613(2).
[34] 42 U.S.C. § 671(a)(29).

become the immediate caretaker of the child, if necessary. It is helpful for the court to observe the child's relatives and to be able to speak to them directly at the hearing.

3. *Law Enforcement Officers*. Law enforcement officers who remove children from dangerous situations are often key witnesses. They sometimes need to be present to testify to the circumstances of removal.

4. *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 safety plan so that the child may return home.

5. *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.

6. *Department of Juvenile Corrections*. In a Rule 16 expansion case, the Department of Juvenile Corrections has standing as an interested party in the CP action, if the juvenile is in the custody of Juvenile Corrections.[35]

7. *Other Witnesses*. To ensure careful and informed judicial decisions, appropriate witnesses should testify at the shelter care hearing. In addition to law enforcement officers and service providers, such witnesses may include eyewitnesses to the neglect or abuse of the child and medical providers who have examined the child.

4.3 KEY FINDINGS AT SHELTER CARE HEARINGS

A. Petition

Idaho law requires that the court find that a petition has been filed under the Child Protection Act.[36] The petition must describe the facts that bring the child within the jurisdiction of the CPA.[37]

A recommended best practice is that the petition be verified or that it be accompanied by one or more affidavits from the social worker and/or law enforcement officer involved in the case. The affidavit(s) describe all the circumstances of the removal, 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. Whenever possible, the affidavit should include as many of the relevant facts discussed

[35] IDAHO JUV. R. 16(f). See Chapter 12 for more information on Rule 16 expansion cases.
[36] § 16-1615(5)(a).
[37] § 16-1610(2)(a). The preparation of the petition is discussed in detail in Chapter 3 of this manual.

above and a thorough evaluation of the child's safety at the time of shelter care. Detailed affidavits will improve decision making by the court and will aid the prosecutor, Department, and guardian *ad litem* in best ensuring the child's safety and permanency.

B. Jurisdiction

Idaho law requires that the court find that there is reasonable cause to believe that the child comes within the jurisdiction of the court under the CPA.[38] 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.[39]

C. Contrary to the Welfare/Best Interests

The central concern of the shelter care hearing is whether the child can be safely returned home. Thus 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 interest of the child to remain in temporary shelter care pending the adjudicatory hearing.[40] Unlike the federal requirement discussed in the following paragraph, state law requires that the contrary to the welfare finding be made at the shelter care hearing, even if the shelter care order is not the first order sanctioning removal.[41]

Federal law requires a parallel finding as a condition of preserving federal IV-E match funds for otherwise eligible children. If the shelter care order is the *first court order* sanctioning removal of the child from the home, federal law requires that the court find that: "It is contrary to the welfare of the child to remain or to be returned home and it is in the child's best interests to remain in the custody of the Department".[42] This finding must be *case specific* and it must be *documented* in the court order.[43] If this finding is not made, an otherwise eligible child will not be eligible for federal IV-E foster care reimbursement and/or adoption assistance 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 only be corrected with a transcript of the hearing that documents the case-specific finding.[44] If the child was taken into custody pursuant to an Order to Remove the Child on the summons, then

[38] § 16-1615(5)(b).
[39] The grounds for a CPA case are found in § 16-1603. They are discussed in detail in Chapter 3.
[40] § 16-1615(5)(d)–(e).
[41] *Id.*
[42] 42 U.S.C. §§ 672(a)(1), 673(a)(2)(A)(i).
[43] 45 C.F.R. § 1356.21(d) (2011).
[44] 45 C.F.R. § 1356.21(c) (2011).

that order is the first order sanctioning removal. The documented, case-specific best interests finding must be made in that order and, unlike the requirements of state law, is not required by federal law at the shelter care hearing.[45]

D. Background Information Relevant to the Child's Safety[46]

The evaluation of the child's safety must be based on information observed or gathered from credible sources. Six background questions should be asked to guide the analysis of the child's safety in each case.

1. *What is the nature and extent of the maltreatment of the child?* The social worker should be able to identify the child and the maltreating parent. She or he also should be able to describe the maltreating behavior and the immediate physical or psychological effects on the child. Explaining the nature and extent of the maltreatment should include the type of maltreatment, the severity of the maltreatment, the history of maltreatment, a detailed description of the events constituting the maltreatment, and the emotional and physical symptoms or injuries caused by the maltreatment.

2. *What circumstances accompany the maltreatment?* The social worker should be able to describe what is going on when the maltreatment occurs. This description includes knowledge about how long the maltreatment has been occurring. It also includes information relevant to determining parental intent regarding the maltreatment and whether the parent was impaired by substance use or was otherwise out-of-control when the maltreatment occurred. The social worker also should know how the parent explains the maltreatment and the family conditions and what the parent's attitude toward the maltreatment is (*i.e.*, does the parent acknowledge the maltreatment).

3. *How does the child function day-to-day?* The social worker should know about how all the children in the home function – their behaviors, emotions, temperaments, and physical capacities. This information should be relevant to how the child functions generally and not just at a particular point in time (such as the time of IDHW contact or at the time of maltreatment). The answer to this question should include information about the child compared to other children of the same age. Factors in the answer to this question include capacity for attachment, general mood and temperament, intellectual functioning, communication and social skills, expressions of emotions/feelings, behavior, peer relations, school performance, independence, motor skills, and physical and mental health.

4. *How does the parent discipline the child?* The social worker should learn how the parent approaches discipline and child guidance. The worker should find out about disciplinary methods, the concept and purpose of discipline, the context in which discipline occurs, and cultural practices relevant to discipline.

---

[45] *See* Chapter 3 of this manual regarding Orders to Remove the Child.

[46] The following sections are based substantially on the *ABA Child Safety Guidelines for Judges and Attorneys*. *See* LUND & RENNE, *supra* note 1.

5. *What are overall parenting practices?* Beyond discipline, the social worker should learn more about the general approach of the parents to parenting and to parent-child interactions. She or he should find out the parents' reasons for being a parent, satisfaction in being a parent, knowledge and skill in parenting and child development, decision-making in parenting practices, parenting style, history of parenting behavior, protectiveness and cultural practice regarding parenting.

6. *How does the parent manage his own life?* Finally, a social worker should learn how the parent feels, thinks, and acts daily, not just limited to times and circumstances surrounding the maltreatment. The focus of this inquiry must be on the adult, separate from his or her parenting role or the interaction with the Department. The social worker should discover the parent's abilities in the following areas: communication and social skills, coping and stress management, self-control, problem solving, judgment and decision making, independence, home and financial management, employment, community involvement, rationality, self-care and self-preservation, substance use, abuse or addiction, mental health, physical health and capacity, and functioning within cultural norms.

At the shelter care hearing, the Department may not have had sufficient time to assemble all the relevant information and may only have information about the immediate situation. Nonetheless, the court should expect the social worker at an absolute minimum to know the extent of the maltreatment and the surrounding circumstances. The court's decision at shelter care should be supported by as much of the information listed above as can be mustered, given the timing of the hearing.

E. Elements of Safety Decision Making: Threats, Child Vulnerability, and Parental Protective Capacity[47]

1. Threats of Danger

A threat of danger is a specific family situation or behavior, emotion, motive, perception, or capacity of a family member that may impact a child's safety status. The threat should be specific and observable, out-of-control, immediate or imminent, and have severe consequences.

The terms *safety* and *risk* are often used interchangeably. Within the child protection context, however, these terms have significantly different meanings. "Safety" refers to imminent threats to a child's safety that are either occurring presently or that are likely to occur in the near future and that are likely to result in severe consequences for the child due to a family member or an out of control family situation or condition. In contrast, "risk" refers to the likelihood that child maltreatment might or might not occur without an intervention. The timeframe for risk is open ended and the consequences to a child may be mild to serious.

When considering threats of danger, the focus should be on the child's own home and also should be on the individuals who function as the child's parents (eg: biological parents, live-in boyfriend, grandmother).

[47] LUND & RENNE, *supra* note 1, at 9–18.

2. Child's Vulnerability

Threats of danger can jeopardize a child's safety when a child is vulnerable. Considering a child's vulnerability involves both knowing about the child's ability to protect him or herself from threats and knowing how the child is able to care for him or herself. Factors relevant to this determination include the child's age, physical ability, cognitive ability, developmental status, emotional security, and family loyalty.

3. Parental Protective Capacities

The parents' protective capacities must be weighed against the existing threats of danger. The key question on this factor is whether the parent(s) demonstrate sufficient capacity to control and manage the threats. Protective capacities are cognitive, behavioral, and emotional qualities supporting vigilant protectiveness of children. They are fundamental strengths preparing and empowering a person to protect. All adults in the home should be assessed for protective capacities.

F. Reasonable efforts to eliminate the need for shelter care

Under Idaho law, the court may order a child placed in shelter care at the shelter care hearing only if the court finds that 1) the department "made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful" OR 2) the Department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventive services."[48]

Federal law requires a similar finding by the court – that the Department made reasonable efforts to prevent the child's removal from the home.[49] Where the child is removed because of immediate danger and the Department has had a limited opportunity to provide services to prevent removal, 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.** [50] A finding of no reasonable efforts in this circumstance will preclude federal funding.

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), an otherwise eligible child will lose eligibility for federal foster care match funds, and the omission **cannot be corrected at a later date** to reinstate the child's eligibility.[51]

To ensure compliance with the federal requirement, the recommended best practice is to make the finding at the shelter care hearing, if possible. The federal finding may also be made at the

[48] §16-1615(5)(b)(i)(ii). Idaho law requires that the reasonable efforts to prevent removal finding be made at BOTH the shelter care and adjudicatory hearing. § 16-1615(5); § 16-1619(6)(a-c).
[49] 42 U.S.C. §§ 671(a)(15)(B), 672(a)(1) & (2); 45 C.F.R. § 1356.21(b).
[50] The exact language provided in bold should be utilized, as this finding has been sufficient to preserve federal funding when reviewed in federal audits of Idaho procedures.
[51] 45 C.F.R. § 1356.21(b)(1).

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. 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. [52] 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 only be corrected with a transcript of the hearing.

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.[53]

What constitutes reasonable efforts depends on the time available in which such efforts could be made.[54] In many cases, IDHW's first contact with the family occurs as part of the incident giving rise to the petition. Efforts of third parties, including law enforcement, may constitute reasonable efforts. In other cases, the Department has had prior contact with the family. By taking a careful look at the Department's efforts, the court can better evaluate both the danger to the child and the ability of the family to respond to help. In any determination of reasonable efforts, the child's safety is the paramount concern.[55]

4.4 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.[56] 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 further proceedings. State law, in effect, establishes the policy 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.

4.5 PROTECTIVE ORDER TO ENSURE SAFE RETURN HOME

The court may issue a protective order that permits the child to safely return home. Where the court finds that the child is within the jurisdiction of the court, it also may find that "a reasonable effort to present placement outside the home could be affected by a protective order safeguarding the child's welfare and maintaining the child in his present surroundings... "[57] The determination

[52] 45 C.F.R. § 1356.21(d).
[53] 45 C.F.R. § 1356.21(b)(3); 42 U.S.C. § 671(15)(D)(i).
[54] *See* YOUTH LAW CENTER, MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD (1999) available at http://familyrightsassociation.com/bin/white_papers-articles/reasonable_efforts/making_reasonable_effort.pdf; DEBORAH RATTERMAN BAKER ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION (1989).
[55] 42 U.S.C. § 671(a)(15)(a) (2011); § 16-1601(a).
[56] § 16-1615(5)(c).
[57] § 16-1615(5)(f).

of whether such a protective order would be appropriate should focus on whether a safety plan can be put in place to control threats of danger to the child.[58]

Protective orders are defined in the CPA in Idaho Code §16-1602(28), which references Idaho Code §39-6303. These provisions are particularly applicable in cases where a child has been abused by one parent but not the other parent. In such situations, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order against the other parent that ensures the safety of the child and the non-abusing parent.[59] Such a protective order 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.[60]

The CPA does not specifically provide an option for the court to order that the child remain in the home under Department supervision pending the adjudicatory hearing. A judge must choose between shelter care, where the Department has temporary custody and the authority to make placement decisions, and returning the child home in the custody of the parents with a protective order in place. Returning the child home in "protective custody" is not an option provided by the statute. The two options available to the court cannot be combined. 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 at the adjudicatory hearing. In addition, because IDHW's supervision responsibilities are not spelled out by the Act, the legal status of the Department's relationship to the child and its power to ensure the child's safety is ambiguous.

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.[61]

4.6 OUT-OF-STATE PLACEMENT

An out-of-state placement may not be made without court order.[62] 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).[63]

[58] Safety Plans are discussed in Chapters 2 and 3. The safety principles relevant to this determination are discussed earlier in this chapter.
[59] §§16-1615(5)(f), 16-1602 (28) & 39-6306.
[60] §§16-1615(5)(f) and 16-1602(28) authorize entry of protection orders following the shelter care hearing.
[61] For more information on stipulations, please see page 52.
[62] §§16-1629(8), 16-2102(III)(a); IDAHO JUV. R. 46(c).
[63] The ICPC is discussed in detail in Chapter 12 of this manual.

4.7 LEAST RESTRICTIVE SETTING AND PLACEMENT PRIORITIES FOR RELATIVES

Idaho law requires:

> At any time the department is considering a placement pursuant to this chapter, the department shall make a reasonable effort to place the child in the least restrictive environment to the child and in so doing shall consider, consistent with the best interest and special needs of the child, placement priority of the child in the following order:
> (a) A fit and willing relative.
> (b) A fit and willing non-relative with a significant relationship with the child.
> (c) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code.[64]

Federal Law also requires that the Department place children with a relative so long as the relative meets the Department's "child protection standards".[65]

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.

Often out-of state placement is required in order to accomplish this placement priority. If so, immediate attention must be paid to the requirements of the ICPC. As noted above, Idaho law requires court approval of an out-of state placement. Moreover, in certain cases court orders may be necessary in order to make an expedited ICPC placement.

Finally, the "least restrictive environment" language of this provision means that children 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 should review that appropriate referrals are made so that the child can be moved to a more appropriate placement when one becomes available.

4.8 ADDITIONAL CONSIDERATIONS THAT MAY BE REQUIRED OR APPROPRIATE

A. Indian Child Welfare Act (ICWA)

If the child is an Indian Child, the case will be governed by the Indian Child Welfare Act.[66] It is very important that efforts be made as early as possible to determine if the child is an Indian child. ICWA establishes special procedural and substantive safeguards to protect the interests of Indian children and tribes.[67] If the child is an Indian child, the child's Indian Tribe has the right

[64] § 16-1629(11).
[65] 42 U.S.C. § 671(a)(19).
[66] 25 U.S.C. § 1901–63.
[67] 25 U.S.C. §§ 1901–1963. ICWA requirements are discussed in detail in Chapter 11.

to notice and an opportunity to participate in all hearings regarding the child. ICWA also establishes preferences for placement of Indian children.

B. Examinations, Evaluations, or Immediate Services

During some shelter care hearings, the court may order examinations or evaluations, where appropriate. 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 and service 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).

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.

C. 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.[68] A visitation schedule between the child and his/her parent(s) and/or siblings should be identified in the case plan.[69] 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.

Before issuing a no-contact order, serious consideration should be given to the impact it has on the Department's obligation to reunify the family. If needed, visitation may be restricted and the Department has the ability to control and supervise the visitation process.

D. Maintaining the Child's Connection to the Community

The shelter care placement for the child has important ramifications for the child's long-term success. From the beginning, considerations to maintain the child's connection to the community should be taken into account in placement.[70] Where possible, a court should inquire at the shelter care hearing as to whether these considerations are being taken into account. In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) imposed a number of requirements on states relevant to these provisions of Idaho law.[71] Fostering Connections requires states to emphasize children's relationships with siblings and other close relatives and to maintain educational stability for the child.

---

[68] *See* K. Blumenthal & A. Weinberg *Issues Concerning Parental Visiting Of Children In Foster Care, in* FOSTER CHILDREN IN THE COURTS, 372, 372–98 (M. Harden ed., 1983).
[69] IDAHO JUV. R. 44(a)(2).
[70] IDAHO JUV. R. 44(a)(1).
[71] Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 122 stat. 3949 (2008).

Regarding sibling placement, Fostering Connections requires that reasonable efforts be made to place siblings together in the same foster home, or other placement, unless such a joint placement would be contrary to the safety or well being of any of the siblings. If siblings are not placed together, the state must provide for frequent visitation or other ongoing interaction between the siblings, unless doing so would be contrary to the safety or well being of any of the siblings. As discussed above, the case plan under Idaho law should contain such provisions for visitation, where appropriate.

With regard to educational stability, Fostering Connections requires the Department to have a plan that takes into account the appropriateness of the child's current educational setting. This means that the Department should ensure that the child remains in his or her school of origin or, if such enrollment is not in the child's best interest, to provide immediate and appropriate enrollment in a new school. The Act also requires the Department to monitor the child's school attendance.[72]

E. Child Support

Idaho law authorizes a court to order a parent or other legally obligated person to provide child support for a child in the Department's custody. Such support must be a "reasonable sum that will cover in whole or in part the support and treatment of the child."[73]

4.8 ADDITIONAL ACTIVITES AT THE SHELTER CARE HEARING

A. Serving the Parties with a Copy of the Petition

The petition and summons must be prepared in advance of the shelter care hearing. If service has not been previously completed, the hearing provides an excellent opportunity to efficiently complete service of process.

B. Advising Parties of their Rights

The court is required to advise the parties of their rights. This specifically includes the right to court-appointed counsel, where applicable.[74] Even when the parties are represented at the hearing, the court should explain the nature of the hearing and the proceedings that will follow.

The court should verify that each party has a copy of the petition, and advise the parents:

- of the purpose and scope of the hearing;
- of the possible consequences of the proceeding, including the possibility that a petition for termination of the parent-child relationship can be filed if reunification has not occurred prior to the time that the child has been in care 15 of the last 22 months;
- of the right of parties to present evidence and cross-examine witnesses; and
- that failure to appear at future hearings could result in a finding that the petition has been proved.[75]

[72] 42 U.S.C. § 671(a)(30).
[73] § 16-1628(a).
[74] IDAHO JUV. R. 39(g).

C. 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. A number of important considerations make the timing of the adjudicatory hearing very sensitive. Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.[76] 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.[77] As discussed previously in this chapter, 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.

In addition, as a result of agreements by the parties,[78] the adjudicatory hearing and the case plan hearing[79] sometimes are held together. This can happen when the parties 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. When this happens, the timing of the adjudicatory hearing also may be affected by the time requirements of the case plan hearing. Idaho law requires that a written case plan be filed with the court 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. Additionally, the case planning hearing must be held within 5 days after the plan is filed.[80]

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 proceedings and so many steps in the process governed by strict deadlines, scheduling can be challenging. These challenges 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, such as 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

---

[75] IDAHO JUV. R. 39(g).
[76] § 16-1619(1).
[77] §§ 16-1616, 16-1619(1)–(2), 16-1633(2).
[78] Stipulations and agreements are discussed in the next section of this Chapter.
[79] *See* § 16-1621. This hearing is discussed in detail in Chapter 6 of this manual.
[80] § 16-1621(1).

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.

D. Agreements by the Parties

Parties are sometimes willing and able to enter into stipulations at the shelter care hearing. Such stipulations may expedite the litigation and simplify the early stages of the proceedings. However, thought should be given to the value of having parents appear before the judge early in the case so that the judge can advise parents of their rights, the allegation(s) against them, the timeline of a child protection proceeding, and the value of early engagement with the Department. IJR 38 governs such stipulations. It provides that stipulations shall be on the record and are subject to court approval. Rule 38 further provides that "[t]he court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interest of the child."

The court should ensure that the stipulated facts and agreements address 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. Rule 38 provides that orders entered based on stipulations "must include all case-specific findings required" by state or federal law or by the Idaho Juvenile Rules.

CHAPTER 5:
The Adjudicatory Hearing

5.1 INTRODUCTION

The adjudicatory hearing is a two-phase process. The first is the adjudication phase, in which the court determines whether the child falls within the jurisdiction of the court pursuant to the Child Protective Act ("CPA") due to being abandoned, abused, neglected, homeless, lacking a stable home environment, or living/visiting in the same household as another child who is within the CPA's jurisdiction.[1] Adjudication provides the basis for on-going state intervention with a family. In addition, if the Petition alleges aggravated circumstances, the court at the adjudicatory hearing must determine whether the facts support the allegations.

Disposition is the second phase of the adjudicatory hearing. At the time of the adjudicatory hearing, the child is often in the temporary custody of the Department as a result of the court's order after a shelter care hearing. The child may also be at home, subject to the Department's supervision pursuant to a protective order. Disposition is the process by which the court determines whether to place the child in the legal custody of IDHW or to place the child in the child's own home under the protective supervision of the Department.[2] The court may set conditions concerning the child's placement and may issue specific directions to the parties.[3]

5.2 TIMING OF THE ADJUDICATORY HEARING AND PRETRIAL CONFERENCE

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.[4] In addition, a pretrial conference must be held within three to five days prior to the adjudicatory hearing.[5] 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.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. §§16-1619(4),16-1603; IDAHO JUV. R. 41(a).

[2] § 16-1619(5); IDAHO JUV. R. 41(a). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed later in this chapter.

[3] § 16-1619(9).

[4] § 16-1619(1).

[5] § 16-1619(2).

Timely adjudication has important long-term implications for the child and the family. 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 a child has been abused or neglected before parents will begin to work with the Department. Additionally, the time in which this adjudication is completed may control the timing of later judicial proceedings.

The timeliness of the adjudicatory hearing will also impact the timeliness of required federal IV-E findings. If the adjudicatory hearing is the first hearing sanctioning the removal the child of the home, the order must include the finding that it is contrary to the welfare of the child to remain in the home.[6] Additionally the court must, in all cases, determine whether the Department 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.[7] **If this finding is not made within the deadline, the child will lose eligibility for federal foster care match funds.** This omission cannot be corrected at a later date to reinstate the child's eligibility for funding.

IJR 41(b) provides that "The hearing may not be continued more than 60 days from the date the child was removed from the home, unless the court has made case-specific, written findings, as to whether the Department made reasonable efforts to prevent the need to remove the child from the home." Generally, only a genuine personal emergency of a party or counsel warrants a continuance; 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.[8] Best practice is to grant a continuance only for compelling reasons and only for a short period of time.

5.3 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.[9]

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.[10]

The reports are not admissible by the court for purposes of determining issues during the adjudication phase[11] because they typically contain hearsay information or other information that

[6] For additional information on the required Contrary to the Welfare finding, please refer to Chapter 4 on Shelter Care and Chapter 12 on required IV-E findings.
[7] 42 U.S.C. § 671(a)(15)(B)(1); 45 C.F.R. §1356.21(b)(1).
[8] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (1995)
[9] § 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.
[10] § 16-1633.
[11] § 16-1616(3).

does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes prior to disposition. The process of report preparation can tighten a caseworker's or GAL'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, which works as an alternative to the more time-consuming methods of discovery used in other civil proceedings.[12] The availability of this information prior to the pretrial conference promotes reasoned and informed settlement of cases prior to trial. Finally, when the parties stipulate to admission of all or portions of the reports, the reports can be used as the basis for the court's written findings and conclusions.[13]

The purpose of these required reports is to facilitate the exchange of essential information in order to promote knowing and voluntary settlement prior to trial and to ensure all issues are efficiently determined by the court.

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 GAL'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 successful resolution of disposition issues. Additionally, once a child has been determined in the adjudicatory 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.

5.4 AGREEMENTS BY THE PARTIES

Most cases are resolved by agreement of the parties. Therefore, court practices and procedures for uncontested or stipulated cases are particularly important. [14] IJR 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 must 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 must determine that the parties have thoroughly considered the reports by IDHW 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.

---

[12] 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 parents' rights against self-incrimination. *See* IDAHO. R. CRIM. P. 26–37. To the extent that information can be voluntarily exchanged, delays in the case that can jeopardize permanency and funding for the child are also avoided.

[13] Based on the importance of required findings in CPA cases, special considerations govern the use of stipulations in these cases. *See* IDAHO JUV. R. 38.

[14] IDAHO JUV. R. 38 sets forth minimum standards for court endorsement of stipulations by the parties.

Parties may stipulate to only adjudication, only disposition, or both. The court must ensure that the stipulation is comprehensive and that it addresses all of the key decisions that the court must or should make at the adjudicatory hearing. The court must 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 below.

5.5 EVIDENTIARY ISSUES AT THE ADJUDICATORY HEARING

The Idaho Rules of Evidence apply to the adjudication phase of the hearing. [15] The standard of proof at the adjudicatory hearing is preponderance of the evidence.[16] The Idaho Rules of Evidence also apply at a hearing on aggravated circumstances.[17]

The reports of IDHW and the guardian *ad litem*, may not be considered during the adjudication phase, as they may contain hearsay.[18] Attempts to present hearsay evidence during the adjudication phase can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, 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. Accordingly, a doctor's testimony will be necessary at the adjudicatory hearing. Since the rules of evidence apply, the caseworker cannot testify as to a doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit a doctor's written report. Regular communication and active cooperation between the prosecutor, caseworkers, and law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

The Idaho Rules of Evidence do not apply to the disposition phase of the adjudicatory hearing. In the disposition phase, the court may consider any information relevant to its decision regarding the child's disposition, including the reports of IDHW and the guardian *ad litem*.[19]

5.6 WHO SHOULD BE PRESENT

The CPA provides that hearings under the Act are not open to the general public and that only persons who are "found by the court to have a direct interest in the case" may be present.[20] Thus relatives, family friends, and others are generally not permitted to be present at the hearing. Generally, the persons whose presence is required include:

- Judge
- Parents who have a legally recognized relationship to the child[21]
- Guardian or other adult who has a legal custody order regarding the child
- Indian Custodian, the child's Tribe, and attorney, if applicable

[15] IDAHO R. EVID. 101; IDAHO JUV. R. 51.
[16] § 16-1619(4).
[17] IDAHO JUV. RULE. 41(c).
[18] § 16-1616(3).
[19] §§ 16-1619(4), 16-1619(5), 16-1633(2).
[20] § 16-1613(1). Additional information on the roles of the participants below can be found in Chapter 2.
[21] Please see Chapter 12 of this manual for more information on issues surrounding putative fathers.

- Assigned caseworker
- County Prosecutor or Deputy Attorney General
- Attorney for parents (separate attorneys if conflict warrants)
- The child, after careful consideration
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter, security personnel, and interpreter(s), as needed

5.7 WITNESSES

A. In General

Witnesses may be required if the adjudicatory hearing is contested. The key witnesses at the adjudication phase 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.

The primary issues at disposition are placement and 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.

B. Child Witnesses

In the adjudication phase of a contested adjudicatory hearing, the proceeding is formal and the key issue is whether the child is abused, neglected, or otherwise comes within the jurisdiction of the Act. The disposition phase is less formal, and the key issues are placement and reasonable efforts to avoid placement. Any time a child is considered as a witness, the court and attorneys should pay close attention to the potential trauma to the child from the testimony and other aspects of such a hearing.[22] Every effort should be made to make the child's testimony unnecessary. However, if the child's testimony is required, alternatives to in-court testimony should be pursued to minimize the trauma to the child.[23]

5.8 KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATORY HEARING

A. Phase 1: Adjudication

1. *Is the child within the jurisdiction of the CPA?*

The first issue the court must determine is whether the child is within the jurisdiction of the CPA. The burden of proof is on the state, and the standard of proof is by a preponderance of the

[22] Please see Chapter 12 of this manual for a discussion of issues surrounding children and youth in court in non-witness capacities.
[23] §§ 9-1801 to 1808.

evidence. Idaho law requires the court to make a finding on the record regarding the facts and conclusions of law that bring the child within the jurisdiction of the CPA.[24]

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. There are five grounds for a child to be within the jurisdiction of the Act. The Act applies where a child has been abused, neglected, abandoned, lacks a stable home environment, is homeless, or resides in/visits a household where other children are subject to the CPA.[25] These grounds are discussed in detail in Chapter III regarding the initiation of a CPA case.

2. *Has the parent subjected the child to aggravated circumstances?*

If aggravated circumstances are an issue, they will generally 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 and place the child in a new safe and loving home can be initiated promptly.[26]

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing. Aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.[27] However, because 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.

In determining whether the parent has subjected a child to aggravated circumstances, the Act specifically identifies the following: abandonment; torture; chronic abuse; sexual abuse; committed murder; voluntary manslaughter of another child; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter; committed a battery or an injury to a child that results in serious bodily injury to any child; or the parental rights of the parent to a sibling have been terminated involuntarily.[28] The Act further provides that aggravated circumstances "include *but are not limited to*" those specifically listed (emphasis added). In determining whether other circumstances constitute aggravated circumstances, the court should be guided by two factors: 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.

If aggravated circumstances are found, then:

1. IDHW is not required to make reasonable efforts to prevent removal or to reunify the family;[29]

[24] § 16-1619(4).
[25] § 16-1603.
[26] 45 C.F.R. § 1356.21(3)(i).
[27] *See* §§ 16-1610, 16-1619.
[28] § 16-1619(6)(d).
[29] *Id*. § 16-1620(1); 45 C.F.R § 1356.21(3)(i).

2. the next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent plan and placement for the child;[30] and
3. the Department 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.[31]

B. Phase 2: Disposition

The Idaho Child Protective Act provides for two distinct approaches to disposition. The determination that must be made by the court is who has *custody* of the child: the parents or the Department. The court may place the child in the custody of the Department. If the court determines that it is appropriate for the child to return home while in the custody of the Department, the court may approve an extended home visit.[32] In the alternative, the child may remain in the legal custody of his/her parents, under the protective supervision of the Department.[33]

The court's analysis should focus on three primary factors:

- *Threats of Danger to the Child*. A specific family situation or behavior, emotion, motive, perception, or capacity of a family member which are specific and observable, immediate, out-of-control, and have severe consequences.[34]
- *Vulnerability of the Child*. A child is vulnerable when he/she lacks the capacity to protect him/herself. Age is only one of many factors which may impact a child's vulnerability.[35]
- *Protective Capacities of the Parents and Family*. The knowledge, understanding, perceptions, observable behaviors, feelings, attitudes, and motivations that contribute to the parent's ability and willingness to protect the child.[36]

All of these criteria are discussed in more detail in Chapter 2, pages 13 through 16.

1. *Custody with Parents and Protective Supervision by the Department*

The child's best interests are the court's primary consideration in determining whether to leave the child in the custody of his/her parents under the protective supervision of the Department.[37] Placement of the child at home under the Department's 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 legal custody of IDHW is necessary to ensure the health and safety of the child while reunification efforts are

[30] § 16-1620(1).
[31] §§ 16-1619(6)(d), 16-1624.
[32] IDAHO JUV. R. 42.
[33] § 16-1619(5)(a).
[34] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-10, "Benchcard B" (2009).
[35] LUND & RENNE, *supra* note 30, at 11-13, "Benchcard C" (2009).
[36] LUND & RENNE, *supra* note 30, at 13-18, "Benchcard D" (2009)..
[37] § 16-1619(5)–(6).

made. Where aggravated circumstances have been found, no effort is to be made at reunification, and the child must be placed in an out-of-home placement.[38]

When determining whether the child may be placed in her or his own home, the court should evaluate whether a plan to ensure the child's safety is sufficient, feasible, and sustainable. The safety plan must control or significantly reduce the safety issues identified in the investigation. If the family's protective capacities are insufficient, the safety plan should determine what will protect the child by examining how and when threats emerge. It should also specify what actions or services are required to control those threats.[39]

The plan may contain conditions such as:

- Providing for the child to stay in the home of a relative;
- Controlling who can be present or reside in the home;
- Identifying what services will be provided until the parents' protective capacities have been strengthened;
- Requiring the home to meet the basic needs of the child (i.e. water, power, heat, etc.); and/or
- Eliminating unsafe conditions in the home.

A decree leaving the child in the custody of the Department continues until the child turns eighteen or until the court orders otherwise.[40] Prior to the child's eighteenth birthday, the case remains under the continuing jurisdiction of the court until the safety threats to the child are permanently eliminated and the child may safely return to or remain in the home without continuing Departmental supervision.[41] At that point in time, the case may be dismissed by court order. If the safety threats to the child cannot be controlled or eliminated, removal from protective supervision will be required and a new disposition decision will be necessary. Re-disposition is discussed in detail in Chapter 4.

In addition to the conditions in place with the safety plan, the court should consider whether a protective order would also be appropriate.[42] Protection orders are defined in the CPA in Section §16-1602(28), which references §39-6303. 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 against the other parent that ensures the safety of the child and the non-abusing parent.[43]

2. *Custody with the Department*

When it is not possible to control or eliminate the threats of danger, the child must be placed in the custody of IDHW. The court should carefully review why a safety plan is insufficient,

[38] 45 C.F.R. § 1356.21(3)(i).
[39] LUND & RENNE, *supra* note 29, at 25-32, "Benchcard G" (2009).
[40] § 16-1619(7).
[41] § 16-1604.
[42] § 16-1619(9).
[43] *See* §§ 16-1619 (9), 16-1602 (28), 39-6306. See earlier discussion.

unfeasible, or unsustainable and should begin the discussion of the conditions for return home (which will be addressed in the case plan). A decree placing the child in the custody of the Department continues until the child turns eighteen or until the court orders otherwise.[44] The Department shall not place a child in the home from which the court ordered the child removed without first obtaining the approval of the court.[45]

3. *Contrary to the Welfare*

Federal law requires a case-specific finding that it is contrary to the welfare of the child to remain in the home in the first court order sanctioning removal of the child from the home.[46] Generally, this finding has already been made prior to the adjudicatory hearing at the shelter care or at another hearing. However, if the adjudicatory hearing is the first order sanctioning the removal of a child, this finding must be made.[47]

4. *Reasonable Efforts to Prevent or Eliminate the Need for Placement of the Child in the Custody of the Department*

If the child is to be placed in the custody of the Department, state and federal law requires the court to make a series of reasonable efforts determinations. First, the court must determine whether the agency made reasonable efforts to prevent or eliminate the need to place the child in foster care.[48] This finding must be made regardless of whether the child was removed after interaction between the family and the Department, or was removed as a result of a declaration of imminent danger. When the child is placed in the custody of the Department, the court must make a finding on the issue of reasonable efforts to prevent removal. The court must make one of the following five findings:

1. Reasonable efforts were made but were not successful in eliminating the need for foster care placement of the child;
2. The Department made reasonable efforts to prevent removal but was not able to safely provide preventive services;
3. Reasonable efforts to temporarily place the child with related persons were made but were not successful;
4. Reasonable efforts were not required as the parent had subjected the child to aggravated circumstances as determined by the court; or
5. Reasonable efforts were not made.

State and federal law require a case-specific written finding of reasonable efforts.[49] This requirement can be met by incorporating by reference a Department report describing the efforts that were made and why those efforts were reasonable under the circumstances.

---

[44] §16-1619(7).
[45] §16-1629(8).
[46] 45 C.F.R. § 1356.21(c).
[47] For more information, please refer to findings in Chapter 4 of this manual. More information on the required IV-E findings can be found in Chapter 12.
[48] §16-1619(6)(a); 42 U.S.C § 671(a)(15); 45 C.F.R. §1356.21(b)–(d).
[49] 45 C.F.R. §1356.21(d); §16-1619(6).

Federal law requires that the documented, case-specific finding be made within 60 days of the date the child is removed from the home.[50] 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.[51]

If the court is considering a "no reasonable efforts" finding, the child's eligibility for IV-E funding can be maintained if the finding is made in advance of the 60-day deadline and the court schedules a follow-up hearing prior to the 60-day deadline and then makes a finding that the additional efforts or documentation constitute reasonable efforts to prevent removal.

C. Role of the Court in Reviewing the Placement Decision

When a child is placed in the custody of IDHW, Idaho law vests authority in the Department to determine the child's placement, subject to review by the court.[52] Idaho law establishes priorities for the child's placement. The first priority is for placement with a "fit and willing relative."[53] The second priority is for placement with a "fit and willing non-relative with a significant relationship with the child."[54] Finally, the third priority is for placement with "foster parents and other licensed persons."[55]

Because the placement is critical to the child's well-being, the court should make careful inquiry as to the Department's proposed placement for the child at the disposition phase of the adjudicatory hearing. As a beginning point, Idaho judges and practitioners must be familiar with the following specific provisions of Idaho and federal law and the Idaho Supreme Court decision in *Roe v. State* ("*Roe 2000"*). [56]

In *Roe 2000*, a grandmother who had established a strong relationship with her granddaughter sought to intervene in a child protection case to seek permanent custody of her granddaughter. The Idaho Supreme Court affirmed the trial court's decision denying intervention by the grandmother.[57] 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-

[50] 45 C.F.R. §1356.21(b)(1)(i) and (ii).
[51] 45 C.F.R. § 11356.21(d)(1).
[52] §16-1629(8).
[53] §16-1629(11).
[54] *Id*.
[55] *Id.*
[56] 134 Idaho 760, 9 P.3d 1226 (2000).
[57] *Id*. at 767, 9 P.3d at 1233.

> 1623(h), the CPA provides the court only limited authority to review the Department's placement decisions.[58]

The Court did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. This leaves a major question as to the nature and extent of judicial review of the Department'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 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 Department's proposed placement of the child.

Finally, federal law requires that placement authority be vested in the state agency for the child to be eligible for federal funds.[59] However, 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] Attorneys who are faced with this issue are encouraged to do significant additional research.

1. *Indian Child Welfare Act Considerations*

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.[61] 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. Finally, the substantive standards governing the case (for example, the qualified Indian expert witness) are unique and apply at the adjudicatory hearing. Failure to comply with ICWA can render the court's decision void. Chapter 11 of the manual contains a detailed discussion of the Indian Child Welfare Act.

2. *Services Provided by the Department*

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, best practice is for the court's disposition decree to 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.

---

[58] *Id*. (referring to pre-2005 numbering of the Child Protective Act).
[59] 45 C.F.R. §1356.71(d)(1).
[60] Responsibility for Placement and Care, Section 8.3A.12 of the Children's Bureau's Child Welfare Policy Manual, Questions and Answers on the Final Rule (65 FR 4020 (1/25/00)).
[61] *See generally* 25 U.S.C. §1901–1922.

The purpose is to keep the case moving forward, as there is often no good reason to wait for the case plan 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 substance 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 Department 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 IDHW supervision.

3. *Timing of the Case Plan or Permanency Hearing*

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory 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 or home with a parent on protective supervision, 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 case plan hearing must be set for a date within five days of the filing of the case plan.[62]

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 Department's plan and the GAL'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 in 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 appear by telephone.

5.9 THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE ADJUDICATORY HEARING

The court must 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

[62] § 16-1621. *See* Chapter 7 of this manual for a full discussion of the Case Plan hearing.

proceedings, the burden of preparing findings can be greatly reduced by incorporating well-prepared reports submitted by IDHW and/or the guardian *ad litem*. The written findings, conclusions, order, and decree shall include the following:

- If any necessary parties were not present, a finding that proper notice was given.[63]
- 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.[64]
- If the child is found to be within the jurisdiction of the Act, adjudication findings that accurately reflect the reasons for state intervention.[65]
- If aggravated circumstances are found, adjudication findings that accurately reflect the nature of the aggravated circumstances.[66]
- Findings as to the child's ICWA status. 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.[67]
- If the order is the first sanctioning removal of the child from the home, the court should make case-specific 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. It may incorporate by reference an affidavit that describes the specific circumstances.[68]
- Within 60 days of the child's removal, the court must make case-specific findings that IDHW made reasonable efforts to prevent removal of the child from the home.[69] This finding is not necessary if the parent subjected the child to aggravated circumstances. It may incorporate by reference an affidavit that describes the specific circumstances.
- Decree placing child in the custody of IDHW or in the child's own home under Department supervision, until the child's eighteenth birthday (or until otherwise ordered by the court prior to the child's eighteenth birthday).[70]
- If the child is to be placed in the child's own home under IDHW supervision, the safety plan necessary to eliminate threats to the child's safety and welfare in the home, and a protective order, where appropriate.[71]
- Services the Department 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.
- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

For an example of written Findings of Fact and Conclusions of Law, please see the standard recommended forms, available on the Idaho Supreme Court's Child Protection website.

---

[63] § 16-1619.
[64] IDAHO JUV. R. 38.
[65] § 16-1603.
[66] § 16-1620.
[67] For a detailed discussion on the guidelines related to an ICWA case, please see Chapter 11.
[68] § 16-1619(6); IDAHO JUV. R. 41(f).
[69] § 16-1619(6)(a-c); IDAHO JUV. R. 41(e).
[70] § 16-1619(7).
[71] § 16-1619(9).

CHAPTER 6:
The Case Plan and the Case Plan Hearing

6.1 THE CASE PLAN

Idaho law requires that a case plan be prepared "in every case in which the child is determined to be within the jurisdiction of the court, including cases in which the parent(s) is incarcerated."[1] This includes cases in which the child is placed in the legal custody of the Department as well as cases in which the child is home under the protective supervision of the Department.[2] In protective supervision cases, the case plan includes only the relevant provisions of the "reunification plan" outlined in Rule 44.

A. IDHW Preparation of the Case Plan

In Idaho, two documents are used to meet the state and federal requirements regarding the development of the case plan. The federal case plan requirements, which apply when the child is ordered into the custody of the Department, are met in the "Alternate Care Plan." Unless specifically requested, the Alternate Care Plan is generally not submitted to the court. The state case plan requirements are satisfied with the "Case Plan"[3] which is submitted to the court for approval.[4]

The Alternate Care Plan is a rich source of information and detail regarding safeguards for the children and the development of the goals and tasks outlined in the Case Plan. Because the Alternate Care Plan is not submitted to the court, it does not become part of the court's order. Therefore, the terms of the Alternate Care Plan are not enforceable through contempt proceedings. Best practice is for the court to request that the Department provide a copy of the Alternate Care Plan when the Case Plan is submitted for review and approval.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] § 16-1621(1).

[2] § 16-1621(1) (requiring the preparation of a case plan in "every case in which the child is determined to be within the jurisdiction of the court); IDAHO JUV. R. 44(b) (requiring that a case plan in a protective supervisions case contain all the elements of a "reunification plan" under the rule).

[3] Internally the Department refers to the "case plan" as the "service plan."

[4] IDAHO CODE ANN. §16-1621(1).

B. Requirements of Federal Law Governing the Alternate Care Plan

Federal law defines "case plan" as a document which includes the following minimum provisions: "A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and the foster parents in order to improve the conditions in the parents' home, [and] facilitate return of the child to his own safe home."[5] As mentioned above, Idaho refers to this portion of the planning process as the Alternate Care Plan.

Pursuant to this federal definition, the case plan (Alternate Care Plan) must describe specifics of a child's care while in placement, including, at a minimum, the following:

- A description of the type of home or institution in which the child is to be placed;
- A plan for ensuring that the child receives safe and proper care and that appropriate services are provided to the parents, child, and foster parents:
    - To improve the conditions in the parents' home;
    - To facilitate the child's return to his or her own safe home or the alternative permanent placement of the child;
    - To address the child's needs while in foster care;
- To the extent available, the child's health and education records;
- Where appropriate, for a child age 16 years or older, a description of programs and services that will help the child prepare for independent living; and/or
- If the permanency goal for the child is adoption, documentation of the steps being taken to find an adoptive family.[6]

C. Requirements of Idaho Law for the Court-Approved Case Plan

Idaho law imposes the following requirements for the case plan when a child is in the legal custody of the Department. In contrast to the Alternate Care Plan, which is generally not approved by the court, the case plan must be approved by the court.[7]

In cases in which the court has not made a finding of aggravated circumstances, Idaho Code § 16-1621(3) and Idaho Juvenile Rule 44(a)(2) establish that the case plan must include a "reunification plan"[8] with the following provisions:

- Reasonable efforts which will be made to make it possible for the child to return to his home.
- [T]he services to be provided to the child, 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.
- [O]ptions for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with…[whom] the child has a significant connection.

[5] 42 U.S.C. § 675(1)(B) (2011) (alteration in original).
[6] 42 U.S.C. § 675.
[7] § 16-1621(4).
[8] IDAHO CODE ANN. §16-1621(3) (2011) and IDAHO JUV. R. 44(a)(2) establish these requirements.

- A specific statement of the role of the Department toward each parent.
- Identification of all issues that need to be addressed before the child can safely be returned home (also known as "Conditions for Return Home")[9], without Department supervision.
- Specific identification of the tasks to be completed by the Department, each parent, or others to address each issue, including services to be made available by the [Department] to the parents and in which the parents are required to participate.
- [D]eadlines for the completion of each task.
- Where appropriate, specific identification of the terms for visitation, supervision of visitation, and/or child support.[10]

In **all** cases in which the child is removed from the home and placed in the legal custody of the Department (including those in which a finding of aggravated circumstances has been made), Idaho Code section16-1621(3) requires that the case plan include a "concurrent plan"[11] setting forth reasonable efforts to place the child for adoption, with a legal guardian, or in another approved permanent placement if reunification with the family is not possible. This concurrent plan is referred to in IJR 44(a)(3) as the "alternative permanency plan."

Concurrent planning is important if a child is to achieve permanency in a timely manner. Waiting for all reunification efforts to fail before seeking out an alternative permanency option only delays the child's arrival in a permanent placement and increases the emotional toll taken on the child.

Idaho Juvenile Rule 44(a)(3) further provides that the alternative permanency plan shall:

- Address the services to be provided to the child, 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.
- Address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with…[whom] the child has a significant connection.
- Address all options for permanent placement of the child including consideration of options for in-state and out-of-state placement of the child;
- Address the advantages and disadvantages of each option in light of the child's best interest and must include recommendations as to which option is in the child's best interest;

[9] The Department's reports to the court and *The ABA Child Safety Guidelines for Attorneys and Judges* use the term "Conditions for Return Home" to describe this section of the case plan relevant to the state requirement. See THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS (2009).
[10] IDAHO JUV. R. 44(a)(2).
[11] "Concurrent Planning" is defined in the CPA as "a planning model that prepares for and implements different outcomes at the same time." IDAHO CODE ANN. § 16-1602(10)(2010). One of the primary purposes of the CPA is to "coordinate efforts by state and local public agencies, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to: . . . (3) Take such actions as may be necessary to provide the child with permanency including concurrent planning . . ." § 16-1601(3).

- Specifically identify the actions necessary to implement the recommended option, and the schedules for accomplishing those actions;
- In the case of a child who has attained the age of sixteen (16) years, specifically identify the services needed to assist the child to make the transition from foster care to independent living; and
- Identify further investigation necessary to identify and/or address other options for permanency placement, to identify actions necessary to implement the recommended placement, or to identify options for maintaining the child's significant connections.

A case plan must also be prepared in cases where the child is home under the Department's protective supervision.[12] Such a plan must include:

- Identification of the services to be provided to the child, including services to meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the "home situation".
- [A]ddress options for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with…[whom] the child has a significant connection.
- Identification of all issues that need to be addressed before the child can safely live at home without the Department's supervision.
- Specific identification of the tasks to be completed by the Department, each parent, or others to address each issue, including services to be made available by the [Department] to the parents and in which the parents are required to participate.
- "[D]eadlines for the completion of each task".
- Where appropriate, specific identification of the "terms for visitation, supervision of visitation, and/or child support."[13]

In summary, a comprehensive reading of the requirements of Idaho Code § 16-1621 and Idaho Juvenile Role 44 delineate three different patterns of case plans in Idaho. In cases with no finding of aggravated circumstances, the case plan should include a reunification plan and an alternate permanency plan (or concurrent plan). In cases involving a finding of aggravated circumstances, the case plan includes only the alternate permanency plan (concurrent plan). Finally, in cases involving protective supervision, the case plan must include the relevant portions of the "reunification plan" outlined in IJR 44.

Every case plan should *consider* the distinctive needs of each parent. As a matter of best practice, the Department will often prepare separate case plans for each parent where the parents are not in a cooperative relationship. Judges and lawyers need to be aware of the different needs and obligations of each parent under the case plan.

[12] IDAHO JUV. R. 44(b).
[13] IDAHO JUV. R. 44(a)(2), (b).

6.2 GOALS AND ELEMENTS OF EFFECTIVE CASE PLANNING FROM A SOCIAL WORK PERSPECTIVE

A. Key Decisions of the Department During Case Planning

During case planning, several key decisions must be made by the Department social worker with respect to the following questions:[14]

- Who needs to be involved in the development of the case plan?
- What safety factors should be addressed in the case plan?
- What behavior changes are needed to reduce safety threats?
- What are the measurable, realistic, and achievable goals and outcomes anticipated from the services and supports provided?
- What are realistic time frames for completing the case plan?
- What services and supports are needed to:
    - enhance the protective capacity of parents/caregivers.
    - meet the needs of each family member,
    - meet the goals of the case plan, and
    - increase the likelihood of permanency?
- How does the case plan address each child's developmental, educational, health, dental, mental health, and other needs?
- What level of intensity of services and supports is needed?
- What are the barriers to accessing services and supports and how can they be overcome?
- If the primary permanency plan goal is not achieved, what is the concurrent plan?
- Who is responsible for implementing each part of the case plan?
- How is the case plan going to be monitored, and by whom?
- Has all information been provided to the family?
- How does the case plan address the maintenance of family and community ties such as placement proximity, parent/child visits, sibling visits, social worker visits with parents and children, maintenance of community, and school continuity?

B. The Case Planning Process

Case Planning, often called "service planning" by social workers, is the process of establishing desired results, goals, and tasks to address the needs of the entire family so that they can live safely without Department involvement. The case plan also should contain timelines for the accomplishment of all tasks.

The purpose of the case planning process is to achieve the following goals:

- Identify services and tasks that will reduce threats of danger to the child, enhance the protective capacity of parents or caregivers, and/or mitigate the child's vulnerability.

[14] This section regarding the social work goals for case planning is based on Shirley Alexander, *Intervention with Families in* HELPING IN CHILD PROTECTIVE SERVICES: A COMPETENCY-BASED CASE WORK HANDBOOK 393 (Charmaine Brittain & Deborah Esquiel Hunt eds., 2004).

- Create an individualized, outcome-oriented case plan that addresses the needs of all family members.
- Establish a concurrent plan in the event the family cannot be reunited permanently and safely.
- Demonstrate parental commitment and follow through to completing the case plan.

The plan must be specific, measurable, achievable, realistic, and time-limited. The planning process should engage the family in an effective method of problem solving that may be useful to families as they encounter other challenges. It should communicate the belief that change is both expected and desired. It should also send an optimistic, hopeful message that change is possible. Effective planning is dependent upon ongoing assessment. Assessment guides the plan by identifying the issues that pose continued threats of danger to the children.

During case planning, the focus should be on the family unit, and services should be offered to strengthen the family and to allow parents to function effectively while adequately protecting and providing for their children. The role of the social worker is to ensure that families have reasonable access to a flexible, culturally-responsive, individualized array of services and resources.

C. Family Participation in Case Planning

Effective case planning requires participation of a "family team." A family team can include parents, age-appropriate children, other family members, other family supports, resource families/adoptive parents, therapists, mentors, case aides, or others who are significant in the family's life.

IDHW currently uses a process called Family Group Decision making (FGDM)[15] to encourage participation of families in case planning and to assist families in identifying issues and needs. FGDM recognizes that families have the most information about themselves and have the ability to make well-informed decisions. Family members become active participants in decision making for the family.

FGDM embraces the following values: the process of planning should be family focused, strength based, community based, and culturally appropriate. Generally, all family members who wish to be present at the family meeting are invited. The family can identify other non-family supportive individuals who are also invited to participate. The family meeting is usually facilitated by an independent coordinator – the social worker is present but does not lead the meeting.

At the meeting, information is shared by all present, usually starting with the social worker who presents the facts that led to the filing of the CPA proceeding. The family can ask questions of the social worker and others to make sure that they have a full understanding of the issues in the case.

[15] FGDM is also referred to as family decision making, family group conferencing, and family unity meetings.

Once information is exchanged, the professionals generally leave the room so that the family can discuss their planning in private. The family's job is to create a plan to ensure that the child is cared for and protected from threats of violence. The family then presents their plan to the professionals who provide input. The goal of the process is to reach consensus, although the professionals may veto portions of the plan.

The process of FGDM not only can assist in achieving timely reunification of the child with her or his family, but also may assist the family to understand when reunification is not possible. In the latter situation, FGDM can help to identify an alternate permanent placement for the child.

6.3 THE CASE PLAN HEARING

A. Purpose of the Case Plan Hearing

At the case plan hearing, the court must decide whether to approve, modify, or reject the case plan filed by the Department.[16] In making this determination, the court should evaluate the plan using the legal requirements discussed above in the first part of this chapter.

If the court approves the plan as submitted or approves a modified plan, the plan must be incorporated in an order by the court, directing the Department and the parents to comply with the plan. Other parties may also be required to comply with the plan, in appropriate circumstances. Absent a finding of aggravated circumstances, "the court's order shall provide that reasonable efforts shall be made to reunify the family in a timely manner in accordance with the case plan or in the alternative to complete the steps necessary to finalize the permanent placement of the child." [17]

In evaluating the case plan, a judge should consider the following questions:[18]

- Does the plan include goals or tasks addressing changes in behaviors, commitments, and attitudes that will mitigate the threat of danger to the child? (If the plan merely lists the services participants must attend and/or generically directs the participants to "follow a treatment recommendation," then the plan only provides a basis for measuring the participants' attendance, but does not provide a basis for measuring changes in their behavior.)
- Does the case plan follow logically from the threats of danger to the child and gaps in parents' protective capacities? The plan should contain precise detail regarding the strategy and actions necessary to change the situation and to allow the child to return home.
- Is the case plan merely a re-iteration of any safety plan previously put in place? The case plan should not duplicate the safety plan; rather, these two plans should operate

[16] § 16-1621(1).
[17] § 16-1621(4); IDAHO JUV. R. 44(2).
[18] These questions were developed and are discussed in the ABA CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS. THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 40 (2009).

concurrently. The safety plan is focused on ensuring the child's safety. The case plan should focus on what must change over time to enable the child to return home.

- How do the parents react to the case plan?
- Does the case plan focus on reducing threats of danger to the child and also increasing protective capacities of the parents? The family will have the best chance of success at reunification if the case plan addresses both the reduction of threat and increasing the parents' protective capacities.

B. Case Plans Where Aggravated Circumstances Apply

Where the court has made a finding that the parents have subjected the child to aggravated circumstances,[19] the case plan should not include a "reunification plan",[20] and the Department is not required to make reasonable efforts to make it possible for the child to return home.[21]

In aggravated circumstances, cases the case plan and the permanent plan are merged together, and the plan focuses on the actions and services necessary to obtain a permanent placement for the child in a new home.[22] Such plans should contain all the elements discussed above for the "alternative permanency plan".[23]

C. Submission of the Case Plan 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.[24] 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.

D. Timing of the Hearing

The case plan hearing must be held within five days after the plan is filed.[25] As in all CPA proceedings, the court should strongly discourage continuances. It is particularly important to approve the case plan in a timely fashion as the plan provides the "road map" for permanency for the child.

---

[19] Aggravated circumstances are defined in § 16-1619(6)(d) and are discussed in detail in Chapter 5 of this manual
[20] § 16-1619(6)(d).
[21] *Id*.; § 16-1621(4). *See also* IDAHO JUV. R. 44(c); 45 C.F.R. § 1356.21(b)(3)(i).
[22] §§ 16-1620(1), 16-1621(4); IDAHO JUV. R. 44(c).
[23] IDAHO JUV. R. 41(i), 44(c).
[24] § 16-1621(1).
[25] *Id*.

E. Notice

1. *Foster Parents*

Idaho law requires that notice of the case plan hearing be provided to the "parents, legal guardians, guardians *ad litem* and foster parents."[26] In addition IJR 40 provides that "[a]fter the adjudicatory hearing, any person who is designated by the Department of Health and Welfare as the foster parent, as a pre-adoptive parent, or as a relative providing care for a child who is in the custody of the department, shall be provided with notice of, and have a right to be heard in, any further hearings to be held with respect to the child." This notice must be given by the Department and the Department must confirm to the court that the required notice was provided. The Juvenile Rules also makes clear that the right to notice and to be heard does not make foster parents parties to the CPA proceeding.[27]

2. *Children Eight and Older*

IJR 40 requires that "[a]fter the adjudicatory hearing, a child (8) years of age or older, shall be provided with notice of, and have a right to be heard, either in person or in writing, in any further hearings to be held with respect to the child."[28] As with notice to foster parents, notice must be given by the Department, and the Department must confirm that notice was provided

3. *Agreements by the Parties*

The parties may submit a stipulated case plan at the case plan hearing. Pursuant to Idaho Juvenile Rule 38, such a stipulation must be made part of the court record and is subject to court approval.[29] The court must make reasonable inquiry to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that it is in the best interests of the child. 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 additional or different 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.

Best practice is that the court should ensure that the stipulated case plan is comprehensive and that it contains all the essential elements of a case plan (as discussed 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 to give the parties time to address the omitted elements.

---

[26] § 16-1621(2) (emphasis added).
[27] IDAHO JUV. R. 40(a). *See also* Roe v. Dept. of Health & Welfare, 134 Idaho 760, 9 P. 3d 1226 (2000)(holding that foster parents did not have standing to intervene and object to the Department's permanency plan in a CPA proceeding).
[28] IDAHO JUV. R. 40(b).
[29] IDAHO JUV. R. 38.

If, through the pre-trial process, a case plan is agreed upon, it may be presented to the court at the adjudicatory hearing. However, caution should be used to ensure that all the requirements of the case plan hearing are fulfilled in reviewing and approving the stipulated case plan.

6.4 BEST PRACTICES TO REDUCE DELAYS AND TO ACHIEVE TIMELY PERMANENCY FOR CHILDREN BEFORE THE CASE PLAN HEARING

A. Early Identification and Involvement of Absent Parents

The status and involvement of absent biological parents must be resolved as early as possible to avoid delays in achieving permanency. In all cases, absent parents should be identified as soon as possible so a determination can be made regarding whether they must be joined to the action and/or whether they or their families might provide resources in support of the child's permanency.

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. Where the parents are not married at the time the child was born or where an unmarried father has not been adjudicated as a parent, paternity tests should be conducted early in the case as a matter of best practice. This will ensure that a man thought to be the father of the child actually is the father of the child and is properly part of the CPA proceeding.[30]

B. Early Identification and Involvement of Relatives

Both Idaho and federal law impose a priority in favor of placing children with relatives. Idaho Law provides:

> At any time the department is considering a placement pursuant to this chapter, the department shall make a reasonable effort to place the child in the least restrictive environment to the child and in so doing shall consider, consistent with the best interest and special needs of the child, placement priority of the child in the following order:
>
> (a) A fit and willing relative.
> (b) A fit and willing non-relative with a significant relationship with the child.
> (c) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code.[31]

Federal Law requires that the Department place children with relatives so long as the relative meets the Department's "child protection standards".[32]

The Department must identify all relatives of the mother, father, and putative father(s) of the child and thoroughly investigate the appropriateness of these relatives as potential caretakers for the child. Identification and investigation of all potential caretakers is essential to ensure that the

[30] *See. e.g.*, In re Doe, 134 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).
[31] § 16-1629(11).
[32] 42 U.S.C.§ 671(a)(19).

placement selected is the one that best meets the needs of the child and ensures the child's safety.[33]

C. Compliance with the Interstate Compact on the Placement of Children (ICPC)

A child may not be placed out of state without a court order and without compliance with the ICPC.[34] As making an interstate placement is time consuming, the process must be initiated as soon as possible.

D. Compliance with the Indian Child Welfare Act (ICWA)

If the child is an Indian Child, the lawyers, judge, guardian *ad litem*, and social workers involved in the case must be familiar with and implement the provisions of ICWA.[35] The Act establishes special procedural and substantive safeguards to protect the interests of Indian children, their families, and the Indian tribe. This includes 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 and the Department should:

- Identify at the earliest possible opportunity whether ICWA applies to one or more children in a case;
- 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.

CONCLUSION

Once the case plan is in place, the roadmap towards permanency for the child has been established. Even so, the lives of the family are still in flux. Best practice is for the court should ensure that a timely review of the family's progress on the plan is scheduled before the conclusion of the case plan hearing. In addition, review hearings are also important so that the plan can be modified as the family's situation changes and the case progresses.

---

[33] 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 11 of this manual.
[34] IDAHO JUV. R. 46(c); §§ 16-1629(8); 16-2101(3). The ICPC is discussed in detail in Chapter 12 of this manual.
[35] *See generally* 25 U.S.C. §§1901-1963. ICWA is discussed in detail in Chapter 11 of this manual.

CHAPTER 7:
The Permanency Plan and Permanency Hearing

7.1 INTRODUCTION

At the permanency hearing, the court must review, approve, modify, or reject the permanency plan proposed by the Department and must also review the parents' progress in accomplishing the permanency plan.[1] The purpose of a child protection proceeding is not only to achieve timely permanency for the child, but to achieve permanency within the state and federally mandated timelines.

A permanency hearing may be held simultaneously with a review hearing.[2] Presuming the permanency plan is not termination of parental rights and adoption, the functions of a review hearing and a permanency hearing somewhat overlap. Because the Department is obligated to develop a concurrent plan, the case plan hearing includes a reunification and an alternate permanency plan.[3] Since the case plan should have included a permanency plan, any review of progress on the case plan will overlap with a discussion of progress toward achieving the overall goal of permanent placement. The key functions of the permanency hearing are to determine the permanent placement of the child and to set deadlines for effectuating the child's permanency goal.

7.2 THE PERMANENCY PLAN

The permanency plan provides the road map for providing the child with a permanent placement in as timely a manner as possible. The plan identifies the court-approved permanency goal for the child as well as steps for achieving the goal. Formulation of the plan requires IDHW to systematically analyze the child's needs, options for the child's placement, and advantages and disadvantages of the placement options in light of the child's needs.

The options for the child's permanency goal fall into four general categories: continued efforts to reunify with the parent(s), termination of parental rights and adoption, guardianship with a relative or family friend, or "another planned permanent living arrangement" (APPLA)

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN.§ 16-1622(4).

[2] *Id*.

[3] § 16-1621(4); IDAHO JUV. R. 44(a)(2),(3).

(also sometimes referred to in Idaho statutes as long-term foster care).[4] Each of these options will be discussed more fully below.

A. Required Contents of the Permanency Plan

The goals of the permanency plan "may be, but…[are] not limited to, one of the following: continued efforts at reunification, termination of parental rights and adoption, guardianship, or long-term foster care."[5] Idaho Juvenile Rule 46 and Idaho Code sections 16-1620, 16-1622, and 16-1629, read together, require that all permanency plans include the following:

- In the case of a child who will not be returned to a parent, information that will allow the court to review the Department's consideration of options for in state and out of state placement of the child.[6]
- In the case of a child already placed out of state, information that will allow the court to find that the placement continues to be appropriate and in the best interests of the child.[7]
- Specific identification of "the activities necessary to implement the plan and . . . schedules for the accomplishment of those actions."[8]
- In the case of a child who has attained the age of 16 years, services needed to assist the child to make a transition from foster care to independent living.[9]
- Information regarding how the Department's recommended permanency goal maintains the child's connections to the community, including individuals with a significant relationship to the child, religious organizations, and community activities.[10]
- Information regarding the reasonable efforts made by the Department to place the child in the least restrictive environment for the child, and how the Department placement is consistent with the best interest and special needs of the child considering the following placement priority: "(a) a fit and willing relative, (b) a fit and willing nonrelative with a significant relationship with the child, (c) foster parents and other persons licensed in accordance with" Idaho law.[11]
- A statement specifying the role of the Department towards each parent.[12]
- In the event the child has been in out of home care in 15 of the last 22 months and the Department does not intend to file a petition to terminate parental rights, compelling reasons as to why termination of parental rights is not in the best interest of the child.[13]

---

[4] *See, e.g.*, IDAHO JUV. R 46(a).
[5] IDAHO JUV. R 46(a). These goals are discussed in detail later in this chapter.
[6] *Id*.
[7] IDAHO JUV. R 46(c).
[8] IDAHO JUV. R 46(a).
[9] IDAHO JUV. R 46(c). Federal law requires that the Department, in consultation with the youth in foster care, prepare a personalized transition plan for youth at least 90 days prior to their exit from care, which includes education goals and plans. The plan must be as detailed as the child chooses and include specific options on housing, health insurance, education, local opportunities for mentoring, continuing support services, work force supports, and employment services. 42 U.S.C § 675(H)(2010). For more information on Idaho's independent living program see Chapter 12: Special Topics.
[10] § 16-1620(3).
[11] § 16-1629(11).
[12] § 16-1620(3).
[13] § 16-1622(7); § 16-1629(9), 45 C.F.R. § 1356.21(h)(3).

B. Best Practice Recommendations for the Permanency Plan

As a matter of best practice,[14] the permanency plan also should contain the following information:

- Services to be provided to the child, 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.[15]
- An assessment of the advantages and disadvantages of each option, in light of the child's best interests.[16]
- A recommendation as to which option is in the child's best interests.[17]
- Actions necessary to implement the recommended option and deadlines for those actions.

C. The Permanency Plan in Cases Involving Aggravated Circumstances

When the court has determined aggravated circumstances exist, Idaho Law requires all of the above elements to be a part of the permanency plan, including those identified as best practices.[18]

7.3 THE PERMANENCY HEARING

A. Timing of the Hearing

Idaho law requires that a permanency hearing be held prior to twelve (12) months from the date the child is removed from the home or from the date of the court's order taking jurisdiction under the CPA, whichever occurs first.[19] In cases where aggravated circumstances are found at the adjudicatory hearing, the court is required to hold a permanency hearing within thirty (30) days of the determination that aggravated circumstances exist.[20]

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.[21] 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.[22] If the permanency hearing is not timely held, or if the court fails to use the correct language in determining that the Department made reasonable efforts to finalize

---

[14] IDAHO JUV. R 44(a) also requires a number of additional requirements for the permanency plan in a case involving aggravated circumstances. While these requirements do not expressly apply in permanency plans in non-aggravated circumstance cases, they provide a good outline of best practices for all such plans.
[15] IDAHO JUV. R 44(a)(1) and 44(c).
[16] IDAHO JUV. R 44(a)(1).
[17] IDAHO JUV. R 44(a)(3)(C).
[18] IDAHO JUV. R 44(c), 44(a)(1).
[19] § 16-1622(4); IDAHO JUV. R 46.
[20] 45 C.F.R. § 1356.21(h)(2); §§ 16-1619(6)(d) and 16-1620; IDAHO JUV. R 44. Additional information about the permanency hearing in cases involving aggravated circumstances can be found in Chapter 6 of this manual.
[21] 42 U.S.C. § 675(5)(c); 45 C.F.R. § 1356.21(d).
[22] 42 U.S.C. § 675(f).

the permanency plan, an otherwise eligible child may be ineligible for federal IV-E match funds.[23] Eligibility may be reinstated once the permanency hearing is held and/or the court makes a finding that the Department made reasonable efforts to finalize the permanency plan in effect.[24]

The state and federal timelines should be seen as the latest date upon which the permanency hearing should be held. A permanency hearing could always be scheduled earlier. For example, where neither parent has made discernable progress in spite of reasonable efforts by IDHW to implement the case plan, an early permanency hearing may be appropriate.

B. Submission of the Permanency Plan and Guardian ad Litem Reports to the Court

IDHW is required to file a permanency plan with the court at least five days prior to the permanency hearing.[25] Similarly, the guardian *ad litem* is required to file a report with the court prior to the permanency hearing.[26]

7.4 KEY FINDINGS AT THE PERMANENCY HEARING

Idaho and federal law require that the court must make the following findings at the permanency hearing:

- Approving, modifying, or rejecting the permanency plan proposed by the Department and reviewing the progress in accomplishing the permanency plan.[27]
- Whether the Department has made reasonable efforts to finalize the permanency plan in effect for the child.[28]
- If the plan is for another planned permanent living arrangement (long-term foster care), whether there are compelling reasons why a more permanent plan is not in the best interest of the child.[29]
- Whether the child's connections to the community, including individuals with a significant relationship to the child, religious organizations, and community activities, are appropriately maintained because it is/is not in the child's best interests to do so.[30]
- In appropriate cases, compelling reasons exist to relieve the Department of its obligation to file a petition to terminate parental rights when the child has been in care 15 of the last 22 months.[31]
- In the case of a child in an out-of-state placement, the placement "continues to be appropriate and in the best interest of the child."[32]
- In the case of a child who has attained the age of 16, "services necessary to assist the child to make a transition from foster care to independent living."[33]

[23] 45 C.F.R. § 1356.21(b)(2)(ii).
[24] *Id.*
[25] § 16-1629(9).
[26] § 16-1633(2)
[27] § 16-1622(4).
[28] § 16-1522(5); IDAHO JUV. R 46(c).
[29] IDAHO JUV. R 46(b).
[30] § 16-1620; IDAHO JUV. R 44(a)(1); IDAHO JUV. R 44(a)(3)(E).
[31] §§ 16-1629(9) and 16-1622(7).
[32] IDAHO JUV. R 46(c).

7.5 AGREEMENT BY THE PARTIES

The parties may submit a stipulated permanency plan at the permanency hearing. Pursuant to IJR 38, such a stipulation must be made part of the court record and is subject to court approval.[34] The court must make reasonable inquiry to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that it is in the best interests of the child. The court should ensure that the permanency plan has been thoroughly considered by all participants, especially both parents, if involved.

The court should ensure that the stipulated permanency plan contains all the essential elements of a permanency plan as discussed above. If the stipulated permanency plan is not complete, the court should address any omitted requirements. The court might also adjourn the hearing for a short time (such as one day) to give the parties time to address the omitted requirements.

7.6 PERMANENCY GOALS

The goals for permanency fall into the following general categories: reunification with the parents, termination of parental rights and adoption, long-term guardianship, and another planned permanent living arrangement (APPLA).[35] In addition to addressing these general options, the plan should address specific options within each category.

A. Reunification

The most preferred option for permanency is the safe and permanent reunification of the child with his/her parents.[36] The preference for reunification embodied in federal law and in the Idaho statutory policy is that the state must seek, to the fullest extent possible, to reunite the family.[37] The Department 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.[38]

B. 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. If reunification is not a viable option, the permanency preference is termination of parental rights

---

[33] *Id*.
[34] IDAHO JUV. R 38.
[35] The Idaho Code and Juvenile Rules do not clearly distinguish between the permanency goal and permanency plan. To be consistent with professional literature, we distinguish between the permanency goal and permanency plan in this manual.
[36] § 16-1601.
[37] *Id.*
[38] § 16-1619(6)(d); § 16-1620(b); 42 U.S.C. § 671(a)(15)(D). The determination of aggravated circumstances would normally be made at the adjudicatory hearing.

and adoption.[39] Adoption meets all these goals of permanency. In addition, adoption subsidy benefits are available to assist the adoptive parents in meeting the child's needs.[40]

C. Guardianship

A third, and less preferred, permanency goal is long-term guardianship. Idaho has adopted special provisions to secure the stability of CPA-connected guardianships.[41] Nonetheless, guardianship is a less-preferred option as guardianships are vulnerable to review and modification.[42]

D. Another Planned Permanent Living Arrangement

Another Planned Permanent Living Arrangement (APPLA) – which is also referred to under Idaho law as "long-term foster care"[43] – is the least preferred permanency goal, and the situations in which it is appropriate are **extremely** limited. APPLA may include placement with a foster family, a group home, or a residential facility. Federal regulations require that IDHW, internally, identify compelling reasons for approving APPLA as the permanent placement for the child.[44] The Idaho Juvenile Rules provide that a court may only approve a permanent plan of long-term foster care based on written, case-specific findings that there are compelling reasons why a more permanent plan is not in the best interest of the child. [45]

Even if the child cannot currently function in a family setting, ongoing diligent efforts by the Department may result in a family that is willing and able to provide care to the child in the future. If APPLA will be the permanent goal for the child, best practice is to schedule 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.

When Might APPLA Be Appropriate?

1. *An older teen specifically requests that emancipation be established as the permanency plan.*
2. *The tribe (in an ICWA case) selects APPLA for the child.*
3. *The parent and child have a significant bond but the parent is unable to care for the child.*
4. *The foster parents are committed to raise the child to the age of majority.*

Source: 45 C.F.R. § 1356.21(h)(3)(i-iii)

Figure 7.1: APPLA Examples

[39] IDAHO JUV. R 46(a). 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. § 16-1624. In addition, 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. § 16-1629(9); 42 U.S.C. § 675(5)(E).
[40] Adoption is discussed in detail in Chapter 10 of this manual.
[41] *See* § 15-5-212A.
[42] *See* Chapter 12: Special Topics.
[43] IDAHO JUV. R 46(b).
[44] 45 C.F.R. § 1356.21(h)(3)
[45] IDAHO JUV. R 46(b).

7.7 REASONABLE EFFORTS TO FINALIZE PERMANENCY

A. Federal

The court must make a case-specific finding that the Department made reasonable efforts to finalize the child's permanent placement in effect, and the finding must be documented in the court records.[46] If the findings are not made, an otherwise eligible child will lose eligibility for federal IV-E foster care payments. Eligibility may be reinstated once the required finding is made.[47]

The "permanent plan in effect" is generally the permanent plan identified by the Department in the parents' case plan. However, the Department may identify a different permanency goal prior to the permanency hearing and does not need court approval to do so. If the Department changes the initial permanency goal identified in the case plan, the reasonable efforts to finalize permanency finding is a retrospective analysis of whether the Department made reasonable efforts to finalize the most current permanency goal. Typically, this means that the permanent plan for the first twelve (12) months of a CPA proceeding, prior to the first permanency hearing, is reunification with the parents.

There may be instances where the court identifies further efforts to be made by the Department to finalize the permanency plan, such as further investigation to identify or assess potential adoptive families or potential guardians. The fact that the court requires further efforts does not necessarily mean that IDHW 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 Department or changed circumstances that the Department could not reasonably anticipate and thus not the result of lack of effort.

B. State Finding

Idaho law imposes a similar, though not identical, finding that is less specific than the federal finding described above. Under Idaho law, a court must make a written, case-specific finding that the Department "has made reasonable efforts to finalize a permanency plan for the child."[48] This state provision does not refer to the "permanent plan in effect." The federally-required findings described above satisfy this more general Idaho requirement.

7.8 OTHER FACTORS THE COURT SHOULD CONSIDER AT THE PERMANENCY HEARING

A. Keeping Siblings Together

There is a federal preference for keeping siblings together.[49] A child who has been removed from his or her parents should not also suffer the loss of being separated from brothers and

[46] 42 U.S.C. § 675(5)(c); 45 C.F.R. § 1356.21(b)(2).
[47] 45 C.F.R. § 675(b)(2)(ii)
[48] IDAHO JUV. R 46(c)
[49] 42 U.S.C. § 671(a)(31)(A) and (B).

sisters. If siblings cannot be placed together, then the permanency plan should ensure ongoing interaction between the siblings unless ongoing interaction would be contrary to the safety or well-being of any of the siblings.[50]

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.[51] 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.

B. Visitation and Child Support

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.[52] 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. [53] 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.

C. Maintaining the Child's Connection to the Community

Idaho Code requires that both the case plan and the permanency plan address options to maintain the child's connection to his/her community and to maintain significant relationships in the child's life.[54] In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act imposed a number of requirements on states relevant to these provisions of Idaho law.[55] Fostering Connections requires states to emphasize children's relationships with siblings and other close relatives,[56] to maintain educational stability for the child,[57] and to provide a transition plan for children aging out of foster care without a permanent placement or community connections.[58]

Regarding sibling placement, Fostering Connections requires that reasonable efforts be made to place siblings together in the same foster home, or other placement unless such a joint placement would be contrary to the safety or well being of any of the siblings.[59] If siblings are

---

[50] *Id.*
[51] IDAHO JUV. R. 44(a)(3)(E).
[52] IDAHO JUV. R. 44(a)(2).
[53] IDAHO JUV. R. 44(a)(2) provides for the establishment of visitation in the case plan. In addition, Idaho Code sections 16-1620(3) and 16-1621(3) require the case plan and the permanency plan to include provisions to maintain the child's significant relationships if in the child's best interests. *See also* § 16-1628 (authorizing the court to enter an order for a "reasonable sum" of support).
[54] §§ 16-1620(3), 16-1621(3), IDAHO JUV. R. 44(3)(e).
[55] 42 U.S.C. § 475(1)(G).
[56] 42 U.S.C. § 675(a)(31)(A) and (B).
[57] 42 U.S.C. § 675(a)(30).
[58] 42 U.S.C. § 675(5)(H) and (8)(B).
[59] 42 U.S.C. § 675(a)(31)(A) and (B).

not placed together, the state must provide for frequent visitation or other ongoing interaction between the siblings, unless doing so would be contrary to the safety or well being of any of the siblings.[60] As discussed above, the permanency plan under Idaho law, should contain such provisions for visitation, where appropriate.

With regard to educational stability, Fostering Connections requires the Department to have a plan that takes into account the appropriateness of the child's current educational setting, to ensure that the child remains in the school of origin, or if such enrollment is not in the child's best interest, to provide immediate and appropriate enrollment in a new school. The Act also requires the Department to monitor the child's school attendance.[61]

With regard to the transition from foster care, the Act requires the state to provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, including options for housing, health insurance, education, mentoring, workforce supports, and employment services.[62]

D. Time and Date for the Next Hearing; Orders Needed

The court should set the date and time for the next 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.

CONCLUSION

The permanency plan and timely permanency hearing are keys to achieving permanency for the child. Effective permanency planning promotes the systematic investigation and assessment of the child's options for permanent placement, in light of the child's best interests. The permanency plan identifies the actions necessary to implement the placement and to set deadlines for those actions. The plan, incorporated in the court's order, also sets the benchmark against which future progress will be measured and provides the primary mechanism for holding the participants accountable for implementing the plan.

[60] *Id.*
[61] 42 U.S.C. § 671(a).
[62] 42 U.S.C. § 675.

CHAPTER 8:
Review Hearings

8.1 OVERVIEW OF REVIEW HEARINGS

Review hearings are court proceedings that take place after approval of the case plan and that continue until permanency for the child is attained. Idaho Code section 16-1622(3) and Idaho Juvenile Rule 45 govern these hearings. Review hearings are critical to timely completion of case plans and permanency plans. Review hearings facilitate timely permanent placement of the child. They aid in the timely recognition of those families for whom reunification will be achieved and those families for whom reunification is not a viable option.

These hearings are informal, the rules of evidence do not apply, and the general public is not permitted to be present.[1] Children eight and older are entitled to notice and have a right to be heard, in person or in writing.[2] Foster parents (including relatives providing care for a child) and pre-adoptive parents, are also entitled to notice and have a right be heard at review hearings.[3]

Review of the case status is vital for each child within the court's jurisdiction, whether the child is placed in the custody of IDHW or under the supervision of IDHW in the child's own home. In either situation, child safety and timely permanency may be aided by appropriate review of the case. In particular, consistent review helps ensure that progress is being made towards permanency for the child.

Review hearings are necessary because continuation of a child in foster care for an extended time has a negative effect 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.[4] A careful decision concerning the future of every child is needed as soon as

---

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. §16-1613(1) (2010).

[2] IDAHO JUV. R. 40(b); Chapter 12: Special Topics.

[3] IDAHO JUV. R. 40(a); Chapter 12: Special Topics.

[4] The research on children's attachments is extensive. The primary work took place during the 1970's. Examples of this initial research on children's attachment can be found in the following sources: M. RUTTER, MATERNAL DEPRIVATION REASSESSED (1981); J. BOWLBY, ATTACHMENT AND LOSS (1973); J. GOLDSTEIN, A FREUD AND A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (2d ed. 1979).

possible. Review hearings can help ensure that decisions concerning a child's future are made at regular intervals and implemented expeditiously.

Review hearings should re-examine long-term case goals and change or revise goals that 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. If reunification is not an option, review hearings can lead to timely implementation of an alternative permanency plan.

Review hearings provide regular judicial oversight of children in foster care and can help avoid delays in providing necessary services to the child and family. For example, incomplete case plans can prolong foster care placement by failing to clearly specify what each party must do to facilitate family reunification. Unresolved disputes may block case plan progress. Each party may be proceeding unilaterally without confronting a disputed issue, although the dispute may constitute a roadblock to family reunification.

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 may also create incentives for IDHW to make decisions concerning the permanent placement 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 the Department. Current information is put on the record and is more likely to be freely exchanged in the informal atmosphere of a review hearing.

8.2 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 must occur at least once every six months.[5]

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 Department.[6] The court has the discretion to conduct review hearings more frequently.[7] Recommended best practice is to conduct review hearings at least once every two to three months, unless there is good reason in a particular case to schedule reviews less frequently.[8] In Idaho, review hearings are commonly conducted on a more frequent schedule

[5] 42 U.S.C. § 675(5)(B) (2010).
[6] § 16-1622(3).
[7] Pursuant to section 16-1622(1), parents "may not request a review hearing within three months of a prior review hearing."
[8] NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES IMPROVING COURT PRACTICES IN CHILD ABUSE AND NEGLECT CASES 67 (1995).

depending on the needs of the case. In particular, review hearings may occur more frequently at the beginning of a case, when families are making substantial early progress on the case plan, or they may occur more frequently as termination of parental rights deadlines approach. Other types of cases in which more frequent reviews are appropriate include those in which compliance with substance abuse or mental health rehabilitation requirements are an issue.

As in all child protective proceedings, the court should avoid granting continuances except in emergency situations. If a continuance is necessary, it should be for a short period of time, and the court should consider entering appropriate orders to ensure that all parties are prepared to proceed on the new date.

8.3 SUBMISSION OF REPORTS TO THE COURT

The Idaho CPA requires IDHW and the guardian *ad* litem to file a written report to the court at least every six months.[9] This responsibility to report coincides with the courts' responsibility to review cases under their jurisdiction. The court may order more frequent reports where necessary to support review hearings.

Timely submission of reports can assist the parties in analyzing the case, help the judge reach a decision, and help to document the facts and history of the case. Reports should be distributed to the parties well in advance (a minimum of five days or as ordered by the court) of the review hearing to allow time for the parties to consider proposals and to prepare for the hearing.

Any guardian *ad litem* report submitted after the adjudicatory hearing must include the child's wishes regarding permanency or the transition from foster care to independent living.[10] This requirement should be included in the order setting the review hearing. Recommended best practice is for the reports to be verified.

8.4 KEY DECISIONS THAT THE COURT SHOULD MAKE AT THE REVIEW HEARING

A. Is the Child in an Appropriate Foster Care Placement That Adequately Meets the Child's Physical, Emotional, Educational, and Developmental Needs?

When the court places a child in the custody of IDHW, state law vests authority for the placement decision in the Department, subject to review by the court.[11] Federal law requires that placement authority be vested in the Department in order for the child to be eligible for federal funds.[12] When the parties raise issues about the child's placement, "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility", the court may make appropriate placement decisions without impacting the child's eligibility for IV-E funding.[13]

---

[9] §§ 16-1629(9), 16-1633(2).
[10] § 16-1633(2).
[11] Under Idaho law, the authority to make placement decisions resides with IDHW. *See* § 16-1629(8) and Dept. of Health & Welfare v. Hays, 137 Idaho 233, 236-37 , 46 P. 3d 529, 532-33 (2002).
[12] *See* 45 C.F.R. §1356.71(d)(1).
[13] The U.S. Department of Health and Human Services, Administration for Children and Families has a Child Welfare Policy Manual with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the

B. What Services Are Being Provided to Assist the Child in Adjusting to the Placement and to Ensure the Stability of the Placement?

1. *General*

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.[14] 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.

2. *Educational Needs*

In addition, the court should monitor and review whether the child's educational needs are being met, including whether the child has remained in the school of origin.[15] If continued enrollment is not in the child's best interest, the court should monitor whether the child has been or will be immediately enrolled at another school.[16] To assist courts in this evaluation, an Educational Needs bench card is provided with the Child Protection Bench cards available at the Idaho Supreme Court's Child Protection website.

3. *Independent Living*

Every youth who is 15 years or older must have an individualized Independent Living (IL) Plan that includes permanency and IL skill development. At the permanency hearing, (which may also serve as a review hearing), a determination of the services needed to assist a youth 16 years or older to make the transition from foster care to independent living must be identified.[17] Services may include (1) information on education, training, and skills necessary to obtain employment (2) vouchers for education or training, including postsecondary education (3) list of support network contacts for youth when he or she exits care (4) information on health care and how to make decisions after exit from care (5) location of important documents needed for independent living such as a social security card or immunization records.[18]

---

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." 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. Additionally, the court can make a finding that the department has not made reasonable efforts to eliminate the need for shelter care or finalize a permanency plan for the child and set a future hearing to review the finding. The case plan and permanency plan are discussed in further detail in chapters 6 and 7. ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD WELFARE POLICY MANUAL (2011) available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/index.jsp?idFlag=0

[14] IDAHO JUV. R. 44(a)(1).

[15] 42 U.S.C. § 675(1)(G).

[16] 42 U.S.C. §1305. *See also* Chapter 12: Special Topics.

[17] IDAHO JUV. R. 46(c).

[18] For more information on Idaho's independent living program see Chapter 12: Special Topics.

4. *Medical, Vision, Dental, and Mental Health Needs*

The Department, in order to qualify for IV-E foster care maintenance payments (in consultation with pediatricians, other experts in health care, and experts in and recipients of child welfare services), must develop a plan for ongoing oversight and coordination of health care needs of children in foster care, including mental and dental health care needs and oversight of prescription medicines.[19] At review hearing, the court should ensure that health care needs, including mental and dental needs, are being met and that oversight of prescription medicines is being provided.

5. *Family Contact*

The court should examine the child's need for contact with family, especially siblings. Specifically, the court should monitor whether the Department has made reasonable efforts to place siblings in the same placement, and if not, whether the Department is facilitating frequent contact between siblings.[20] Similarly, federal law requires IDHW to "exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child . . ."[21]

The court should review the terms of visitation at review to determine whether terms and conditions of visits should be modified. Where reunification is a goal, and as parents successfully engage in services and threats of danger have decreased or protective capacities have increased, it may be appropriate to provide less restrictive, more extensive visitation.[22]

As visitation increases to include unsupervised visits in the parents' home, visits exceeding forty-eight (48) hours must be approved by the court in writing, in advance.[23] An extended home visit may be ended by IDHW if the Department determines that termination of the visit is 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.[24]

C. Is Child Support Appropriate?

The court should review if parents are complying with child support obligations.[25] Support amounts should either be confirmed or adjusted during review hearings. The court should take

---

[19] 42 U.S.C. § 622(b)(15)(A).
[20] Federal law requires, as a condition of continued funding, that IDHW make "reasonable efforts . . . to place siblings removed from their home in the same . . . placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings." Furthermore, federal law requires that where a joint placement is not made, the state must "provide for frequent visitation or other ongoing interaction between the siblings, unless the state documents that frequent visitation or other ongoing interaction would be contrary to the well-being of any of the siblings." 42 U.S.C. § 671(a)(31)(A) & (B). *See also* IDAHO JUV. R. 44(a)(2).
[21] 42 U.S.C. § 671(a)(29). Locating and notifying relatives is not required in many cases of family or domestic violence.
[22] IDAHO JUV. R. 42 provides a procedure for implementing extended home visits.
[23] *Id*.
[24] *Id*.
[25] Idaho law provides for the entry of support orders for children in the child protection system. See § 16-1628(1). The terms of child support should be included in the case plan. IDAHO JUV. R. 44(a)(2).

care to avoid financial burdens that interfere with family reunification. In particular, delays in setting support followed by retroactive lump sum support orders can delay permanency; the financial disruption can interfere with the parent(s)' ability to maintain or to obtain residential space in preparation for the child's return home. Where a parent is not supporting their child, failure to establish a child support obligation will narrow the grounds for parental termination.

D. Are Children Engaged in the Proceedings in an Age Appropriate Manner?

Children can become frustrated when they are excluded from court proceedings and have no voice in a system designed to ensure their best interests are served. The court should monitor and review that children eight years of age and older have been notified by the Department of all post-adjudicatory hearings.[26] The court should provide an opportunity for children to participate in the proceedings in an age-appropriate manner; whether that is in person, by letter, by phone, or through the assigned caseworker, Guardian *ad Litem*, and/or foster parents.[27] For more information on how the court and practitioners can provide a meaningful opportunity for children to participate in the process, see Chapter 12.

E. Are the Needs of the Foster Parents Being Addressed?

The court should monitor and review any services that may be provided to the foster family to support the care and nurturing of the child.[28] In general, foster parents should be at review hearings and should be engaged by the court in regard to the child's progress and foster parents' needs, [29] as they often have more information than anyone else on how the child is doing on a day-to-day basis.

F. Have the Parents Complied with the Case Plan?

Initially, the court should review the safety issues which brought the child into care and determine whether the conditions for return home have been met. If the conditions for return home have been met, appropriate steps should be taken to facilitate reunification. Secondarily, the court should review information on the extent to which the parents have complied with the case plan.[30]

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 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 on

---

[26] IDAHO JUV. R. 40.
[27] IDAHO JUV. R. 40; William Jones, *Making Youth a Meaningful Part of the Court Process, in* JUVENILE AND FAMILY JUSTICE TODAY, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (Fall 2006).
[28] IDAHO JUV. R. 44.
[29] IDAHO JUV. R. 40(a).
[30] *See generally* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS (2009). Pgs. 43-46.

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 be safely 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 decrease threats or increase his/her protective capacity. The review hearing should not be reduced to a simple checklist of services provided and services attended.

G. Is IDHW Making Reasonable Efforts to Reunify 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.[31] The court should identify any areas in which agency efforts are inadequate and set forth orders to address those inadequacies.

H. Did IDHW Make Reasonable Efforts to Finalize a Permanency Plan for the Child?

Idaho law requires a concurrent plan (also referred in the Idaho Juvenile Rules as the "alternate permanency plan") in every CPA case where the child is determined to be within the jurisdiction of the court.[32] At review hearings prior to the permanency hearing, the court should monitor IDHW's reasonable efforts not only to attain reunification, but also to move forward on the concurrent permanency plan so that permanency is not delayed if reunification efforts fail.[33] Should reunification efforts fail, the concurrent plan must be in place and ready for implementation.

8.5 POST-PERMANENCY REVIEW

There is a continuing obligation to review the child's case and alternate permanency plan at least every six months as long as the child is in the Department's custody.[34] State law requires the court to make written, case-specific findings that the Department has made reasonable efforts to finalize a permanency plan for the child.[35] Federal law requires this finding to be made within twelve (12) months of the date the child is considered to have entered foster care and at least

[31] § 16-1615(5)(b); IDAHO JUV. R. 39(i)(3).
[32] § 16-1621(1); IDAHO JUV. R. 44(3).
[33] IDAHO JUV. R. 45(a)(3).
[34] § 16-1622(3).
[35] § 16-1622(5); IDAHO JUV. R. 45(a)(3).

every twelve months after the permanency hearing.[36] Permanency hearings may be combined with review hearings.[37] In addition, Idaho Juvenile Rules provide that the court should review IDHW's consideration of options for both in and out-of-state placements, if reunification is not the permanency goal.[38]

8.6 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 parent who has completed the case plan, subject to a condition in the plan limiting contact with the other parent.[39]

B. Has the Time and Date for the Next Hearing Been Set; Are Any Orders Needed to Prepare for the Next Hearing?

The court should set the time and date for the next hearing and enter any orders necessary to prepare for it. 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.

8.7 AGREEMENTS BY THE PARTIES

Whenever issues at a review are presented through a stipulation of the parties, the court must take the time to thoroughly review the agreement with the participants. IJR 38 requires that all stipulations be part of the court record, and that the court confirm that all stipulations have been entered into knowingly and voluntarily, have a reasonable basis in fact, and are in the best interest of the child.[40] 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.[41]

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

[36] 45 C.F.R. 1356.21(b)(2)(i).
[37] § 16-1622(4).
[38] IDAHO JUV. R. 45(a)(3) and IDAHO JUV. R. 46(c).
[39] IDAHO JUV. R. 45(a)(4).
[40] IDAHO JUV. R. 38. Rule 38 sets for the requirements for the use of stipulations in CPA proceedings
[41] *See* § 16-1613(1) and IDAHO JUV. R. 45(b).

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), Department oversight of the family, location of missing parents, determination of paternity, etc.

8.8 THE COURT'S WRITTEN FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AT THE REVIEW HEARING

Best practice is for the court to 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 Department or other participants. It is particularly important that the court include an order modifying the case plan or permanency plan (when 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.

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 9:
Termination of Parental Rights

9.1 PURPOSE OF TERMINATION OF PARENTAL RIGHTS

The first priority established by the Child Protective Act (CPA) is to preserve the unity of the family whenever possible.[1] Thus, prior to consideration of termination of parental rights (TPR), the Department must make reasonable efforts to reunify children with their parents, unless the court has found that the parents' conduct rises to the level of aggravated circumstances.[2]

The voluntary or involuntary termination of parental rights severs all legal rights between a child and his or her parents and frees the child for adoption. After an order of termination, parents are no longer entitled to notice of court proceedings concerning the child. An order of termination of parental rights ends the duty of a parent to continue to support the child and the legal right to visit with or have contact with the child. [3]

9.2 TIMING OF TPR PROCEEDINGS WITHIN A CPA CASE

A. Generally

A petition seeking termination of parental rights may be filed within a CPA proceeding.[4] The Federal Adoption and Safe Families Act (ASFA) requires and Idaho law imposes a rebuttable presumption that the Department must move for termination of parental rights if a child has been in custody for 15 of the last 22 months.[5] The Idaho Supreme Court has held that Idaho law "creates a presumption in favor of the department initiating a termination petition when a child

---

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN.§ 16-1601(1) (2010). *See also* § 16-2001(2).

[2] See § 16-1615(b) (reasonable efforts to eliminate the need for shelter care required); § 16-1619(6)(a reasonable efforts to prevent the need for foster care); § 16-1621(3) (case plan must include reasonable efforts to make it possible for child to return home). Section 16-1619(6)(d) defines aggravated circumstances. Pursuant to that provision, where a court makes the finding that a parent's maltreatment of a child constitutes aggravated circumstances, no efforts to reunify the parent and child are required. *See also* 45 C.F.R. § 1356.21(b)(3)(i). Requirements are different if the child is an Indian child. See Chapter 11 for more information.

[3] § 16-2011 (2010) ("An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other.")

[4] §16-1624, IDAHO JUV. R. 48(a).

[5] 42 U.S.C. § 675(5)(E) (2010); 45 C.F.R. § 1356.21(c)(1)(i)§16-1629(9).

has been in the state's custody and not in the parent's care for fifteen out of twenty-two months. It does not create a presumption that it is in the best interests of the child to terminate parental rights."[6]

The requirements for filing a TPR after 15 months of state custody do not limit early filing. The TPR petition may be filed at any time in a case when it is clear that reunification cannot occur.[7] Best practice is to file the TPR petition as soon as it is documented that termination of parental rights is the appropriate permanency goal in the CPA proceeding.

B. Exceptions to Time Standards

There are four exceptions to the general rules regarding the timing of a TPR petition:

1. The Department is required to seek termination within sixty days of a judicial determination that an infant has been abandoned.[8]
2. The Department must seek termination within sixty days of a judicial determination that "reasonable efforts are not required because the parent has subjected the child to aggravated circumstances . . .".[9]
3. The Department must file a petition to terminate parental rights in a case under the Idaho Safe Haven Act as soon as possible after the initial thirty (30) day investigation period.[10]
4. The Department need not file a petition to terminate if:
    a. Filing is not in the best interests of the child. If the Department decides not to file pursuant to section 16-1629(9), Idaho Juvenile Rule 45(d) requires that the Department move the court requesting relief from the duty imposed on the Department to file for termination when the child has been in out-of-home care for 15 out of the last 22 months. The court may grant the Department's motion if it appears, based on compelling reasons in the record, that the presumption has been rebutted."[11]
    b. Reasonable efforts have not been made to reunite the child with his/her family[12]; or
    c. The child has been placed permanently with a relative.[13]

9.3 PROCEDURAL ISSUES GOVERNING TPR PROCEEDINGS

The filing of a TPR petition does not initiate a new case. For data management purposes, a different case number may be assigned to the termination process. When the child is subject to the court's jurisdiction under the CPA, a TPR petition must be filed *within* the CPA case.[14] This

[6] State v. Doe. 144 Idaho 534, 536, 164 P.3d 814, 816 (2007).
[7] IDAHO JUV. R. 41(j); IDAHO JUV. R. 48(a).
[8] § 16-1624; 42 U.S.C. § 475(5)(E).
[9] *Id*. The determination of aggravated circumstances is governed by Idaho Code section 16-1619(6)(d). It is discussed in detail in Chapter 3 of this manual.
[10] §39-8205(5). The Safe Haven Act is discussed in detail in Chapter 12 of this manual.
[11] §16-1622(7), IDAHO JUV. R. 45(d).
[12] IDAHO JUV. R. 45(d).
[13] §16-1624; IDAHO JUV. R. 45(d).
[14] *Id*.

practice is supported by the *ABA Standards for Judicial Excellence for Judges Hearing Abuse and Neglect Proceedings*.[15] The rationale for this approach is that the CPA judge is familiar with the family and the case and can more easily come to an informed decision on the TPR issues, thus avoiding delays for the child. The practice of having a single judge hear both the CPA and termination of parental rights cases is common in many Idaho counties.

Although Idaho law specifically provides that TPR cases "may be conducted in an informal manner," the court must ensure procedural due process for children and their parents, including the right to notice, the appointment of counsel, and the right to be heard.[16] A court must find that termination is supported by clear and convincing evidence after a hearing in which the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence applicable to civil cases apply.[17]

9.4 VOLUNTARY TERMINATION OF PARENTAL RIGHTS

Prior to, or after the filing of a petition to terminate parental rights, the Department and the parents' counsel should discuss with the parents the option of voluntary termination of parental rights by consent. The form for consent to terminate parental rights is established by statute.[18] Voluntary consent to the termination of the parent/child relationship can serve a number of purposes: first, consent can expedite the termination process and free the child for placement in a permanent home. Second, involuntary termination of parental rights to a child constitutes an aggravated circumstance, which can be grounds for relieving the Department of its obligation to make reasonable efforts to prevent removal and to reunify the family.[19] It can also expedite the permanency hearing. However, best practice is to consider whether the termination case can be fully developed in the 30 days prior to the expedited permanency hearing. Timing of the hearing on aggravated circumstances may be critical.

Voluntary consents must be witnessed by a district judge, a magistrate, or an equivalent judicial officer in another state.[20] The effect of a voluntary consent is to completely and absolutely terminate the rights of the parent to the child. The right to a hearing on the TPR petition may be waived by the parents.[21] Upon completion of the voluntary consent to terminate parental rights, the parent(s) is no longer entitled to notice of any proceeding regarding the child. Best practice is to create a record of the consent and to also provide notice of the completion of the termination to the consenting parent.

Idaho law requires the court to accept a termination or relinquishment from another state that has been ordered by a court of competent jurisdiction under like proceedings, or in any other

---

[15] AMERICAN BAR ASSOCIATION, JUDICIAL EXCELLENCE IN CHILD ABUSE AND NEGLECT PROCEEDINGS: PRINCIPLES AND STANDARDS FOR COURT ORGANIZATION, JUDICIAL SELECTION AND ASSIGNMENT, JUDICIAL ADMINISTRATION AND JUDICIAL EDUCATION (2010), available at http://www.isc.idaho.gov/childprotection/PDFs/JudicialExcellenceStandardsAbuse-Neglect-ABA%20Approved-Aug-10.pdf (last visited April 25, 2011).
[16] §16-2009.
[17] *Id.*; IDAHO JUV. R. 51(c); IDAHO R. EVID. 101.
[18] §16-2005(4).
[19] §§16-1619(6)(d).
[20] §16-2005(4).
[21] *Id.*

manner authorized by the laws of another state. In addition, where the law of the sister state would presume abandonment by a putative father and would not require a separate termination, an Idaho court may rely upon the law of the sister state.[22]

The following suggested questions can be asked by counsel and/or the court and answered by the parent:

- 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 a reasonable period of time 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?
- Do you understand why you are here today? Can you tell me in your own words why you are here?
- 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, did you have any concerns about your baby's health? Did seeing the child make you change your mind about consenting to terminate your parental rights to the child?
- When did you decide to sign the consent to termination? Have you had enough time to think about it?
- Has anyone in any way tried to pressure you into signing the consent to terminate?
- Have you talked to a lawyer to get legal advice about this? If not, do you want to?
- Do you have a friend or family member who you 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.
- 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 your decision to terminate your parental rights.
- 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 believe that agreeing to terminate your parental rights is in the child's best interests? Why?
- Do you think that agreeing to terminate your parental rights is in your best interests? Why?

[22] §16-2005(4)(3). For more on putative fathers under Idaho law, see Chapter 12 of this manual.

- 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?

The court should provide copies of the consent to IDHW and to counsel. The prosecutor can then prepare the Findings of Fact, Conclusions of Law, and Decree for the judge's signature. The Findings of Fact, Conclusions of Law, and Decree should notify the parents that the case is sealed and that they may register with the voluntary adoption registry through the State Registrar of the Bureau of Vital Statistics.[23] The parents and their attorney should be provided with a copy of the Findings of Fact, Conclusions of Law and Decree in all termination actions.

9.5 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A. Content of the Petition

Idaho law sets forth specific requirements for the petition in a TPR proceeding.[24] It should refer specifically to the statutory grounds relied upon and should provide a summary of facts in support of each statutory ground.[25] If the child is an Indian child, the petition must include allegations that meet the requirements of ICWA.[26] The petition must be filed with the court and served on all parties.

Idaho Code section 16-2006 requires the petition to contain the following information:

- 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;

[23] §39-259A.
[24] §16-2006.
[25] The grounds for parental termination are discussed in detail in the next section of this chapter.
[26] ICWA imposes additional, different requirements for the termination of parental rights of an Indian child. ICWA is discussed in detail in Chapter 10 of this manual.

- 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 of the assets.

The court may direct the Department to conduct an investigation/"social study" prior to the termination hearing.[27] The "social study" shall include the circumstances giving rise to 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 shall include recommendations with supporting reasons as to why the parent-child relationship should be terminated. Where the parent is a minor, the report shall contain an explanation of the minor parent's contact with his/her parents or the reasons that such information is not or cannot be provided.[28]

9.6 GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

While effective pleading of the petition in a termination case will help adequately guide the proof and findings in the case, the Idaho Court of Appeals has found that the pleading is adequate as long as the language used essentially follows the statutory requirements.[29]

A. Abandonment

The court may terminate parental rights if it finds that such termination is in the best interests of the child and that the parent has abandoned the child.[30] The termination of parental rights statute defines "abandoned" as follows:

> [T]he parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact. Failure of the parent to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment under this section . . .[31]

In *Doe v. Department of Health & Welfare*,[32] the Idaho Supreme Court upheld an order terminating parental rights on the ground of abandonment. The parents had been incarcerated during a substantial period of the time the child was in the legal custody of IDHW and subject to the CPA. The parents sought to rely on an earlier Supreme Court decision, *Doe v. State*,[33] in which the court reversed a trial court order terminating parental rights of an incarcerated parent based on abandonment. In *Doe v. State*, the court found that the parent had not abandoned the child because the parent attempted contact with the child through cards, gifts, attempts to

[27] §16-2008(a) and (b).
[28] §16-2008(b).
[29] In the Matter of Doe, ___ Idaho ___, 239 P 3d 451,455 (Ct. App. 2010).
[30] § 16-2005(1)(a).
[31] § 16-2002(5).
[32] 146 Idaho 759, 203 P. 3d 689 (2009). *See also* Crum v. Dep't of Health & Welfare, 111 Idaho 407, 725 P. 2d 112 (1986).
[33] 137 Idaho 758, 53 P. 3d 341 (2002)

telephone and through consenting to medical treatment for the child. In *Doe v. Department*, the court rejected the comparison of the two cases reasoning that both parents had abandoned the child because they did not make any efforts to contact the child, even by mail or telephone, nor did they participate in the CPA proceeding in any way.

B. Neglected

Idaho law permits the termination of the parent-child relationship where the parent has neglected the child and where termination is in the best interests of the child.[34] "Neglected" is defined in two ways in the termination of parental rights statute. The statute cross-references the definition of "neglected" in the CPA.[35] The CPA definition provides:

> "Neglected" means a child:
> a. Who is without proper parental care and control, or subsistence, 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; however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code; or,
> b. Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or,
> c. Who has been placed for care or adoption in violation of law; or,
> d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code.[36]

In *State v. Doe*,[37] the Idaho Supreme Court upheld the magistrate's order terminating a father's parental rights based on neglect. There, while the father was incarcerated for significant periods of time during the CPA proceeding, he did not attempt to maintain contact with the children. During times he was released from jail, he also did not attempt to maintain contact. He was in prison because he punched the mother in the stomach while she was pregnant with one of the children. Prior to his incarceration, the evidence established that he was often violent and drunk in the home, while the children were present. On appeal the court reasoned that the trial court's conclusion that the father had neglected the children was supported by substantial and competent evidence.

---

[34] § 16-2005(1)(b).
[35] § 16-2002(3)(a).
[36] § 16-1602(25). Section 16-1627, cross-referenced in the above statute, provides a process by which a court may order emergency medical treatment for a child. Section 33-202, cross-referenced in subsection (d) of the above definition, requires parents to provide for the educational instruction of children between the ages of seven and sixteen.
[37] ___ Idaho ___, 144 P. 3d 597 (2006).

In addition, the termination of parental rights statute provides that "'Neglected' means . . . (b) The parent(s) has failed to comply with the court's orders in a child protective act case and the reunification of the child with his or her parent(s) has not occurred within the time standards set forth in section 16-1629(9), Idaho Code."[38] This ground for termination of parental rights was considered in *Idaho Department of Health and Welfare v. Doe.*[39] There the father had not completed his case plan and substantial and competent evidence indicated that termination was in the child's best interests.

C. Abused

Idaho law permits the termination of the parent-child relationship where the parent has abused the child and where termination is in the best interests of the child.[40] The parental termination statute defines abuse through a cross-reference to the CPA.[41] The CPA provides:

> (1) "Abused" means 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 an 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.[42]

D. The Presumptive Parent is Not the Biological Parent of the Child

The Idaho termination of parental rights statute provides that parental rights may be terminated where the court finds that the "presumptive parent" is not the biological parent of the child and finds that termination would be in the child's best interests.[43] The termination of parental rights statute defines "presumptive father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred days after the marriage is terminated."[44]

---

[38] § 16-2002(3)(b). Section 16-1629(9) is discussed in this chapter and imposes a responsibility on IDHW to seek termination of parental rights if a child is in out of home care for 15 out of 22 months.
[39] ___ Idaho ___, 234 P. 3d 725 (2010). *See also* In the Matter of Doe, ___ Idaho ___, 237 P. 3d 661 (Ct. App. 2010)(reasoning that although mother and father had made some progress on case plan, failure to complete the plan over a two year period supported the termination of parental rights).
[40] § 16-2005(1)(b).
[41] § 16-2002(4) cross-referencing § 16-1602(1).
[42] § 16-1602(1). *See* Castro v. Idaho Dep't of Health & Welfare, 102 Idaho 218, 628 P. 2d 1052 (1981)(failure to intervene in other parent's long-term physical abuse of a child constitutes grounds for termination of parental right on the grounds of abuse).
[43] § 16-2005(1)(c).
[44] § 16-2002(12).

This ground for termination of parental rights has not been directly interpreted by the Idaho Courts. Recently, however, the court declined to consider a man who did not fit the statutory definition of "presumptive parent", or any other definition of parent, a proper party to a parental termination action.[45]

E. Parent is Unable to Discharge Parental Responsibilities

Parental rights may be terminated where "the parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals and well-being of the child." [46] Pursuant to this provision, it also must be shown that termination of parental rights is in the child's best interests.

Parental rights might be terminated under this subsection for many different reasons. One in particular, specifically addressed in the statute, regards parents with disabilities.[47] First, the parental termination statute establishes the over-arching policy that the statute is not to be "construed to allow discrimination in favor of, or against, on the basis of disability."[48] Second, the parental termination statute provides that a parent with a disability "has the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child."[49] While these provisions regarding parents with disabilities apply in all termination actions, they are particularly relevant when the ground for termination is the parent's capacity to discharge parental responsibilities, as opposed to acts or omissions of the parents.

In *Department of Health & Welfare v. Doe*,[50] the court terminated parental rights based on this provision of the statute. It reasoned that the parents' emotional, psychological and behavioral impairments, coupled with their inability to participate in and implement aspects of the case plan over an eighteen month period, provided clear and convincing evidence that they were unable to discharge parental responsibilities and would be unable to do so for a prolonged indeterminate period of time. In addition, the court reasoned that supportive services would not enable the parents to discharge their parental responsibilities.

---

[45] *In the Matter of Doe*, 2010 Idaho App LEXIS 108 (Ct. App., Dec. 20, 2010).
[46] § 16-2005(1)(d).
[47] Disability is defined in the statute as follows:

> "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

§ 16-2002(17).
[48] § 16-2001(2).
[49] § 16-2005(6).
[50] ___ Idaho ___, 233 P. 3d 138 (2010).

F. Parent is Incarcerated

Idaho law permits termination of parental rights where a "parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority" and where such termination is in the child's best interests.[51] In *Doe v. Doe*[52] the Idaho Supreme Court upheld a termination under this provision. There, the children had little relationship with their incarcerated father, and he had been sentenced to 30 years in prison with 25 years determinate, and thus was likely to remain incarcerated during the remainder of his children's minorities.

G. Child Conceived as a Result of Rape or Other Sexual Misconduct

Idaho law permits the termination of parental rights where a "parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child under the age of (16) years . . .."[53] When this ground is established, the court "may rebuttably presume" that termination of parental rights is in the best interests of the child.

H. Torture, Chronic Abuse, Murder, et. al.

Idaho law provides that parental rights may be terminated where "the parent has subjected the child to torture, chronic abuse[54] or sexual abuse, has committed murder or intentionally killed the other parent of the child, has committed murder or voluntary manslaughter of another child or has aided, abetted, conspired or solicited to commit such murder or voluntary manslaughter, and/or has committed battery which resulted in serious bodily injury to a child."[55] Under these circumstances, a court "may rebuttably presume" that such termination of parental rights is in the child's best interests.

I. Abandoned Infant

If the court finds that a child is an "abandoned infant", parental rights may be terminated, and the court "may rebuttably presume" that termination is in the child's best interests.[56] This ground is not available in cases where one parent seeks the termination of the other parent's rights.

J. Best Interests of Parent and Child

The final ground for involuntary termination in Idaho law is available where the court finds that termination of parental rights is in the best interests of both the parent and the child.[57] In *State*

[51] § 16-2005(1)(e).
[52] 148 Idaho 243, 220 P.3d 1062 (2009).
[53] § 16-2005(2) (a), cross-referencing sections 18-6101, 18-1508, 18-1506 and 18-6602.
[54] In *Doe v. State*, 144 Id. 420, 421, 163 P 3rd 209, 210 (2007), a CPA proceeding relying upon the same definition, the court found that long-term deprivation of food so that the child was serious malnourished and grossly underweight constituted chronic abuse.
[55] § 16-2005(2)(b).
[56] § 2005(2)(c).
[57] § 16-2005(3).

v. Doe[58], the court relied on this provision to terminate the parental rights of a father who had abused one child but not the second child. The court reasoned that termination was in the best interests of the father because he was an "untreated child molester in denial" and would likely commit further abuse if reunified with his child. It reasoned that termination was in the best interests of the child, despite her attachment to her father and wish that her relationship with him not be terminated, because it would ensure the safety of the child and enable the child to be placed in a safe and supportive family.

9.7 NOTICE AND HEARING

Once a petition has been filed, the court must set a time and place for the hearing, and the petitioner must notify the appropriate individuals of the hearing (see below)[59]. If all reasonable efforts have been made to notify the parents, and these efforts have been unsuccessful, the petitioner should move the court for service by registered or certified mail and/or by publication.[60] Reasonable efforts should include a search of all IDHW's own available databases and attempts to contact family of the parents. The hearing must take place no earlier than ten days after service of notice, or where service is by registered or certified mail and/or by publication, the hearing must take place no earlier than ten days after the date of last publication.[61]

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 specified persons and entities, section 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding.[62] The adoption notice provision, in turn, requires that notice of an adoption proceeding be provided to certain specified individuals, but also to any person or agency whose consent to an adoption proceeding would be required and to "[a]ny person who has registered notice of the commencement of paternity proceedings pursuant to section 16-1513 . . ..".[63] The upshot of this web of notice requirements is that any person or entity named in the parental termination notice provision, the adoption notice provision, or the adoption consent provision is entitled to notice of a parental termination action.[64]

When the overlapping notice provisions of the adoption and parental termination statutes are considered together, notice must be provided to:[65]

- The child, if he or she is over age 12;[66]

[58] 143 Idaho 383, 146 P.3d 649 (2006).
[59] § 16-2007(1).
[60] § 16-2007(2).
[61] *Id*.
[62] *See* § 16-2007(1), referring to § 16-1505.
[63] *See* 16-1505 referring to § 16-1604.
[64] §§16-2007, 16-1505, 16-1504, 16-1513.
[65] In addition to the individuals discussed below, notice also must be provided to the adoptee's spouse, section 16-1504(1)(h), and to the guardian or conservator of an incapacitated adult, section 16-1504(1)(g). These provisions are unlikely to apply in a CPA-connected adoption.
[66] § 16-1504(1)(a)

- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage;[67]
- The mother of the child if the parents are unmarried;[68]
- The father or putative father of the child[69] who has not signed a consent to termination[70] or a Waiver of Notice and Appearance[71] 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;[72]
  - has been adjudicated the father of the child prior to the execution of a Consent to Termination by the mother;[73]
  - has registered notice of the commencement of a paternity action pursuant to the Idaho Putative Father Registry Statute;[74]
  - is recorded on the birth certificate as the child's father with the knowledge and consent of the mother;[75]
  - 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;[76]
  - has filed a voluntary acknowledgment of paternity;[77]
  - 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;[78] 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 section16-1504(2)(b).[79]
- The legally-appointed guardian of the person or custodian of the child;[80]
- The guardian *ad litem* for the child and/or for the parent;[81]
- IDHW, if it is not the petitioner.[82]

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/or by publication once a week for three consecutive weeks in a

[67] § 16-1504(1)(b).
[68] § 16-1504(1)(c); 16-2007(1) (separately requiring notice to any "parent").
[69] The question of who is entitled to be treated as the father in a CPA proceeding and in an action to terminate parental rights is subject to ambiguity under Idaho law and has constitutional implications. The current state of Idaho and federal law in this area is discussed in Chapter 12 of this manual.
[70] *See* § 16-2005(4).
[71] *See* § 16-1007(3).
[72] §§ 16-1505(1)(c) & (f); § 16-1504(1)(b).
[73] § 16-1504(1)(d)
[74] *See* §§ 16-2007(3) 16-1505(1)(b) and 16-1513.
[75] § 16-1505(1)(d).
[76] § 16-1505(1)(e).
[77] *See* § 7-1106.
[78] § 16-1504(2)(a).
[79] This basis for notice, in particular, is discussed in more detail in Chapter 12 of this manual.
[80] § 16-1504(f).
[81] § 16-2007(1).
[82] § 16-2007(1).

newspaper of general circulation in the area of the court's jurisdiction. The hearing should take place no sooner than 10 days after service of the notice or 10 days after the last date of publication.[83]

In cases where a parent has property executed and the court has accepted a consent to termination of parental rights, notice has been waived by that parent.[84]

9.8 POST-PETITION DUTIES

A. Appointment of Counsel

Idaho law provides for appointment of counsel for indigent parents or guardians in termination proceedings.[85]

Idaho law confers exclusive jurisdiction over the parental termination action upon the court that heard the connected Child Protective Act case[86]. As noted earlier, the TPR petition must be filed in the child protection proceeding. Appointments of attorneys and guardians *ad litem* in the CPA case shall remain in effect for the termination proceeding, unless otherwise ordered by the court.[87] If for some reason these appointments are not continued, the court must expeditiously appoint new counsel for any indigent parties[88] and/or a new guardian *ad litem* for the child.[89] Because the court may have reviewed these issues at the most recent permanency hearing, another hearing may not always be necessary to make these determinations. Immediately upon the filing of the motion and petition, the court should review the need for appointment of counsel and/or a guardian *ad litem* so that each can be present at the first pretrial hearing.

B. Pretrial

As a matter of best practice, the court should immediately set a pretrial date within thirty (30) days of the filing of the petition to terminate parental rights. It is also best practice to schedule the pretrial and all of the subsequent hearings before the same judge who has handled the CPA case.[90] At the pretrial, the court should establish all of the following:

- Whether the parents will contest termination of their parental rights.
- The date for discovery to be completed in sufficient time to allow all parties to review the material prior to possible mediation or to a settlement conference.
- The date for 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

[83] § 16-2007(2).
[84] § 16-2005(4). The process for consent to termination of parental rights is discussed earlier in this chapter.
[85] §16-2009. This provision of the Idaho Code is very ambiguous. The first sentence of the paragraph provides for notice to parents and guardians *ad litem,* while the second sentence of the paragraph provides for the appointment of counsel for parents and guardians. The best practice is to appoint counsel for the parents, any legal guardian, and for the guardian *ad litem*.
[86] §16-1603; §16-2003.
[87] IDAHO JUV. R. 48(b).
[88] § 16-2009.
[89] § 16-1614(1).
[90] ABA Judicial Standards, *supra* note 13.

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.

Best practice is to schedule trial dates with sufficient amount of time to complete the termination process. Bifurcating termination trials is strongly discouraged because of the resulting delay in permanency for the child(ren). Best practice is to schedule trial dates within 90 days of the filing of the petition.

Finally, 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. The report, if ordered, should contain recommendations for repayment and provisions for the future support of the child. [91]

9.9 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 the question of whether parental rights should be terminated, and whether such termination is in the child's best interests.

When pretrial negotiations result in an agreement that the parents will voluntarily relinquish parental rights, counsel should notify the court immediately. The court can then use the beginning portion of the dates previously set (either for the final pretrial or the trial for the final hearing on the petition 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 a bench trial, that it must be closed to the general public, and that it should be on the record. Furthermore, the court's findings must be based on clear and convincing evidence.[92] 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.[93]

The following list of persons should be present for trial, although they may be excluded when not testifying:

- The judge;
- The child, in appropriate circumstances, if over eight years of age;[94]

[91] § 16-2008.
[92] § 16-2009.
[93] § 16-2009.
[94] IDAHO JUV. R. 40(b).

- The parent(s);
- Attorney(s) 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;[95]
- Guardian *ad litem* for the child and attorney for the Guardian;
- Attorney for the child, if applicable; and when appropriate,
- Foster parent(s), pre-adoptive parent(s), or a relative providing care for a child.[96]

9.10 FINDINGS AND CONCLUSIONS

Because of the complexity of findings and conclusions in a termination of parental rights case, it is normally not be possible to write and distribute the findings to parties in the courtroom at the end of the hearing.

At the conclusion of the termination case, the court must issue both "Findings of Fact and Conclusions of Law" and a Decree. Best practice is for the court to issue the Findings of Fact and Judgment and Decree as soon as practicable after the close of the trial. The issuance of a separate decree is important in order to trigger appellate jurisdiction.[97] The Findings of Fact and Conclusions of Law in termination of parental rights cases 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 that the relinquishment was voluntary and informed;[98] and
- If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds, best interests findings, and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.

After the presiding judge has signed them, the counsel of prepared the Findings of Fact and Judgment and Decree should, as a matter of best practice, provide a copy of both to the parents and their attorney(s).

---

[95] § 16-2009 states that: "[t]he Prosecuting Attorney shall represent the Department at all stages of the hearing". Appearances by the Deputy Attorney General in a termination proceeding are with the consent of the Prosecutor's office.

[96] IDAHO JUV. R. 40.

[97] IDAHO APP. R. 12.1. *See* Dep't. of Health & Welfare v. Doe, 147 Idaho 314, 208 P. 3d 296 (2009)(Magistrate court lacked jurisdiction to direct a permissive appeal to the supreme court under Rule 12.1 *after* the District Court has exercised appellate jurisdiction).

[98] For Indian children, this must include the special requirements of ICWA described in Chapter 11 of this manual.

9.11 APPEALS

Appeals of Decrees of Termination of Parental Rights cases are governed by Idaho Appellate Rules 11.1, 12.1 and 12.2.[99] A Notice of Appeal from any decree granting or denying a Petition of Termination of Parental Rights must be made by filing an appeal with the Clerk of the District Court within fourteen (14) days from the issuance of the order. Such filing is jurisdictional and can result in dismissal if times periods are not met. The clerk's record will be prepared within twenty-one (21) days of the filing of the notice of appeal. The transcript is also required to be prepared within twenty-one (21) days of the filing of the appeal. The appellant's brief is due within twenty-one (21) days of the clerk's record being filed, and the respondent's brief is due within twenty-one (21) days of service of the appellant's brief. If there is no cross-respondents' brief, the reply brief from the appellant is then due seven (7) days from service of the respondent's brief. No extensions will be granted except upon a verified showing of "the most unusual and compelling circumstances."[100] Oral argument, if requested, has to be held within 120 days of the filing of the appeal.[101] The filing of an appeal does not stay the termination decree without further action of the appellant, and permanent planning for the child may continue.[102]

On appeal, the standard of review applied to the trial court's factual findings on the grounds for termination is whether the findings are supported by substantial and competent evidence. [103]

[99] IDAHO APP. R. 11.1 (providing for appeal as a matter of right to the Supreme Court in the expedited manner provided in Rule 12.2) and 12.1 (providing for permissive appeals to the Supreme Court when such an appeal serves the best interest of a child) and 12.2 (establishing procedures for expediting appeals under either Rule 11.1 or 12.1).
[100] IDAHO APP. R. 12.2.e.
[101] IDAHO APP. R. 12.2.f.
[102] § 16-2014.
[103] *See e.g.:* Dept. of Health & Welfare v. Doe, ___ Idaho ___, 244 P 3d 232, 234 (2010).

CHAPTER 10:
Adoption

10.1 INTRODUCTION

If a child cannot be reunified with his or her family, adoption is the next preferred permanency goal.[1] If adoption is the permanency goal, Idaho's placement priorities are:

- A fit and willing relative;
- A fit and willing non-relative with a significant relationship with the child; or
- Foster parents and other persons licensed in accordance with Idaho law.[2]

This chapter focuses on the finalization of adoptions initiated in connection with a Child Protective Act (CPA) proceeding. The chapter assumes that parental rights already have been terminated.[3]

10.2 THE ADOPTION PROCESS

A. Jurisdiction

The adoption proceeding is initiated when the person or persons proposing to adopt the child file(s) a petition to adopt in the court having jurisdiction over the CPA proceeding, unless the CPA court relinquishes jurisdiction over the adoption proceeding.[4] Where the CPA court relinquishes jurisdiction, the adoption petition must be filed in the county in which the prospective adoptive parents reside.[5]

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] *See* 42 U.S.C. § 675(5)(C). The federal government has put in place numerous incentives to support adoptive placements, most recently in the Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351. This Act is described in detail in the Administration for Children and Families, Policy/Program Issuance PI-08-05, available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0805.htm.

[2] IDAHO CODE ANN. §16-1629(11) (2010).

[3] Termination of parental rights is discussed in Chapter 9 of this Manual.

[4] §16-1506(1).

[5] *Id.* In the latter situation, a copy of the CPA court's relinquishment of jurisdiction should be attached to and filed with the Adoption petition, as a matter of best practice.

Idaho law requires that the petitioners in an adoption proceeding have resided in the state for at least six consecutive months before the filing of the petition.[6]

B. Social Investigation/Home Study

Idaho law requires that prior to the placement 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.[7] Where the prospective adoptive parent is married to the birth parent or a grandparent of the child, no social investigation is required unless ordered by the court.[8] If the social investigation is not conducted by the Department, a copy of the study must be provided to the Department. 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 another placement. The social investigation must then be initiated within five days of placement.[9]

The pre-placement social investigation must be completed within sixty (60) days of its initiation. If the proposed adoptive parent is not related to the child, the petition must be served within five days "by the court receiving the Petition" for adoption on the director of IDHW by registered mail or by personal service.[10]

If no private social investigation is conducted, IDHW must verify the allegations of the petition, and make a thorough investigation including the date and place of the child's birth and the parentage of the child within thirty (30) days after service of the petition.

The investigative report must include:

1. All reasonably known medical and genetic information regarding the child and the biological parents.
2. Reasonably known or available providers of medical care or services to the natural parents.
3. The source(s) of the information contained in the report.

A copy of the medical and genetic information compiled in the report must be provided to the adopting family.[11] The pre-placement investigation and recommendation and the investigative report of IDHW must be filed with the court.[12]

---

[6] *Id.*
[7] § 16-1506(3). *See also* IDAHO ADMIN. CODE r. 16.06.01.750 *et seq.* for regulations regarding the investigation process.
[8] IDAHO CODE ANN. § 16-1506(3) (2010). This is also true in a stepparent adoption, which rarely comes up in CPA connected proceedings.
[9] *Id.*
[10] *Id.* The five-day deadline also does not apply if the prospective adoptive parent is married to a parent.
[11] *Id.*
[12] *Id.*

C. Consent to Adopt

Persons whose consent is required must execute such consent in writing.[13] The form of the consent is prescribed by Idaho law and is the same form used to consent to the termination of parental rights.[14] The consent must be filed in the court in which the adoption petition is filed. Best practice is to have the consent signed 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.

Consent to adoption is required from the following individuals:[15]

- The child to be adopted, if the child is over 12 years of age;
- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage;
- The mother of an adoptee 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);[16]
- Any legally appointed custodian or guardian of the child;
- The spouse of the adoptive parent;[17]
- 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;[18] and,
- The father of an illegitimate child who has adopted the child by acknowledgement.

In an adoption in connection with a CPA proceeding, the parental rights of both parents have generally been terminated prior to the adoption proceeding, either through consent or involuntary termination. If parental rights have been involuntarily terminated, consent is not required at the time of the adoption.[19] Rather, the attorney handling the adoption should include with the Petition the Findings of Fact, Conclusions of Law and Termination of Parental Rights Order for the child's mother, and, if required, for the child's father.[20]

---

[13] § 16-1506(2).
[14] IDAHO CODE ANN. § 16-1506(2) (2010). *See also* § 16-2005(4).
[15] § 16-1504(1).
[16] Idaho Code sections16-1504(2) and (3) and Idaho Code section 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 sections 16-1504(2) and (3) and section 16-1513 until questions regarding their constitutionality are resolved. Chapter 12 contains a discussion of the constitutional issues raised by these provisions.
[17] §16-1504(1)(h).
[18] The consent statute also provides for the consent of the father of an illegitimate child who has adopted the child by acknowledgement pursuant to Idaho Code section 16-1510. §16-1504(1)(i). However, section 16-1510 was repealed in 2000, although the adoption statute was not amended at that time.
[19] § 16-1504(7).
[20] The question of when a father is required to participate in a CPA proceeding, when his parental rights may be terminated, and whether his consent to adoption is required is discussed in Chapter 12.

D. Notice of the Adoption Proceeding

Idaho Code § 16-1505 states that notice of the adoption action must be provided to any person whose consent is required under Idaho Code § 16-1504(1), unless that person's parental rights have been terminated or otherwise relinquished.[21] Thus, if an individual has executed a "Consent to Termination of Parental Rights" pursuant to Idaho Code § 16-2005(4), notice of a subsequent adoption proceeding is not required.

Idaho Law also provides that "[n]o consent shall be required of, nor notice given to, any person whose parental relationship to such child shall have been terminated in accordance with the provisions of either chapter 16 or 20, title 16 Idaho Code, or by a court of competent jurisdiction of a sister state under like proceedings; or in any other manner authorized by the laws of a sister state."[22] As a matter of best practice, notice of the completion of the termination of parental rights and adoption should be provided to the attorney and the parent(s) whose rights were terminated.

Idaho Code § 16-1505(1)(b)-(f) further provides for notice to the following persons:

- 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.

If there is any person who fits one of these categories, whose parental rights have not previously be terminated either voluntarily or involuntarily, that person must receive notice of the adoption proceeding. As a matter of best practice, consider serving the guardian *ad litem* (GAL) appointed in the child protection case, the Attorney for the GAL (if one is appointed), and/or the Attorney for the child.

The notice need not disclose the name of the mother who is placing the child for adoption.[23] It must be served as least twenty (20) days prior to the final dispositional hearing. The notice must also state that if the person 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.[24]

---

[21] IDAHO CODE ANN. § 16-1505(1)(a) (2010).
[22] § 16-1504(7).
[23] §16-1505(3).
[24] § 16-1505(5)(b).

E. Service

Notice of adoption proceedings must be personally served on individuals whose consent is necessary for the adoption, unless their parental rights have been previously terminated. If reasonable efforts to effect personal service are unsuccessful, a court may order service by registered or certified mail to the last known address of the person to be notified and/or by publication.[25]

For others entitled to notice, service by certified mail, return receipt requested, is sufficient.[26] Notice to any person who has registered as a putative father pursuant to Idaho Code section 16-1513 must be served by certified mail, return receipt requested, at the last address filed with the Department.[27]

Proof of service on all those required to receive notice of the adoption must be filed with the court before the final hearing on the adoption petition.[28]

F. Petition

The adoption petition must contain the following information:

- 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 known 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. [29]
- the marital status of the prospective adoptive parents;[30]
- the ages of the prospective adoptive parents (demonstrating that they are at least fifteen years older than the child being adopted or are at least 25 years of age);[31]
- that the parental rights of the mother and the father have been terminated either through consent or through judicial action; and
- that the CPA court made the required federal findings necessary to support the child's eligibility for Adoption Assistance. (These findings are detailed throughout this manual and are summarized briefly below in the Adoption Assistance section of this Chapter.)

---

[25] § 16-1505(6).
[26] § 16-1505(6)(b).
[27] IDAHO CODE ANN. § 16-1505(6)(c) (2010).
[28] § 16-1505(7).
[29] § 16-1506(1).
[30] Idaho Code section 16-1503 provides that if the person adopting a child is married, the consent of the person's spouse is required. § 16-1503. A minor may consent to the adoption of a child on the same basis as an adult. § 16-1504(6).
[31] Idaho Code section 16-1502 requires that the person adopting a child must be at least fifteen (15) years older than the child or at least twenty-five (25) years of age or older unless the person adopting the child is the spouse of a parent. § 16-1502.

G. Objections to the Adoption

Although adoptions are generally uncontested, Idaho law provides a procedure for objections to an adoption. A person who has been served with notice must file written objections within twenty days after service. The written objection must set forth the "specific relief sought" and must be accompanied by a "memorandum specifying the factual and legal grounds upon which the written objection is based."[32] If a person fails to file written objections within twenty days of service, notice of any further proceedings in connection with the adoption is waived and the person "forfeits all rights in relation to the adoptee, and is barred from thereafter bringing or maintaining any action to assert any interest in the adoptee."[33]

H. 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."[34] 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.[35] This consolidation rarely occurs in a CPA connected adoption because parental rights typically have been terminated previously as part of the CPA proceeding.

At the hearing, the judge must examine each of the parties appearing at the hearing separately and must review the investigative report.[36] The court must find that the interests of the child will be promoted by the adoption.[37]

I. Order of Adoption

Based upon the examination of all of the parties and of the investigative report, an order of adoption may be entered if the judge is "satisfied that the interests of the child will be promoted by the adoption."[38] The order must declare that "the child shall thenceforth be regarded and treated in all respects as the child of the person adopting."[39] Several additional provisions of the adoption statute make clear that the standard for approval is the best interests of the child. For example, the adoption notice provision states that "[e]xcept to those persons whose consent to an adoption is required . . ., the sole purpose of notice under this section is to enable the person served to present evidence to the court relevant to the best interest of the child."[40] Likewise, § 16-1506 provides that "[i]n all disputed matters under this chapter . . . the paramount criterion for consideration and determination by the court shall be the best interests of the child."[41]

---

[32] IDAHO CODE ANN. § 16-1505(5)(a) (2010).
[33] § 16-1505(5)(b).
[34] § 16-1506(1).
[35] § 16-1506(4).
[36] §§ 16-1506(1); 16-1507.
[37] § 16-1507.
[38] *Id*.
[39] *Id*.
[40] IDAHO CODE ANN. § 16-1505(9) (2010).
[41] § 16-1506(4).

10.3 FINALIZING PERMANENCY AND ADOPTION ASSISTANCE

A. Federal Requirements Regarding Finalization of Permanency

The federal Adoption and Safe Families Act requires that reasonable efforts extend beyond the permanency planning hearing to actual achievement of permanency for a child and closure of the case.[42] Adoption recruitment is one of the activities that judges must now determine to be "reasonable." This determination includes whether the Department has:

- adequate programs to recruit and identify prospective adoptive parents, both locally and beyond state boundaries;
- adequate support to approve adoptive families including completion of home studies in a timely manner preparation of adoption assistance agreements, interstate documentation, and provision of relevant information to the family regarding the child; and
- appropriate and accessible post-adoption services to support and stabilize a child in the adoptive home.[43]

B. Adoption Assistance: Federal Adoption Assistance for Special Needs Children

Federal adoption assistance is administered under the Federal Title IV-E adoption assistance program.[44] Payments to the parents of an eligible child with special needs can take the form of either one-time (nonrecurring) adoption assistance or ongoing (recurring) adoption assistance. These funds are paid through IDHW and are available for children being adopted from foster care.

1. *Eligibility for Federal IV-E Adoption Assistance (either Non-recurring or Recurring)*

A child is eligible for federal Adoption Assistance funds if two conditions are met.[45] First, the child must have "Special Needs." A child with special needs is a child who:

- cannot or should not be returned home to his or her parent(s);
- has a physical, mental, emotional, or medical disability, or is at risk of developing such disability based on the child's experience of documented physical, emotional, or sexual abuse or neglect;[46] and

---

[42] 45 C.F.R. §1356.21(b)(2)(i)("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 (Claire Sandt ed., 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.").

[43] This reasonable efforts requirement is found in 42 U.S.C. § 671(a)(15)(C). *See* MAKING IT PERMANENT, *supra* note 42 at 40-44(discussing the nature of the state agency's responsibility under the reasonable efforts provision in the context of a permanency plan of adoption).

[44] Child Welfare Information Gateway: Adoption Assistance for Children Adopted from Foster Care, http://www.childwelfare.gov/pubs/f_subsid.cfm#federal (last visited April 19, 2011). The provisions for federal adoption assistance were part of the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500. The Act is primarily codified at 42 U.S.C.§ 673 (2010).

[45] 42 U.S.C. § 673(a)(1)(B).

- has not been able to be placed without adoption assistance (attempts at placement for adoption) were made, but were unsuccessful, except where it would be against the best interests of the child.[47]

This eligibility determination is made by the Department pursuant to detailed federal regulations.

The second requirement for Adoption Assistance eligibility, which only applies to recurring adoption assistance, is that the child meets one of the following four criteria:

1. The child was eligible for IV-E match funds at the time the child was removed from the home. Although there are other requirements, the key consideration for the court and for the attorney for the adoptive parents is that at the time of removal, in the first order sanctioning removal, the court made a finding that remaining in the home was contrary to the child's welfare and that removal was in the child's best interests; [48]
2. The child was eligible for supplemental security income (SSI) programs under the Social Security Act before adoption; [49]
3. The child's parent was in foster care and receiving Title IV-E funds that covered both the parent and the child when the adoption was initiated; or
4. The child previously received adoption assistance and his/her adoptive parent(s) died or the adoption was dissolved.

2. *Nonrecurring Adoption Assistance*

Nonrecurring adoption assistance is paid or reimbursed for one-time reasonable and necessary expenses directly related to the legal adoption of a child with special needs that have not been reimbursed from other sources or funds. These reimbursable expenses may include the home study fees, attorney fees, replacement of the birth certificate, and travel for visits to the child (including mileage, lodging, and meals). The federal maximum for this type of assistance is $2,000 for each adoptive placement.[50]

3. *Recurring Adoption Assistance*

Ongoing adoption assistance provides funds that may be used for any identifiable need of the child. These usually take the form of monthly payments to the parents of eligible children. The maximum payment amount may not exceed the amount that would have been paid for

---

[46] Pursuant to federal law, this element of "special needs" is defined on a state-by-state basis. 42 U.S.C. § 673(c)(1)(B); Adoption Assistance, http://www.benefits.gov/benefits/benefit-details/822 (last visited April 22, 2011) . In Idaho, the definition is found in IDAHO ADMIN. CODE r. 16.06.01.900.02(b) (2010).
[47] 42 U.S.C. § 673(c) (2010)
[48] 42 U.S.C. §672(a)(1)(2010); .45 C.F.R. 1356.21
[49] *See* Child Welfare Information Gateway, *Adoption Assistance for Children Adopted From Foster Care*, http://www.childwelfare.gov/pubs/f_subsid.cfm (last visited April 22, 2011)
[50] *See* Children's Bureau, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=50#745 (last visited Feb. 28, 2010).

maintenance if the child had remained in a foster home in Idaho. Payments can continue until the child reaches age 18, and these payments continue even if the family moves to another state.[51]

4. *Family Income and Determination of Need*

Federal law mandates that the resources of the adoptive parents cannot be considered when determining a child's eligibility for Title IV-E adoption assistance.[52] However, the circumstances of the family and the needs of the child may both be taken into consideration when determining the amount of assistance.[53]

C. State Adoption Assistance

Under IDHW regulations, a child qualifies for state adoption assistance if the child has special needs but is not eligible for federal adoption assistance. Such a situation may arise if the appropriate federal findings are not made in the child's CPA case. The requirement for special needs is the same as the requirement for federal assistance, discussed above.[54] In addition, under Department regulations, children with special needs are eligible for Medicaid coverage. This coverage may not continue if the child moves to another state.[55]

10.4 SPECIAL CONSIDERATIONS FOR PRIVATE COUNSEL REPRESENTING PROSPECTIVE ADOPTIVE PARENTS IN A CPA CONNECTED ADOPTION

A. Retention of Counsel by the Adoptive Parents to Finalize the Adoption

IDHW will usually advise the potential adoptive parents to seek a private attorney to finalize the adoption. The attorney will be asked to make contact with the local adoption social worker and provide a written estimate of his/her costs and fees to finalize. In the initial contract, the attorney should ascertain from his/her clients:

- The name of and contact information for the adoption social worker;
- The status of the Adoption Assistance application process;
- The full name the child will be given at the completion of the adoption; and
- Whether the family knows the identity of the natural parents.

The adoption social worker is the source of the following crucial information:

- The status of the case;
- A reasonably anticipated timeframe for the adoption petition to be filed or heard;

---

[51] *See* Child Welfare Information Gateway, *Adoption Assistance for Children Adopted From Foster Care*, http://www.childwelfare.gov/pubs/f_subsid.cfm (last visited April 22, 2011).
[52] 45 CFR 1356.40 (c). *See* Children's, Bureau, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=81 to read the section of the Child Welfare Policy Manual that says that States cannot employ a "means test" in negotiating adoption assistance agreements.
[53] *Id.*
[54] IDAHO ADMIN. CODE r. 16.06.01.900.02 (2010).
[55] r. 16.06.01.911.03 (2010).

- What steps in the permanency plan remain to be completed by the prospective adoptive parent, if any, and how the attorney can assist in completing the steps;
- The process to submit the attorney's fee and cost estimate;
- Any anticipated problems or unique issues to the adoption; and
- Whether the child is an Indian child under the Indian Child Welfare Act.[56]

B. Preparing for the Adoption Action: the "Attorney Letter" from the Department

Once an attorney contacts the adoption social worker and confirms that she or he is the attorney for the prospective adoptive parents, the attorney will receive an "Attorney Letter" from the Department. This letter is a roadmap to completing the adoption process. It spells out:

- When the child was placed with the prospective adoptive parents;
- Confirmation of the statutory requirement that the attorney provide a copy of the petition to the Department within five days of filing;[57]
- Confirmation that the Department has thirty (30) days after the filing to provide the Court with the Court Report and Director's Consent;[58]
- The Department's request that the attorney provide it with a copy of the completed Notice of Hearing that will be proposed to the court at the time the petition is filed; and
- That the final Departmental Consent to the adoption, in addition to the Director's Consent, must be given in Court by the social worker and witnessed by the judge.

A majority of Idaho courts will allow the clerk to set an adoption hearing at the time the petition is filed. If this is the case, the attorney should set the hearing out. As a matter of best practice, the attorney should already have discussed potential unavailable dates with the social worker who must be present at hearing. This will provide adequate time for the Central Office of the Department to prepare its Court Report and to obtain the Director's Consent.

Some judges require that the Court file be complete before they will schedule the final hearing. If this is the case, the attorney must explain to the prospective adoptive parents that the hearing date will not be known until the Department has provided all of the required information to the Court. Since the Department's information goes directly to the Court, the attorney will know that the hearing may be scheduled when she or he receives a copy of the Director's Consent from the Central Office. This will alert the attorney that the court report has been sent to the court. Attorneys should allow forty-eight hours for the local clerk's office to process the report before scheduling the hearing.

In addition to confirming the information outlined above, the Attorney Letter will typically have the following documents attached:

- A certified birth certificate for the child being adopted;

[56] ICWA is discussed in detail in Chapter 11 of this manual.
[57] IDAHO CODE ANN. § 16-1506(3) (2010).
[58] *Id.*

- Findings of Fact, Conclusions of Law and Termination of Parental Rights Order, as to the Birthmother;
- Findings of Fact, Conclusions of Law and Termination of Parental Rights Order, as to the Birthfather; and
- When appropriate, an Order to Relinquish Jurisdiction Over Adoption and Releasing the Relinquishment Order to another Court.

With regard to the relinquishment, if one is required because the adoption will not be filed in the same court handling the CPA proceeding, the attorney must be prepared to obtain an order of relinquishment. This can be problematical because an attorney for the prospective adoptive parents does not generally have access to the CPA case file. The attorney will need to work with the Department and with the Prosecutor or Deputy Attorney General in the county where the child protection case is filed to obtain the order of relinquishment.

10.5 POST FILING RECOMMENDATIONS

Once the Petition is prepared and filed, copies should immediately be provided to the social worker and IDHW's Central Office. If the hearing was scheduled at the same time of filing, a Notice of Hearing should accompany the copies of the Petition.

In order to obtain the consent of the Director of IDHW to the adoption, the social worker submits an Adoption Report to the Court, copies of the family's home study, placement documentation, and legal documentation to the Department's Central Office. At the Central Office, the adoption file undergoes a quality assurance review. The file is then submitted to the Director for written consent. The Department has 30 days to complete this review and sign the consent. It is important to note that consent to the adoption is not signed by the Director until a copy of the Petition to Adopt is received by the Central Office.

Upon receipt of the Director's consent authorizing the social worker to consent to the adoption, the Department's Central Office sends a packet of information via certified mail or express courier to the Clerk of the Court where the adoption will finalize. This packet includes the following:

- Adoption Report to the Court;
- Director's written consent to the adoption;
- Copies of the child's Child and Family Social and Medical Information Forms;
- Copies of the pre-adoptive parents' adoption home study and criminal history clearances; and
- Copy of the Petition to Adopt.

The social worker brings to the hearing a document evidencing his/her consent to the adoption, which he/she will sign during the court hearing.[59]

[59] §§ 16-1506(2); 16-2005(4); 67-2405.

10.6 THE ADOPTION HEARING

Prior to the scheduled hearing, the attorney should consider discussing the following matters with the client:

- Review the Agreement of Adoption and the proposed Order of Adoption. (Note: With the exception of the Department's Consent, all pleadings taken into the Courtroom at the adoption hearing should reflect only the new name of the child.)
- Have the clients prepare as much of the original Idaho Certification of Adoption as possible before the meeting ends. Always have the client fill in the information on the second line of question number 22.[60]

At the hearing, the attorney should consider asking the following questions:

- Whether the adoptive parents have been provided all appropriate information regarding the physical and mental health of the child.[61]
- Whether the child has special needs.
- Whether the Department will remain involved with the child.

If the child to be adopted is 12 years of age or older, she or he must be present at the hearing. Three questions should be asked of the child:

- What are we doing here today?
- Is this what you want? Do you wish (clients) to be your Mother and Father forever?
- Do you understand the Consent and do you want to sign it?[62]

POST-HEARING BEST PRACTICES

After the hearing counsel should provide the following copies to:

- The Client(s):
    - Two court-certified copies of the Adoption Order. Counsel should advise his or her clients not to give away the court certified copies to anyone. If requested, the clients should offer *copies* of the order; however, the original order should remain with the client. Also, the client should always retain the Order even after the new birth certificate arrives. There have been instances where clients have applied for a passport for the child only to be asked to show proof of why the child's name was changed. The new birth certificate isn't satisfactory to answer the question.
    - Conformed copy of the Agreement of Adoption.
    - Conformed copy of the Department's Consent to Adoption.

[60] Regarding the information on line 15, the client needs to give their residential address as of the day the child was born – not where they now live.
[61] *See* IDAHO CODE ANN. § 16-1506(3) (2010).
[62] § 16-1504(1)(a).

- The Department Social Worker. (The following list anticipates the social worker will forward on all required documents to the Central Office.)
    - Two court-certified copies of the Adoption Order. These orders are necessary for the family to receive adoption assistance and for the Department to end their child protection case.
    - Conformed copy of Agreement of Adoptive Parents.
    - Two court certified copies of the Department's Consent to Adoption.

- Counsel
    - One court certified copy of the Adoption Order. (If the child was born out of state, retain two court-certified copies in the file. The birth state may require a certified copy to issue the new birth certificate.)
    - Conformed copy of Agreement of Adoptive Parents.
    - Conformed copy of the Department's Consent to Adoption.
    - Some Clerks' offices will retain the Idaho Certificate of Adoption and forward it on to the Idaho Bureau of Vital Statistics. If this is the case, counsel should also have the Clerk provide him or her with a copy of the Idaho Certificate of Adoption after it is fully filled out and stamped by the Clerk.
    - A motion and order to close the child protection case, which can be signed at the adoption hearing.

Counsel should remember that the adoption file will be sealed shortly after the hearing. Access to the file can then only come about after a Motion has been filed to reopen the file and a Court Order issued allowing reopening.

Following the adoption proceedings, the Department will work with their Prosecuting Attorney or Deputy Attorney General to obtain an Order to Vacate the Child Protection Case.

SECURING THE NEW BIRTH CERTIFICATE

The attorney for the Prospective Adoptive Parents should accept the role of securing the new birth certificate. Idaho and out of state requests for new birth certificates are routed through the Idaho Bureau of Vital Statistics. Sending it to the Idaho Bureau of Vital Statistics ensures it is properly forwarded to the state of the child's birth.

If the child was born in a foreign country, Idaho will issue the new Birth Certificate.

The attorney will receive a copy of the letter from the Bureau of Vital Statistics forwarding the Idaho Certificate of Adoption to the state in which the child was born. Thereafter, the attorney will receive a letter from the out-of-state Bureau informing him or her of the cost and required documents needed to secure the amended birth certificate.

The new birth certificates are always mailed to the attorney – never to the client. When it is received in the attorney's office, the best practice is to make a copy for the file and to ask the social worker if she or he wishes a copy. Then a copy should be provided in person to the adoptive parents.

CONCLUSION

The creation of a new, stable family through adoption is extraordinarily beneficial for many children in foster care. Care must be taken that the adoption is process correctly and that eligibility for adoption assistance is preserved whenever appropriate.

CHAPTER 11:
The Indian Child Welfare Act (ICWA)

11.1 INTRODUCTION

The Indian Child Welfare Act (ICWA)[1] is a federal statute that was adopted to protect Indian families and to preserve the ties between Indian children and their tribes.[2] When ICWA applies, it pre-empts inconsistent state law provisions in child welfare cases. Guidance to interpretation of the Act is found in case law and in the Department of Interior, Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, usually referred to as the BIA Guidelines.[3]

11.2 DEFINING TERMS RELEVANT TO ICWA

ICWA applies to "child custody proceedings" involving an "Indian child."[4] Some ICWA provisions also may be triggered in paternity proceedings and in certain voluntary arrangements for child placement.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] 25 U.S.C. §§1901-1963 (2010).

[2] 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. *See* American Indian Child Resource Center, *About ICWA*, http://www.aicrc.org/icwa.html (visited October 20, 2010); B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (1996); 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://splitfeathers.blogspot.com/2010/02/split-feathers-study-by-carol-locust.html (last visited October 20, 2010).

[3] The BIA Guidelines can be found at 44 Fed. Reg. 67 (1979). The BIA Guidelines for State Courts were originally published in the Federal Register in 1979. They have never been formally adopted as regulations of the Bureau of Indian Affairs and thus are not binding. Rather, the Guidelines are a non-binding resource regarding interpretation of ICWA.

[4] 25 U.S.C. § 1904.

A. "Indian Child"

IWCA applies to actions involving an "Indian child." The Act defines an Indian child as a child who is either **(a) a member of an Indian tribe, or (b) who is eligible to be a member of an Indian tribe and who is a biological child of a tribal member**.[5] 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.[6]

ICWA applies only to federally-recognized tribes and to Alaska native villages and corporations. There are more than 500 federally recognized Indian tribes in the United States. The Department of Interior is required by federal law to maintain and publish an annual list of federally-recognized tribes.[7]

Each tribe has its own rules for determining tribal membership.[8] Thus, it is imperative that the Idaho Department of Health and Welfare (IDHW) and the prosecutor consult with the tribe directly to determine if a child is a tribal member or is eligible for tribal membership. The Bureau of Indian Affairs (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.[9] 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.[10]

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. If there is any reason to believe that the child is an Indian child, notice must be provided and efforts must be made to verify the child's status. 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;

---

[5] *Id*.
[6] 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, § B.1(b)(i).
[7] The most recent list at the time of the publication of this Manual was dated October 1, 2010. *See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 75 Fed. Reg. 60810-01 (Oct. 1, 2010). The National Congress of American Indians maintains an up to day unofficial list of Tribes on its website at http://www.ncai.org/Tribal-Directory.3.0.html.
[8] Determining tribal membership is exclusively a tribal function because such determinations are 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.1(b)(i) and B.2.
[9] BIA Guidelines § B.1(b)(ii).
[10] In the Matter of Baby Boy Doe, 123 Idaho 464, 469-70, 849 P. 2d 925, 930-31(1993).

- 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.[11]

If the identity of the child's tribe is unknown, all possible identified tribes should be contacted as early as feasible to seek verification of the child's Indian status.

B. "Parent"

"Parent" is defined by ICWA as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom."[12] ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[13] Thus, putative fathers who have not established paternity are not considered parents for purposes of ICWA.

C. "Indian Custodian"

ICWA defines "Indian Custodian" as "any Indian 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 such child"[14]. Indian custodians have many of the same rights as a parent in an ICWA case.[15] Thus, where tribal law recognizes that a third party who has legal custody pursuant to an informal process, such a third part has standing in the ICWA case in state court as an Indian Custodian.

D. "Extended Family Member"

ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe." If the tribe does not have such law or custom, ICWA provides that an extended family member is "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[16]

E. "Child Custody Proceedings"

ICWA defines "child custody proceedings" to include any action involving a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. Most child welfare cases fall within the definitions of "foster care placement" and "termination of parental rights.[17]

---

[11] BIA Guidelines § B.5.
[12] 25 U.S.C. § 1903(9).
[13] *Id*.
[14] 25 U.S.C. § 1903(6).
[15] *See* Ted W. v. State, Dept. of Health & Social Services, Office Of Children's Services 204 P.3d 333, 337 (Alaska 2009); Pam R. v. State, Dept. of Health and Social Services, Office of Children's Services, 185 P.3d 67 F/N 6 (Alaska 2008).
[16] 25 U.S.C. § 1903(2).
[17] 25 U.S.C. §1903(1).

F. "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."[18] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian.[19] If a child is placed pursuant to a parent's stipulation at adjudication or disposition, the placement is not considered voluntary and is a "foster care placement" pursuant to ICWA.

G. "Termination of Parental Rights"

ICWA applies to any action resulting in the termination of the parent-child relationship.[20]

H. "Pre-Adoptive Placements" and "Adoptive Placements"

The Act applies both to private and agency adoptions and to adoptions that take place as part of a child protection case. Official state involvement through, for example, a child protection action, is not required.

"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." Many guardianships and long-term foster care placements fall within this provision

ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[21]

I. Private Custody Actions

Generally, ICWA does not apply to custody disputes between parents. However, ICWA may be triggered if custody of an Indian child is to be awarded to a non-parent as a result of private custody litigation.[22] Similarly, ICWA may be triggered if a non-parent family member independently seeks guardianship or custody of a child.[23] ICWA may also be triggered if a *de facto* custodian seeks custody of a child.[24]

---

[18] 25 U.S.C. §1903(1)(i).
[19] Voluntary placements are discussed in more detail later in this chapter.
[20] 25 U.S.C. §1903(1)(ii).
[21] 25 U.S.C. §1903(1)(iii) & (iv).
[22] There is a conflict of authority regarding whether I.C.W.A. applies in a purely intra-family dispute although the weight of authority supports the conclusion that I.C.W.A. does apply. See J. Thompkins, Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions, 81 U. Colo. L. Rev. (Fall 2010); In re custody of A.K.H., 502 N.W. 2d 709 (Minn. App. 1993)(holding I.C.W.A. applied in custody dispute between parents and grandmother of child); In re Bertelson, 617 P.2d 121 (Mont. 1980) (I.C.W.A. does not apply to intra-family disputes).
[23] Guardianship of Ashley Elizabeth, 863 P.2d 451 (N.M. App. 1993).
[24] It is unclear at this time what impact the new Idaho *DeFacto* statute will have, as no other states have similar legislation and the statute has not been reviewed by the courts as it pertains to an Indian Child.

J. Juvenile Corrections Act Proceedings

The BIA Guidelines expressly provide that ICWA does not apply to most juvenile corrections cases.[25] 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. When a JCA proceeding is expanded into a CPA proceeding pursuant to IJR 16, the CPA proceeding is governed by ICWA.

K. Voluntary Mental Health Placements Pursuant to Idaho Code § 20-511A

Voluntary placements, such as mental health placements pursuant to Idaho Code §20-511A, in which the parent or Indian custodian can regain custody of the child upon demand, are also excluded from ICWA.

L. 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 type of placement would not involve the filing of a CP petition but would be a voluntary agreement between IDHW and the parent. This type of voluntary placement is not governed by ICWA. The second situation, referred to as a "voluntary *foster care* placement," arises after the filing of a CP petition when 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.

When a parent consents to a voluntary foster care placement in which the parent may not demand immediate return of the child, a full blown CPA case is not required to comply with ICWA. However, ICWA requires that the parent's consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such consent must certify that the consequences of consenting to voluntary foster care placement were fully explained and were understood by the parent. Thus, the parent must appear before the judge for questioning. Such consent may only be executed more than ten days after the birth of a child.[26] ICWA also provides for the withdrawal of consent at any time in a voluntary foster care placement.[27] 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 by the state.[28]

Though full application of the Act is not required, best practice is to apply the Act and make the active efforts finding and the serious physical and emotional harm finding through testimony

---

[25] BIA Guidelines § B.3(a).
[26] 25 U.S.C. § 1913(a).
[27] 25 U.S.C. § 1913(b).
[28] B.J. JONES, ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 69-71(2d ed. 2008) (hereinafter ICWA HANDBOOK).

of a qualified expert witness at the elevated burden of proof. If the matter proceeds to an involuntary termination, these findings will become relevant in the termination action.

Finally, ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[29]

11.3 WHEN ICWA APPLIES, WHAT CHANGES IN THE CPA CASE?

ICWA imposes three categories of requirements on covered cases. First, ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, ICWA imposes substantive requirements for the removal of Indian children including imposing a higher standard in determining whether the state has worked hard enough to avoid removal of the child. The state must make sufficient remedial services and rehabilitative programs to prevent the breakup of the family after removal, evaluate the nature of the circumstances supporting removal, and ensure through expert testimony, evidence and an elevated burden of proof that an Indian child is only removed if continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Third, in addition to these jurisdictional and substantive requirements, ICWA imposes limitations on the placement of Indian children to ensure that to the extent possible they are not separated from their tribe and/or his or her Indian culture.

A. Procedural Requirements of ICWA

ICWA imposes procedural obligations on the court affecting jurisdiction, governing notice, providing for tribal intervention in child welfare cases, and conferring a right to counsel to indigent parents and Indian custodians.

B. Jurisdictional Requirements of ICWA

1. *Exclusive Jurisdiction*

a. ICWA Provisions Regarding Indian Children Domiciled Within the Reservation

ICWA provides that tribal courts have *exclusive* jurisdiction over any child custody proceeding involving an Indian child domiciled within the reservation of the tribe asserting jurisdiction.[30] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[31] 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.[32] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Holyfield v. Mississippi Band of Choctaws*.[33]

---

[29] 25 U.S.C. § 1913(d).
[30] 25 U.S.C. § 1911(a). The only potential 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. *See* discussion of P.L. 280 below.
[31] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990).
[32] 25 U.S.C. § 1911(a).
[33] 490 U.S. 30 (1989).

Domicile is broadly defined for purposes of ICWA. 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.[34] Furthermore, the Court reasoned that the jurisdiction provisions of ICWA must be interpreted to accomplish the purpose of the Act. Thus, a child who is temporarily residing off the reservation but who intends to return to the reservation is domiciled on the reservation. 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.[35] 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. Concurrent Jurisdiction Resulting From P.L. 280

Despite what appears to be clear language in ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states governed by Public Law 280. As a result of P.L. 280, despite the appearance of exclusive tribal jurisdiction, Idaho state courts and tribal courts currently exercise concurrent jurisdiction in cases involving reservation-domiciled Indian children.

Public Law 280 is a 1950's Congressional enactment granting states the option to extend their jurisdiction over reservations within their borders.[36] In 1963, Idaho adopted legislation pursuant to Public Law 280 purporting to exercise jurisdiction over "dependent, neglected and abused children."[37] The ICWA jurisdictional provisions may arguably be a revision of P.L. 280 with regard to Indian child welfare cases. If so, to the extent that ICWA and state jurisdiction under P.L. 280 appear to conflict, the ICWA jurisdictional provisions should control. In the only federal court to consider the conflict between P.L. 280 and ICWA, the Ninth Circuit determined that the exclusive jurisdiction provisions of ICWA were not intended to displace concurrent state court jurisdiction under P.L. 280.[38]

c. 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.[39] ICWA provides that such a temporary emergency placement should "terminate immediately when it is no longer necessary

---

[34] 490 U.S. at 43.
[35] 25 U.S.C. 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act.
[36] 67 Stat. 588 (1953).
[37] IDAHO CODE ANN.§ 67-5101 (2010).
[38] Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). For a discussion of *Doe v. Mann* in light of Idaho law, *see* Clay Smith, *Doe v. Mann: The Indian Child Welfare Act, the Rooker-Feldman Doctrine, And Public Law 280*, THE ADVOCATE, Feb. 2006 at 14.
[39] 25 U.S.C. § 1922.

to prevent imminent physical damage or harm to the child."[40] 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.[41]

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 may request that the case be transferred to tribal court.[42] 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.

If an appropriate request to transfer to tribal court is made, the case must be transferred unless one of the following exceptions to transfer apply. First, the court may decline to transfer the case if either parent objects to the transfer. Second, the state court may retain the case if the tribal court declines to accept jurisdiction. Third, 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.[43] 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.[44]

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;
- 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.[45]

[40] *Id*.
[41] *Id.*
[42] 25 U.S.C. §1911(b).
[43] BIA Guidelines § C.3(d).
[44] *Id.*
[45] BIA Guidelines § C.3.

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."[46]

b. Advanced Nature of the Proceeding[47]

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. This is particularly true while the permanency plan for the child is reunification with the parents. 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 the tribe's view that family relationship is still intact. The possibility of such a transfer underscores the importance of active tribal involvement in child protection cases.

c. A Child Over Twelve Years of Age Objects[48]

The BIA Guidelines suggest that a court should decline transfer if the Indian child is over twelve (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.

d. Inconvenient Forum[49]

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. Care

[46] *Id.*
[47] BIA Guidelines § C.3(b)(i)
[48] BIA Guidelines § C.3(b)(ii).
[49] BIA Guidelines § C.3(iii).

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 bring undue hardship and cannot be abated through the use of standard procedures, such as the taking of testimony telephonically.

e. Child has Little Contact With Tribal Members[50]

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 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.

f. 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.[51] 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.[52]

C. Notice of an ICWA Action

When there is reason to believe that the child is an Indian Child, notice must be provided to the child's parents, any Indian custodian, the Indian child's tribe, or, if the tribe is not identified, 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. ICWA's notice requirements are separate and apart from the notice/ service of process requirements under state law. The concepts of notice

[50] BIA Guidelines § C.3(iv).

[51] 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).

[52] 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).

and service should be distinguished. The child's Tribe is notified but not served. The BIA Guidelines provide for personal service in lieu of registered mail.[53] The other parties to the case are entitled both to notice under ICWA and are required to be served under state law.

In Idaho, personal service of the petition is required by the state Child Protective Act, Termination of Parental Rights statute, and Adoption statute.[54]

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.[55]

As a matter of best practice, the Department should send any information it has regarding the child, such as the child's date of birth, the parents' names and dates of birth, the genogram, and any other documents to the tribe. This information will assist the tribe in making an appropriate determination of the child's status.

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.[56]

Failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[57] 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.[58] 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 not discovered until after the proceedings have progressed that the child is an Indian child, despite appropriate inquiry, notice must be

[53] BIA Guidelines § B.5(e).
[54] *See* §§ 16-1611, 16-2007 and 16-1506.
[55] The BIA Guidelines provide that the notice should contain a statement, based on the general confidentiality of child welfare proceedings, that the tribal officials should keep the information contained in the notice confidential and should not reveal it to anyone who does not need the information in order to exercise the tribe's rights. BIA Guidelines § B.5(xi).
[56] 25 U.S.C. § 1912(a).
[57] *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).
[58] Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 1999).

given at that point. Even where notice should have been provided but was not, 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.[59]

Finding that the child is an Indian child is not a prerequisite to giving notice to a tribe of a pending action. ICWA provides for notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child.[60] The drafters of ICWA anticipated that the tribe would 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.[61]

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 are entitled to an additional twenty days to prepare for the proceeding upon making a request.[62]

D. Tribal Intervention in State Court Proceedings

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.[63] 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, best practice is to provide notice to the tribe in every case in which a court action is filed.

E. Right to Counsel

ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[64] The right to counsel applies to all the actions covered by ICWA:

[59] *See, e.g. id.*
[60] 25 U.S.C. § 1912; BIA Guidelines §B.5.
[61] BIA Guidelines § B.5.
[62] 25 U.S.C. § 1912(a).
[63] 25 U.S.C. § 1911(c).
[64] 25 U.S.C. § 1912(b).

pre-adoptive, adoption, foster care placements, and termination of parental rights (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.

11.4 SUBSTANTIVE REQUIREMENTS OF ICWA COVERING THE REMOVAL OF INDIAN CHILDREN FROM THEIR HOMES

In order to remove an Indian child from his or her home in an involuntary foster care proceeding, the party seeking to remove must show, and a court must find, that "active" efforts have been made to provide remedial and/or rehabilitative services to prevent the breakup of the Indian family and that these efforts have been unsuccessful.[65]

In addition, a court must find by clear and convincing evidence, supported by the testimony of qualified expert witnesses, that continued custody with the Indian parents or Indian custodian is likely to result in serious emotional or physical damage to the child.[66] These findings should be made at the adjudicatory hearing, as it will generally not be possible to have a qualified Indian expert in place and the evidence to make the findings may not yet be available prior to the adjudicatory hearing.

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. These findings are discussed in detail throughout this manual and in the relevant section of Chapter 12.

A. Active Efforts

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is generally considered to be a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[67]

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."[68]

The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Guidelines provide that active efforts "shall take into account the prevailing social and cultural conditions and the

---

[65] 25 U.S.C. § 1912(d).
[66] 25 U.S.C. § 1912(e).
[67] ICWA HANDBOOK, *supra* note 24, at 57-58.
[68] BIA Guideline § D.2, comment.

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."[69]

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 preponderance of the evidence.[70]

B. Serious Emotional and Physical Damage

As previously noted, 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."[71] 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."[72] 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.[73]

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.[74] 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.[75] Congress envisioned that the qualified expert would be more than a social worker.[76] 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

---

[69] BIA Guidelines § D.2.
[70] ICWA HANDBOOK, *supra* note 24 at 58.
[71] BIA Guidelines § D.3(c).
[72] *Id.*
[73] See BIA Guidelines § D.3 Commentary.
[74] 25 U.S.C. § 1912(e).
[75] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[76] *Id.* at 21.

- a lay person with "substantial experience" delivering services to Indians and "extensive knowledge" of tribal customs and practices; or
- a professional with "substantial education and experience in his or her area of specialty."[77]

In *In the Matter of Baby Boy Doe*,[78] 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.

D. Additional Substantive Requirements for Involuntary Termination of Parental Rights

Like involuntary foster care proceedings, no termination of parental rights may be ordered in the absence of a determination supported by evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that continued custody would result in "serious emotional or physical harm."[79] In addition, the court must find that the petitioner has made "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[80]

In addition to terminating the rights of parents of an Indian child, it is unclear of the rights of the Indian custodian must also be terminated in applicable cases.[81]

E. Consent to Termination of Parental Rights

ICWA provides that a parent or Indian custodian 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 consent must certify that the consequences of consenting to voluntary termination of parental rights were fully explained and were understood by the parent or Indian custodian. 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 consent must be executed at least 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 right of a parent to withdraw his or her consent expires upon the entry of the order terminating parental rights or upon the entry of an order of adoption.

---

[77] BIA Guidelines § D.4
[78] 127 Idaho 452, 902 P. 2d 477 (1996).
[79] 25 U.S.C. § 1912(f).
[80] 25 U.S.C. § 1912 (d).
[81] *See* 25 U.S.C. §§ 1912(f) and 1913. ICWA does not include Indian custodians within the definition of "parent" in 25 U.S.C. § 1903(9). The provisions relating to serious physical or emotional harm and voluntary termination refer to the Indian custodian but the active efforts provision and the withdrawal of consent for a voluntary termination provision do not. No cases were located in which an Indian Custodian's "parental rights" were terminated.

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.[82]

F. Placement Preferences 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."[83] In *Holyfield,* the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[84] 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 served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[85]

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.[86] 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."[87]

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."[88] The ICWA foster care placement preferences apply even where the child has not resided in an Indian family.[89]

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 the Indian child's extended family as defined by ICWA[90];
- A foster home licensed, approved, or specified by the child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian agency; or

---

[82] 25 U.S.C. § 1913(d).
[83] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[84] 430 U.S. at 36.
[85] 25 U.S.C. § 1902.
[86] 25 U.S.C. § 1915(b).
[87] 25 U.S.C. § 1915.
[88] 25 U.S.C. § 1915(d).
[89] *See* ICWA HANDBOOK, *supra* note 24 at 84-85.
[90] 25 U.S.C. § 1903(2).

- 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.[91]

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…"[92]

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.[93]

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.[94]

ICWA does not define "good cause". However, the BIA Guidelines provide that good cause may be found under the following circumstances:

- 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.[95]

3. *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. [96] Finally,

---

[91] 25 U.S.C. § 1915(b).
[92] 25 U.S.C.§ 1915(c).
[93] *Id.*
[94] *See* ICWA HANDBOOK, *supra* note 24 at 139, citing Adoption of N. P. S. 868 P. 2d 934 (Alaska 1994)(holding that a mere preponderance of the evidence is sufficient) and In re Custody of S. E. G., 507 N.W. 2d 872, 878 (Minn. Ct. App. 1994*), rev'd on other grounds,* 521 N.W. 2d 357 (Minn. 1994), *cert. denied sub nom.* Campbell v. Leach Lake Band of Chippewa Indians, 513 U.S. 1127 (1995)(holding clear and convincing evidence is necessary).
[95] BIA Guidelines §F.3.
[96] 430 U.S. at 38.

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.[97]

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.

4. *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.[98]

5. *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."[99]

G. 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:

- a member of the Indian child's extended family;
- other members of the Indian child's tribe; and
- other Indian families.[100]

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.

H. 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

[97] BIA Guidelines §F.3 Commentary.
[98] BIA Guidelines §F.3 and Commentary.
[99] *Id.*.
[100] 25 U.S.C. § 1915(a).

preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[101]

I. Return of Child to Parent or Indian Custodian

If a decree of adoption is set aside or if the adoptive parents consent to the termination of their parental rights, ICWA provides that a biological parent or prior Indian custodian may petition for return of the child. The court must grant the petition unless it is shown that returning the child to his or her former custodian is not in the best interests of the child. The proceeding seeking return of a child is subject to the procedural protections of section 1912 of ICWA including notice to the tribe, parents and Indian custodian, appointment of counsel, a finding of active efforts, and of serious emotional damage supported by the testimony of a qualified expert witness.[102]

11.5 THE IDAHO CHILD PROTECTION ACT AND ICWA INTEGRATED

A. Referral & Investigation

Under the Idaho Child Protection Act (CPA), a case is initiated when a child is removed from the home through a declaration of imminent danger, on order to remove the child, the conversion of a Juvenile Corrections Act case to a CPA case, or the filing of a Petition under the Act. In addition, children may be removed from the home through the use of a voluntary agreement with IDHW prior to the initiation of a case. The initiation of a case through any of these mechanisms triggers ICWA if the child is an Indian child.

During the investigation stage and at the time a case is initiated, IDHW should be taking steps to determine whether the child is an Indian child.

B. Initiation of the Case

Once the case is initiated, notice of the pending proceeding must be provided to the Indian child's tribe, parents, and Indian custodian. ICWA requires that 10 days notice be provided. This will not usually be possible in most cases where a shelter care hearing must be held within 48 hours.

ICWA was drafted prior to the institution in most states of emergency removal proceedings such as the shelter care hearing under Idaho law. To blend the federal Act with modern state practices, in consideration of ICWA's emergency removal provisions, states have taken the position that the tribe and parents of the Indian child must receive notice 10 days prior to the adjudicatory hearing.

In addition to the ten-day notice requirement, ICWA provides that the tribe and parents must be given an additional 20 days to prepare for the proceeding, at their request. The request for additional does not have to be in writing.

---

[101] 25 U.S.C. § 1916(b).
[102] 25 U.S.C. 1916(a).

Given the ICWA time frames for notice and the mandatory extension of time, it is imperative that the Indian child's status be determined as early as possible in each case and that notice be provided to the tribe and the parents as early as possible before the adjudicatory hearing.

Upon the filing of the petition, counsel should be appointed for indigent parents. This step, required by ICWA, is consistent with Idaho law which also requires appointment of counsel for parents.

C. Shelter Care

If possible at shelter care, the court should make findings regarding whether the child is an Indian child. Depending on how the case arose, these findings may or may not be possible. However, the earlier they are made, the more likely later phases of the case will comply with ICWA.

Even where the Indian child's tribal affiliation is known, notice is provided to the tribe and parents prior to shelter care, and all parties are present, it will not generally be possible to make the required ICWA findings of active efforts to prevent the breakup of the Indian family and serious emotional and physical damage at the shelter care hearing. This is because the finding of serious emotional and physical damage must be supported by the testimony of a qualified expert witness. Such expert testimony will rarely be available at shelter care. In addition because of the heightened burden of proof, it is difficult to gather all the necessary evidence in the 48-hour shelter care timeframe.

It is always appropriate for a court to monitor the progress of the state in determining the child's status as a member of a Tribe or the child's eligibility for Tribal membership and/or preparing to make the required ICWA showings at the shelter care hearing as appropriate progress on these matters will ensure that the case is not delayed later in the process.

D. Adjudicatory Hearing

1. *Procedural Matters: Phase I*

At Phase I, adjudication, the court should make findings as to whether the child is an Indian child, the basis for the court's exercise of jurisdiction pursuant to ICWA, and whether the notice to the tribe and parents complied with the requirements of ICWA.

Different tribes approach their involvement in ICWA cases involving tribal children in different ways. Some tribes regularly seek transfer of ICWA cases to tribal court. Others intervene and actively participate in state court cases involving tribal children. Still other tribes quietly monitor the case but do not intervene and participate as a party during the adjudicatory and planning phases. Occasionally, tribes may not intervene until later in the proceedings, such as when a termination is filed. The tribe has the right to intervene at any point in the proceeding.[103]

[103] 25 U.S.C. §1911(c).

These different approaches are the result of different cultural practices among tribes and are driven, in part, by the tribal resources available for child welfare. ICWA anticipates many different levels of tribal involvement in cases. While it can be frustrating for state courts and for the Department when the tribe is not active or when it intervenes unexpectedly, the decision regarding involvement is the tribe's, is supported by ICWA, and must be accommodated by the court and parties.

2. *Substantive Matters: Phase I*

In addition to resolving procedural issues, the required ICWA findings must be made at Phase I of the adjudicatory hearing. Thus, in addition to the findings under the CPA and federal IV-E findings, the court must find that (1) IDHW made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those services were unsuccessful; and (2) continued custody with the parents will result in serious physical or emotional damage to the child. This second finding must be supported by the testimony of a qualified expert witness. The second finding is subject to a clear and convincing standard of review under ICWA. The expert's testimony may not be waived. If the parties plan to stipulate at the adjudicatory, an affidavit from a qualified expert must be included that will support a finding under ICWA. Alternatively, a separate hearing can be set for the qualified expert witness to testify regarding the serious physical or emotional harm provision under 25 U.S.C. § 1912 (f),

ICWA does not provide any exceptions to the active efforts requirement which would allow a streamlined process for situations in which the facts would support a finding of aggravated circumstances under state law. Thus, in a case involving an Indian child, courts should not make findings of aggravated circumstances and should ensure that the normal ICWA process toward permanency is observed.

3. *Substantive Matters: Phase II*

During Phase II, disposition, the court must evaluate whether the disposition for the child put forth by IDHW complies with the placement preferences of ICWA. If one of the parties argues that the placement does not meet the placement preferences, the Court will need make a finding of good cause or it must reject the proposed placement and direct the Department to recommend a complying placement or to present evidence of good cause to support a non-complying placement.

E. Case Plan Hearing and Review Hearings

By the time case plan or review hearings are held, ideally the child's Indian child status has been firmly established, the required ICWA findings have been made if the child has been removed from the custody of his or her parents, and the child is placed in an ICWA preferred placement.

What remains at this time is for the court to continue monitoring the child's status as an Indian child if the issue has not been resolved and to monitor the ICWA-compliant placement. If the child's placement must be altered, the same rules apply to the new placement as to the

original placement. In addition, the court should ensure that active efforts are being made to provide remedial services and rehabilitative programs to the family.

F. Permanency Hearing

ICWA alters the permanency options for the child in several ways. Many tribes do not recognize the concept of termination and thus a tribe may oppose a termination action even though they have been supportive of the case previously. In addition, the stricter requirements under ICWA make the case harder to prove. ICWA does not establish independent grounds for termination, however, the serious physical or emotional harm requirement under 25 U.S.C. § 1912 (f) does require the testimony of a qualified expert witness and evidence that is beyond a reasonable doubt. The active efforts finding must also be made. As a result of these factors, termination of parental rights may be less common in ICWA cases.

CHAPTER 12:
Special Topics in Child Protection Cases

12.1 Relevant Federal Statutes

12.2 Idaho Juvenile Rule Expansions

12.3 Notifying and Including Unwed Fathers in Child Protective Act Proceedings

12.4 The Idaho Safe Haven Statute

12.5 DeFacto Custodians and Child Protective Act Proceedings

12.6 Findings Required to Establish and/or Maintain a Child's Eligibility for Federal IV-E Funding

12.7 Interstate Compact on the Placement of Children (ICPC)

12.8 Juvenile Rule 40: Involving Children and Foster Parents in Court

12.9 Educational Needs of Children

12.10 Independent Living

12.11 Guardianships

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

12.1 RELEVANT FEDERAL STATUTES

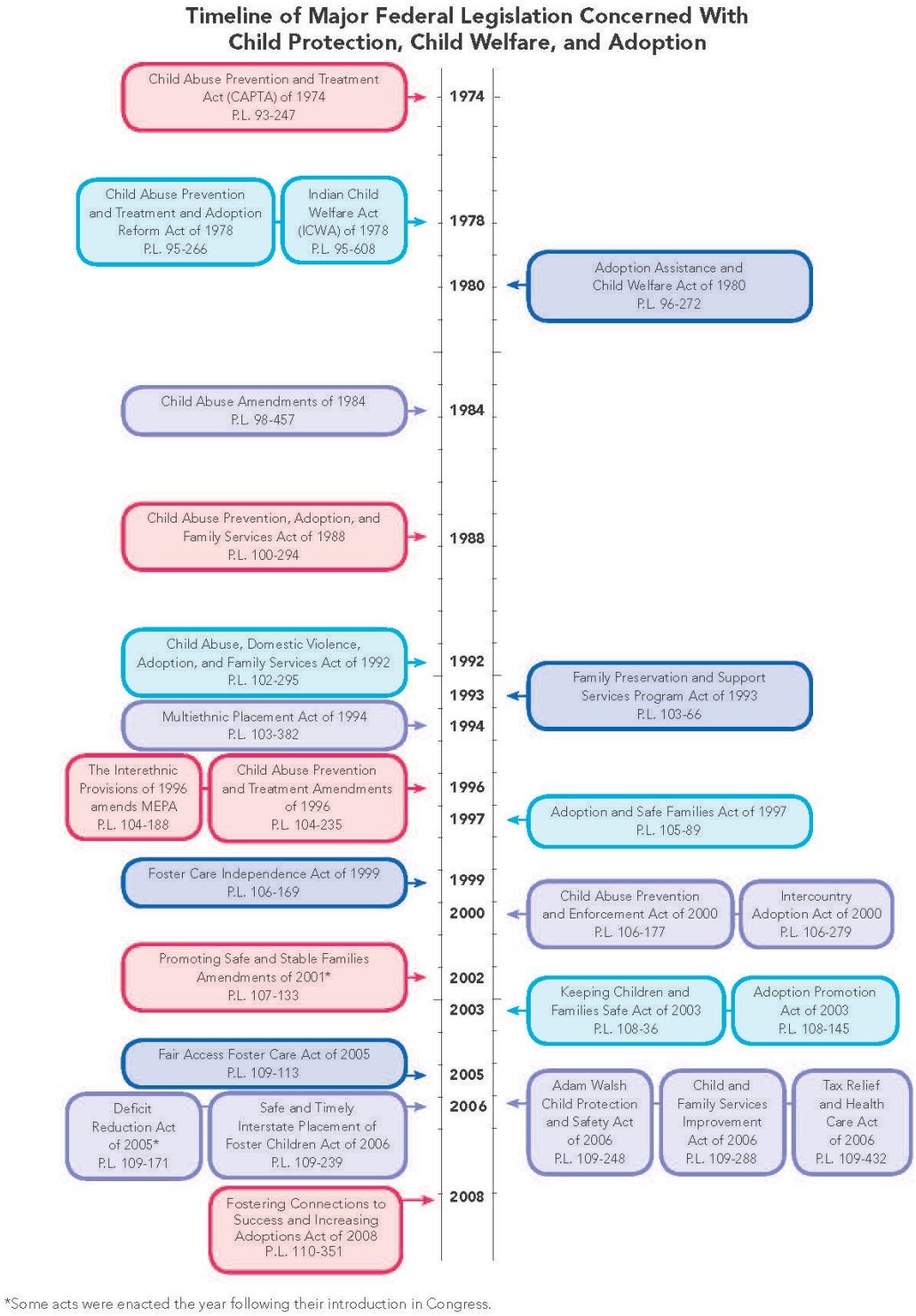


Table 12.7: Relevant Federal Child Protection Statutes
Courtesy: Child Welfare Information Gateway, 2009.

12.2 IDAHO JUVENILE RULE EXPANSIONS

Idaho Juvenile Rule 16[1] is a powerful tool, used by judges in Juvenile Corrections Act (JCA) cases to ensure collaboration between the juvenile justice system and the child protection system. Each system offers different services and resources and each system trains their workers in different skills. The rule provides a basis for sharing resources to serve the needs of the child. Both may be needed to meet the needs of a child and her/his family.

Without notice, a chance to plan, or an opportunity to follow normal investigative procedures, Rule 16 expansions may not feel like a "collaboration" but rather a "clobberation" to the Department. Sometimes there are no other options; when possible, however, actions can be taken to more effectively use a Rule 16 expansion.

In some cases, the facts present decisions makers with a choice regarding whether a child shows up before a judge in a juvenile corrections case or whether her/his parents appear in a child protection case. Assume, for example, that "Bobby" is caught stealing food at a local market. Bobby can be charged with violation of the JCA. The officer might charge and release, or charge and notify parents, or charge and take Bobby to detention. If the officer choses any of these options, Bobby becomes subject to the jurisdiction of the Juvenile Justice system. In the alternative, the officer may decide to take Bobby home where the officer may discover that Bobby's parents cannot be located. Upon further questioning, the officer learns that Bobby's father is not part of Bobby's life and that Bobby's mother is away with friends for a few days. The house where Bobby lives with his two younger siblings has no heat, water, or food. Rather that pursuing one of the options provided by the JCA, the officer may decide to make a declaration of imminent danger. If this happens, Bobby, and most likely his siblings, will become part of the child protection system.

Much research has focused on the link between juvenile justice and child welfare.[2] "The Child Welfare System has an important impact on the juvenile justice system. Research is clear that youth who have been abused and neglected are at heightened risk for early onset of delinquency."[3] This causal link is discussed further in the journal *Criminology*, with an article by C.S. Widom which states: "Over the last forty years, researchers have repeatedly demonstrated the connection between childhood maltreatment and delinquency. Many of our maltreated youths cross over into the juvenile justice and other systems of care, as child abuse and/or neglect increases the risk of arrest as a juvenile by 55% and the risk of committing a violent crime by 96%."[4]

An Idaho judge may not always choose how the child's case enters the court system, however the judge does have the authority to take actions to meet the needs of the child. Idaho Juvenile Rule 16 allows a juvenile court, acting under the Juvenile Corrections Act, to reach across

---

[1] The statutory basis for Rule 16 is found in Idaho Code § 20-520 (m) (2010) and Idaho Code § 16-1613(3). IDAHO CODE ANN. §§ 20-520 & 16-1613(3)(2010).
[2] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 21 (2005).
[3] Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice: Two Sides of the Same Coin, Part II*, JUV. & FA, JUSTICE TODAY (Winter 2009), p. 21.
[4] *Id*.

systems and agencies to the Child Protection Act (CPA). The CPA and Rule 16 also permit a child protection judge to reach across to the juvenile justice system and its resources under the JCA.[5] Rule 16 provides: "At any stage of a proceeding under this chapter, if the court determines that it is the best interests of the child or society, the court may cause the proceedings to be expanded or altered to include full partial consideration of the cause under the juvenile corrections act without terminating the original proceeding under this chapter."[6]

Tools in both systems allow a judge to collect information and recommendations to assist in good decision making and in providing appropriate services. These include:

1. Idaho Juvenile Rule 16(a) also allows the court to order the Department of Health and Welfare to investigate and report to the court without expanding to a CPA.
2. Idaho Code § 20-520 allows the court to order the Department of Health and Welfare to conduct "A comprehensive substance abuse assessment of the juvenile."[7]
3. Idaho Code § 20-523 allows the court to order a screening team composed of officers or agencies designated by the court to screen and make recommendations to the court.
4. Idaho Code § 20-511A allows the court to order assessment and screening teams for juveniles with mental health issues.[8]
5. Idaho Code § 20-520(m) also supports cross-system intervention when necessary. It provides: "Order the proceedings expanded or altered to include consideration of the cause pursuant to Chapter 16, Title 16, Idaho Code."[9]
6. Idaho Juvenile Rule 19 also allows the court to convene screening teams with state agencies (eg: the Department of Health and Welfare and the Department of Juvenile Corrections), and local entities (eg: county Juvenile Probation and school districts), and the family of the child, required by the court to cooperate in planning for the child.

Each of these tools has its own purpose. The key is using each tool at the proper time to alleviate the child's issues and to provide resources from different sources. The court can ensure collaboration instead of letting each system view the child as someone else's problem.

The division of responsibilities within the Department of Health and Welfare and within the Department of Juvenile Corrections should not be allowed to hinder delivery of services. The court can motivate cooperative work within Health and Welfare between departments such as Children's Mental Health, Adult Mental Health, Substance Abuse, Family and Children's Services, Child Support, Vital Statistics, and others.

---

[5] IDAHO CODE ANN. § 16-1613(3)(2010); IDAHO JUV. R. 16.
[6] § 16-1613(3).
[7] § 20-520(1)(m)
[8] § 20-511A. Childhood maltreatment and neglect can cause a host of short and long term negative consequences. Early physical abuse and neglect may impede development and cause adverse alterations to important regions of the brain, which can have long-term cognitive, emotional, and behavioral consequences. Children abused early in life may exhibit poor physical and mental health well into adulthood. ROBIN KARR-MORSE, ET AL., GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE (1999).
[9] § 20-520(m)

Best practice recommendations in the use of Rule 16 include:

1. Inviting a Health and Welfare representative to JCA hearings when the use of Rule 16 is contemplated.
2. When possible, use the option of ordering an investigation instead of a full expansion.
3. Use Screening Teams where possible.
4. If expansion or investigation is ordered, provide a copy of court records to Health and Welfare from the JCA proceedings.

* * *

12.3 NOTIFYING AND INCLUDING UNWED FATHERS IN CHILD PROTECTIVE ACT PROCEEDINGS

The Idaho Child Protective Act (CPA) does not define the term "parent." As a result significant issues can arise in determining whether and when an absent father should be joined as a party in a CPA proceeding. Courts and lawyers confronted with questions regarding the status of an alleged father in a CPA case should carefully evaluate related statutory definitions of parents contained in the Idaho adoption and termination of parental rights statutes and in the Idaho law regarding the establishment of paternity. In addition, state and federal case law regarding the constitutional rights of unwed fathers also should be considered.

A. Idaho Statutory Provisions Regarding the Definition of "Parent"

1. *Paternity Statute*

The paternity statute establishes two processes for legally establishing paternity. Paternity proceedings may, first, be initiated by the filing of a verified Voluntary Acknowledgement of Parentage[10] or second, by filing a verified complaint naming a defendant who is the alleged father of the child.[11]

The Paternity Statute does not define the term "parent." However, the term "father" is defined as "the biological father of a child born out of wedlock."[12] In *Johnson v. Studley-Preston*,[13] the Idaho Supreme Court interpreted the phrase "born out of wedlock" in this definition to refer to the status of the biological parents' relationship to each other. Thus the Court concluded that a child born to a married woman, but biologically conceived with a man other than her husband, was "born out of wedlock" even though the biological mother of the child was married, because the biological parents of the child were not married to each other.[14] Based on this reasoning, the Court concluded that the father of a child born while the mother was married to another person had standing to bring an action under the Paternity Statute.

2. *Adoption Statute*

The adoption statute does not define the term "parent." By implication, as following analysis indicates, however, the statute provides guidance on who might be considered a parent through its provisions regarding who must consent to and/or receive notice of an adoption.

---

[10] IDAHO CODE § 7-1111(1) (2010); Voluntary Acknowledgments of Paternity are discussed later in this section and are governed by § 7-1106.
[11] § 7-1111.
[12] § 7-1103(4).
[13] 119 Idaho 1055, 812 P. 2d 1216 (1991). *But see* Doe v. Roe, 142 Idaho 202, 127 P. 3d 105 (2005)(*Doe I 2005*). In *Doe I 2005*, the married, presumed father brought an action to terminate the parental rights of the unmarried, biological father of the child. In *Doe I 2005*, the Court held that an unmarried biological father was not a "father" and that he had no rights that required termination because he had not pursued a paternity action, filed a voluntary acknowledgement of paternity, or taken steps to establish a relationship with his child.
[14] *Id*. at 1057, 812 P. 2d at 1218.

a. Consent

The consent of the man who fits in one of the following four groups is required for an adoption:

1. **The consent of both parents (including the father) is required for the adoption of a child who was "conceived or born within a marriage**."[15] This provision implies that a man who is married to the mother at the time a child is conceived or born has at least an interest in being considered the father of the child. In addition, the notice provisions of the Adoption Statute provide that "any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption" is entitled to notice of the adoption proceeding.[16] These provisions are consistent with the Termination of Parent-Child Relationship Statute ("TPR Statute") which defines a "presumed father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated." [17]

   This provision of the adoption statute is also consistent with the Paternity Statute which provides a means by which the man married to the mother at the time of the conception or birth of a child, can file an "affidavit of non-paternity."[18] The negative implication is that, without such a process, the man married to the mother at the time of the conception or birth of a child might otherwise be considered the father of the child.

2. **A man who has been adjudicated the biological father by a court**, prior to the mother's execution of consent to the adoption, must consent to an adoption.[19] Pursuant to this provision, any man who obtains a timely adjudication of paternity must consent to a subsequent adoption of the child.[20]

3. **An unmarried biological father who has filed a Voluntary Acknowledgement of Paternity** pursuant to the paternity statute.[21] The Paternity Statute provides that an appropriately executed, notarized Voluntary Acknowledgement of Paternity filed with the Idaho Department of Health and Welfare "shall constitute a legal finding of paternity."[22] While the language of the Adoption Statute could be read to imply that the father can file such an acknowledgment on his own, the Paternity Statute makes clear that a Voluntary Acknowledgement of Paternity must be executed by both the "alleged father" and the mother of the child.[23]

---

[15] IDAHO CODE § 16-1504(1)(b) (2010).
[16] § 16-1505(1)(f).
[17] *See* § 16-2002(12), discussed later in this Chapter.
[18] § 7-1106(1).
[19] § 16-1504(1)(d).
[20] Interestingly, the Paternity Statute assumes that a man would either voluntarily acknowledge paternity or would resist the allegation that he is the father of a child, as it provides the verified complaint in a paternity proceeding must allege that "the person *named as defendant* is the father of the child." § 7-1111(1)(emphasis added).
[21] § 16-1504(1)(i).
[22] § 7-1106(1).
[23] § 7-1106(1).

4. **An unmarried biological father who demonstrates through his conduct that he is committed to fulfilling his responsibilities as a father** toward the child must consent to an adoption if he meets certain requirements and conditions.[24] Pursuant to the Adoption Statute, the unmarried biological father must fall within one of these three categories:[25]
    a. If the child is more than six months of age at the time of placement, the unmarried biological father must have "developed a substantial relationship with the child, taken some measure of responsibility for the child and the child's future, and demonstrated a full commitment to the responsibilities of parenthood by financial support of the child," and, when not prevented from doing so by a third party, either visited the child monthly or communicated with the child regularly;
    b. The unmarried biological father must have lived openly with the child for a period of six months within one year after the birth of the child and immediately preceding the placement of the child with adoptive parents, and must have "openly held himself out to be the father of the child"; or,
    c. If the child is under six months of age at the time of placement, the unmarried biological father must have commenced paternity proceedings and must file an affidavit stating that he is fully able and willing to have full custody of the child, setting forth his plans for the care of the child, and agreeing to a court order of child support and payment of expenses incurred in connection with the mother's pregnancy and the child's birth. In addition the unmarried biological father must file a notice of his commencement of paternity proceedings with the Bureau of Vital statistics pursuant to Idaho Code § 16-1513. Finally, if he had actual knowledge of the pregnancy he must pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth in accordance with his means and assuming he was not prevented from doing so by a third party. Idaho Code § 16-1513 provides that the required notice of commencement of paternity must be filed prior to the placement of the child for adoption.[26]

In *Doe I 2005*[27] the Idaho Supreme Court interpreted these provisions in the context of a termination of parental rights case. The TPR Statute cross-references and incorporates the notice and consent provisions of the Adoption Statute.[28] In *Doe I 2005* the Idaho Supreme Court held that an unmarried biological father was not a "father" whose rights had to be terminated under the TPR Statute. It reasoned that the father in the case was not entitled to notice of the termination of parental rights action because he did not fall within any of the categories of men under the TPR Statute or under the incorporated Adoption notice and consent provisions, who were entitled to notice. The unmarried biological father had not filed in the putative father registry nor had he attempted to file a Voluntary Acknowledgment of Paternity. He had not

[24] § 16-1504(1)(e).
[25] These provisions are all set forth in § 16-1504(2).
[26] § 16-1513(2). *But see* Burch v. Hearn, 116 Idaho 956, 782 P. 2d 1238 (1989)(A paternity action may be filed at any time within the Paternity Statute's time limitations if it is not connected to an adoption or action to terminate parental rights).
[27] *Doe I 2005*, 142 Idaho 202, 127 P. 3d 105.
[28] *See* § 16-2007, cross-referencing and incorporating the adoption notice provisions in Idaho Code § 16-1505. Section 16-1505, the adoption notice provision, cross-references and incorporates the adoption consent provision, section 16-1504.

commenced paternity proceedings. And finally, he had never even attempted to support his child or establish a relationship with his child over a four year period of time.[29] Since the child's birth, the father had had no contact with the child and had not paid support; he only had expressed interest in the child at the urging of the mother in order to assist her in her custody dispute with her husband (the "presumed father"[30] of the child).

The Court recently affirmed the reasoning of *Doe I 2005* in *Department of Health & Welfare v. Doe* (hereinafter *Doe 2010*).[31] The Court held that an unmarried biological father was not a person whose rights had to be terminated under the TPR Statute. In *Doe 2010*, the Court concluded that there was no reason to terminate the rights of an unmarried biological father who had not been adjudicated the father of the child, had not filed a Voluntary Acknowledgement of Paternity, and had not established a relationship with the child or supported the child. In the four years after the child's birth, the biological father had been in prison, had only two contacts with the child, and had contributed only a very small amount indirectly to the child's support.

b. Notice

In addition to the consent provisions outlined above, the adoption statute provides that certain additional men, whose consent is not required by the statute, must nonetheless receive notice of an adoption proceeding. The adoption statute expressly provides that the purpose of notice is to enable the notified person to "present evidence to the court relevant to the best interest of the child."[32] Three categories of people are entitled to such notice:

- Any person who is recorded on the birth certificate as the child's father with the knowledge and consent of the mother unless such right to notice or parental rights have been previously terminated.[33]
- Any person who is 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 to be the child's father, unless such rights to notice or parental rights have been previously terminated.[34]
- Any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption.[35]

These notice provisions are especially ambiguous. The first two provisions expressly condition the right to notice on the fact that the parental rights of the covered persons have not been terminated. Yet some individuals who come within these notice provisions would not be required to consent to an adoption of the child, and under *Doe I 2005* and *Doe 2010* do not have parental rights that must be terminated. The consent of a man under the third provision is expressly required by the adoption statute.

---

[29] *Doe I 2005*, 142 Idaho at 205, 127 P. 3d at 108.
[30] The Idaho TPR Statute provides that the man married to the mother at the time the child is conceived or born is the "presumptive father." § 16-2002(12).
[31] ___Idaho ___, 244 P. 3d 232 (2010)(*Doe III 2010*).
[32] § 16-1505(9).
[33] § 16-1505(1)(d).
[34] § 16-1505(1)(e).
[35] § 16-1505(1)(f).

The Idaho Supreme Court has not interpreted these provisions of the adoption statute. Thus, it is not clear whether this right to notice for the purpose of presenting evidence regarding the child's best interest means that men covered under these provisions but not fitting in any of the provisions regarding consent to adoption would be considered to be a father of the child.

B. Termination of Parental-Child Relationship Statute

The TPR Statute defines "parent" as:

(a) The birth mother or the adoptive mother;
(b) The adoptive father;
(c) The biological father of a child conceived or born during the father's marriage to the mother; and
(d) The unmarried biological father whose consent to an adoption of the child is required pursuant to section 16-1504, Idaho Code[36]

With regard to part (d), any person in one of the four adoption consent categories discussed above would be considered a "parent" for purposes of termination of parental rights.

The TPR statute further provides that a "presumptive father" is "a man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated."[37]

Finally, the TPR statute provides that "unmarried biological father "…means the biological father of a child who was not married to the child's mother at the time the child was conceived or born."[38]

While the definitions of a parent whose rights may be terminated under the TPR statute appear at first blush to be consistent with the provisions for consent to adoption (although not the provisions for notice of adoption), the notice provision in the TPR statute creates new ambiguity. It states that where a "putative father" has failed to commence paternity proceedings in a timely fashion notice is not required "*unless such putative father is one of those persons specifically set forth in section 16-1505(1), Idaho Code*."[39] The referenced provision is the adoption *notice* provision. Thus, it appears that by its express language the TPR statute requires notice to be provided to any person whose consent would be required for adoption because such persons are "parents" for purposes of the TPR statute, as well as any person who is entitled to notice of an adoption action. Like the adoption statute's notice provisions, the TPR notice provisions do not clarify whether the parental rights of a man entitled to notice but not fitting the definition of "parent" must be terminated.

---

[36] § 16-2002(11). In *Doe v. Doe*, 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*) the court reasoned that a father who, with the mother, had completed a "Voluntary Acknowledgement of Paternity Application" and who was subsequently listed as the father on the child's birth certificate was an "unmarried biological father" under § 16-2002(p). This section has been amended and is now section 16-2002(11)(11).
[37] § 16-2002(12)
[38] § 16-2002(15)
[39] § 16-2007(5)

C. U.S. Supreme Court Authority Relevant to the Constitutional Rights of Unmarried Fathers

In a series of cases beginning with *Stanley v. Illinois*,[40] and through *Lehr v. Robinson*,[41] the United States Supreme Court has made clear that an unwed father has a constitutionally protected liberty interest in establishing a relationship with his child. The Court has concluded that this interest is strongest when the father has lived together with the child in a family unit and that the right cannot be unilaterally terminated without notice by a state's failure to provide an adequate procedural framework that allows the unwed father to protect his rights.

In *Stanley*, the unwed father and mother had lived together for approximately 18 years, during which they had three children. When the mother died suddenly, the state of Illinois initiated a dependency proceeding, took custody of the children as wards of the state, and declined to give Stanley, the father, an opportunity to be heard. The state court reasoned that Stanley did not have a right to be heard because he was not married to his children's mother. The state statutory scheme assumed that "an unwed father is not a 'parent' whose existing relationship with his children must be considered."[42]

The Supreme Court rejected the implicit state presumption that all unwed fathers were unfit. Rather, the Court held that a state cannot terminate the parental rights of an unwed father who has lived together with his children in a family unit without first conducting a hearing to determine whether the father is unfit. It rejected the state's argument regarding efficient handling of adoption, concluding instead that:

> [p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[43]

The *Stanley* reasoning was extended by the U. S. Supreme Court in *Quilloin v. Wolcott*[44] and *Caban v. Mohammed*.[45] In both of these cases, stepfathers sought to adopt stepchildren over the objections of the children's biological fathers. As in many states at the time, statutes in both jurisdictions provided that an unmarried father's child could be adopted without his consent if the court found the adoption to be in the child's best interests. However, the statutes also allowed other categories of parents, "married fathers and all mothers," to veto adoption of their children unless the vetoing parent was found to be unfit or to have abandoned the child. In both *Quilloin* and *Caban*, the unmarried fathers challenged the constitutionality of these statutory schemes on equal protection and substantive due process grounds arguing that, like other parents, their parental rights could not be terminated without notice and a hearing, at which they would be accorded the opportunity to present evidence regarding the best interests of the child.

---

[40] 405 U.S. 645 (1972).
[41] 463 U.S. 248 (1983).
[42] *Stanley*, 405 U.S. at 649-50.
[43] *Id.*
[44] 434 U.S. 246 (1978).
[45] 441 U.S. 380 (1979).

In *Quilloin*, the unwed father had had little or no contact with the child or mother in the nine years after the child's birth. He had not paid child support, had rarely visited or contacted the child, and had not filed any action to establish his paternity. Only after the stepfather began proceedings to adopt the child did the unwed birth father make any attempt to assert his parental rights. The Court held that because the father had not lived together in a family unit with his child and had not "seized his opportunity interest," he had no protectable liberty interest in establishing his parentage.[46] Thus it upheld the statutory scheme.

In *Caban*, the father had lived together with his children and their mother for two years, and thereafter had substantial, although sometimes indirect, contact with the children. The Court reasoned that he had a cognizable liberty interest in continuing his relationship with his children. He had lived with them and their mother for the first two years of their lives. After that he had indirect contact with them through their grandmother over a period of several years. He did not seek to establish his paternity formally. Nor did he pay child support to the children's mother. However, the Court recognized that, despite failing to comply with formal obligations of parenthood, Caban had "established a parental relationship" with his children, and the Court thus concluded that the statutory scheme that treated an unwed father with an established parental relationship differently from mothers and married fathers violated Caban's equal protection rights.[47]

Together, *Stanley*, *Quilloin,* and *Caban* established the fundamental principle that an unwed father who has lived in a family unit with his children or otherwise has established a relationship with them through contact, establishing paternity, and/or paying child support has a constitutionally protected liberty interest that cannot be ignored because he has not filed a paternity action and was not married to his children's mother. The most important factor considered by the court in this trio of cases was whether the father actually had resided with the children as part of a family unit. The cases did not address the rights of unwed fathers who had not yet had the opportunity to establish a parental relationship.

This latter situation was addressed in *Lehr v. Robinson*.[48] In *Lehr*, the father had expressed his interest in parenting the child since the child's birth but never had the opportunity to establish a relationship with the child because of the interference of the mother and because of his own ineffectiveness. The Court recognized than even a father with no established relationship with his child has a liberty interest protected by the Constitution:

> [T]he significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."[49]

[46] *Quilloin,* 434 U.S. at 256.
[47] *Caban,* 441 U.S. at 385.
[48] 463 U.S. 248 (1983).
[49] *Lehr*, 463 U.S. at 262.

The Court concluded that a state could terminate the parental rights of an unwed father who had not established a relationship with his child only if the state provided the opportunity for the father to assert his relationship. Such an opportunity is provided where the state has a statutory scheme that is likely to notify most interested fathers and that provides the father a way of asserting parental rights independent of the mother. In *Lehr*, the Court found that the New York statute in question required notice be provided to seven categories of men who might be interested in being a father, including men who had resided with the mother during the pregnancy and/or after the child's birth and who held themselves out as the father of the child. In addition, the Court approved New York's "putative father registry", which permitted men to register their interest in paternity by filing a post card with the state.

The most recent U.S. Supreme Court case in this area is *Michael H v. Gerald D.*[50] The Court held that California's conclusive presumption that the man married to the mother at the time of the child's birth is the legal father of the child did not violate the due process rights of the unwed biological father. The case involved a situation in which the mother, while separated from her husband, had a child and lived with the child and the child's biological father in a family unit for a period of time. The relationship between the mother and father broke up and the mother reconciled with her husband. When the biological father attempted to formally establish his paternity and obtain visitation with the child, the mother and her husband argued that California law barred the father's action. The Supreme Court recognized the constitutional rights of the unwed father, but reasoned that a state could constitutionally prefer the marital father to the unwed father because of the importance of protecting the marital relationship.

Read together, *Stanley*, *Quilloin*, *Caban*, and *Lehr* stand for the proposition that all fathers have a constitutionally protected interest in parenting their children. While fathers who have established relationships with their children are entitled to more constitutional protection than fathers who have not yet established their relationships with their children, even unwed fathers in this latter group cannot be completely foreclosed from decision making regarding their child under all circumstances. These men, according to *Lehr*, have an "opportunity interest" that no other man has to establish a relationship with their children. Because of this interest, states may not terminate the parental rights of a man who has an established family relationship with his children without providing notice and a right to be heard on the question of the children's best interests. Furthermore, states must have a statutory scheme that is calculated to include most responsible unwed fathers within the requirement for notice and which provides an unmarried father the ability to assert parental rights that is within the reach of the putative father and not subject to veto through the actions of a third party (such as the child's mother). Finally, however, the constitutional rights of an unwed father may be secondary to a state's interest in protecting and fostering marriage.

D. Idaho Supreme Court and Court of Appeals Cases Relevant to the Rights of Unmarried Fathers

The Idaho Supreme Court and Court of Appeals have decided a number of cases in recent years relevant to the interpretation of the Idaho provisions regarding unwed fathers.

[50] 491 U.S. 110 (1989).

The first such case was *Steve B.D. v. Swan*[51]. There, the Idaho Supreme Court adopted some of the reasoning of *Lehr*. In *Steve B.D.* the father knew of the child's birth and visited the child and mother in the hospital. After that time, however, he had no contact with the child, offered no financial support for the child, refused to sign an affidavit of paternity, and did not marry the child's mother. The father also did not file in the Idaho Putative Father Registry, which existed at that time.[52] After the child's birth, the mother, without the knowledge of the father, placed the child for adoption and stated under oath that she did not know who the father of the child was.

Subsequently, the mother attempted to revoke her consent to the adoption[53]. At the time, efforts were being made to provide the father with notice by publication (based on the mother's testimony that she did not know who the father was), and the unwed father was subsequently permitted to intervene in the mother's action to revoke her consent to adoption. The father argued that he relied on the mother's representations that she planned to keep the child. Under those circumstances, the Idaho Court found that although the father had an "opportunity interest" under *Lehr v. Robinson*, he had not established a substantial relationship with the child and had not seized his interest in any other cognizable way. Thus, the Court concluded that the father's consent was not needed for the adoption.

Interestingly, the Idaho Court, while relying on *Lehr*, did not review the constitutional sufficiency of the Idaho statutory scheme for notice of adoption and TPR proceedings. Instead, the Court focused on the quality of the father's relationship with the child. It is not clear whether the scheme in force at the time was constitutionally sufficient.

The Idaho Supreme Court next addressed the rights of unwed fathers in *Johnson v. Studley-Preston*.[54] In *Johnson*, the Court reversed the trial court's holding that an unwed father lacked standing to file a Paternity action because he had failed to establish a substantial relationship with the child. The Supreme Court held that the adoption notice provisions regarding putative fathers only applied to limit paternity claims where such claims arise in connection with an adoption or termination of parental rights case. In *Johnson*, no action for adoption or TPR had been filed. Instead, after the mother left her relationship with the unwed biological father and married another man, the unwed biological father sought to establish his parental relationship by seeking an order of paternity. Further, the Court held that although the mother of the child was married at the time of the child's birth, the child was, nonetheless, a "child born out of wedlock" for purposes of the Paternity Statute because the mother was not married to the biological father. Thus the unwed biological father's paternity action was not barred by his failure to register in the putative father registry and was properly filed under the provisions of the Paternity Statute.

In *Roe Family Services v. Doe (Doe 2004)*[55] the Court addressed the requirements for notice to an unwed father under the TPR Statute. It held that an unmarried biological father who was

[51] 112 Idaho 22, 730 P. 2d 732 (1986).
[52] The statutory scheme in existence at the time of the *Steve B.D.* decision was completely revised in 2000.
[53] *See* DeBernardi v. Steve B.D., 111 Idaho 285, 723 P. 2d 829 (1986)(denying the mother's attempt to revoke her consent to adoption).
[54] 119 Idaho 1055, 812 P. 2d 1216 (1991).
[55] 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*).

recorded on the birth certificate as the child's father was entitled to notice of a TPR proceeding pursuant to the TPR Statute. That provision (now Idaho Code section 16-2007) required then, and still requires today, that notice be provided to any person included in the adoption notice provision – Idaho Code section 16-1505. Thus, the Court concluded that the unmarried father, listed on the birth certificate, was entitled to notice of the TPR proceeding. Furthermore, the Court held that where the mother and the father both acknowledged the father's paternity, the father's action should not be barred by his failure to register in the putative father registry pursuant to Idaho Code section 16-1513.

In *Doe I 2005*,[56] the Supreme Court held that an unmarried, biological father was not a parent whose rights must be terminated because he had not established paternity, had not filed a Voluntary Acknowledgement of Paternity, and had not established a relationship with his child. In *Doe I 2005*, the mother was married at the time the child was born. The husband was listed as the father of the child on the birth certificate and thereafter held himself out and functioned as the child's father in every way. Several years later, during a pending divorce action, the husband learned that he was not the father of the child. Nonetheless, the magistrate in the divorce case found that the husband was the presumed father of the child by virtue of his marriage to the mother, and the Court gave full custody to the husband. In response to the award of custody, the mother contacted the biological father of the child and urged him to obtain a paternity test and to pursue his parental rights. To secure his relationship with the child, the husband then filed an action to terminate the parental rights of the unmarried biological father. The unwed father was named as the defendant, was notified of the action, and participated in it.

In *Doe I 2005*, the Court reasoned that the parental termination statute was premised on the assumption that the "defendant parent has some parental right to his or her child, which should be terminated…."[57] Based on the facts of the case and on both Idaho and U.S. Supreme Court precedent, the court held that the biological father did not have such a parental right. It reasoned that to have parental rights a father must 1) establish paternity through a court decree, 2) file a Voluntary Acknowledgment of Paternity, or 3) his consent to an adoption must be required pursuant to the adoption statute.[58] The unmarried biological father had not established paternity, had not filed a Voluntary Acknowledgment, nor had he established any relationship with the child. The Court reasoned that its holding was consistent with both *Steve B.D.* and with *Lehr v. Robinson.* Based on those cases, it rejected the biological father's argument that he had not established paternity because the mother lied to him and told him that the child was not his. The Court reasoned that the father had plenty of time and opportunity to question the mother's representations and to seek to establish his relationship with the child, but had not done so.

In (*Doe 2010*)[59], the factual situation was similar to *Doe I 2005*. The mother was married at the time of the child's birth to a person who was not the biological father of the child. While the mother was pregnant, the biological father was sent to prison. Mother told the biological father

[56] 142 Idaho 202, 127 P. 3d 105 (2005).
[57] *Id*. at 204, 127 P. 3d at 107
[58] As discussed previously, the following men must consent to an adoption : 1) the man married to the mother at birth or conception; 2) a man who has established paternity through a court decree; 3) a man who has filed a Voluntary Acknowledgment of Paternity; or 4) a man who has established a sufficiently close relationship with the child as defined in the adoption statute.
[59] ___ Idaho ___, 244 P. 3d 232 (2010).

that he might be the father of the child and he made inquiries into the possibility of establishing paternity. However, he never pursued any formal steps to establish paternity. Prior to the biological father's release from prison, the child and her siblings were removed from the care of the mother and her husband by IDHW, and a child protective case was initiated. The husband was listed as the father of the child in the CPA proceeding. The Department became aware of the biological father at some point during the case and attempted to contact him in Walla Walla, where he lived after his release from prison. He did not respond. The child was not reunified with the mother, and the Department filed a TPR proceeding against the mother, her husband, and the biological father. Relying on *Doe I 2005*, the Idaho Supreme Court affirmed the magistrate's finding that the biological father did not have parental rights that required termination. Although he had a paternity test, he never filed a paternity action. Nor did the biological father file a Voluntary Acknowledgment of Paternity. Finally, the court reasoned that the biological father's two brief contacts and payment of a very small amount of support did not establish a sufficient relationship to constitute a parental right that must be terminated. The Court concluded that the father's due process rights were not violated, relying on *Doe I 2005*, *Caban*, *Lehr*, and *Steve B.D.*

In *Department of Health and Welfare v. Doe* (*Doe III 2010*),[60] the Idaho Court of Appeals held that a man who believed that he was the child's father and who had resided with the child and the child's mother, was not a "father" whose rights had to be terminated prior to an adoptive placement. In *Doe II 2010*, paternity testing during the child protective proceeding revealed that Doe was not the biological father of the child. He argued that he had standing to participate in the proceeding and to object to the termination of his parental rights. His theory was that he was a "presumed father" under Idaho Code section 16-2002(12), or that, in the alternative, he should be considered a parent under the equitable doctrine of *in loco parentis*. Although Doe believed he was the father, had resided with the child and the child's mother as a family unit, and had actively participated in the child's case plan, he had never married the mother. The court held that Doe did not meet the definition of "presumptive father" because he never married the child's mother. Further, the court declined to extend the doctrine of *in loco parent* to the facts of the case. Thus, it affirmed the magistrate's conclusion that Doe was not a father and that he did not have standing to object to the termination of parental rights. Finally, the court concluded that Doe's constitutional rights to access the courts and to due process were not impaired by the court's conclusion. Regarding access to the courts, the Court pointed out that Doe had been permitted to fully participate in the proceeding on the issue of whether he was the child's father. Regarding due process, the Court concluded that Doe did not have a cognizable liberty interest because he was not the biological parent of the child. It reasoned, "[t]his Court declines to recognize a liberty interest in this case. No jurisdiction has identified a liberty interest in a non-biological person who is neither a legal guardian, adoptive parent, step-parent, bold relative, nor foster parent."[61]

Despite the Court's frequent consideration of issues regarding notice of unwed fathers, it has never had the opportunity to evaluate the constitutionality of the current adoption and parental termination notice provisions. Rather, the Idaho Court has evaluated the quality of an unwed father's relationship to determine whether he has established a constitutionally sufficient interest

[60] ___ Idaho ___, 245 P. 3d 506 (App. 2010).
[61] *Id*. at ___, 245 P. 3d at 511.

to challenge a TPR proceeding or adoption. In each of the Idaho cases, with the exception *Steve B.D.* and *Doe 2004*, the unmarried father had received notice and was permitted to participate in proceedings for the purpose of determining whether his relationship with the child warranted recognition. *Steve B.D.* was decided prior to the current notice provisions. In *Doe 2004*, the court did not reach the constitutional question because it found that the Idaho TPR Statute required that the father be notified.

E. Best Practice Recommendations in CPA Proceedings Based on the Idaho Statutory Scheme

Based on the Idaho statutory scheme, the following individuals should be notified of a CPA Proceeding. This recommendation, which harmonizes the disparate provisions of the statutes discussed above, is made because such individuals may become integral to the case at any of its stages (removal and legal custody, TPR, and adoption), and failure to notify them may cause delays in permanency for the child.

- The man married to the mother at the time the child is conceived or born.
- Any man who has been adjudicated the father by a court of competent jurisdiction.
- Any man who has, with the mother, signed a Voluntary Acknowledgement of Paternity.
- Any man who is able to demonstrate that he has maintained a substantial relationship, as defined in § 16-1504(2), with a child who is more than 6 months of age.
- Any man who has lived with the child for at least six months, within the first year after the child's birth and immediately preceding the initiation of an adoption proceeding, and who has openly held himself out as the father of the child.
- Any man who, prior to the child's placement for adoption, has commenced a paternity proceeding, and who has filed a notice of commencement of paternity proceedings and an affidavit of support and care for the child.
- Any man who is recorded on the birth certificate as the father of the child with the knowledge and consent of the mother.
- Any man who is openly living in the household with the child at the time the mother's consent to adoption is executed and who holds himself out as the father of the child.

* * *

12.4 THE IDAHO SAFE HAVEN STATUTE

In 2001, Idaho adopted the Idaho Safe Haven Act. Similar statutes have been enacted in most states as a response to reported increases in infanticide and the abandonment of infants.[62] The Idaho Safe Haven Act is codified in Title 39, Chapter 82 of the Idaho Code. The Act permits a parent to safely relinquish a baby to a designated location where the baby will be protected and cared for until a permanent home can be found. The law permits the parent to remain anonymous and be shielded from prosecution for abandonment or neglect. It also establishes procedures to secure permanency for the child.

A. Who May Leave a Baby at a Safe Haven

A custodial parent may deliver a child to a safe haven in Idaho. Pursuant to the Act, the custodial parent is the parent with whom the child resides.[63] A child left at a safe haven must be no more than thirty days of age at the time it is left at the safe haven.[64] If a custodial parent leaves a child at a safe haven the parent is not subject to prosecution for abandonment.[65]

B. Save Havens

In Idaho, safe havens authorized to receive a child pursuant to the Safe Have Act, include: Idaho licensed hospitals or physicians, staff working at a licensed office or clinic, Idaho licensed or registered advanced practice professional nurses and physician assistants, or emergency medical personnel responding to a "911" call from a custodial parent.[66]

C. Responsibility of Safe Havens

If a safe haven takes custody of a child, it has a number of responsibilities under the Act. The safe haven must "perform any act necessary in accordance with generally accepted standards of professional practice, to protect, preserve, or aid the physical health and safety of the child during the temporary physical custody, including but not limited to, delivering the child to a hospital for care or treatment."[67] The safe haven also is required to "provide notice of the abandonment to a peace officer or other person appointed by the court."[68]

The safe haven may not "inquire as to the identity of the custodial parent."[69] Moreover, if the identity of the parent is known to the safe haven, it must "keep all information as to the identity

---

[62] *See* Child Welfare Information Gateway, *Infant Safe Haven Laws: Summary of State Laws*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm (2010).
[63] IDAHO CODE § 39-8203(1)(b)(2010)(specifying that the child must be delivered by the custodial parent) and IDAHO CODE § 39-8202(1)(2010)(defining the term custodial parent).
[64] § 39-8203(1)(a).
[65] § 39-8203(5).
[66] § 39-8202(2).
[67] § 39-8203(2)(a).
[68] § 39-8203(2)(b).
[69] § 39-8203(3).

confidential."[70] In addition, the parent cannot be required to provide "any information" to the safe haven, although the safe haven may collect information voluntarily offered by the parent.[71] A safe haven exercising its responsibilities under the statute is immune from civil or criminal liability "that otherwise might result from their actions", so long as the safe haven is acting in good faith in receiving the child and performing its duties.[72]

D. Permanency for the Relinquished Child

Once a peace officer or other person designated by the court is notified by a safe haven that it has taken custody of a child, the officer must take protective custody of the child and immediately deliver the child to the care, control, and custody of the Department of Health and Welfare. If the child needs further medical care, the child may be left in the care of a hospital and the peace officer must notify the court and the prosecutor of the child's location.[73]

Once the child is delivered to the Department, the Department must "place the abandoned child with a potential adoptive parent as soon as possible."[74]

The Safe Haven Act provides that a shelter care hearing must be held pursuant to Idaho Code § 16-1615, and that the *Department* must file a "petition for adjudicatory hearing pursuant to Idaho Code § 16-1621."[75] The process envisioned by these provisions is ambiguous. Idaho Code § 16-1615 requires a shelter care hearing to be held within 48 hours of a child's emergency removal from the home pursuant to the Child Protective Act (CPA). Presumably, the Safe Haven Act anticipates that the shelter care hearing in a safe haven case should take place within 48 hours of the child's relinquishment to a safe haven, although this timing is not specified in the Act. As a matter of best practice to ensure the safety of the child, the appropriateness of the safe haven's actions, and to begin the investigation into the other parent of the child, the shelter care hearing should be held within 48 hours of the time the child is left at the safe haven.

A second ambiguity in the Safe Haven Act is the cross reference to Idaho Code § 16-1621 regarding the filing of a petition and the adjudicatory hearing. Section 16-1621 is the Case Plan Hearing section of the CPA. Presumably, this cross reference should refer to the CPA provision regarding the CPA petition – § 16-1610 – and/or the provisions of the CPA regarding the adjudicatory hearing – § 16-1619.

A third ambiguity is that the Safe Haven Act requires that the *Department* file a CPA petition. The CPA provides that either the county prosecutor or a deputy attorney general – not the Department – file the petition in a CPA case.[76] The best practice is for the Department to consult

---

[70] *Id*.
[71] *Id*.
[72] § 39-8203(4).
[73] § 39-8204(1). The Safe Haven Act further provides that the peace officer or other authorized person acting pursuant to the statute will not be held liable unless "the action of taking custody of the child was exercised in bad faith." § 39-8204(3).
[74] § 39-8204(2).
[75] § 39-8205.
[76] § 16-1610(1)(a).

with the prosecutor, who can then file the petition at the time of the shelter care hearing as provided for in the CPA.

The Safe Haven Act requires that an adjudicatory hearing must be held pursuant to Idaho Code § 16-1619 and § 16-1621.[77] This section repeats the confusing cross reference to the CPA Case Plan Hearing provision (§ 16-1621), but also directly cross-references the CPA adjudicatory hearing provision. The adjudicatory hearing in a safe haven case should be held within thirty days after the petition is filed. Within the initial thirty (30) days after the safe haven assumes custody of the infant, the Department is also required to conduct an investigation to ensure that the infant is not a missing child[78] and may, if ordered by the court, initiate a child protective or criminal investigation if a claim of parental rights has been made.[79] In addition, the Department must conduct the investigations required by the CPA.[80]

As soon as practicable, after the first thirty days in which the child is in custody, the Department must petition to terminate the parental rights of the parent who abandoned the child and of any absent parent.[81]

No further procedures are set forth in the Safe Haven Act itself. The inference is that the case should proceed as a typical CPA proceeding to the final adoptive placement of the child. This proceeding is likely to be truncated because the parents of the child are not participating in the action. Also, the Safe Haven Act seems to anticipate that the permanent placement for a safe haven child is adoption.

E. Parental Rights

Care must be taken to respect the parental rights of the absent parent in a Safe Haven Act proceeding. Two potential issues could arise regarding the rights of that parent that can affect the stability of the child's placement.

1. *Constitutional Rights of Parents*

The absent parent has a constitutionally protected liberty interest in establishing a relationship with the child. Both federal and state law regarding the nature and scope of this liberty interest are discussed in the section of this chapter regarding the rights of unwed fathers.

2. *Indian Child Welfare Act*

If the child is an Indian Child, any adoption may be void if the provisions of ICWA are not complied with. Chapter 11 of this manual contains a detailed discussion of ICWA. Care must be taken in a safe haven case to ensure that the child's status as an Indian Child is investigated. Although there is no case law on this point, it is likely the federal requirements of ICWA would

[77] § 39-8205(4).
[78] § 39-8205(3).
[79] § 39-8205(2).
[80] § 16-1616(1).
[81] § 39-8205(5).

prevail: that the state's duty to determine the child's status under ICWA pre-empts inconsistent state laws providing that inquiry into the parents' identity and background cannot be made. This direct statutory clash between state and federal law poses serious issues where there is any indication that the child may be an Indian child.

3. *Procedural Requirements of the Safe Haven Act to Protect Parental Rights*

a. Registration in the Abandoned Child Registry and Notice

The Safe Haven Act contains some provisions aimed at protecting the parental rights of the absent parent. Although the act specifically disallows inquiry into the identity of the custodial parent, it provides that during the first thirty days the child is in custody, "the department shall request assistance from law enforcement officials to investigate through the missing children information clearinghouse and other state and national resources to ensure that the child is not a missing child."[82]

The act also provides that the vital statistics unit of the Department must maintain a "missing children's registry" where a parent may make a claim of parental rights of an abandoned child.[83] To be effective, the act provides that a claim of parental rights must be filed before an order terminating parental rights is entered by a court. The act states that "[a] parent that fails to file a claim of parental rights prior to entry of an order termination their parental rights is deemed to have abandoned the child and waived and surrendered any right in relation to the child, including the right to any judicial proceeding in connection with the termination of parental rights or adoption of the child."[84] Prior to a hearing on a petition to terminate parental rights, the Department must file a certificate from the Department of Vital Statistics stating that a diligent search of the missing children registry was conducted and setting forth the results of the search or stating that no claim of parental rights was made.[85]

The Safe Haven Act specifically provides that registration of notice of the commencement of paternity proceedings pursuant to Idaho Code section 16-1513 does not satisfy the requirements of the Safe Haven Act.[86] Given that unwed parents have a constitutional right to parent their children, this provision may be of doubtful constitutionality. The federal and state cases regarding parental rights are discussed in the unwed fathers section of this chapter. For example, an unwed father who resided with the mother and supported her during her pregnancy and who timely filed pursuant to § 16-1513, but did not file a claim of parental rights of an abandoned child pursuant to the Safe Haven Act, might nonetheless be constitutionally entitled to notice of an action terminating parental rights or an adoption action. Likewise, a father who lived together in a family unit with the child's mother and the child after the child's birth, albeit for a brief period of time, also would likely be constitutionally entitled to notice even despite failing to file the claim of parental rights required by the Safe Haven Act.

---

[82] § 39-8205(3).
[83] § 39-8206(1). This provision also establishes procedural requirements for the registry and for the filing of claims.
[84] § 39-8306(1).
[85] § 39-8306(2) and (4).
[86] § 39-8206(1).

b. Filing a claim of parental rights

If a claim for parental rights is timely filed, notice of the action to terminate parental rights must be provided to the person claiming parental rights pursuant to Idaho Code section 16-2007 (the TPR statute). In addition, the court must hold the action of involuntary termination of parental rights "in abeyance" for a period of time not to exceed sixty days.[87]

During the sixty day period of abeyance, the court must order genetic tests to establish maternity or paternity at the expense of the person claiming parental rights. In addition, the act directs the Department to conduct an investigation pursuant to Idaho Code section 16-2008.[88]

When indicated, a shelter care hearing must be conducted within 48 hours to determine whether the child should remain in the custody of the Department or should be returned to the parent. Presumably, this shelter care hearing is in addition to the shelter care hearing that was conducted when the child was initially abandoned and hearing must be held within 48 hours of the filing of a claim of parental rights, although the statute does not state how the time requirement should be implemented.[89] In making a determination regarding whether to return the child to the parent, continue a CPA proceeding, or terminate parental rights, the act provides that "a parent shall not be found to have neglected or abandoned a child" solely because the child was left with a safe haven.[90]

* * *

[87] § 39-8206(3).
[88] § 39-8306(3)(a) & (b). The referenced investigation includes a financial analysis regarding unreimbursed public assistance provided on behalf of the child. In addition the section directs that a social study of the circumstances of the child and the case be conducted. § 16-2008.
[89] § 39-8206(3)(c).
[90] § 39-6307(3)(d).

12.5 DEFACTO CUSTODIANS AND CHILD PROTECTIVE ACT PROCEEDINGS

In 2009, the Idaho Legislature enacted the De Facto Custodian Act.[91] This statute provides a procedural mechanism by which a relative of a child may obtain an order of legal or physical custody of the child.

If a *de facto* custodian has been appointed for a child prior to the removal of the child from the home, the custodian is a proper party to the CPA proceeding.[92] Depending on the facts of the case, the custodian may be considered as a possible resource for the child during the CPA proceeding.

However, where a *de facto* custodian has not been appointed by a court prior to the initiation of the CPA proceeding, this statute does not provide a basis for the alleged custodian to participate as a party in the CPA proceeding or to use a CPA placement as a bootstrap for a legal order of custody.

The De Facto Custodian Act, itself, makes clear that that a person cannot qualify as a *de facto* custodian based on a placement made pursuant to the CPA.[93] Thus, placement of the child with a relative as part of a CPA proceeding cannot provide a basis for the relative to seek appointment as a *de facto* custodian.

The CPA provides that the court in the CPA proceeding has exclusive jurisdiction of the matter.[94] The Idaho Rules of Civil Procedure provide that proceedings filed under Title 16 of the Idaho Code (including adoptions, child protective act proceedings, and parental termination actions) are not "child custody proceedings" in which an individual may intervene to seek appointment as a *de facto* custodian.[95]

* * *

[91] IDAHO CODE §§ 32-1701 – 32-1705.
[92] Idaho Code § 16-1602(12) defines the term "custodian" as "a person, other than a parent or legal guardian to whom legal or joint legal custody of the child has been given by a court order." This definition would include a de facto custodian who has been awarded legal custody. A custodian must be identified in the CPA petition with specificity, § 16-1610(2)(d), is to be notified of the CPA proceeding in the Summons, section 16-1611(3), and must receive notice of the shelter care hearing, section 16-1615(2). *See* IDAHO CODE §§ 16-1602(12), 16-1610(2)(d), and 16-1611(3)(2010).
[93] § 32-1703(4)(a).
[94] § 16-1603(1).
[95] IDAHO R. CIV. P. 24(d).

12.6 FINDINGS REQUIRED TO ESTABLISH AND/OR MAINTAIN A CHILD'S ELIGIBILITY FOR IV-E FUNDING

In order for an Idaho child who is placed in foster care to establish and maintain eligibility to receive federal IV-E foster care maintenance payments, the judge hearing the child protection case must make specific findings at specific times in the child protection case. This section is designed to review the specific findings, their language, and the timing of each throughout the child protective process.

A. Contrary to the Welfare

The first order pertaining to the removal of the child from the home must contain a finding that it would be contrary to the welfare of the child to remain in the home. Failure to make this finding will cause an otherwise eligible child to be ineligible for federal foster care maintenance payments as well as adoption assistance funds.

The first order pertaining to the removal of a child from the home could be:

1. Initial Detention Orders in Juvenile Corrections cases;
2. Idaho Juvenile Rule 16 Expansion Orders;[96]
3. Orders of Removal;[97]
4. Orders that continue shelter care hearings to another date;[98]
5. Orders issued at shelter care hearings that place the children in shelter care, based on the stipulation of the parties;[99]
6. Orders issued at shelter care hearings that place the children in shelter care, based upon the evidence presented;[100]
7. Orders issued at adjudicatory hearings that place the children in the custody of the IDHW, based upon the stipulation of the parties;[101]
7. Orders issued at adjudicatory hearings that place the children in the custody of IDHW, based upon the evidence presented at the adjudicatory hearing;[102]
8. Orders issued at a Redisposition Hearing (for example, a child is removed from home after having been placed in the home under protective supervision);[103] or
9. Orders issued at a Review Hearing[104] or a 12-month permanency hearing,[105] if the child is removed from the home at that time.

[96] IDAHO JUV. R. 16.
[97] IDAHO CODE ANN. § 16-1611(4)(2010).
[98] § 16-1615.
[99] *Id.*
[100] *Id*.
[101] § 16-1619.
[102] *Id*.
[103] § 16-1623.
[104] § 16-1622.
[105] § 16-1622(4).

1. *Finding*

The judge hearing a child protection case must make a finding that it would be "contrary to the welfare of the child to remain in the home."[106]

2. *Timing*

Federal law requires this finding to be made in the first order pertaining to the removal of the child from the home.[107] Idaho Code § 16-1615(5) (d) requires that the "contrary to the welfare finding" be made at the shelter care hearing and Idaho Code § 16-1619(6)(a-c) requires that the "contrary to the welfare" finding be made at the adjudicatory hearing.

If the child has been removed from the home, the shelter care hearing is continued, and custody of the child is mentioned in any way, the contrary to the welfare finding must be made at that hearing.[108]

3. *Corrective Action*

If the "contrary to the welfare" determination is not made in the first court order pertaining to the child's removal from the home, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.[109] Additionally, the child will also likely be ineligible for federal adoption assistance payments.

If the "contrary to the welfare" finding was made at the shelter care hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[110]

B. Reasonable Efforts to Prevent Removal

1. *Finding*

A judicial determination must be made as to whether or not the Department made reasonable efforts to prevent the removal of the child from his/her home.[111]

2. *Timing*

Under federal law, the reasonable efforts to prevent removal finding must be made **no later than sixty (60) days from the date the child was removed from home.** Idaho law requires that the "reasonable efforts to prevent removal" finding be made at the shelter care and, if the court vests

[106] 42 U.S.C.§ 672(a)(2)(A)(ii); §§ 16-1615(5) (d), 16-1619(6)(a-c).
[107] 45 C.F.R. § 1356.21(c).
[108] 45 C.F.R. § 1356.21(c).
[109] 45 C.F.R. § 1356.21(c).
[110] 45 C.F.R. § 1356.21(d)(1).
[111] 42 U.S.C. § 671(A)(15)(B)(1).

legal custody in the Department, at the adjudicatory hearing as well.[112] The adjudicatory hearing may not be continued to a date more than 60 days from the date of removal unless the court has a made case specific, written, reasonable efforts to prevent removal finding.[113]

3. *Corrective Action*

Federal Law provides that "[i]f the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, an otherwise eligible child is not eligible under Title IV-E foster care maintenance payments program for the duration of the child's stay in foster care."[114]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

C. Removal from Protective Supervision

1. *Finding and Timing*

When the child is returned home under protective supervision, the Department relinquishes custody of the child and custody of the child is returned to the parent(s). If the child is ultimately returned to care, it is treated as a new removal and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings must be made at the Redisposition Hearing.[115]

2. *Corrective Action*

If the contrary to the welfare finding is not made in the first order of removal, which could be an Order of Removal or the order resulting from the re-disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[116]

---

[112] 45 C.F.R. § 1356.21(b)(1)(i) and (ii); §§16-1615(5)(b), 16-1619(6)(a-c).
[113] IDAHO JUV. R. 41(b).
[114] 45 C.F.R. § 1356.21(b) (1) (i) and (ii).
[115] §§16-1623,16-1619; 42 U.S.C. §672(a)(2)(B) and 45 C.F.R. § 1356.21(g)(3).
[116] 45 C.F.R. § 1356.21(c).

If the "contrary to the welfare" finding was made at the re-disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[117]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

D. Extended Home Visit

1. *Finding and Timing*

When a child is returned home on an extended home visit, the Department retains custody of the child, and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings need be made only if the child is returned to care after a home visit that exceeds six (6) months without prior court approval.[118]

2. *Corrective Action*

If the contrary to the welfare finding is not made in the first order of removal, which could be an Order of Removal or the order resulting from the re-disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[119]

If the "contrary to the welfare" finding was made at the re-disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[120]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations

[117] 45 C.F.R. § 1356.21(d)(1).
[118] 45 C.F.R. § 1356.21(e).
[119] 45 C.F.R. § 1356.21(c).
[120] 45 C.F.R. § 1356.21(d)(1).

recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

E. Reasonable Efforts to Finalize the Permanency Plan

1. *Finding*

A judicial determination must be made as to whether the Department did or did not make reasonable efforts to finalize the permanency plan that was in effect. The finding must be a *retrospective review* of the efforts made by the Department to finalize the permanency plan *that is in effect*.[121] Idaho law requires that, after the permanency hearing, the court make "written case-specific findings" as to whether the "[D]epartment made reasonable efforts to finalize a permanency plan for the child."[122]

2. *Timing*

This finding must be made **within twelve (12) months of the date the child is considered to have entered foster care and at least once every twelve (12) months thereafter.** A child is considered to have entered foster care on the earlier of the date of the first judicial finding that the child has been subjected to child abuse or neglect or the date that is sixty (60) calendar days after the date on which the child is removed from the home. A state may use a date earlier than that required by federal regulations.[123]

Idaho law requires that the hearing to review the permanency plan be held ***prior to*** **twelve (12) months** from the date the child is removed from the home or the date of the court's order taking jurisdiction under this chapter, whichever occurs first.[124]

Federal policy regarding the failure to make this finding and the ability to quickly reinstate such funding is as follows: "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section (45 C.F.R. 1356.21), the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible unless such a determination is subsequently made. The eligibility re-commences the first day of the month the finding is eventually made.[125]

---

[121] 45 C.F.R. § 1356.21(b)(a)(i) and (ii).
[122] § 16-1622; IDAHO JUV. R. 46(c).
[123] 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i) and (ii).
[124] § 16-1622(4).
[125] 45 C.F.R. § 1356.21(b)(2)(ii).

3. *Corrective Action*

1. Problem: Twelve (12) month permanency plan hearing not held on time.

   Action: Schedule and hold the permanency review hearing at the earliest possible date.

2. Problem: Twelve (12) month permanency plan hearing was held, but no (or incorrect) "reasonable efforts to finalize the permanency plan" finding is made.

   Action: If the "reasonable efforts to finalize the permanency plan" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

   If the "reasonable efforts to finalize the permanency plan" finding was not made, or was incorrectly made, the finding must be made. The "reasonable efforts to finalize the permanency plan" finding can be made by the court upon evidence presented to it by the state without a formal hearing. This finding can be made from the bench or from chambers based on testimony.[126] If the "reasonable efforts to finalize the permanency plan" finding is not made, not made within the mandated time frame, or made but the language of the finding is incorrect, IV-E funding will end on the last day of the month which is 12 months from the date of removal. The IV-E funding will be restored on the first day of the month in which the permanency hearing is held and the "reasonable efforts to finalize the permanency plan" finding is made.

F. Placement and Care Authority

The state IV-E agency must have placement and care authority in order to be eligible for federal IV-E funding. Although placement and care authority is generally associated with legal custody there is no absolute federal requirement that legal custody be vested in the agency in order for the child to be eligible for IV-E funding. Legal custody may be translated to mean placement and care authority.[127]

If the court orders a child into a specific placement setting, facility, home, or institution, this action may be considered to have usurped the IV-E agency's authority for placement and care, thus making the child ineligible for federal IV-E funding.[128] When the court's order merely names the child's placement as an endorsement or approval, or generally references of the agency's choice, eligibility for IV-E funding is not precluded.[129]

---

[126] 42 U.S.C. § 672(a)(15)(B).
[127] 42 U.S.C. § 672(a) (2) (B)(1). U.S. Dept. Health & Human Services, Admin. For Children & Families Program Instruction ACYF-CB-PI-08-07 available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0807.htm (12/24/2008)
[128] 45 C.F.R. § 1356.21(g) (3).
[129] 42 U.S.C. § 672(a) (2) (B);45 C.F.R. § 1356.21(g) (3).

Federal IV-E guidelines do not require that the court always concur with the agency's recommendation regarding placement. The IV-E guidelines state: The court may take testimony and after hearing such testimony or recommendations, including that from IV-E representatives and\or others, the court may accept such recommendations and name a specific placement in its order. In all such situations the court should make it clear that the designation of the specific facility is based upon the evidence presented at the hearing and upon a bona fide consideration of the agency's recommendation regarding placement.[130]

* * *

[130] U.S. Dept. Health & Human Services, Admin. For Children & Families Program Instruction ACYF-CB-PM-8.3A.12 available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0807.htm (12/24/2008)

12.7 INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

A. Introduction

The Interstate Compact on the Placement of Children[131] (ICPC) is the best means to ensure protection of and services to children who are placed across state lines for foster care or adoption. The Compact is a both an interstate agreement and a uniform law that has been enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands.[132] It establishes orderly procedures for the interstate placement of children and fixes responsibility for those involved in placing the child. Provisions of the Compact ensure the same protection and services to children as if they had remained in their home state. The compact contains 10 Articles and 10 Regulations. The Association of Administrators of the ICPC promulgates regulations.

Although the ICPC includes private adoptions and placements for residential care, the majority of Idaho ICPC cases involve children in foster care. Each year, Idaho processes between 800-900 total ICPC requests, with the majority being public cases. From those ICPC requests, about 300 placements are made from other states with Idaho families, and roughly 200 placements are made from Idaho public agencies with out-of-state families. [133]

B. Goals of the ICPC

1. *Safety*

The ICPC provides the sending agency[134] the opportunity to obtain home studies in the receiving state prior to placement of the child. The prospective receiving state ensures that the placement is not "contrary to the best interests of the child" and that all applicable laws and policies are followed before it approves the placement.

2. *Permanency and Well-Being*

The ICPC guarantees the child's legal and financial protection once the child moves to the receiving state.[135] The sending agency receives the opportunity to obtain supervision and regular

---

[131] Interstate Compact on the Placement of Children, available at http://icpc.aphsa.org/Home/articles.asp. The Compact is codified in Idaho at IDAHO CODE §§ 16-2101 – 16-2107 (2010)

[132] An interstate compact is an agreement between two or more states of the United States of America. Article I, Section 10 of the United States Constitution provides that "no state shall enter into an agreement or compact with another state" without the consent of Congress. Frequently, these agreements create a new governmental agency that is responsible for administering or improving some shared resource such as a seaport or public transportation infrastructure. In some cases, a compact serves simply as a coordination mechanism between independent authorities in the member states. *See* Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS 13, 14 (1994)

[133] Data taken from Idaho's APHSA ICPC database 2005-present.

[134] "Sending agency" is defined in the ICPC as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought, any child to another party state." § 16-2102, Art. III(b).

[135] "Receiving state" is defined in the ICPC as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local authorities or for placement with private agencies or persons." § 16-2102, Art. II(c).

reports on the child's adjustment and progress in the placement and ensures the sending state does not lose jurisdiction over the child.[136]

C. Situations Where the ICPC Applies

The core provision of the ICPC establishes that:

> No sending agency shall send, bring or cause to be sent or brought into any other party state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and wit the applicable laws of the receiving state governing the placement of children therein.[137]

Pursuant to this provision and the definitions in Article II of the Compact, the ICPC applies to the following situations where the child is being placed from one state to another:

- Children who are within the custody of the Department (or in a parallel arrangement in another state) and who are being placed with a parent or relative when a parent or relative is not making the placement;
- Children who are entering foster care or a placement for the purpose of adoption;
- Children who are within the custody of the Department (or in a parallel arrangement in another state) for placement in a group home and/or residential treatment facility;
- Children who are to be placed in a group home and/or residential treatment facility by a legal guardian;
- Children who are placed by a legal guardian with a person outside of the third degree of relationship, *i.e.* child's second cousin; or
- Children who are adjudicated delinquents for placement in a group home and/or residential treatment facility.[138]

The Compact does not apply to placement of children into any institution caring for the mentally ill, mentally defective or epileptic, or any institution primarily educational in character, and/or any hospital or other medical facility.[139]

D. Placement and Maintaining Jurisdiction

Under the compact, the sending state must provide written notice to the appropriate public authorities in the receiving state of "the intention to send, bring, or place the child in the receiving state."[140] The notice must contain: 1) the name, date and place of birth of the child; 2) the identity and address(es) of the parents or legal guardians of the child; 3) the name and address of the person, agency or institution to which the sending agency proposes to send the

[136] § 16-2102, Art. V.
[137] § 16-2102, Art. III(a)
[138] § 16-2102, Art. VI.
[139] § 16-2102, Art. II(d).
[140] § 16-2102, Art. III(b)

child; and 4) a "full statement" of the reasons the child is being sent and the authority pursuant to which the proposed placement is being made.[141]

A child may not be sent to a receiving state until the receiving state notifies the sending state that the placement is in the best interests of the child.[142] In order to make this determination, once notice of the proposed interstate placement is received by the public authorities in the receiving state, the receiving state may request, and is entitled to receive, additional information necessary to carry out the purposes of the compact.[143]

Finally, pursuant to the ICPC, the sending state must maintain jurisdiction until the child is adopted, reaches the age of majority, or the child protection case is closed with concurrence from the receiving state.[144]

E. Timeframes

Under the Safe and Timely Interstate Placement of Foster Children Act of 2006, all states are required to have home studies completed and back to the sending state within 60 calendar days. Failure to do so could result in penalties for the state failing to complete the home study within the timeframes. Permission to place continues to be valid for six months.[145]

F. Special Cases

1. *Regulation 1 – Intact Moves*

Regulation 1[146] of the ICPC applies when a child is placed with a family and the family plans to move to another state.[147] The child may accompany the family to the new state. If the child will be moving to the receiving state for more than 90 days, the receiving state must conduct a home study and approve the child's placement. During the transition, Regulation 1 provides that the receiving state must honor the home study completed in the sending state until it is able to complete its own evaluation.[148]

2. *Regulation 7 – Priority Cases Involving Placement with a Relative Only*

ICPC Regulation 7 provides for expedited handling of interstate placements with a relative under some circumstances. Pursuant to Regulation 7, a request can be made when the proposed

---

[141] *Id*.
[142] § 16-2102, Art. III(d).
[143] § 16-2102, Art. III(c).
[144] § 16-2102, Art. V(a).
[145] 42 U.S.C. § 671(a)(25)-(26).
[146] The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) is an interstate agency consisting of representatives from all 50 states that has the authority under the ICPC to "promulgate rules and regulations to carry out more effectively the terms and provisions of the compact." *See* § 16-2102 Art. VII. The regulations adopted by AAICPC are available at: http://icpc.aphsa.org/Home/resources.asp (last visited on February 8, 2010)
[147] INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, Reg. No. 1(3)(2010), available at http://icpc.aphsa.org/Home/resources.asp (last visited on February 8, 2010).
[148] *Id*. at Reg. No. 1(5)-(6)

placement is with a relative AND: the child is under two years OR the child is in an emergency shelter OR the court finds the child has already spent a substantial amount of time in the proposed placement.[149] Regulation 7 requires a court to make the specific finding just described in order to qualify for expedited handling.[150]

* * *

[149] *Id*. at Reg. No. 7(6)(a)
[150] *Id*.

12.8 IDAHO JUVENILE RULE 40: INVOLVING CHILDREN AND FOSTER PARENTS IN COURT

Youth are the most important part of a child protection case, and making decisions based on the child's best interests requires his or her voice to be heard throughout the proceedings. Children are often understandably frustrated when they are excluded from court proceedings in which their family relationships, physical safety, health, education, and where they will live are all at stake.[151] With this fundamental idea in mind, Idaho Juvenile Rule 40 was enacted to give children (and foster parents) the right to notice and the right to be heard at each stage of the proceedings, post adjudication.

IJR 40 requires that a foster parent, pre-adoptive parent, relative placement, and/or a child eight years of age or older, must be provided with notice of, and have a right to be heard in, any post-adjudicatory hearings to be held with respect to the child.[152] This does not give foster parents, pre-adoptive parents, or relative placements the status of a party to the proceedings.[153] The Department has the duty of providing notice to the individuals and must confirm to the court that notice was given.[154] To further the policy of giving children a voice in the courtroom, the guardian *ad litem* appointed to the case has the duty of inquiring of any child capable of expressing his or her wishes and including the child's express wishes in the report to the court.[155]

Many judges and child welfare advocates have decided that children should be present in court to have their voices heard in the proceedings. Many questions arise from both judges and practitioners on how to best involve children in the proceedings and gain insights to aid decision making. One question that often arises concerns ex-parte communications between the youth and judge. In *State of Idaho v. Clouse*[156], the court determined it was permissible for the judge to interview the child in chambers, with no record taken and where parents' counsel was not permitted to cross-examine. The court applied the reasoning used in domestic relations cases. Considering both the *Clouse* decision and the Idaho Code of Judicial Conduct[157], some best practice recommendations include:

- get parties' consent to such an interview on the record;
- always make a record of the interview;
- if possible, have counsel (but not parents) present;
- have an advocate available to accompany the child; and
- if parties and/or counsel will not be present during the interview, offer opportunities to submit questions.

---

[151] William G. Jones, *Making Youth a Meaningful Part of the Court Process,* JUV. & FAM. JUSTICE TODAY, 16 (Fall 2006).
[152] IDAHO JUV. R. 40(a),(b).
[153] IDAHO JUV. R. 40(a).
[154] *Id*.
[155] §16-1633(2).
[156] 93 Idaho 893, 477 P.2d 834 (1970).
[157] "A judge may not have *ex parte* communications concerning a pending proceeding with any party on any substantive matter." IDAHO CODE OF JUDICIAL CONDUCT CANNON 3-(B)(7).

Another concern often voiced by judges and child welfare experts is that information discussed in court may be disturbing and upsetting to children who attend the hearings. Judges and attorneys should keep in mind that children are involved in court proceedings because of real-life events they have experienced. They have already been exposed to and survived the harsh realities that will be discussed in court. If certain parts of the proceeding are unusually upsetting, the youth can be excluded for that part of the hearing. Youth participation allows the youth to hear how the parent has progressed in meeting requirements and to have a better ability to come to terms with what the court orders.[158]

Finally, concerns arise over disruptions in the youth's schedule to attend court hearings. The judge can alleviate some of this concern by scheduling hearing times so youth miss the least amount of school possible. Ensure the hearings are scheduled before or after school hours or on school holidays. The judge can also ensure that when youth are present, he or she hears those cases first.

While the child is in court, the role of the judge, attorneys and child welfare workers is twofold: to make the experience a positive one, and to gain as much relevant information about the child and family as possible.[159] The following best practice tips accomplish both tasks:

- Arrange for or allow children to have a support person present if they desire.
- Provide age-appropriate reading material describing the court process to the child and a list of some legal terms and definitions that may be used during the hearing.
- Address the child directly using a supportive voice and making eye contact.
- Explain your role to the child and explain what issues you can address.
- Avoid acronyms or legal jargon that a child would not understand.[160]

Most importantly, take the time to prepare for a child's involvement using proper language, asking good questions, and talking about the right issues.

When children have a voice in court and the opportunity to participate in the critical processes that profoundly impact their lives, the entire system benefits from better-informed decision making. Whether the child attends a hearing, or the social worker, guardian *ad litem*, or child's attorney informs the court of the child's wishes, the youth has the chance to be heard and to make an impact on some of the most important decisions in his/her life.

* * *

[158] ANDREA KHOURY, ESTABLISHING POLICIES FOR YOUTH IN COURT—OVERCOMING COMMON CONCERNS (2008) available at http://www.isc.idaho.gov/childprotection/PDFs/Establishing%20Policies%20for%20Youth%20in%20Court-Common%20Concerns.pdf (last visited Apr. 25, 2011)

[159] Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, A.B.A. CHILD L. PRACTICE, Nov. 2007.

[160] *Id*.

12.9 EDUCATIONAL NEEDS OF CHILDREN

"Our greatest natural resource is the minds of our children." – Walt Disney

A. Overview

When children come into care for abuse, neglect, abandonment, or unstable homes, it is almost certain that their education has been harmed in some way by the action or inaction of their parents. Studies have confirmed this fact.[161]

Research indicates that "[e]ach year, an estimated 400,000–440,000 infants (10–11% of all births) are affected by prenatal alcohol or illicit drug exposure. Prenatal exposure to alcohol, tobacco, and illicit drugs has the potential to cause a wide spectrum of physical, emotional, and developmental problems for these infants. The harm caused to the child can be significant and long-lasting, especially if the exposure is not detected and the effects are not treated as soon as possible."[162] Exposure to maltreatment as a child is especially detrimental in the context of education. Children's " brains are developing at life-altering rates of speed. Maltreatment chemically alters that development and can lead to permanent damage to the brains architecture. Every year 196,476 children from birth to 3 years old come into contact with the child welfare system."[163]

Other issues in the home, such as tobacco use, have also been linked to cognitive problems for children:

> "The effects of prenatal tobacco exposure are particularly concerning because so many expectant mothers smoke---by one estimate, over 10 percent in the United States. In utero exposure to tobacco by products had been linked to cognitive deficits in laboratory animals and human adolescents. Some studies suggest that such exposure can lower general intelligence; for example, one found a 12 point gap in full scale IQ between exposed and unexposed middle-class adolescents. In another study, the odds of having attention deficit hyperactivity disorder (ADHD) were more than three times as great for adolescents whose mothers smoked during pregnancy compared with children of nonsmoking mothers."[164]

---

[161] ADVOCATES FOR CHILDREN OF NEW YORK, INC. EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER DARE SYSTEM (2000) available at http://www.eric.ed.gov/PDFS/ED443910.pdf; MARKE. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004); PETER J. PECORA, P., ET. AL. ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY (2003).

[162] NANCY K. YOUNG ET AL., SUBSTANCE EXPOSED INFANTS: STATE RESPONSES TO THE PROBLEM 9 (2009), *available at* http://www.ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf

[163] MATTHEW E. MELMED, A CALL TO ACTION FOR INFANTS AND TODDLERS IN FOSTER CARE (2011) available at ZerotoThree.org, http://main.zerotothree.org/site/DocServer/Melmed_31-3_Jan_2011.pdf?docID=12201.

[164] Thomas J. Gould, *Addiction and Cognition*, NIDA ADDICTION SCIENCE & CLINICAL PRACTICE, Dec. 2010 at 4.

Studies report that up to 47% of children and youth in foster care receive special education services at some time in their schooling.[165]

Medicaid pays for 37% of births nationally and well above that level in several states. The good news is that interventions at birth for substance-exposed infants can remedy much of the harm and have the children ready for success when entering school. The bad news is that few states pay for or provide these expensive comprehensive services and parents in poverty are not always well equipped to access existing services or advocate for their children. The best option is prevention. Healthcare providers that take the time to educate expectant mothers effect significant reductions in prenatal substance abuse. Early intervention for substance-exposed infants can also prevent a lifetime of expensive services and costs to the criminal justice system. [166]

"From the moment of conception to the initial, tentative step into a kindergarten classroom, early childhood development takes place at a rate that exceeds any other stage of life. The capacity to learn and absorb is simply astonishing in these first years of life. What impact does child care have on a child's development? What lasting toll does family stress have on a child? What are the most important known influences on early brain development? Can early interventions alter the course of early development for the better? … The conclusions and recommendations are very specific, derived from a rich and extensive knowledge base firmly grounded in four core themes:

1. All children are born wired for feelings and ready to learn.
2. Early environments matter and nurturing relationships are essential.
3. Society is changing and the needs of young children are not being addressed.
4. Interactions among early childhood science, policy, and practice are problematic and demand rethinking."[167]

B. Legal Framework for Assessing Educational Needs

1. *Federal Law*

In response to the clear data of a failed system in regards to educational needs of foster children, the federal government has responded with legislation designed to motivate local jurisdictions. These include:

1. The Fostering Connections to Success and Increasing Adoptions Act of 2008.[168] (Fostering Connections) This act places the responsibility on local child welfare agencies to collaborate with local school districts for the educational success of foster children. Reimbursement (part of IV-E funding going to the Department)

[165] COURTNEY, *supra* note 129 at 40 tbl. 38.
[166] Young, *supra* note 130, at 4-5
[167] NATIONAL RESEARCH COUNCIL AND INSTITUTE OF MEDICINE, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 4 (Jack P. Shonkoff & Deborah Phillips eds., 2000).
[168] Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, 122 Stat. 3949 (2008), amending portions of 42 U.S.C. § 671 - 675 (2010).

helps pay for transportation to keep foster children in their original school when appropriate.

2. The McKinney Vento Homeless Assistance Act (McKinney Vento).[169] This act forces action by local school districts to support educational efforts of the department with the threat of loss of federal funds for non-action.

Of the two laws, Fostering Connections is far more comprehensive and is carried out by state child welfare agencies. McKinney Vento is directed at local school districts, and the districts are responsible for the cost of implementation. On the issue of who pays the cost of meeting children's special needs – the child welfare agency or the schools – the courts can bring the parties together in a comprehensive manner. The case plan must include "an assurance that the state [or local child welfare agency] has coordinated with appropriate local education agencies … to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement" unless moving is in the child's best interest.[170]

Unique challenges exist in Idaho because of differences in the size and resources available in school districts around the state. For some children, it may be helpful to move the child to a county where needed services are available. If this option is considered, care should be taken to look at the transferability of the any existing or needed "Individual Education Program" (IEP) plans. The latest version of the Individuals with Disabilities Education Act (IDEA 2004) made parents of children with special needs even more crucial members of their child's education team. Parents can now work with educators to develop an IEP. The IEP describes the goals the team sets for a child during the school year, as well as any special support needed to help achieve them. The plan should address who is to act in the roll of parent and interact with the school on educational issues -- the foster parents, the case worker, or a specially assigned educational advocate. The child's case plan must include "assurances that the placement of a child in foster care takes into account the appropriateness of the current educational setting and proximity to the school in which the child is enrolled at the time of placement."[171]

C. Idaho Law

Idaho has responded to the educational needs of children by amending the definition of neglect in the CPA. It now provides:

> (25) "Neglected" means a child:
> . . .
> (d) Who is without proper education because of the failure to comply with section 33-202, Idaho Code [mandatory school attendance].[172]

Idaho statutes relating to education provide guidance on what constitutes a "proper education". For example, the state compulsory school attendance law provides:

---

[169] McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11301 – 11432 (2010)
[170] 42 U.S.C.§ 675(1)(G). *See U.S. Department of Education, Building the Legacy: IDEA 2004* for general information about the Individuals with Disabilities Education Act (IDEA) at http://idea.ed.gov/ .
[171] *Id*.
[172] § 16-1602(25)

> The parent or guardian of any child resident in this state who has attained the age of seven (7) years at the time of the commencement of school in his district, but not the age of sixteen (16) years, shall cause the child to be instructed in subjects commonly and usually taught in the public schools of the state of Idaho. To accomplish this, a parent or guardian shall either cause the child to be privately instructed by, or at the direction of, his parent or guardian; or enrolled in a public school or public charter school, including an on-line or virtual charter school or private or parochial school during a period in each year equal to that in which the public schools are in session; there to conform to the attendance policies and regulations established by the board of trustees, or other governing body, operating the school attended.[173]

In addition Idaho Juvenile Rule 44 regarding the case plan hearing requires that the child's educational needs be met by the case plan. Rule 44 requires that the case plan

> "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 plan shall also address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child, and organizations or community activities with who the child has a significant connection."[174]

D. Issues for Social Workers Regarding Education Needs of Children

The child protection system can appear to require social workers to manage a child's situation in inconsistent ways. For example the CPA's concurrent planning requirement means that caseworkers must to seek to reunify the child with the parents and, at the same time, plan for failure by developing a permanency plan if reunification is not timely. Educational mandates described above can raise similar conflicts – should a social worker keep a child in his home school or place the child in a foster placement that will require the child to be in a different school district or even state?

Social workers are trained to evaluate cases by focusing on an escalating ladder of risk assessment, starting at addressing immediate safety issues and escalating through imminent risk, risk of harm, imminent risk of severe harm, immediate physical danger, threat of harm, and finally, threat of imminent harm.[175] It is not always obvious how the child's educational needs fit into this type of assessment. It is not likely that the Department will pursue many CPA cases simply based on educational neglect. Yet, a child whose educational needs are not being met may be facing many future obstacles. Nonetheless, educational issues are more likely to surface through truancy charges in juvenile court or charges against the parents rather than through a CPA case.

Social workers making school stability determinations need to document and justify their actions to the court in review hearings. Best practice is to answer these questions in the Department's reports to the court:

---

[173] IDAHO CODE § 33-202 (2010)
[174] IDAHO JUV. R. 44.
[175] *See* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-19 (2009)

1. How was the best interest determination made for the child's school selection?
2. Who made the best interest decision?
3. What role did the parents play in making these decisions?
4. If there were disputes how were they resolved?
5. How did the Department and the school district collaborate?
6. How long is the child's current placement expected to last?
7. How many schools has the child attended this year? The past few years?
8. How strong is the child academically?
9. What is the availability of programs and activities at the different school options?
10. Which school does the student prefer?
11. How deep are the child's ties to the school?
12. How was the timing of a transfer decided? End of year or testing timing?
13. How did changing schools affect the student's ability to earn full credits, participate in sports or extra-curricular activities, or graduate on time?
14. How does the length of the commute to the school of origin impact the child?
15. What school do the child's siblings attend?
16. Are there any safety issues to consider?[176]

E. Suggested Questions for Judges to Assess a Child's Educational Needs

Throughout the planning process, the court should assure that all of the educational needs of the child are being addressed. In protective supervision cases and in cases progressing towards reunification, focus must be placed on the caregivers learning about the importance of education, about how to help their child succeed in school, and about how to advocate for the educational needs of their child.

As a matter of best practice, judges should read the reports provided by the Department and the guardians *ad litem*. The new reports provided to the courts in Idaho have space dedicated to answering many of the educational questions a judge may have.

A team effort between the National Council of Juvenile and Family Court Judges, Casey Family Programs, and Team Child Advocacy for Youth developed a technical assistance brief in 2005 for the use of judges and others entitled "Asking the Right Questions." [177] It provides judicial checklists to ensure that the educational needs of children and youth in foster care are being addressed. As a matter of best practice, judges, practitioners, and social workers are encouraged to use the extensive checklists found in the judicial bench cards which compliment this manual.

* * *

[176] *See* THE LEGAL CENTER FOR FOSTER CARE & THE NATIONAL CENTER FOR HOMELESS EDUCATION, SCHOOL SELECTION FOR STUDENTS IN OUT-OF-HOME CARE *available at* http://center.serve.org/nche/downloads/briefs/school_sel_in_care.pdf

[177] ASKING THE RIGHT QUESTIONS: A JUDICIAL CHECKLIST TO ENSURE THAT THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE ARE BEING ASSESSED (2005) *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/EducationalOutcomes/2005educationchecklistfulldoc2.pdf (a joint publication between NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CASEY FAMILY PROGRAMS, &TEAM CHILD ADVOCACY FOR YOUTH).

12.10 INDEPENDENT LIVING

On any given day, more than 463,000 children and youth are in out-of-home care across the United States.[178] Of these children, an estimated 39% were identified as being 13 years of age or older[179] and more than 29,000 of these youth reach an age at which they must make the transition out of the child welfare system, whether or not they possess the skills and support necessary to live successfully on their own.[180] Youth who have experienced abuse, neglect, and other circumstances resulting in out-of-home placement often need additional resources to reach their full potential after leaving the child welfare system.

Independent Living services are intended to mitigate negative outcomes for former foster youth and enhance their chances for success as adults. The services provided by Idaho's Independent Living Program support older youth in foster care and assist them in developing the skills they need to live as responsible and successful adults.[181] Recognizing the unique challenges of older youth who have lived in foster care, the federal government established the Chafee Foster Care Independence Program and appropriated funds to states to assure a minimum level of preparation for independent living for older youth who have been in foster care.[182]

The goals of Idaho's Independent Living program are to achieve the goals of the Chafee Act:[183]

- Help youth transition to self-sufficiency;
- Help youth receive the education, training, and services necessary to obtain employment;
- Help youth prepare for and enter postsecondary training and education institutions;
- Provide personal and emotional support to youth aging out of foster care through mentors and the promotion of interactions with dedicated adults;
- Provide financial, housing, counseling, employment, education and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition into adulthood;
- Make available vouchers for education and training, including postsecondary education, to youth who have aged out of foster care; and
- Provide services to youth who, after attaining 16 years of age, have left foster care for kinship guardianship or adoption.[184]

---

[178] Child Welfare Information Gateway, *Foster Care Statistics*, available at http://www.childwelfare.gov/pubs/factsheets/foster.cfm (last visited April 23, 2011)
[179] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2007.
[180] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2008.
[181] Idaho Department of Health and Welfare, Independent Living Program, http://www.healthandwelfare.idaho.gov/Children/AdoptionFosterCare/IndependentLivingProgram/tabid/158/Default.aspx (last visited April 23, 2011)
[182] 42 U.S.C. §§ 677(b)(2)(A), 677(a)(1)-(7).
[183] *Id.*
[184] 42 U.S.C. § 677(a).

To be eligible for Independent Living Services in Idaho, youth must meet all of the following criteria:

- Must be, or have been, the responsibility of the State or Indian Tribe either through a court order or voluntary placement agreement with the child's family;
- Be between the ages of fifteen and twenty-one years;
- Resided in an eligible placement setting which includes foster care, group care, Indian boarding school, or similar foster care placement and excludes inpatient hospital stays, detention facilities, forestry camps, or other settings primarily designed for services to delinquent youth; and
- Resided in an eligible foster care setting for ninety cumulative days after the 15th birthday.

Every youth, 15 years of age or older and in the custody of IDHW, must have an individualized Independent Living (IL) Plan that includes a permanency plan and independent living skill development and is updated at least annually. For a youth who has attained sixteen (16) years of age, the permanency plan approved by the court must include the services needed to assist the youth to make the transition from foster care to independent living.[185] Idaho law requires that at permanency hearings for youth who are 16 or older, a determination of the services needed to assist the youth to make the transition from foster care to independent living must be identified.[186]

Independent Living planning continues at 17 and 18, but formal transition planning is added at age 17 to assure that youth are prepared to move into independent living at age 18. Transition planning includes assessing the youth's readiness, resources, and skills and providing individualized services to prepare each youth to live as independently as possible after leaving care.

No earlier than 60 days before and no later than 60 days after the youth's 17th birthday, a transition planning meeting must be held. Transition planning participants include the youth for whom the plan is being developed, foster parents, biological parent(s) and family when appropriate, youth mentors, educators, service providers, and others requested by the youth or specific to the youth's needs. The plan should provide for a stable transition and support network for the youth during the transition period and following the exit from care. The Transition Plan is part of the youth's IL Plan and is required at two points, when the youth in care turns 17 and when the youth is within 90 days of aging out of care. [187]

The Fostering Connections to Success and Adoption Assistance Act of 2008 requires a Transition Plan be completed during the 90-day period immediately prior to a youth's 18th birthday or when the youth ages out of care.[188] This plan must be "personalized at the direction of the youth." Within those 90 days, the IL Transition Plan developed must be reviewed and

[185] IDAHO JUV. R. 44(3)(D).
[186] IDAHO JUV. R. 46(c).
[187] THE WORKING WITH OLDER YOUTH STANDARD, IDAHO DEPARTMENT OF HEALTH AND WELFARE, DIVISION OF FAMILY AND COMMUNITY SERVICES, CHILD AND FAMILY SERVICES (2010).
[188] 42 U.S.C. § 677

updated to ensure that the final IL Transition Plan reflects the current status and needs of the youth.

A youth who has a final IL transition plan must be given information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if the youth becomes unable to participate in such decisions and the youth does not have, or does not want, a relative who would otherwise be authorized under State law to make such decisions.[189] The final IL transition plan provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law.

Before youth age out of foster care, they are to be given a Health and Education Passport. The passport should include the following documents:

- Birth Certificate
- Social Security Card
- Immunization Record: Complete and up to date
- Health Records and Medical Card: allergies; hospitalizations; treatments; medications; list of all past medical exams with any diagnoses; childhood diseases
- Information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if he/she is unable to participate in such decisions, specifically as found in Idaho's Living Wills and Idaho's Natural Death Act.
- Education Record: Past and present schools attended, report cards, IEP's, transcripts, letters of achievement
- Independent Living Plan: Most recent Independent Living Transition Plan
- Letter of Verification of Dependency in the State of Idaho: Letter of verification, which establishes eligibility for future IL services and enables the youth to receive IL services from another state if they leave Idaho
- Permanency Pact: Developed before the youth leaves care
- Education and Training Voucher (ETV) information
- State and regional resource guides, as available[190]

When the state fails to connect youth to a permanent legal family, youth struggle to create their own family or support network to meet legal, emotional, psychological, and cultural needs. Youth who age out of the system are less likely than their peers in the general population to achieve academic milestones, and find employment opportunities. They are more likely to experience violence, homelessness, mental illness, and poor health outcomes.[191] Independent living advocacy in the courtroom at each hearing, collaboration between all the child welfare participants, and close monitoring of the youth's independent living needs will ensure that the youths' needs are being met and that youth receive the supports they need for future stability and success.

* * *

[189] *Id*.
[190] THE WORKING WITH OLDER YOUTH STANDARD, IDAHO DEPARTMENT OF HEALTH AND WELFARE, DIVISION OF FAMILY AND COMMUNITY SERVICES, CHILD AND FAMILY SERVICES (2010).
[191] CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE (2008) available at http://www.casey.org/resources/publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_FR.pdf

12.11 GUARDIANSHIPS

The CPA court has exclusive jurisdiction and venue over any guardianship proceeding involving a child who is the subject of a CPA proceeding, unless the court declines jurisdiction.[192] Best practice is for the court to 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 close to adoption as possible, subject only to the rights that are reserved to the parents under the guardianship statute or in the order appointing the guardians.

The statute provides that notice of any action regarding a guardianship arising under the CPA must be provided to IDHW, which has the right to appear and be heard in any hearing and which may intervene as a party in the action.[193] Under this provision, the guardian may not consent to adoption of the child without prior notice to the Department.[194] Finally, the guardianship statute limits the situations under which a CPA-connected guardianship may be modified or terminated or under which the guardian may be removed. The person who moves to terminate a guardianship or have a guardian removed in actions arising under the CPA has the burden of proving by clear and convincing evidence that there has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship and that termination of the guardianship would be in the best interests of the minor. [195]

In limited circumstances, guardianship can have some advantages over termination of parental rights and adoption as a long-term permanency option:

- Guardianship does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, or Social Security.
- 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.
- A guardianship may offer the potential for an agreed-upon solution that has active support of all the parties and avoids contested and time-delaying termination proceedings. A parent might be threatened by the idea of having their parental rights terminated, yet at the same time be unable or unwilling to actually fulfill the role of a parent. If the threat of termination is removed, the parent may be supportive of an alternative arrangement for their child.
- A relative may be committed to providing the child with parental care through guardianship, but may not be willing to become an adoptive parent.
- The potential guardian may be willing to take on the challenge of raising a 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 but may accept the same placement if it is in the form of a guardianship.

[192] IDAHO CODE § 15-5-212A(1).
[193] § 15-5-212A(2) & (3).
[194] § 15-5-212A(4).
[195] § 15-5-212A(5) & (6).

- For children in foster care, guardianship assistance may be available in specific circumstances:
    - *IV-E Guardianship Assistance.* Benefits may be provided to a relative guardian for the support of a child who is fourteen (14) years of age or older, who without guardianship assistance, would remain in the legal custody of IDHW.
    - *State Guardianship Assistance.* Benefits may be provided to a legal guardian for the support of a child if the parental rights have been terminated and there are documented unsuccessful efforts to place the child for adoption.

Guardianship also has significant disadvantages:

- Despite provisions of Idaho law intended to make CPA-connected guardianships long term, such a guardianship may be modified or terminated under some circumstances during the child's minority.[196]
- Guardianships terminate when the children reaches majority.
- Guardianships are subject to ongoing monitoring until the guardianship is terminated by court order or the minor reaches the age of majority. The court may be required to monitor the guardianships, but IDHW will not monitor the guardianship once the CP case has been closed.
- The adoption subsidies that are available to assist adoptive families and special needs children are not usually available in guardianships. In a limited number of cases, a child may qualify for guardianship assistance through the Department. Eligibility is based on the child's identified needs, legal termination of parental rights, and documentation of the unsuccessful efforts to place the child for adoption.[197]
- Many insurance policies that will cover a parent's biological or adoptive child, such as medical or life insurance policies, will not cover a ward.

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 Department 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.

If the proposed permanent placement of the child is guardianship, the court should ask, and the participants should answer, the following questions:

[196] *See* § 15-5-212A.
[197] Eligibility for adoption subsidies is discussed in Chapter 10 of this manual.

- Why is a guardianship in the best interests of the child? What are the facts and circumstances showing that guardianship is a better option for the child than termination of parental rights and adoption?
- 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?[198]

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.

* * *

[198] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES-IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (Barbara Seibel, Fall, 2000).