



ENHANCED RESOURCE GUIDELINES

Improving Court Practice in Child Abuse and Neglect Cases



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Acknowledgments

The National Council of Juvenile and Family Court Judges® (NCJFCJ) provides cutting-edge training, wide-ranging TA, and research to help the nation’s courts, judges, and staff in their important work. Since its founding in 1937 by a group of judges dedicated to improving the effectiveness of the nation’s juvenile courts, the NCJFCJ has pursued a mission to improve courts and systems practice and raise awareness of the core issues that touch the lives of many of our nation’s children and families.

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I. Introduction



I. INTRODUCTION

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I. Introduction

A. Historical Perspective and the Need for Guidelines to Improve Courts' Handling of Child Abuse and Neglect Cases

During most of the 20th century, juvenile and family courts were expected only to determine whether a child had been abused or neglected and, if so, whether the child needed to be removed from home or placed under court or agency supervision. Children were often being removed from their homes unnecessarily, and children who could not be safely returned home lingered in temporary care for years. These children endured multiple placements and often aged out of the child welfare system without family ties and with inadequate skills to function successfully as adults. Court involvement in cases was often a “rubber stamp” for agency recommendations and plans.

In the 1980s, with the implementation of the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), juvenile and family court judges became responsible for ensuring that a safe, permanent, and stable home was secured for each abused or neglected child coming before the court. The Act was passed to address the growing concern that children were being “lost” in foster care; there was also a hope that through the provision of preventive services and permanency planning, the future for these children would be more clear and appropriate. The law required courts to evaluate the reasonableness of services provided to preserve families, hold periodic review hearings in foster care cases, adhere to deadlines for permanency planning decisions, and comply with procedural safeguards concerning placement and visitation.

By the early 1990s, law and policymakers were beginning to recognize the need for timely decision-making and active judicial case oversight for abused and neglected children, resulting in the passage in 1997 of the Adoption and Safe Families Act (ASFA; P.L. 105-89), which marked the culmination of more than two decades of reform in the child welfare field. ASFA reinforced and clarified the intent of the Adoption Assistance and Child Welfare Act and codified many innovative state policies and practices that had emerged to respond to the multiple, often complex, needs of children and families. ASFA put time limits in place for permanency and the termination of parental rights so that children are provided safe and stable permanent placements more quickly. ASFA established the child’s health and safety as the paramount concern in foster care cases.¹ ASFA did not make changes to the Indian Child Welfare Act of 1978,² which had higher standards for removal of Indian children and placed a greater burden on child welfare agencies to make active efforts to

prevent removal and to reunify Indian families.

As a result of these federal laws, and related legislation passed in the states, child abuse and neglect proceedings in the nation's juvenile and family courts were transformed. ASFA clearly established juvenile and family court judges' role as the gatekeepers of our nation's foster care system. New demands were placed upon the courts, with the court's oversight responsibilities requiring a large portion of the court's attention, workload, and resources. Unfortunately, many courts had neither the ability nor the resources to meet these demands. As a result, in many jurisdictions, the quality of the court process gravely suffered. Hearings were often rushed, and there were frequent and unfortunate delays in the timing of hearings and decisions, which resulted in children being left to grow up without permanent homes.

The nation's juvenile and family courts needed a clear description of ways to fulfill their growing responsibilities in child abuse and neglect cases. This description needed to explain the decision-making process in these cases and what resources might be required to create such a process. A clear vision for effective child abuse and neglect case procedures – a vision based upon the experiences of courts as well as information about best or promising practices to improve safety, permanency, and well-being outcomes for children and families involved in the child welfare system – was needed.

The Original RESOURCE GUIDELINES, Model Courts, and ADOPTION AND PERMANENCY GUIDELINES

In order to assist juvenile and family courts to successfully carry out their responsibilities, the National Council of Juvenile and Family Court Judges (NCJFCJ) developed, over a three-year period in the early 1990s, the *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases*.³ Development of the RESOURCE GUIDELINES formally began in 1992 with funding from the Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (OJJDP), U.S. Department of Justice. The best practices and judicial role described in this document were ultimately developed through the extensive dialogue and debate of the publication's drafting committee, but they also evolved from prior years of judicial practice, information-sharing, and outreach efforts among the NCJFCJ membership and its leaders. Rather than being developed in a vacuum, the RESOURCE GUIDELINES resulted from the working experience of many courts. Throughout the publication's development process, court practice was observed, measured, and documented to provide a baseline for understanding both the need for good practice and the requirements necessary to assure it can occur.⁴

Published in 1995, the RESOURCE GUIDELINES detailed effective dependency court hearing practices, provided options for improved practice, and guided juvenile and family courts in assessing and implementing improvements in the handling of child abuse and neglect cases. Endorsed by the NCJFCJ



Board of Trustees, the Conference of Chief Justices, and the American Bar Association, the RESOURCE GUIDELINES eventually became the blueprint for NCJFCJ’s efforts to provide training and technical assistance to judges presiding over child abuse and neglect cases in courts across the country. As a result of these training efforts, hundreds of judges began to embrace their role as outlined in the RESOURCE GUIDELINES and started redesigning their systems to make significant, systemic improvements.

In addition to training, NCJFCJ obtained funding support from OJJDP to select “Model Courts” which agreed to focus on improving practice in child abuse and neglect cases by incorporating the principles outlined in the RESOURCE GUIDELINES. Lead judges in each Model Court agreed to take a critical look at their practices and institute reforms where needed to improve court performance and enhance outcomes for children and families.⁵ Beginning with just a handful of Model Courts willing to implement the RESOURCE GUIDELINES, NCJFCJ’s Model Court initiative eventually grew to involve over 80 jurisdictions, representing large urban centers such as New York City, Miami, Chicago, and Los Angeles, smaller communities such as Alexandria, Virginia and Reno, Nevada, statewide model courts in Florida, Kentucky, New York, Utah, and Virginia, as well as tribal Model Court communities. Model Courts began to consistently measure outcomes in 2007, basing their improvement efforts on real-time data.

During approximately the same time period, the U.S. Department of Health and Human Services’ (HHS)

Children’s Bureau implemented the Court Improvement Program (CIP), which made funds available to each state to create court and interagency teams to assess their systems serving abused or neglected children and to develop and implement improvements. Many CIPs used the RESOURCE GUIDELINES in local and state judicial trainings and as a tool for multidisciplinary best practice court teams to use to assess their child abuse and neglect hearing process and make improvements to align with the GUIDELINES’ recommendations.

In 2000, NCJFCJ published the ADOPTION AND PERMANENCY GUIDELINES.⁶ Developed over a three-year period to produce best practice recommendations for use in cases in which abused or neglected children cannot be reunified with their parents, this companion document to the RESOURCE GUIDELINES provided juvenile and family court judges with guidance on how to hold meaningful hearings from the permanency hearing through termination of parental rights hearings and final case closure.

Initially, the RESOURCE GUIDELINES and ADOPTION AND PERMANENCY GUIDELINES were intended to provide judges with guidance on the many aspects of conducting effective court hearings in child abuse and neglect cases – hearing timeframes, the purpose of specific hearings, parties’ attendance at various hearings, the issues to address at each hearing, and making thorough and effective judicial findings. However, since their publications in 1995 and 2000, these two seminal publications have achieved widespread acceptance of what have become foundational judicial best practices in child abuse and neglect cases, the recognition of the judge’s critical leadership role (both on and off the bench), the role of the court more broadly, and the need for systems-wide collaboration to truly improve outcomes for abused and neglected children and their families. NCJFCJ judges and the original RESOURCE GUIDELINES were relied upon by Congress in the crafting of ASFA. Today, the practices and recommendations for the handling of child abuse and neglect cases articulated in these two GUIDELINES documents are still critical components of ongoing reform in child abuse and neglect cases nationwide – and they continue to shape the future of legal, court, and child welfare agency reform efforts.⁷

**FOLLOWING ARE SOME OF THE PRACTICE IMPROVEMENTS
RECOMMENDED BY THE ORIGINAL RESOURCE GUIDELINES AND
IMPLEMENTED BY COURTS:**

- Substantive and thorough child abuse and neglect hearings
- One family-one judge case assignment and calendaring
- Individual and time-certain calendaring
- Implementation of strict no-continuance policies
- Dissemination of copies of orders to all parties at the end of the hearing
- Setting the date and time of the next hearing at the end of the current hearing
- Frequent court review with enforcement of established timeframes
- Judicial leadership both on and off the bench to improve case processing and child welfare outcomes
- Front-loading of the case process – substantive preliminary protective hearings, early appointment of counsel for parents and children, the use of pre-hearing and pre-trial conferencing, early alternative dispute resolution, early identification of services to children and families
- Development and use of family group conferencing and child protection mediation
- Strong and effective collaborative relationships and collaborative action among all aspects of the court and child welfare system
- Monitoring of the effectiveness of the system through the development of data information systems specifically focused on dependency case processing and performance measurement
- Collaboration among state and tribal courts

B. The Need for Revision

While the original RESOURCE GUIDELINES and ADOPTION AND PERMANENCY GUIDELINES are still valuable in their own right, the new ENHANCED RESOURCE GUIDELINES builds on the foundational material of the earlier documents by incorporating the most recent changes or additions in legal requirements and the continually evolving nature of information about promising practices in the handling of child abuse and neglect cases. Updates were needed to both the original documents because of new demands placed on judges as a result of changing and emerging federal laws (e.g., Adoption and Safe Families Act of 1997; Promoting Safe and Stable Families Program Title IV-B Subpart 2 of the Social Security Act 1993 and 2001; Fostering Connections to Success and Increasing Adoptions Act of 2008; and the Preventing Sex Trafficking and Strengthening Families Act of 2014). In addition, there was a need to consolidate the two documents into one resource.

Much had been learned from the successes experienced by courts that had implemented the RESOURCE GUIDELINES that needed to be incorporated in the revised document. Just some of the successes reported by Model Courts implementing the RESOURCE GUIDELINES, for example, include increased adoptions, as well as safe reductions in the number of children in foster care, the amount of time a child remains under the jurisdiction of the court, and the time it takes for all parties to be appointed counsel.⁸ In addition, a growing body of research examining the effectiveness of a number of the key strategies recommended in the RESOURCE GUIDELINES needed to inform the revised document. Research, for example, has demonstrated the benefits of key strategies such as time-certain calendaring,⁹ judicial continuity, and early and effective legal representation in child abuse and neglect cases.¹⁰

Many specialized judicial checklists and benchcards have been developed since the original RESOURCE GUIDELINES, and these needed to be referenced and integrated (e.g., ICWA implementation checklists; benchcards to address disproportionality and disparate outcomes; and checklists addressing the needs of very young children involved in the child abuse and neglect system, ensuring attention to the educational needs of children in care, addressing the crossover of domestic violence and child protection, and focusing on what judges need to know to be a trauma-informed and responsive court). A growing body of empirical knowledge about the needs of children and families involved in the child abuse and neglect system and the effectiveness of court-based interventions such as mediation, family group conferencing, drug courts, and other problem-solving court approaches has also emerged, indicating a need to expand the menu of best practice options that courts may implement to improve the child abuse and neglect case process. The original RESOURCE GUIDELINES' focus on due process and fairness, access to justice, safety, and permanency also needed to include more focus on child well-being and responsiveness to issues of race and culture.

Child welfare is a dynamic and continually evolving field of practice. Recent years have seen both changes in applicable laws and policies and significant reforms based on emerging science about best practices in child welfare. The lessons learned from courts implementing the RESOURCE GUIDELINES and ADOPTION and PERMANENCY GUIDELINES, the development of specialized benchcards and checklists, and the growing body of research, evaluation, and assessment results all indicated a need for a new ENHANCED RESOURCE GUIDELINES document.

The RESOURCE GUIDELINES Revision Process

The goal of the RESOURCE GUIDELINES revision process was not to “reinvent the wheel” but to give the wheel an update – in fact, much of the original RESOURCE GUIDELINES and ADOPTION and PERMANENCY GUIDELINES are reprinted herein. But to determine what needed to be augmented from the original documents and what new content needed to be developed to create an ENHANCED RESOURCE GUIDELINES, a Steering Committee comprised of judges, NCJFCJ staff, and consultants was convened. This Steering Committee guided consultant authors as they drafted hearing chapters and benchcards, providing a substantive review of drafts and recommendations for revisions. The Steering Committee also identified governance and leadership issues resulting from a reconsideration of the original GUIDELINES documents and presented those issues to NCJFCJ’s Board of Trustees for approval. For example, in discussing the original key principles for practice in child abuse and neglect cases underlying the RESOURCE GUIDELINES, the Steering Committee determined which key principles needed revision and created new “key principles of permanency planning” which were then vetted and approved by the NCJFCJ Board of Trustees.¹¹



In addition to the Steering Committee, drafts of the ENHANCED RESOURCE GUIDELINES were reviewed by members of NCJFCJ's Courts Catalyzing Change (CCC) Steering Committee,¹² as well as participants attending NCJFCJ trainings, including the Child Abuse and Neglect Institute, the Advanced Child Abuse and Neglect Institute, and other regional trainings supported by State Court Improvement Programs. These reviews, along with discussions with judges on the application of the benchcards to their daily practice, provided valuable feedback which was used to refine the benchcards and supporting chapter material.

The New Key Principles Underlying the ENHANCED RESOURCE GUIDELINES

Judging in juvenile and family court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being. Judges must encourage the court system to respond to children and their families with both a sense of urgency and dignity. These key principles provide a foundation for courts to exercise the critical duties entrusted to them by the people and the laws of the land.

KEEP FAMILIES TOGETHER

Families are the cornerstone of our society, and judges should avoid unnecessary separation of child and family if the child can remain safely in the home. When the state is forced to intervene on behalf of abused and neglected children and must decide whether to place children outside the home, it must take into account not only the children's safety, but also the emotional impact of separation. The best plan, if it can be safely implemented, is the least restrictive environment – the child's own home. Throughout its involvement, the state must strive to ensure that children are brought up in stable, permanent families. Each child and family deserves to be treated fairly and holistically, regardless of how and why they enter the court system. Judicial determinations to remove children from a parent should only be made based on legally sufficient evidence that a child cannot be safe at home.

ENSURE ACCESS TO JUSTICE

Judges must ensure that the courtroom is a place where all who appear are treated with respect, patience, dignity, courtesy, and as part of the problem-solving process. Juvenile courts must be child- and family-centered and presumptively open to the public. Children and parents must have the opportunity to be present in court and meaningfully participate in their case planning and in the court process. It is the responsibility of judges to see that all children and each parent are afforded their constitutional rights to due process.

CULTIVATE CULTURAL RESPONSIVENESS

Courts must be welcoming and respectful to people of all races, legal, ethnic, and socio-economic statuses, honoring family in all its forms. All members of the court system must recognize, respect, and seek to preserve the ethnic and cultural traditions, mores, and strengths of those who appear before the court. Judges must become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect decision-making.

ENGAGE FAMILIES THROUGH ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

Judges should encourage and support the development of family-centered, culturally responsive forms of dispute resolution to allow families to craft effective court-sanctioned solutions to the issues that brought them before the court. Courts should support the development and use of appropriate dispute resolution techniques including mediation, family group conferencing, differential response, and encourage all to utilize the form that will be most beneficial to the children and parents in a particular case.

ENSURE CHILD SAFETY, PERMANENCY, AND WELL-BEING

Judges are responsible for ensuring the physical, mental, emotional, and reproductive health, and educational success of all children under the supervision of the court. If a parent is a victim of violence from the other parent/spouse/friend, the judge should sanction plans that keep that victim safe as the best way to keep a child safe. When return to a parent is inappropriate, placement with kin or a responsible person with a significant relationship with the child is the first priority. No child should exit foster care without a life-long connection to a caring and responsible adult.

A child's sense of time requires timely permanency decisions. Research supports that a child's development of trust and security can be severely damaged by prolonged uncertainty in not knowing or understanding if they will be removed from the home, or when and whether they will return home. The shorter the time a

child spends in foster care, separated from his or her family, the less likely there will be prolonged damage to the child's development of trust and security.

ENSURE ADEQUATE AND APPROPRIATE FAMILY TIME

Consistent with child safety, relationships between and among children, parents, and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child. Sibling family time apart from parental family time should be considered. Family time should not be used as a case compliance reward or consequence.

PROVIDE JUDICIAL OVERSIGHT

Juvenile and family court judges have a responsibility to provide individual case oversight as well as system oversight and leadership. The role of the juvenile and family court judge is unique, as it combines judicial, administrative, collaborative, and systemic advocacy roles. By taking on these roles, the juvenile and family court judge holds all stakeholders, including the court, responsible to ensure safe, timely permanency and well-being for children and families. Judges must provide fair, equal, effective, and timely justice for children and their families throughout the life of the case, continually measuring the progress toward permanency for children. The same judge should oversee all cases impacting the care, placement, and custody of a child. Judges should ensure that there is communication, collaboration, and cooperation among all courts handling cases involving any given family.

ENSURE COMPETENT AND ADEQUATELY COMPENSATED REPRESENTATION

Judges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys who are committed to these key principles. Children should be parties to their cases. Children are entitled to representation by attorneys and Guardians *ad litem*, and judges must ensure the child's wishes are presented to and considered by the court.

ADVANCE THE DEVELOPMENT OF ADEQUATE RESOURCES

Juvenile and family courts must be appropriately supported. Courts must maintain a sufficient number of specially trained and permanently assigned judicial officers, staff, attorneys, and Guardians *ad litem* to thoroughly and effectively conduct the business of the court. Judges should continually assess the availability and advocate for the development of effective and culturally responsive resources and services that families need.

DEMONSTRATE JUDICIAL LEADERSHIP AND FOSTER COLLABORATION

Judicial leadership is the cornerstone of the RESOURCE GUIDELINES' principles – both on the bench in individual cases and off the bench in the broader community. Committed, knowledgeable judicial leaders are crucial to the success of court improvement and child welfare system reform efforts. Without this vitally important cornerstone, best practice principles cannot be fully implanted and achieved. The leadership of the judiciary is a crucial and necessary component in implementing reforms that support the RESOURCE GUIDELINES. Judges must engage the community in meaningful partnerships to promote the safety, permanency, and well-being of children and to improve system responses to our most vulnerable citizens. The juvenile court must model and promote collaboration, mutual respect, and accountability among all participants in the child welfare system and the community at large.

C. Scope and Purpose of the ENHANCED RESOURCE GUIDELINES

Despite the great challenges inherent in the complex, dynamic environment of child abuse and neglect proceedings, great progress has been made in courts' handling of child abuse and neglect cases. Practice improvements and the law have raised the bar, and the ENHANCED RESOURCE GUIDELINES are intended to help judges and courts meet and exceed these new heightened expectations. The ENHANCED RESOURCE GUIDELINES set forth the principles that should guide a judge's work and provide the tools to achieve the key principles outlined above.

The GUIDELINES cover all stages of the court process, from the preliminary protective hearing until juvenile and family court involvement has ended. The GUIDELINES assume that the court will remain involved until after the child has been safely returned home, placed in a new, secure, and legally permanent home – whether through adoption or legal custody – or the court's jurisdiction has otherwise ended.

The GUIDELINES address the process itself rather than substantive case law. They do not offer criteria for state agency or court intervention in the lives of families, but are limited to matters of judicial procedure. The GUIDELINES do not attempt to define child abuse and neglect, describe what kinds of abuse or neglect justify a child's removal from home, specify when children can safely be returned home, or set forth suggested grounds for the termination of parental rights. Instead of focusing on the criteria for judicial decisions, these GUIDELINES set forth the characteristics of each hearing and outline needed procedural steps, identify the key decisions that must be made, specify when each hearing needs to take place; and describe the judge's role at that stage of the hearing process.

While the original RESOURCE GUIDELINES included specific time requirements for each hearing, the ENHANCED RESOURCE GUIDELINES are not prescriptive about hearing times. The time recommendations in this document are best practice recommendations and are intended to serve as a guide for judges and court administrators in estimating docket time, judicial time, and ancillary court staff time. Time recommendations encourage the setting aside of sufficient time for hearings to permit the engagement of all parties (including children) and meaningfully move the case forward toward permanency.

Not everything judges need to know about being an effective, informed judge is contained in this document, and resources for additional reading are offered where needed and in the resource list available on the NCJFCJ website.¹³ Moreover, judges cannot be expected to be given the ENHANCED RESOURCE GUIDELINES to read and be ready to perform their duties. Intensive and experiential training and ongoing education are essential to implementation of the recommendations. Judges must also examine the GUIDELINES in conjunction with their state statutes, bench books, and rules.

The GUIDELINES are not just for judges. The document can also be informative to representatives of other child welfare system stakeholders (e.g., attorneys, child welfare caseworkers, CASAs, etc.). The GUIDELINES outline foundational practices for the handling of child abuse and neglect hearings that should be part of the training of judges but also have value when training other individuals who work with child abuse and neglect cases.

The GUIDELINES can also be used by the court, in collaboration with its system partners, to shape policies and practices to ensure effective child abuse and neglect case processing that upholds the requirements of the law and comports with what is known to be effective in achieving safety, permanency, and well-being for children and families involved in the child welfare system.

Whether judges are new to the child abuse and neglect bench or are experienced dependency court judges who are very familiar with the past edition of the RESOURCE GUIDELINES, the latest edition is a valuable read. The ENHANCED RESOURCE GUIDELINES provides the latest knowledge in legal and non-legal considerations in child abuse and neglect cases.

By applying the guidance in this document, judges will not only be able to apply federal law to their child abuse and neglect cases, but also inform their courtroom and decision-making practice by considering best and promising practices as well as science about the needs of children and families.

The ENHANCED RESOURCE GUIDELINES provide:

- Guidance for judges on how to make decisions regarding safety, permanency, and well-being at every stage of the process.

- Guidance for judges on how to develop effective findings based on assessment of the facts, the individual needs of the child and family, the law, and the best available research and science.
- Guidance for judges on how to hold other players in the system accountable by asking questions which raise the expectations for practice for all those who come to court.

The ENHANCED RESOURCE GUIDELINES illuminate:

- The role of the judge as a leader on the bench in cases and off the bench in systems improvement with court stakeholders, system partners, and the community.
- How to obtain the information needed to make informed decisions and ensure that hearings meaningfully contribute to case progress.
- The procedural steps for each hearing to ensure procedural justice is achieved.
- The key decisions that must be made to ensure the needs of the child and family are being met.

D. Contents of the ENHANCED RESOURCE GUIDELINES

Each of the key principles underlying these ENHANCED RESOURCE GUIDELINES emphasizes the tremendous responsibility undertaken by judges hearing child abuse and neglect cases as well as the various issues involved in court organization and operation. The most pertinent of these issues are examined in a chapter on General Issues. This chapter includes content from both the original RESOURCE GUIDELINES and the ADOPTION AND PERMANENCY GUIDELINES, updating and adding to that content where needed to reflect the latest knowledge about legal and non-legal best practice considerations in conducting effective child abuse and neglect hearings. The General Issues Chapter is not intended to be exhaustive of all of the possible issues that may arise in the handling of child welfare cases, nor is the treatment given to the topics included encyclopedic in nature. Instead, the General Issues Chapter contains brief summaries of useful information on a variety of matters that apply to the overall hearing process, such as the role of the



judge, use of alternative dispute resolution techniques, and engaging children and families in the court process. Additional resource material for more detailed reading and technical assistance is available, as well as more relevant content for child abuse and neglect case processing, on the NCJFCJ website.¹⁴ Also included on the website is an overview of federal child welfare legislation, providing a brief synopsis of the provisions of federal law that have had the most impact on child welfare practice. These resource materials are included online, rather than in a printed GUIDELINES appendix to ensure these resources are as up-to-date as possible and reflect the latest science and practical knowledge about child abuse and neglect case processing and outcomes.

The nucleus of the ENHANCED RESOURCE GUIDELINES are the chapters on hearings in child abuse and neglect cases, which contain information about how to prepare for, conduct, and conclude the most common hearings in child abuse and neglect cases. Each hearing chapter is meant to be read in conjunction with the associated benchcard for that hearing. Hearing chapters provide an overview of the purpose and timing of the hearing and issues to be addressed, a summary of the legal requirements as delineated by federal law, general guidance in hearing procedures, the critical questions to be addressed, preparing findings and orders, and best practices considerations for the hearing.

The benchcards are detailed and comprehensive, outlining both the legal requirements of each hearing as well as non-legal considerations based on the latest scientific and promising practice knowledge. The benchcards provide essential information a judge needs on the bench to facilitate conducting thorough and meaningful hearings designed to achieve optimal results. All hearing benchcards are unique to their hearing but follow the same organizational format. Key concepts are reinforced through repetition on each benchcard. Repeating key concepts on each benchcard (and accompanying hearing chapter) serves to facilitate their use as stand-alone training tools and guards against missing key elements of best hearing practice that should apply to all hearings, when training is focused on one stage of the hearing process.

Each benchcard includes actions that should be taken at every hearing including prehearing case preparation, opening the hearing by engaging children and families present, jurisdictional and due process issues that should be addressed repeatedly (e.g., ICWA, location of absent parents), continual monitoring of the child's safety and well-being needs, and timely and effective case processing. The hearing chapter for each benchcard provides supplemental detailed information to aid judges in implementing the benchcards, including cross references to broader discussions in the General Issues Chapter, relevant specialized checklists (e.g., ICWA checklists), and additional resources. References in the benchcards and chapters are to federal law and nationally recognized best and promising practices; judges should also refer to their local and state statutes, case law, and resources for authoritative documents on being a judge in child abuse and neglect hearings in their own jurisdictions.

EACH BENCHCARD AND CHAPTER MAKES RECOMMENDATIONS FOR:

- Case management to prepare for the hearing
 - Document review
 - Internal reflection to prevent bias
 - Identifying who should be present or may be needed
 - Evaluation of related cases
- Case management during the hearing
 - Opening the hearing by engaging children, parents, families, and foster parents
 - Due process and fairness considerations
 - Key inquiries, decisions, findings, and orders
- Case management to prepare for the next hearing
 - Focus on time to permanency
 - Setting next hearing date and time
 - Engaging children, parents, relatives, and foster parents

The amount of detail and content of the benchcards may appear daunting, but they are a valuable roadmap to conducting thorough hearings. Many of the considerations listed in the benchcards are aimed at aiding judges in obtaining or learning more information about the child and family for better decision-making. The court should always include a thorough discussion of all relevant issues in open court, rather than a total reliance on written reports. Making all system stakeholders aware of the contents of the benchcards will enable parties to better prepare for hearings and anticipate the information judges will need to make informed decisions in a case. When first implementing the benchcards, judges may need to ask attorneys and caseworkers for the information, however, participants in the court process will eventually come to understand and anticipate the court's expectations without being asked. This will be particularly true if courts use the ENHANCED RESOURCE GUIDELINES and the benchcards as a basis for ongoing training of all stakeholders on what is expected from them in their roles in the process and more specifically in each court hearing.

This section includes links to websites of national level child welfare policy making, research organizations, and information clearinghouses, as well as various tools and guidelines that have been developed for judges who handle child welfare cases. Through contracts with individual states, tribes, and federal grant funding, the NCFCJ stands ready to provide training, technical assistance, and research design and implementation to both state and tribal court judges and staff, attorneys, agencies and other key partners on implementation of these GUIDELINES.

I. INTRODUCTION ENDNOTES

¹The Adoption and Safe Families Act of 1997 (P.L. 105-89).

²The Indian Child Welfare Act of 1978 (P.L. 95-608).

³National Council of Juvenile and Family Court Judges. (1995). RESOURCE GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases. Reno, NV: Author.

⁴The primary courts observed and evaluated in the development of the original RESOURCE GUIDELINES were Hamilton County Juvenile Court, Cincinnati, Ohio and Kent County Juvenile Court in Grand Rapids, Michigan. This observation and evaluation experience was documented in Hardin, M. (1992). Judicial implementation of permanency planning reform: One court that works. Washington, DC: American Bar Association, and in Hardin, M., Rubin, H. T., & Ratterman-Baker, D. (1995). Another court that works: Judicial implementation of permanency planning reform. Washington, DC: American Bar Association.

⁵Portune, L., Gatowski, S. I., & Dobbin, S. A. (2009). The RESOURCE GUIDELINES: Supporting best practices and building a foundation for innovation in child abuse and neglect cases. Reno, NV: NCJFCJ; Whitney Barnes, E. (2010). Model court protocol: Leadership, innovation and accountability. Reno, NV: NCJFCJ.

⁶National Council of Juvenile and Family Court Judges. (2000). ADOPTION AND PERMANENCY GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases. Reno, NV: Author.

⁷For examples of some of the ways the national Model Courts used the RESOURCE GUIDELINES documents to change practice, see Whitney Barnes, E. (2006). Back to basics: Fundamental application of the RESOURCE GUIDELINES and the ADOPTION AND PERMANENCY GUIDELINES in child abuse and neglect cases. Reno, NV: NCJFCJ.

⁸For a summary of Model Court outcomes, see National Council of Juvenile and Family Court Judges. (2009). The model court effect:

Proven strategies in systems change. Reno, NV: Author; also see the many technical assistance publications evaluating Model Court practice available at www.ncjfcj.org.

⁹National Council of Juvenile and Family Court Judges. (2015). Research report: Assessing time-certain calendaring dockets. Reno, NV: Author.

¹⁰See, for example, Festinger, T., & Pratt, R. (2002). Speeding adoptions: An evaluation of the effects of judicial continuity. *Social Work Research*, 26, 217-224; Kirk, R. S., & Griffith, D. P. (2006). Final report: Evaluation of North Carolina family court pilots. Raleigh, NC: Administrative Office of the Courts, Court Improvement Advisory Committee; Martinson, D. J. (2010). One case-one specialized judge: Why courts have an obligation to manage alienation and other high conflict cases. *Family Court Review*, 48, 180-188; Shdaimah, S., & Summers, S. (2013). One family, one judge practice effects on children: Permanency outcomes on case closure and beyond. *Journal of Juvenile Justice*, 2(2), 37-45.

¹¹National Council of Juvenile and Family Court Judges. (2011). Key principles of permanency planning for children. Reno, NV: Author. To review past “key principles” underlying the RESOURCE GUIDELINES and the ADOPTION and PERMANENCY GUIDELINES, please refer to those earlier documents (*supra* note 3 and 6).

¹²A goal of NCJFCJ’s Courts Catalyzing Change (CCC) Steering Committee is to create and disseminate judicial tools, policy and practice guidelines, and associated action plans that court systems can implement to reduce racial disproportionality and disparities in the dependency system. See Gatowski, S. I., Maze, C.L., & Miller, N. B. (2008, Summer). Courts catalyzing change: Achieving equity and fairness in foster care – Transforming examination into action. *Juvenile and Family Justice TODAY*, 16-19.

¹³See the ENHANCED RESOURCE GUIDELINES resources listed at www.ncjfcj.org

¹⁴*Ibid.*



II. General Issues

II. General Issues

A. The Judge's Role in Child Abuse and Neglect Proceedings

Because of their length, complexity and the continuous nature of the determinations that they require, child abuse and neglect cases involve the court in the lives of the parties and the operations of child welfare agencies to an extent unlike any other court case.¹ Federal law and statutes direct courts to determine whether and when a child should be removed from the home, returned home, or placed in a new permanent home. In addition, depending on state law, judges² may decide or oversee the child welfare agency's³ decisions about whether, how often, and under what conditions parent-child and sibling family time⁴ will occur, what if any efforts will be made to reunite the family after removal of the child and placement in substitute care, and what services will be offered to meet the needs of the child while in care. When those efforts are unsuccessful, courts must determine whether parental rights should be terminated, one of the most significant decisions any judge may make. Moreover, juvenile and family courts⁵ have the significant responsibility of protecting the rights of all parties who come before the court⁶ while they are making decisions to ensure safe, permanent homes for abused and neglected children as expeditiously as possible.

Congress's main purpose in involving judges in the oversight of child protection cases was to ensure that the social service agency was doing its job: that children were not removed from their family unless they were endangered, that the agency provided reasonable efforts to prevent removal, reasonable efforts to help parents reunify with their children, and reasonable efforts to achieve permanency for the child.

Not only do judges presiding over child abuse and neglect cases have considerable managerial and directive functions – more than perhaps any other type of judicial bench practice – but they also must be concerned with principles of treatment, rehabilitation, family preservation, and permanency planning.⁷ Judges in child abuse and neglect cases must be culturally responsive and ensure that families are appropriately engaged in and understand the judicial process, the timelines that apply to cases, and the court's orders. Besides achieving child safety and permanency, courts are expected to make decisions that enhance the child's overall well-being.⁸ Judges must be knowledgeable about ways in which child development, attachment, trauma, and family violence impact the case process, placement, services, and permanency outcomes. Judges need to understand how the child welfare agency's key service providers operate and to know the

resources available in the community, their capacity, and their effectiveness. Judges must understand that children and families of color are overrepresented in the child welfare system and be willing to examine not only their own implicit biases but also any potential structural and institutional racism that may be contributing to this overrepresentation and disparate outcomes. Furthermore, judges presiding over child abuse and neglect cases must demonstrate a commitment to exemplary practice which involves leadership both on the bench in child abuse and neglect hearings and off the bench in collaborative system improvement efforts.⁹

The judge's role in child abuse and neglect cases was conferred on them by federal legislation, and it is a role that is distinct and unique compared to the traditional role of a judge in other litigation venues. The law makes the judge and the judicial process integral parts of a larger, extra-judicial process, the goal of which is to achieve safe, timely permanence for abused and neglected children in a nurturing family setting, preferably with a parent. The law also requires the judge to monitor the work of the other participants in this process and to require that each participant fulfills his or her responsibilities within the statutory timeframe. In order to fulfill this role – not simply to make the requisite judicial determinations but also to work to achieve the broader goals of safety, permanency, and child well-being – the judge must be knowledgeable about many domains outside of the law, which include the people he or she is dealing with (e.g., their culture, history, etc.), the extra-judicial stakeholders and systems involved in the process, the issues underlying child abuse and neglect cases, and the services needed to effectively address those underlying issues.

In child welfare cases, the judge is not merely the arbiter of a dispute placed before the court; he or she also sets and repeatedly adjusts the direction for state intervention on behalf of each abused and neglected child.

1. The Oversight Role of the Juvenile and Family Court

Child welfare cases impose a special obligation on juvenile and family court judges to oversee case progress. Case oversight includes two requisites: child welfare agency fulfillment of its responsibilities and parental cooperation with the state. In child abuse and neglect matters, the court maintains oversight until court supervision of the case is terminated. The oversight obligation of judges in child welfare cases is necessary because special circumstances apply: 1) court involvement in child welfare cases occurs simultaneously with agency efforts to assist the family; 2) the law assigns to the juvenile court a series of interrelated and complex decisions that shape the course of state intervention and determine the future of child and family; and 3) because of the many persons dealing with the child and family, there is increased potential for delay and error.

Unlike most litigation, child abuse and neglect cases deal with an ongoing changing situation. In a criminal

case, the trial usually deals with whether specific criminal acts took place at a specified time and place. But in a child welfare case, the court must focus on agency casework and parental behavior over an extended period of time. In making a decision, the court must take into account the agency's plan to help the family and anticipated changes in parental behavior. At the same time, the court must consider the unique and evolving circumstances and needs of each child.

The juvenile court is required to remain actively involved over a period of time in child welfare litigation. The judge does not simply make a one-time decision concerning the care, custody, and placement of a child, but rather a series of decisions over time. In effect, step-by-step, the judge must determine how best to assure the safe upbringing of the child and that the child is eventually in a safe and permanent home.

The decisions that must be made in child welfare litigation are not merely litigation management decisions, but decisions governing the lives and futures of the parties. For example, over time a court may order, in a single child welfare case: the appropriateness of the child's removal; the child's emergency placement into shelter care; the child's extended placement into foster care; the parents' participation in treatment; the parents' submission to evaluations or testing; the parents' participation in treatment planning; a schedule for parent-child and sibling family time; termination of parental rights; and a child's adoption. As previously mentioned, the length, scope, and continuous nature of these determinations involve the court in the lives of the parties and the operations of the agency to an extent unlike other court cases.

All decisions in a child welfare case are interrelated. Just as findings at the adjudication (trial) shape the disposition (the decision concerning the child's custody, placement, and services), subsequent review hearings typically focus on how the parties have reacted to the court's decision at disposition and the actions they have undertaken. Termination of parental rights proceedings rely heavily upon the court's findings during earlier stages of the case. Because court decisions in child welfare cases are interlocking and sequential, the court performs a more material and directive function than in other types of

cases. Court decisions shape agency actions by identifying dangers and defining the agency's approach to each case and related delivery of services to the child and family. Regular court review of each case refines and redefines agency involvement. Because of the nature of this decision-making in child welfare cases, the judge has a distinct impact on the course of agency work with each family. More frequent and timely court oversight can effectively move children to safe permanency sooner. In exercising their oversight function, judges in child abuse and neglect cases must actively listen and ask questions that challenge all those before the court to expedite safe permanency for the child and families involved in each case.

Through frequent and thorough review, judges must exercise their authority to order and monitor the timelines, quantity, quality, and cultural responsiveness of services for children and families. Judges must oversee families' progress and permanency progress for children.

ISSUES TYPICALLY RESOLVED BY JUVENILE COURTS IN CHILD ABUSE AND NEGLECT CASES*

<p>1978</p> <ul style="list-style-type: none"> • Validity of allegations • Custody, if allegations proven 	<p>2014</p> <ul style="list-style-type: none"> • Need to remove children from their home/need for emergency placement • Sufficiency of efforts to prevent placement • Necessity of emergency relief other than placement (e.g., removal of perpetrator) • Validity of allegations • Custody, if allegations proven • Family time (visitation) • Conditions of family time (visitation) • Sufficiency of case plan including concurrent plan • Sufficiency of efforts to reunify family • Whether services to preserve or reunify the family are required • Child’s long-term legal status (permanency hearing) • Termination of parental rights • Legal guardianship • Sufficient efforts to place the child for adoption • Adoption • Rights of foster parents and children to appear in court and participate in hearings • Efforts to ensure timely interstate placements
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SOME OF THE TYPICAL PARTICIPANTS IN CHILD ABUSE AND NEGLECT CASES*

<p>1978</p> <ul style="list-style-type: none"> • Caseworker • Custodial parent(s) 	<p>2014</p> <ul style="list-style-type: none"> • Caseworker • Custodial parent(s) • Non-custodial or putative parent • Separate attorney for each parent • Child • Child’s attorney or Guardian <i>ad litem</i> • Agency attorney and/or attorney for the state • CASA volunteers • Fowster parents • Relatives • Service and treatment providers
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*Adapted and reprinted from *Judicial Excellence in Child Abuse and Neglect Proceedings: Principles and Standards for Court Organization, Judicial Selection and Assignment, Judicial Administration and Judicial Education*. American Bar Association House of Delegates, Aug. 9, 2010, note 7–8.

2. The Need to Make Timely Decisions in Child Abuse and Neglect Litigation

The law requires courts to make timely decisions for abused and neglected children, but court delays can be a major obstacle to achieving permanency. Even where the pace of litigation is tightly managed, decision-making in child abuse and neglect cases has the potential to extend for many months. When juvenile or family court proceedings are allowed to proceed at the pace of other civil litigation, children spend years of their childhood waiting for agency and court decisions concerning their future.

Children have a very different sense of time than adults. Short periods of time for adults seem interminable for children, and extended periods of uncertainty exacerbate childhood anxiety. When litigation proceeds at what attorneys and judges regard as a normal pace, children often perceive the proceedings as extending for vast and infinite periods. The passage of time is magnified for children in both anxiety levels and direct effect. Three years is not a terribly long period of time for an adult. For a three-year-old, it is the formative stage for trust and security, for a six-year-old, it is half a lifetime, and for a nine-year-old, it can mean the difference between finding an adoptive family and failing to gain permanence because of age. If too much time is spent in inconsistent, unstable, and changing foster care placements in a child's formative years, life-long problems may result.¹⁰

When juvenile or family court proceedings are allowed to proceed at the pace of other civil litigation, children spend years of their childhood awaiting agency and court decisions concerning their future.

Court delays caused by prolonged litigation can be especially stressful for abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether and when they will go home, might be moved to another foster home, or may be placed in a new permanent home is frightening. Early and intensive attention to child protection cases also benefits parents. Parents must be given early opportunities to access competent legal representation, understand their rights and the legal situation they are in, hear from a judge about their case, and be fully engaged in the agency and court processes so that reunification is a viable goal and outcome.¹¹ Limiting the time required to bring cases to their conclusion limits the exposure of children, parents, and families to the stress caused by uncertainty and indecision.

Combating delays in juvenile court, where there are many stages to the litigation and many participants in the process, can be more difficult than in other courts. Yet efforts to speed litigation in child welfare can be successful. There are great variances in court delays from jurisdiction to jurisdiction, and while differences in caseloads can be the cause, docketing practices and case flow management can be factors in delayed proceedings. Some courts have very successfully used case flow management to reduce delays in child welfare litigation. To do so, however, judges must make timely litigation a priority.

3. The Leadership Role of the Judge in Child Abuse and Neglect Cases¹²

Juvenile and family court judges lead from the bench in cases when they exhibit exemplary judicial practice, fully exercise their oversight role, and insist on holding all stakeholders in the child abuse and neglect case process (including themselves) accountable for a substantive hearing process and timely case processing. Juvenile and family court judges have the authority by statute or court rule to order, enforce, and review delivery of services and treatment for children and families. The court must insist that the proposed plan or disposition is complete and, when it is not, direct the agency to respond. The court's leadership responsibilities when exercising its oversight role include the application of sanctions against parties who fail to appropriately respond to court orders.

Judges face many challenges when hearing child abuse and neglect cases: poor data, busy dockets, insufficiently trained staff, insufficient or ineffective services, and not enough qualified attorneys for parents and children. To address these challenges, judges must also exercise leadership off the bench in collaboration with the child welfare agency and other system partners. This includes encouraging multidisciplinary training, promoting collaboration by bringing stakeholders to the table to discuss improvements, sharing data and encouraging evidence-based and outcome informed practice, and advocating for improvements in the administration of justice. Judges should encourage the continuing education of all who serve in the juvenile and family court system, including themselves, with professional training topics encompassing the latest knowledge of child abuse and neglect issues, the prevailing laws and effective court practices, cultural competence, and gender and identity fairness, as well as encouraging interdisciplinary education that includes training of all stakeholders on the same topics.

“Judges who embark on a path of excellence in handling child abuse and neglect cases recognize the importance of achieving timely permanency through active judicial case oversight demonstrated by effective and timely case scheduling, by thorough hearings with informed and prepared participation by all parties, and by regular review hearings. A self-disciplined court can discipline the whole system.”

NCJFCJ. (1999). *Judge's Guidebook on Adoption and Other Permanent Homes for Children.*

Judges are uniquely positioned to motivate systems change. Because judges see cases from all perspectives, they can often provide a clear vision of how the child welfare system needs to be improved. Judges have the influence to bring all necessary stakeholders to the table to collaborate. Juvenile and family court judges can be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families.¹³ Judges can be active in the development of policies, laws, rules, and standards by which the courts and their allied agencies and systems function. Judges can inform the community of the unique and diverse needs of troubled children and their families. Across the nation, state and tribal dependency court judges are participating in collaborations designed not only to strengthen

the court process for child abuse and neglect cases, but to strengthen the child welfare system itself.¹⁴ Experience has shown that the “exercising of a proper judicial leadership role within the community to provide for better services for children and families”¹⁵ promotes change and improvement in the child welfare system.

Judicial responsibility for impartiality does not preclude judicial leadership. Judicial ethics are often identified as a barrier to leadership, but this is an excuse. While judicial ethics standards may vary across states, judicial ethics do not undermine or erase the power of off-the-bench judicial leadership. The very nature of the office mandates that the judge act as an advocate and convener to assure that needed services for children and families are available and accessible.¹⁶ Indeed, nationally eminent judicial, legal, and child welfare organizations have endorsed the appropriateness of the leadership role for judges. In 2006, the NCJFCJ adopted a resolution regarding judicial leadership in juvenile and family courts encouraging judges to take action to improve child abuse and neglect outcomes in their communities.¹⁷ The American Bar Association also endorsed a leadership role for judges in its Standards for Judicial Excellence, noting that “due to the unique interdependence of the court and a wide range of external groups, organizations, and entities, court leaders need to actively collaborate with other interested agencies and organizations.”¹⁸ And, the Pew Commission on Children in Foster Care, a national blue-ribbon panel of child welfare experts, supported judicial leadership in child welfare reform, noting that “Chief Justices and state court leadership must take the lead, acting as the foremost champions for children in their [child welfare] court systems.”¹⁹

In sum, judges serve as leaders in the court, and child welfare systems and should embrace the precept “first, do no harm” recognizing that all persons appearing before the court do so with experience and concepts of self, family, community, culture, and history that exist “cradle to grave” as well as across generations – those appearing before the judge are not just a “case” but individuals. In support of this

Judges are uniquely positioned to lead through encouragement and facilitation of the establishment of a child welfare–system collaborative.

Judicial leaders regularly bring multiple perspectives to bear on issues.

Judicial leaders critically reflect on performance – evaluating their own practice as well as that of system stakeholders.

Judicial leaders embrace an experimental mindset which encourages innovation for systems improvement.

Judicial leaders foster a shared vision for improving the child welfare system.

Judicial leaders are concerned about the impact of court processes on outcomes for children and families.

Gatowski, S. I., Dobbin, S. A., & Rubin, S. (2010). *Achieving excellence in judicial leadership: Leading change for better outcomes for children and families – A National Judicial Leadership Curriculum*. NCJFCJ and National Child Welfare Resource Center on Legal and Judicial Issues.

precept, judges should engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being; victim safety; offender accountability; healthy family functioning; and community protection. To do this, judges should collaboratively convene people inside and outside the court system, as well as consumers of the court system, to identify and implement solutions to systemic problems.

“Judges must convene and engage the community in meaningful partnerships to promote safety, permanency, and well-being of children and to improve system responses. The juvenile court must model and promote collaboration, mutual respect, and accountability among all participants in the child welfare system and the community at large.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

National Council of Juvenile and Family Court Judges Resolution Regarding Judicial Leadership in the Juvenile and Family Courts

Whereas, the success of our nation’s juvenile and family courts is directly related to the leadership provided by the juvenile and family court judges serving in them; and

Whereas, in consultation with the presiding judge of the court system and to the extent that it does not interfere with the adjudication process, these judges are encouraged to:

1. Provide leadership within the community in determining the needs and obtaining and developing resources and services for at-risk children and their families. At-risk children include delinquents, dependents, and status offenders.
2. Investigate and determine the availability of specific prevention, intervention, and treatment services in the community for at-risk children and their families.
3. Exercise their authority by statute or rule to review, order, and enforce the delivery of specific services and treatments of at-risk children and their families.
4. Exercise a leadership role in convening, developing, and maintaining programs of interagency cooperation and coordination among the court and the various public agencies that serve at-risk children and their families.

5. Take a leadership role in the formation of a community-wide network to promote and unify private and public sector efforts to focus attention and resources for at-risk children and their families.
6. Maintain close liaison with school authorities and encourage coordination of policies and programs.
7. Educate the community and its institutions through every available means including the media concerning the role of the juvenile court in meeting the complex needs of at-risk children and their families.
8. Encourage the development of community services and resources to assist homeless, truant, runaway, and incorrigible children.
9. Convene volunteers from the community to work with, mentor, and support at-risk children.
10. Be familiar with all detention facilities, placements, and institutions used by the court.
11. Act in all instances consistent with the public safety and welfare.

NOW THEREFORE BE IT RESOLVED, the National Council of Juvenile and Family Court Judges does support and approve this Resolution regarding judicial leadership in the Juvenile and Family Courts.

Adopted by the Membership Assembled in Conference in Milwaukee, Wisconsin, 2006.

B. One Family–One Judge Case Assignment and Calendaring

One of the key principles of permanency planning²¹ discussed in the Introduction section is that judges must provide fair, equal, effective, and timely justice for children and their families throughout the life of the case. Through frequent and thorough review, judges must exercise their authority to order and monitor the timelines, quantity, quality, and cultural responsiveness of services for children and families. Judges must oversee families' progress toward ameliorating the issues that brought them to the attention of the court and oversee progress toward safety, permanency, and well-being for children. To do this, judges have to ensure that there is communication, collaboration, and cooperation among all courts handling cases involving any given family. It is the position of the NCJFCJ that all of these judicial responsibilities are best accomplished by the same judge overseeing all cases, regardless of case type (juvenile, family, criminal, civil) impacting the care, placement, and custody of the child in a one family-one judge/judicial officer case assignment and calendaring system.²²

A one family-one judge system encourages judges to take ownership in and maintain active oversight of their cases. Under this case assignment system, children and families have the same judge for the life of all cases in which any member of the family is involved. A single incident may generate numerous cases involving dependency, delinquency, criminal, civil protection order, and others. Having the same judge preside over all hearings ensures orders related to the child throughout the case will be informed by a thorough understanding of the history, decisions, challenges, and successes in each case, as well as enables a full analysis of reasonable efforts based on all available information. Such a system makes certain that the agency is treating the family holistically and moving forward to achieve permanency for the child. When cases are heard in multiple courts by multiple judges, conflicting court orders and failure to share information among all involved creates havoc for families.



A unique judicial perspective is developed by a single judge hearing all court matters related to a single family. Knowledge gained of family circumstances and response to court orders may increase the quality

“The same judge should oversee all cases impacting the care, placement, and custody of a child.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

of government’s response to family crises.

This long-term perspective identifies patterns of behavior exhibited over time by all parties involved in a case, preventing a judge from relying too heavily on social service agency recommendations. In states where judges are

expected to approve and review agency case plans, a single judge provides consistency and continuity, developing a case plan in a logical, step-by-step manner. A judge who has remained involved with a family is better able to make decisions consistent with the best interests of the child.

In many courts, cases are assigned to a specific judge or judicial officer at the time the case is first brought to court, and this initial judge conducts all subsequent hearings, conferences, and trials. Courts in which one family is assigned to one judge throughout its court experience are said to use “direct calendaring.” By contrast, courts with “master calendaring” can reassign cases to different judges at different stages of the case. Direct calendaring (also known as “individual calendars”) is particularly suitable for child abuse and neglect cases because this type of litigation typically involves complex hearings extending over a long period of time. Direct calendaring enables the judge or judicial officer to become thoroughly familiar with the needs of children and families, the efforts over time made to address those needs, and the complexities of each family’s situation.

Direct calendaring allows the court to speak with a single voice and convey consistent messages and expectations to the parties. Parties can rely on the court’s direction without concern that a different judge at the next hearing will interpret the case differently. This can help keep families from feeling that strangers who know nothing about them are controlling their lives, and enable families to anticipate a judge’s response to their efforts to reunite their family.

Direct calendaring gives judges a sense of ownership in each case.

The court’s long-term, detailed case knowledge can prevent parties from resurrecting previously rejected arguments. Because of the court’s continuous involvement in each case, the judge can quickly review files, agency reports, and case plan changes before each hearing, allowing for informed decisions on case scheduling, both in terms of frequency and length of time allotted for hearings. Direct calendaring gives judges a sense of ownership in each case. Direct calendaring helps a judge schedule the time necessary to gather complete information, assess the results of decisions, and develop a working relationship with all the parties.

JUDGE-SUPERVISED JUDICIAL OFFICERS

Whenever possible, child abuse and neglect cases should be prioritized and heard by a judge, even in jurisdictions in which judicial resources are at a premium. In most jurisdictions throughout the nation, however, judges have the authority to appoint judge-supervised judicial officers to preside over hearings and make decisions concerning cases assigned to them. Such judicial officers are often referred to as “associate judges,” “magistrates,” “referees,” “special masters,” “hearing officers,” or “commissioners.”

When judge-supervised judicial officers are assigned to juvenile court, the principle of one family-one judge must still be maintained. Cases should not be shifted between judges and hearing officers at different stages of the proceedings. If cases can be appealed from the hearing officer to the judge, they should not be retried by the judge. Rather, the judge should promptly review a tape or transcript of the hearing. Retrials waste judicial time, delay case decisions, and undermine the principle of one family-one judge.

C. Case Flow Management

Court administrators have developed techniques to reduce litigation delays, collectively known as “case flow management.” Effective case flow management is important in child abuse and neglect cases because it is essential to successful permanency planning. Permanency planning involves achieving permanent placements for abused or neglected children within relatively short periods of time, either through their safe return home, or their placement in a new, safe, legally secure permanent home. Sound case flow management by juvenile and family courts is needed to assure that delays in the court process do not interfere with the timely achievement of permanency. Case flow management also helps the court monitor the agency to make sure the case is being moved diligently and decisively toward completion.²³

The basic tools of case flow management include: 1) judicial leadership and commitment; 2) standards and goals; 3) monitoring and information systems; 4) scheduling for credible hearing/trial dates; and 5) judicial control of continuances.²⁴ Additional key characteristics of effective case flow management in child abuse and neglect cases are the use of time-certain calendaring and court policies and practices that serve to “front-load” the case process.

1. Judicial Leadership and Commitment

The court must demonstrate an unmistakably strong commitment to timely decisions in child abuse and neglect cases. It must communicate to its own employees, the attorneys practicing before it, and the child welfare agency that timely decisions are a top priority. The court must conduct and participate in

educational programs concerning the elimination of delays, and also must make necessary organizational adjustments related to delays, in cooperation with court and agency staff. The court must design explicit processes to ensure timely hearings and make sure they are implemented by all judges and administrative staff. Courts should schedule cases in a manner that makes it easy for parents and children to attend.

Effective case flow management focuses on influencing not only the behavior of the judges and court staff, but also the behavior of the attorneys and other system participants in the child abuse and neglect case process. The court cannot succeed in making the best use of its time and resources unless all of the relevant system stakeholders, entities, and agencies adopt a disciplined approach to the processing of cases. For example, when attorneys and caseworkers have an expectation that matters will occur when they are scheduled, they prepare for the hearing, assemble needed documents or witnesses, and are ready to proceed when the matter is called. The court must set an example and work to establish a “disciplined culture” that accepts that events will take place when they are scheduled.

2. Standards and Goals

Specific and detailed timetables for the different stages of litigation are essential to an effective delay-reduction program. Federal and state laws most often establish explicit deadlines for each preliminary protective, review, and permanency planning hearing, as well as deadlines for other events such as filing of the case or service plan and the completion of the termination of parental rights. Federal law does not prescribe timelines for some hearings (such as adjudication and disposition). If state statutes do not include timelines for these hearings, judges should exercise leadership to ensure that they do. The court’s case flow management procedures should be set up to align with these deadlines and to enable the court to identify or “flag” cases that are outside accepted time standards. The court’s case flow management procedures should also be aligned with the goals of dependency cases and facilitate the timely safety, permanency, and well-being of children and families.

3. Monitoring and Information Systems

Court staff can monitor the timing of court proceedings in several ways. They may use tickler files to help the judge or judicial officer schedule hearings within required deadlines. Court staff can contact agency staff to remind them of judicial deadlines for the filing of reports. In addition, court staff should operate a computerized data system capable of spotting cases that have been seriously delayed and measuring court progress in case flow management.

The information system should be capable of capturing the key dependency court performance measures outlined by OJJDP and HHS, Children’s Bureau, as well as those used in the federal Child and Family

Services Reviews (CFSRs).²⁵ The court's information system should be able, for example, to maintain and report statistics on the length of time from case filing to each major court event and to case closure, as well as report on process and outcomes as they relate to key case demographic features (e.g., age, gender, and race and ethnicity of children and families involved in the court's cases). These statistics should be periodically reported and used to evaluate the effectiveness of case flow management as well as in the design of interventions to improve the case process and safety, timeliness, and permanency outcomes. Court and agency information systems should be linked and able to share information.

4. Scheduling for Credible Court Dates

In the great majority of cases, the court should hold hearings on the date that they are originally scheduled. To make this possible, attorneys and parties must understand that trial dates are firm. Pretrial conferences often must be held prior to contested hearings to resolve preliminary issues and to arrive at a time estimate for the hearing. There should be no major interruptions in contested hearings. It should be unusual for a contested hearing not to be completed on the day scheduled or within a few days thereafter.

The early appointment of counsel and other representation is another important factor in scheduling firm trial dates. Attorneys for parents and children must be present and actively involved in the very first court hearing and all hearings thereafter. Many jurisdictions substantially delay adjudication and disposition because of delays in the appointment of counsel. One approach to facilitating early appointment of counsel that has been adopted by many courts around the country is to provide attorneys with notice of their appointment at the time of the filing – attorneys are given a copy of the petition and the supporting documents as well as the name of the person (parent or child) they are going to represent.²⁶

Another way to keep hearings on schedule is to set future hearing dates in open court with parties and advocates present, and provide all parties with a written court order specifying the date and time of the next hearing. The order should also specify actions to be taken by each party, including social service personnel, and list appropriate timelines. The order should be written in easily understandable language so that all parents and other non-lawyers understand clearly what actions are required before the next hearing. Orders should be translated to the family's primary language if they do not speak English.

5. Court Control of Continuances

The cornerstone for effective case flow management – the core concept on which all other case flow management principles depend – is court control of the scheduling of events in every case. The court should learn from counsel and other relevant parties about any special circumstances that affect the pace at which a particular case should proceed, but the court should then set the schedule for the case. Firm judicial control

is not only in the best interests of the court; it also serves the interests of the parties – vesting in a neutral person the responsibility for moving cases forward to a prompt and fair resolution. Adapting the calendaring system to give judges control of their calendars and schedule sufficient time to conduct thorough hearings is

The court must have a firm and effective policy on continuances and should share that policy with stakeholders.

critical to meet performance measures. The court must develop a firm and effective policy on continuances and share it with stakeholders. Continuances should not be allowed because hearing dates prove inconvenient for attorneys and parties. Continuances should be granted only when attorneys or parties are ill, essential witnesses cannot be located, or services of

process have not yet been completed. Neither should continuances be granted based upon the stipulation of parties. Administrative personnel should not be authorized to grant continuances. Good cause for any continuance should be included in the court record. With such procedures in place, many continuances can be avoided.

One of the consequences of a firm policy on continuances is better use of judicial resources. With strong continuance policies, pre-trial conferences, and calendar calls in contested matters, few hearings should need to be rescheduled at the last minute. With a strict policy against continuances and an adequate number of judges, all hearings can be set for a time-certain. When cases are set for a time-certain, typical waiting time should be less than 20 minutes. Reduction of waiting time for agency caseworkers and other witnesses can result in major reductions in government expenditures.²⁷ Implementing time-certain calendaring helps the court facilitate the participation of working parents, caregivers, and school-aged children in court by reducing the wait time for hearings. A strict timeline for all court events should be adopted and, to every extent possible, court hearings should be scheduled in accordance with those timelines. Time-certain calendaring creates and maintains an expectation that events will occur when they are scheduled.

IMPORTANT THEMES TO EFFECTIVE CASE FLOW MANAGEMENT ...

Golden Opportunities: *Don't squander opportunities when all or most parties are present. Instead of just granting a continuance, let everyone know what is expected from each of them the next time they come before the court. Find out what remains to be resolved before the next hearing. Identify any new problems that may have arisen so that all parties are on notice that the court will take those up at the next hearing.*

Create an Atmosphere of Expectation: *Clearly communicate what needs to be done and when. Let everyone know what has to be accomplished and by what date. People will live up to this expectation if it is clearly set.*

6. Implement Procedures that “Front-Load” the Case Process

In numerous jurisdictions, the adversarial nature of initial pre-adjudicatory and adjudicatory proceedings contributes to delays in early case processing as parties frequently litigate specifics of the allegations contained in the dependency petition. More importantly, this litigation typically contributes to delays in substantive case planning, delays in returning children home, and when that cannot happen, the search for kinship alternatives to shelter and foster care, and the provision of services to the child and family. These issues are generally worked out later in conjunction with some resolution of petition allegations.

The concept of “front-loading,” however, is designed to address these concerns by establishing a process that encourages cooperation and problem-solving from the outset of court proceedings.

The court should ensure that front-loading procedures are in place so that, at the earliest point possible, all parties to a court proceeding begin doing all they can to minimize the length of time that children remain in temporary placement. Court processes that front-load the system, such as settlement or pre-trial conferences, family group decision-making or family team meetings, and child protection mediation, should be explored and implemented.²⁸ Research examining the impacts of these front-loading procedures has found they help to identify extended family members for placement, increase the quality of safety and case planning, reduce the amount of time needed for cases to complete the pre-adjudicatory and dispositional phases of court processing, reduce the number of contested trials, and reduce the length of time children remain in temporary placements, as well as making hearings themselves more substantive and meaningful.²⁹

Differentiated case management is another technique of effective case flow management than serves to front-load the case process. Differentiated case management refers to treating cases with varying degrees of complexity differently. The classic model for differentiated case flow management is the creation of multiple procedural “tracks” for cases of differing complexity or difficulty. Another application of the concept is to establish specialized calendars for handling cases with characteristics warranting the application of specialized expertise or calling for the attendance in court of outside experts, such as in dependency drug court cases. Differentiated case flow management may also involve procedures to “triage” cases at their inception to determine how much of the court’s resources they warrant and to identify potential delay-causing issues. Some triaging models include the front-loading concept of pre-hearing conferencing. In the dependency context, pre-hearing conferences provide an opportunity at the inception of a case for parties to exchange case information, begin to address any outstanding issues (e.g., paternity, the application of the Indian Child Welfare Act, or whether or not potential relative resources for placement have been located), and orient respondent parents to the court process.

IN THE CONTEXT OF CHILD ABUSE AND NEGLECT PROCEEDINGS, CASE MANAGEMENT INCLUDES:

- **Case preparation** – The judge must engage in thorough pre-hearing preparation in order to make the most effective use of hearing time. This preparation should also include a process of self-reflection to protect against bias (e.g., to help the judge take a strengths-based approach to families and focus on genuine issues of child safety and well-being).*
- **Calendar management** – The court must ensure that hearings are held and decisions are made in compliance with federal and state mandated timeframes.
- **Case plan management** – The court oversees the case-related activities of the parties and participants and must ensure that the requirements imposed by federal and state laws are met. This includes the agency’s responsibility to develop a permanency goal and concurrent plan, make reasonable efforts to effect the safe reunification of the child and parents as documented in a case plan, and place the child in the most appropriate setting, among other responsibilities.
- **Family engagement** – Achieving the optimal goal of family reunification is more difficult if all parents have not been identified, served, competently represented and actively involved in the case. The court should continually monitor efforts to locate absent parents and other family and actively engage parents and family members who are present.*
- **Multi-case coordination** – It is not unusual that a child abuse and neglect case may have related and concurrently pending cases in other courts or before other judges. The court should take steps to consolidate all related cases before one judge, or if not possible, to coordinate with other judicial officers to facilitate orders that do not conflict and can be complied with by all parties.
- **Time management** – The child’s need for permanency and the mandate for swift resolution of the case frequently run squarely into the reality of congested court calendars. The court must use the often limited time available for child abuse and neglect hearings as effectively as possible through pre-hearing conferencing, pre-hearing preparation, and in-court preparation for the next hearing.

- **Focus on child well-being** – The judge should make time at every hearing to address the well-being of the child, ensuring that the child’s voice is heard and the child’s needs are met.*
- **Advancing the process** – The judge should advance the process at the end of each hearing by preparing with all parties for the next hearing (e.g., set a date and time for the next hearing while all parties are present, distribute copies of orders at the conclusion of the hearing or as soon as possible afterward, ensure parties’ understanding of what took place and next steps required, and set the stage for subsequent hearings by summarizing expectations for those hearings).

* See subsequent sections of the General Issues Chapter for more discussion.

D. Access to Competent Representation

Juvenile and family courts should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. Attorneys and other advocates determine, to a large extent, what information is presented to a judge. Each party must be competently and diligently represented in order for juvenile and family courts to function effectively. The court should ensure that all parties’ representatives, whether lawyers or non-lawyer GALs, have the requisite training and experience necessary to achieve a high quality of practice in child abuse and neglect cases. NCJFCJ’s *Key Principles for Permanency Planning*, for example, state that "... judges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys..."³⁰

Because critically important decisions will be made at the very first hearing, parents should be represented by counsel as early in the process as possible. Few parents will be able to afford to hire an attorney on their own. The court should work with counsel who practice before the juvenile and family court to develop a system for appointment sufficiently in advance of the preliminary protective hearing to permit meaningful consultation and preparation. At each hearing, the judge should ensure that the parents have had sufficient

"Judges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys ..."

NCJFCJ. (2011). *Key Principles for Permanency Planning*

opportunity to consult with counsel and that counsel is prepared to advocate zealously on their behalf.

Because fundamental rights of the child – as well as the parents – are at stake in these proceedings, best practice calls for the appointment of an attorney who will advocate the child’s position from the very beginning of the case. The *Key Principles for Permanency Planning* also state that children should be parties to their cases and are "entitled to representation by attorneys and Guardians *ad litem* and that judges must ensure the child’s wishes are presented to and considered by the court."³¹ This philosophy is consistent with the view that children’s legal service needs are best met by both client-directed (“expressed wishes”) and advocate-directed (“best interest”) models of representation.³² In some jurisdictions, a Guardian *ad litem* (GAL) or non-lawyer Court Appointed Special Advocate (CASA) is appointed on behalf of the child; it is the responsibility of the GAL or CASA to advocate to the court for the child’s best interests (see section on GAL/CASA below). In such cases, the judge should make the extra effort to determine what the child’s wishes are; they may differ from what others may argue are in the child’s best interests.

1. Attorneys

Attorneys present information to the court through opening statements, questions, and answers. Because a judge must receive complete and accurate information in order to make a well-informed decision, attorneys must be competent and diligent. Counsel must thoroughly investigate the case and prepare a list of issues and questions in advance of court hearings to ensure that the judge has complete and accurate information. Much of the initiative for decisions and actions comes from attorneys in the form of motions and petitions. If attorneys fail to take timely action to correct errors or to resolve cases, the quality and timeliness of the court’s decision-making suffers.

Each party must be competently and diligently represented in order for juvenile and family courts to function effectively.

Separate attorneys for parents should be appointed if conflict warrants.

Throughout the United States, there is an extraordinary range in the quality of counsel in child abuse and neglect cases, from inactivity and incompetence (e.g., attorneys who meet their clients only shortly before hearings) to attorneys with a high degree of dedication and skill. Courts, however, have a great ability to positively influence the quality of counsel. Courts can set prerequisites for appointments, including requirements for experience and training. Some courts require attorneys to attend training and “second chair” cases before taking an appointment to a child abuse or neglect case. Some courts have implemented videotaped training sessions to speed the eligibility of attorneys for appointment.

Courts should set specific standards for how parents and children should be represented, including the obligation to continue representation through all stages of the case. Courts can impose sanctions for

violation of their standards, which might include the termination of an attorney's appointment to represent a specific client, the denial of further appointments, or even fines or referral to the Bar committee for professional responsibility. Reasonable compensation is essential for high quality representation, and juvenile and family courts should urge state legislatures and local governing bodies to provide sufficient funding for attorney compensation.

The court can also play a direct role in training attorneys in child abuse and neglect cases, with judges and judicial officers volunteering to provide training and publications for continuing legal education seminars. Before becoming involved in an abuse and neglect case, attorneys should have the opportunity to assist more experienced attorneys in their jurisdiction. They should also be trained in, or familiar with:³³

- Relevant state, federal, and case law, and procedures and rules on abuse and neglect cases, including termination law.
- State and federal benefit programs affecting parties in the child welfare system.
- Federal Indian law including the Indian Child Welfare Act (ICWA), state law related to Native Americans, and the Bureau of Indian Affairs (BIA) Guidelines.
- Reasonable and active efforts.
- Immigration law in child welfare cases.
- Education law in child welfare cases.
- How family violence impacts parties in the child welfare system, including protection orders.
- The causes and available treatment for child abuse and neglect.
- Issues underlying child abuse and neglect cases and the children and families involved in the child protection system (e.g., child development and attachment, substance abuse, mental illness, trauma, etc.).
- Legal permanency options.
- Understanding the impact of out-of-home placement on children.
- The child welfare and family preservation services available in the community and the problems they are designed to address.
- The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.

- Local experts who can provide attorneys with the consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in the home.
- Legal ethics related to their role as an attorney in child abuse and neglect cases.
- Negotiation strategies and techniques.
- Appellate advocacy and procedures.
- Child interviewing and options for presenting children's testimony.

After attorneys are assigned or retained on an abuse and/or neglect case, they should do the following:³⁴

- Adhere to all relevant jurisdiction-specific training and mentoring requirements.
- Engage in ongoing continuing legal education to develop and expand working knowledge of all relevant federal and state laws, regulations, policies, and rules.
- Actively represent client in pre-petition phases of a case (if permitted within the jurisdiction).
- Actively participate in every critical stage of the proceedings, including but not limited to hearings on adjudication, disposition, periodic case review, permanency planning, termination of parental rights, and adoption. When necessary to protect the interests of the client, the attorney should introduce and cross-examine witnesses, file and argue motions, develop dispositional proposals for the court, and file appeals.
- Actively participate in any alternative dispute resolution such as settlement conferences or child protection mediation.
- Actively participate in any multidisciplinary case conferencing models such as family team meetings or family decision-making conferences.
- Thoroughly investigate the case at every stage of the proceedings. Attorneys should know, among other things, the family's prior contacts with the child welfare agency; who made the decision to bring the case to court; the basis for state intervention, including the specific harm state intervention is supposed to prevent; and what alternatives, including voluntary in-home services and placement with relatives, were considered prior to initiating court proceedings.
- If the child has been removed from the home, determine what contacts the agency has since made with the parents and the child, and what efforts were made to reunify the family prior to the preliminary protective hearing.
- Conduct a full interview with the client to determine what involvement, if any, the child welfare agency

has had with the parent or child; what progress the parents and child have made; and what services the client (parent or age-appropriate child) believes would be helpful.

- In preparation for such proceedings as adjudication, disposition, periodic review, and termination of parental rights, interview key witnesses including child welfare agency personnel, key service providers to the child and family, representatives of other key agencies, and others with knowledge of the case.
- Review all documents that have been submitted to the court.
- Review the agency's file and any pertinent law enforcement agency reports to evaluate the case and ensure that the agency has complied with its own procedures and regulations.
- Obtain or subpoena necessary records, such as school reports, medical records, and case records.
- When necessary, arrange for independent evaluations of children or parents.
- Stay in regular contact with clients, writing letters and making telephone calls when necessary and using tickler files.
- Cooperate and communicate regularly with other professionals and the court as needed in the case.
- Participate in collaborative practice improvement and systems change meetings and workgroups.

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

The Child Abuse Prevention and Treatment Act of 1974 (CAPTA) required states receiving federal funds for the prevention of child abuse and neglect to provide a Guardian *ad litem* (GAL) for every child involved in

“Children should be parties to their cases. Children are entitled to representation by attorneys and Guardians ad litem, and judges must ensure that the child’s wishes are presented to and considered by the court.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

such proceedings. Since the federal act failed to fully define the role or responsibilities of GALs, some jurisdictions implement the CAPTA requirement by appointing specially qualified and trained attorneys as GALs; some appoint trained citizen volunteers as GALs, such as Court Appointed Special Advocates (CASAs); and some, lacking sufficient funding fail to provide children with GAL representation.

In 1996, Congress noted that, under the current system, there are more and more cases where an appointed Guardian *ad litem* has no contact with the child and makes uninformed recommendations to the court. Therefore, language was added

to clarify that the role of such individuals includes obtaining a first-hand understanding of the situation in order to make an informed recommendation to the court.³⁵

In addition, Congress added language to this provision in 2003 via Public Law 108-36 to require that states train Guardians *ad litem* appropriate to their role in representing children. Public Law 111-320 (2010) further amended section 106(b)(2)(B)(xiii) to require that this training include early childhood, child, and adolescent development.

CASAs are specially screened and trained volunteer Guardians *ad litem* appointed by the court to speak up for the best interests of abused and neglected children. The appointment order of the court authorizes the child's volunteer advocate to interview the child and other people involved in the case and attend meetings, and permits access to otherwise confidential records concerning the child in the case for the volunteer to review. As a result of their efforts investigating, reviewing, attending meetings, and interviewing the child and others, CASAs make recommendations to the court as to what is in the best interests of the child. In addition, they continue to monitor the case until it is resolved.³⁶

There are a number of GAL/CASA program models in operation.³⁷ In one model, the judge appoints a volunteer to serve as Guardian *ad litem*. The GAL is afforded party status and has the responsibility to investigate the situation, review records, interview the child and other individuals in the case, and attend meetings regarding the child. The volunteer, in consultation with CASA staff, decides what recommendations are in the best interests of the child and prepares a written report to be filed with the court. Volunteers may also have access to an attorney through the program whose responsibility it is to provide information and legal advice.

In another model of GAL/CASA representation practice, the judge appoints the volunteer as a "friend of the court" rather than a party to the case. In some states, older abused or neglected youth are required to have legal counsel appointed as GAL to represent their wishes, regardless of whether their wishes and best interests are congruent. Volunteers who function as "friends of the court" have the same duties to investigate, meet with the child and other individuals in the case, attend meetings, advocate, and monitor cases as volunteers who are appointed as GALs. However, the attorney appointed to represent the child provides direction, presents the case in court, and prevails in any disagreement regarding the volunteer's recommendations.³⁸

In some courts, the attorney GAL and the volunteer function as a team, sharing information and planning strategy together.³⁹ In still others, the attorney GAL and volunteer represent the same child or sibling group but may disagree about the direction of the case and may present opposing positions in court. A hybrid of these two models exists in a few jurisdictions, with both a GAL attorney and a non-GAL volunteer being appointed with full party status. Both represent the child's best interests, one from a legal and one from a community perspective.⁴⁰

GAL/CASA pre-service training should be substantive and cover areas such as the role of the GAL/CASA volunteer, child abuse and neglect proceedings, confidentiality, the dynamics of abuse and neglect, relevant

laws, child development and attachment, community resources, cultural awareness, interview techniques, and report writing. In addition to pre-service training, active GAL/CASAs should continue training throughout their appointment in order to hone or refresh skills and learn about new laws and emerging promising approaches in the representation of children and child welfare practice. Training should also provide sufficient opportunities for participants to apply what they have learned in practice. As noted in National CASA's training curriculum, the intent of GAL/CASA training should be to develop advocates who are competent, reasonably autonomous, and able to exercise good judgment in their role as GAL/CASA volunteers.⁴¹

After GALs/CASAs have been appointed on an abuse and/or neglect case, they should do the following:⁴²

- Conduct an independent investigation by reviewing all pertinent documents and records and interviewing the child, parents, social workers, foster parents, teachers, therapists, daycare providers, and other relevant persons to determine the facts and circumstances of the child's situation.
- Determine the thoughts and feelings of the child about the situation, taking into account the child's age, maturity, culture and ethnicity, and degree of attachment to family members, including siblings. Also to be considered are continuity, consistency, and a sense of belonging.
- Seek cooperative solutions by acting as a facilitator among conflicting parties to achieve a resolution of problems and foster positive steps toward achieving permanency for the child.
- Provide written reports at each hearing which include findings and recommendations.
- Appear at all hearings to advocate for the child's best interests and present testimony when necessary.
- Explain the court proceedings and the role of the GAL/CASA to the child in terms the child can understand.
- Make recommendations for specific, appropriate services for the child and the child's family and advocate for necessary services which may not be immediately available.
- Monitor implementation of case plans and court orders, checking to see that court-ordered services are implemented in a timely manner and that review hearings are held in accordance with the law.
- Inform the court promptly of important developments in the case including any agency's failure to provide services or the family's failure to participate. The GAL/CASA should ensure that appropriate motions are filed on behalf of the child so that the court can be made aware of changes in the child's circumstances and take appropriate actions.

- Advocate for the child’s interests in the community by bringing concerns regarding the child’s health, education, and mental health, etc., to the appropriate professionals to assure that the child’s needs in these areas are met.

Both trained volunteers and attorneys must play a significant role in providing GAL representation for children. In jurisdictions where there is role conflict and confusion, there should be joint efforts to clarify and define mutual responsibilities. The NCJFCJ encourages juvenile and family court judges to consider “ assisting in the creation and expansion of CASA/GAL programs and utilizing CASA/GAL volunteers in cases involving abused and neglected children.”⁴⁴ Where GALs or non-lawyer CASAs are appointed for children, the judge should take extra steps to determine what the child’s wishes are. Juvenile and family courts must continue to examine methods of using both volunteers and attorneys to improve the representation of children involved in dependency proceedings.

THE COURT’S ROLE IN ASSURING THE QUALITY OF REPRESENTATION IN CHILD ABUSE AND NEGLECT PROCEEDINGS

- Recognize the importance of the attorney/GAL role by demonstrating respect for advocates and for all parties.
- Establish uniform standards of representation and GAL practice.
- Ensure attorneys and GALs in child abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with standards. Play a role in continuing education and provide mentoring opportunities.
- Ensure appointments of all attorneys and GALs are made in a timely manner – immediately upon removal or filing of petition (i.e., as soon as possible in a case) and before the first hearing – and last until the case has been dismissed from the court’s jurisdiction.
- Ensure attorneys receive fair compensation.
- Ensure timely payment of fees and costs for attorneys.
- Provide interpreters, investigators, and other specialists needed by attorneys to competently represent clients and ensure attorneys are reimbursed for the costs of these specialists.

- Ensure attorneys carry a reasonable caseload that allows them to provide competent representation for their clients.
- Ensure all parties and their attorneys/GALs receive copies of court orders at the conclusion of each hearing (or as soon afterward as possible) as well as other documentation.
- Provide contact information between clients and attorneys/GALs as needed.
- Ensure child abuse and neglect cases are heard promptly with a view toward timely decision-making and thorough review of issues. Schedule hearings for a time-certain to avoid delay.
- Maintain, grow, and help establish standards for CASA/GAL programs.
- Include all attorneys, CASA/GALs and other advocacy groups in collaborative systems change efforts.

Adapted from the American Bar Association’s Standards of Practice for Attorneys in Child Abuse and Neglect Cases; sections discussing the role of the court (see General Issues Chapter, note 28) and National CASA Association’s Judges Guide to CASA/GAL program development (revised, 2013).

E. Court Facilities

The courthouse should be centrally located in the community it serves and should be readily accessible via mass transit.

The courtroom itself should be separate and apart from the courtrooms used for adult criminal and civil cases. If this is not feasible, child abuse and neglect cases can be separated from other matters on the court’s docket through scheduling.

Recognizing that the “public has a legitimate and compelling interest in the work of juvenile and family courts,” and that open court hearings would increase public awareness of child protection matters and increase accountability in the conduct of hearings, the

“Juvenile courts must be child- and family-centered and presumptively open to the public.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

membership of the NCJFCJ resolved in July 2005, that “our nation’s juvenile and family courts be open to the public except when the juvenile or family court judge determines that the hearing should be closed in order to serve the best interests of the child and/or family members.”⁴⁵ Hearings should be held in a courtroom sufficient to accommodate the judicial officer and court staff, the agency attorney and social worker, the child’s attorney and Guardian *ad litem*, the custodial and non-custodial parents and their attorneys, the child, relatives, foster parents, treatment and service providers, and any other individual important to the case. The courtroom must have adequate seating capacity, but need not have the appearance of a traditional courtroom. The use of a conventional courtroom may be intimidating and stressful to children appearing before the court. The courtroom design should be as comfortable as possible and mindful of lessening the stressfulness of the situation. Space should be provided for parties, witnesses, and attorneys waiting for hearings in the same court. There should be no side discussions or distractions permitted while the court is in session. Victim safety in cases involving domestic violence should be addressed by the court, both in terms of the physical layout of the court and the conduct of hearings.

The courtroom should have a telephone and adequate recording equipment. The judge or court staff member should have a personal computer in the courtroom that is linked to a printer and the Internet. The computer is needed to permit instantaneous preparation and distribution of court orders and findings at the hearing. Court forms can easily be programmed into the computer to facilitate rapid preparation of the orders. A bailiff should be in the courtroom, and the judge should have a silent buzzer or other device available to obtain additional security personnel when necessary.

If a tape recorder rather than a court reporter or stenographer is used, the court must have appropriate, high quality recording equipment available to allow efficient and cost-effective transcriptions. Where permitted by law, the court alternatively may use video-taping equipment and dispense with the transcription process.

F. Voluntary Agreements for Care

State laws typically allow parents to enter into voluntary agreements with public child protection agencies for the temporary placement of a child in foster care. These agreements, which are entered into prior to court involvement, are often referred to as voluntary agreements for care.

Voluntary agreements can serve useful purposes. In cases where a short-term placement is necessary for a defined purpose, such as when a parent enters in-patient hospital care, a voluntary agreement can allow the temporary placement of a child without unnecessarily involving the court and expending its scarce resources. Voluntary agreements can provide a method of immediately placing children with a relative or in foster care with parental consent prior to initiating court involvement, which can avoid the need

to petition the court for emergency removal. Voluntary agreements, however, can be misused by child-placing agencies. Without proper safeguards on voluntary agreements, agencies can place children for extended periods without court involvement, thus circumventing court review of agency efforts. Voluntary agreements also can be misused to place children in foster care under circumstances where the agency lacks sufficient cause to seek court-ordered placement of the child.

To prevent misuse of voluntary agreements, statutory frameworks should exist to regulate their use and to ensure judicial oversight. The use of voluntary agreements should be limited, and all such agreements should be time-bound. Statutes should provide that all agreements automatically expire after a short, defined period of time and can be extended only with the agreement of all parties and with court approval based upon a written report from the agency. Voluntary agreements should be approved only when it is apparent that each involved parent was a full and able participant in the agreement process.

A voluntary agreement should always be in writing and on a form that explains the parents' rights, which include: the right to reasonable family time (visitation) with the child; the right to be consulted on decisions regarding the child's care and placement; and the right to revoke the agreement upon proper notice to the agency. The agency should be required to prepare a case plan whenever a child is placed pursuant to a voluntary agreement. The case plan, at a minimum, should provide each treatment goal that must be achieved for reunification to occur, the services to be provided, and the terms of family time (visitation).

A voluntary agreement should always be in writing and on a form that explains the parents' rights.

To prevent the misuse of voluntary agreements, judges should review each agreement when cases involving them become active with the court. ASFA requires that all voluntary cases be reviewed by the court at 180 days from the date the agreement was signed by all parties pursuant to a "request for judicial determination"

to determine whether the voluntary placement should continue or whether a petition should be filed. If a judge notices a pattern of misuse of voluntary agreements, he or she can seek corrective action by bringing the problem to the attention of appropriate administrators within the agency. If a child has been placed inappropriately pursuant to a voluntary agreement, a judge may find (when appropriate) that the agency failed to make reasonable efforts to prevent or eliminate the need for placement of the child.

G. Emergency Orders

1. Child Protection

Many states allow the removal of an allegedly abused or neglected child prior to issuance of a court order. In emergency situations, it may be necessary to take steps to protect a child at or even before the beginning of litigation. It may be necessary to immediately remove a child from home or to expel from the home a parent who is alleged to have abused or neglected the child or another parent.

While quick and decisive action is sometimes necessary for the protection of the child, it can have a drastic impact on the family. Precipitous and unplanned removal of a child from home or forcible removal of a



parent is always traumatic. Once such action is taken, it is difficult to reverse.

First, the court must act quickly to ensure protection of the child. Second, the court must provide prompt procedural protection for parents, consistent with the safety of the child. Third, it must move proceedings forward as quickly as possible. Fourth, the court must make as careful and considered a decision as emergency circumstances allow.

2. Speedy Issuance of Orders

The police or the child protection agency (whichever is responsible under state law for emergency removal of children) should have virtually immediate access to the court in emergency situations. When the court is not open (evenings, weekends, and holidays), there should be 24-hour access to a judge to issue orders. To allow for such rotation in sparsely populated rural counties, one judge should be empowered to take emergency calls for more than one county.

If an emergency arises during hours when the court is in operation, the court should provide a hearing within 24 judicial hours. To make this possible, the court may need to set aside special times for emergency hearings such as the first thing in the morning or afternoon or at the end of the court day.

3. Procedural Protections in Emergencies

In emergency situations, there are several ways in which the decision to remove a child or alleged abuser might be made:

- an in-court hearing about which parents are given prior notice and the opportunity to appear;
- an *ex parte*, in-court hearing about which parents are not notified;
- an *ex parte* hearing in which parents participate via telephone; or
- action by the police or child protection agency without prior court approval.

State laws define which of the preceding options are available and under what circumstances. In states without applicable statutes, this may be accomplished through court rules. These options are listed in order of priority, with the preferred procedures listed first. Thus, emergency custody should be obtained through a hearing where the parents have the opportunity to appear, unless this would place the child in danger. When such a hearing is requested, it should be conducted as soon as possible. Court-appointed counsel for both the parents and the children and/or a GAL/CASA for the children should be immediately available for such a hearing. If parents cannot be located despite agency efforts to notify them, the court must proceed with an *ex parte* hearing and instruct the agency to continue diligent efforts to provide such notice.

In some cases, providing parents with advance notice of a hearing may endanger the child. Emergency custody or expulsion of an abuser through an *ex parte* hearing may then be selected. It might not be safe to notify the parents before removing the child if there is reason to believe that the parent might harm the child, intimidate or convince the child not to provide information, or abscond with the child.

If an emergency occurs in the evening or on a weekend or holiday, the court may issue an *ex parte* order by telephone. In states where the agency is authorized to take custody, an *ex parte* telephone custody order usually authorizes the agency to take custody of the child and instructs the police to provide assistance. An *ex parte* order for removal of a parent should be executed by police with the involvement of child protective services.

The final option, action by the police or agency without prior court approval, should be permitted only when it is not practical to use one of the first four options. For example, sometimes children are taken into custody by the police at the time that the police arrest a parent. In these cases, police subsequently contact the agency to arrange emergency placement for the child, and agency personnel come before the court at the preliminary protective hearing. Ideally, however, the removal would have included the involvement of a child protective services worker.

4. Advancing the Litigation in Emergencies

In the event an *ex parte* order must be issued, there are four important steps: first, the court must review the agency's efforts to notify the parents and other responsible adults. Second, counsel should be provided as soon as parents are notified, and consideration should be given to appointment of representatives for the child (e.g., child's attorney and a GAL/CASA). Third, a preliminary protective hearing should immediately be scheduled to give parents the opportunity to contest the order in compliance with ASFA and state law. And fourth, the court should require an affidavit of reasonable efforts before any order can be signed.

5. Procedure for Emergency Hearings

Ex parte hearings should be brief proceedings, in which the caseworker testifies concerning immediate danger to the child. A brief discussion of recent efforts by the agency to assist the family should seek to identify safe, non-disruptive ways to protect the child without removing the child or the alleged abuser from the home.

The *ex parte* hearing should be recorded, whether the hearing occurs in court or via telephone. The recording should be preserved as part of the court record. A written report also should be filed by the agency or police after the hearing. The report should contain a complete description of the circumstances of the removal and a sworn affidavit of reasonable efforts to prevent the placement. The recording of the hearing and the written report both provide a record that will be helpful in later proceedings and help protect against careless or false statements in requests for emergency orders.

H. Child Safety Assessment, Planning, and Decision-Making ⁴⁷

In child abuse and neglect cases, judges assess the current safety level of children coming into the system and plan for their continued safety throughout the case. Judges make critical decisions regarding whether to remove a child and, once removed, whether and when the child can return home. The American Bar Association's *Child Safety: A Guide for Judges and Attorneys*⁴⁸ provides clear standards that help build consistency in decision-

"Children should remain at home as long as they can be safe. Removal of a child from the home should occur only as a last resort. Judges are responsible for proactively monitoring the safety of children and ensuring services are provided to maintain their safety no matter where they are placed."

NCJFCJ. (2011). *Key Principles for Permanency Planning*

making around child safety, as well as provide judges with a decision-making structure so the agency's removal decision is critically evaluated, children are not left in unsafe settings, and children are not returned home prematurely.

Determining safety is a decision separate from others in the case. As noted in *Child Safety*,⁴⁹ a first step in making effective safety decisions is to require the agency to gather information well beyond the precipitating incidents of abuse or neglect. Background questions for the agency should obtain detailed information about: the nature and extent of maltreatment; the circumstances accompanying the maltreatment; how the child is functioning day-to-day; how the parent disciplines the child; and the overall parenting practices. The court needs to revisit the safety issue once it has complete information – regardless of when the original reasonable efforts and contrary to welfare findings were made. If the agency fails to provide safety information, the court may find the agency failed to make reasonable efforts to prevent placement. A child is considered unsafe when: 1) threats of danger exist within the family; 2) children are vulnerable to those threats; and 3) parents have insufficient protective capacities to manage or control threats. To make the best decision, judges need to carefully consider each of these elements. If threats are not present, the child is safe. If threats are present, but the child is not vulnerable, the child is safe. If threats are present with a vulnerable child, but sufficient protective capacities exist, the child is safe. If threats are present, the child is vulnerable, and protective capacities are insufficient, the child is unsafe.

If the judge determines the child is unsafe, a safety plan is needed to ensure safety while working with the family. This plan is distinct from a case plan – it must have an immediate effect on controlling threats to the child's safety. Under ASFA, the court must consider if the agency made reasonable efforts to prevent

Once a child is removed it becomes logistically and practically more difficult to help a family resolve its problems.

removal. The judge initially must decide on a sufficient, feasible, and sustainable safety plan. The goal is to control threats in the least intrusive way. If an in-home safety plan is sufficient and the agency did not implement one, then the agency failed to provide reasonable efforts to prevent removal. If an out-of-home safety plan is necessary, the court needs to consider the kind

and amount of family time and the minimum conditions for the child to return home.

Threats of danger must be controlled, not necessarily eradicated, for children to be safely returned home. Deciding to allow the child to return home by finding an in-home safety plan can replace an out-of-home safety plan. Once the child safely returns home, the parties work to end court intervention. The court should dismiss the case only when safety threats are absent, parents have sufficient protective capacities, or both.

I. The Intersection of Domestic Violence and Child Protection

The NCJFCJ views battered parents as partners in the protection of their children. Judges should work diligently with system partners to adopt this principle. Cases that are filed naming the battered parent as a perpetrator of abuse and neglect because a child was exposed to domestic violence further traumatize the battered parent.

Judges should exercise leadership to ensure that their courts become more efficient in how they handle domestic violence cases through implementing improved practices and procedures for restraining orders, improved monitoring of batterer-intervention programs, and stricter enforcement of firearms-relinquishment laws and orders. Improvement efforts that involve community stakeholders, such as law enforcement and social services, as well as strategies improving collaborations across child welfare and domestic violence agencies and dependency courts, are necessary to enhance cross-system understanding and interactions.

Judges should work closely with prosecutors, defense attorneys, and victim advocates in system reform efforts to ensure that petitions are filed using language that protects children and views the battered parent as a partner in protection. Routinely filing “failure to protect” petitions in cases involving domestic violence misstate the issue at hand and fail to hold batterers accountable.

J. Alternative Dispute Resolution Techniques

All juvenile and family court systems should have alternative dispute resolution (ADR) processes available to the parties so that trials can be avoided whenever possible and appropriate. Such systems should include mediation and settlement conferences. These systems expedite sound decision-making and can avoid lengthy appeals because they often produce full or partial agreement of the parties. These practices can achieve these results by: providing parents with factual information that offers a realistic prospect of trial outcome and helps to separate personal issues and biases from factual information; giving parents a sense of participation in future case planning; helping the child, parents, and relatives to understand the importance of permanency; and providing a forum to discuss the appropriateness of permanency options. Even when mediation, settlement conferences, and

Courts should support the development and use of alternative dispute resolution techniques including mediation, family group conferencing, differential response, and like approaches.

NCJFCJ. (2011). *Key Principles for Permanency Planning*

other ADR techniques fail to produce agreements and avoid contested hearings and trials, they can help to narrow the number of contested issues, shorten the duration of trials, and ensure that all parties are well-prepared. Family group decision-making or family group conferences are often discussed in the context of ADR techniques. However, while the use of family group decision-making can result in differences being resolved, it is discussed herein in the context of a tool for family and child engagement in the court process (see the section in this Chapter on engaging children and families). When ADR mechanisms are utilized, the court should still conduct a thorough inquiry to determine whether agreements were reached collaboratively and consensually and whether parents understand and agree.

1. Mediation

Alternative dispute resolution has emerged as an effective strategy for resolving issues in child abuse and neglect cases by infusing neutrality in situations that are rife with potential conflict and power imbalance. Juvenile courts recognize that the adversarial process in child abuse and neglect cases can sometimes break down communications and create hostility, divisiveness, and rigid position-taking among participants, most notably the parents and the child protective agency. Child welfare mediation offers an alternative to the typically adversarial child protection and permanency resolution process between the child welfare agency, birth parents, and other involved family members. Mediation in child abuse and neglect cases is a process that brings all significant case participants together in a non-adversarial setting.

Mediation brings parties together with a neutral third party (the mediator) to thoroughly, constructively, respectfully, and humanely attempt to resolve case issues to the satisfaction of the parties. The mediator has no authority to impose a solution, but strives to reframe the issues to help the parties see their conflicts from different perspectives, emphasizing areas of common ground and guiding them toward recognizing new approaches to resolve their problems. Courts use mediation to address conflicts between the parent and child or other family members, between the parents and the agency, between the parents, or between the family and the child protection agency or other agencies such as schools or mental health providers. Mediators in all of these situations must be highly trained, experienced, and skilled professionals who have credibility with the court and related professionals. Family members and other participants must truly perceive them as neutral and having the best interests of the child and family at heart. All parties, their attorneys, and other relevant case participants, including the child if developmentally age appropriate, should be included in the mediation process.

The mediation process should typically include the following individuals at various stages of the mediation session:

- Mediator(s); preferably one male and one female
- Parents whose rights have not been terminated, including putative fathers
- Relatives with legal standing or other custodial adults
- Assigned caseworker
- Age-appropriate children
- Agency attorney
- Attorney for parents (separate attorneys if conflict warrants)
- Legal advocate for the child and/or GAL/CASA
- Service providers
- Tribal representative if appropriate
- Adult or juvenile probation or parole officer.

RESOURCE GUIDELINES RECOMMENDATIONS FOR IMPLEMENTING MEDIATION PROGRAMS:

- Mediation programs should be court-based or court-supervised and have strong judicial and interdisciplinary support.
- Mediators must be highly trained, experienced, and skilled professionals, have credibility with the court and related professionals, and be perceived by family members as being neutral and having the best interests of the child and family at heart.
- Mediation can be helpful in resolving dispositional, post-dispositional, and some jurisdictional issues.
- Mediation may be appropriate in only a select number of cases, but when ordered by the court, participation in mediation programs should be mandatory.
- Mediation should be confidential.
- Mediated agreements should become part of the court record.
- Mediated agreements should be specific and detailed.
- Mediated agreements will be only as effective as the community resources available to provided needed services to children and families.

Child protection mediation is often used to resolve a broad range of dispositional and post-dispositional issues, such as identifying the family preservation services required to protect the child's safety in the home, determining the willingness of the parents to accept services, arrangements for placement and visitation of the child, and frequency and conditions of family time. When mediation is used at the point jurisdiction or termination of parental rights, there should be a clear court policy that mediated agreements are to reflect a full and accurate statement of the facts, that legal advocates for all parties actively participate, and that legal advocates ensure that the interests of their clients are not sacrificed to simply obtain an agreement. When mediation focuses on the underlying and real concerns of the parties and professionals, and when the court expects factual jurisdictional or termination of parental rights findings, issues can be resolved without sacrificing the integrity of the child's safety, the dignity of the parents, or the social worker's concerns and goals for the family.

Many juvenile and family courts may refer to mediation all or any portion of a matter relating to dependency (e.g., mediation at the pre-jurisdictional stage, dispositional stage, post-dispositional stage, and termination of parental rights stage). Regardless of what point in the case mediation is used, mediation should always focus on preserving the safety and best interests of the child while simultaneously attempting to validate the concerns, points of view, feelings, and resources of all participants, especially family members. Mediators orient and educate family members, clarify issues, facilitate exchange of current case information, and creatively intervene to resolve roadblocks to settlement. Mediation also seeks to leave family members with an experience of having been significant, respected, and understood participants in the court process, and with an investment in accepting and complying with the terms of the resolution and/or decision of the court. Mediation can be a valuable tool for engaging parents and family members in child protection, parenting issues, and case planning.⁵¹

Studies of child welfare mediation have demonstrated positive results, documenting impressive settlement rates, quick resolution of problems, and high rates of compliance with case plan requirements when mediation was used.⁵² Mediated agreements were also found to be more likely to succeed in the long term,⁵³ and offer participants a more constructive, problem-solving approach to permanency.⁵⁴ Studies have also found mediation in child protection cases particularly useful in facilitating communication, problem-solving, exploring new options, developing supportive relationships, providing neutrality as a guiding principle, and offering the potential to offset power imbalances between the parties involved.⁵⁵

Mediation programs assist juvenile courts by: ⁵⁶

- facilitating the development of early, appropriate, and comprehensive settlements which serve to protect the safety and best interests of children;
- preserving the dignity and involvement of family members and encouraging sensitivity;
- emphasizing family preservation and strengthening whenever possible, identifying and utilizing resources within the family first and within the community if required;
- facilitating a full exchange of the most current case information, clarifying the roles and responsibilities of each of the participants, and encouraging the accountability of family members and professionals interacting with the family;
- separating the personal issues and biases of the participants from factual information which facilitates constructive communication and reduction of acrimony;
- creatively intervening to resolve conflict and provide therapeutic interventions as required and appropriate;
- providing various participants with information on the court process, child development, family dynamics, and available services; and
- reducing the family's sense of alienation from the child protective system and the courts.

2. Settlement Conferences and Pre-Hearing Case Conferencing

Because an outcome reached by agreement is often superior to an outcome reached through litigation, courts should encourage settlement without contested litigation. Many jurisdictions use pre-adjudicatory or pre-termination of parental rights settlement conferences to facilitate non-trial resolutions of contested matters. Settlement conferences may or may not be set before a judge, with some jurisdictions using a mediator to convene these conferences. When there are disputes concerning discovery, evidentiary or other legal issues, judicial involvement is preferred. As with mediation, all parties, including developmentally age-appropriate children and their attorneys, should be involved. Even without a process in place that uses a mediator, case manager, or facilitator who convenes the settlement conference, judges should urge parties (usually the attorneys) to conduct settlement conferences in which they can reduce or modify the allegations or counts in the petition, stipulate to facts not in contention, and otherwise shorten the court appearance or hearing time, even if they fail to eliminate all areas of conflict.

SETTLEMENT CONFERENCES CONDUCTED BY THE PARTIES

A key advantage to mandatory pre-adjudication and pre-disposition settlement conferences at which all parties and attorneys must participate is that attorneys are better informed about the case and better able to perform in court. Mandatory pre-trial settlement conferences are especially useful in courts where many attorneys habitually delay settlement discussion until shortly before trial. By compelling attorneys and parties to meet and discuss a case well in advance of trial, settlement conferences encourage early case preparation by attorneys.

In child abuse and neglect cases, success in accomplishing what is best for the child requires ongoing cooperation between parents and the agency. Contested hearings often create an adversarial atmosphere that may prevent a cooperative relationship from developing. After a contested hearing, the parents may be less willing to work with the agency because they feel the outcome of the case was imposed upon them.

The process of reaching a negotiated settlement requires that the parties seek to understand each other's positions and work together to devise solutions. Misunderstandings and misperceptions can be corrected. The parties can be encouraged to view themselves less as adversaries and more as persons who have an interest in working together to solve common problems.

Mandatory settlement conferences require close cooperation between parents and the social service agency. A negotiated settlement requires parties to devise joint solutions. Parties are more likely to view themselves less as adversaries and more as allies in solving serious problems. Parents involved in determining case outcomes often have an increased commitment to the success of case plans.⁵⁷ The resulting outcomes not only have a better chance of being successfully implemented, but often are achieved at significantly lower

While there should be no prohibition on using mediation in cases involving family violence, when making referrals to mediation, judges should consider if any family violence issues in the case make the parties unable to effectively mediate and would compromise victim safety or the mediation process.

"Where mandated or permitted, mediation and similar approaches, such as family group conferencing, should be used only in settings that develop protocols on its appropriate and safe use, conduct appropriate agency training, and regularly supervise staff about victim safety needs."

NCJFCJ. (1998). *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* ("Greenbook"), p. 67.

"Judges have an obligation to oversee the provision of any mediation services to ensure that mediation is conducted consistent with guidelines for best practice in cases involving family violence."

NCJFCJ. (1998). *Greenbook*, pp. 101-102

costs than litigated outcomes.⁵⁸ Plans should be developed by families as long as they provide adequately for child safety and permanency.

Settlement conferences should be held at least 10 days before a scheduled hearing and conducted in or near the courthouse to provide immediate judicial availability and attention to any problems which might arise during the settlement process. Advance scheduling of settlement conferences allows time for a follow-up conference if significant progress is made but full agreement is not achieved. Advance scheduling allows the court time to organize and readjust case calendaring. Without a timely pre-trial settlement conference, parties are more likely to settle just before a trial is to begin, which makes it difficult for the court to adhere to sound principles of case flow management.

Immediately, or no later than 24 hours after completion of a conference, the parties should inform the court as to whether a settlement was reached. If a settlement has not been reached, parties should inform the court at least one week in advance of the trial date of the estimated court time needed for trial and submit statements concerning agreed and disputed facts. If the judge sees the need for a judicially supervised pre-trial conference, this can take place prior to the time set for the trial.

JUDICIALLY SUPERVISED SETTLEMENT CONFERENCES

The parties often will seek to reach agreements on their own, but courts may, nevertheless, encourage the settlement of cases by mandating judicially supervised conferences. In jurisdictions which mandate settlement conferences, courts should require that they take place at a fixed time and place at least 10 days before the trial. All parties (including age-appropriate children unless precluded because of safety or best interests considerations) should be required to attend. Consideration should be given to judicially supervised pre-trial conferences whenever certain circumstances arise, including:

- unexplained case delays occur;
- disputes arise concerning discovery;
- service of process remains incomplete after a reasonable time without a satisfactory explanation;
- issues under dispute need clarification to shorten trial time; and
- evidentiary or other legal issues must be resolved prior to trial.

Judicially supervised settlement conferences are advisable whenever parties request a hearing which will take a substantial amount of time. Settlement conferences can be advisable before any type of contested hearing such as adjudication, disposition, review, permanency planning, or termination of parental rights. Assuming the case cannot be settled, the purpose of these hearings is for the court to control to the extent

it can, the legal proceedings that are about to take place. To this end, the settlement conference should be able to identify issues to be tried and experts to be called, receive necessary reports, and determine the availability of each witness to be called.

The court should be watchful for settlements that do not recognize the alleged parental behavior on which the original petition was brought.

The court should notify all parties that they should complete discovery without any hearings on the issues. Petitioners should give all information relating to a case to the parties without the necessity of a court order. A standing court order on the discovery issue may be effective in this regard. A successful settlement conference can offer the court the opportunity to ensure that the trial will be well-run, last an anticipated amount of time, and involve no surprises.

All settlement conferences must be structured so that the court is certain that any settlement agreements reflect the interests of the various parties. There must be competent representation for the petitioner, parents, and the child. All parties should be present (including age-appropriate children as previously mentioned). All settlement proposals should be reviewed thoroughly on the record during the hearing by the court.

PRE-HEARING CASE CONFERENCING

Pre-hearing case conferencing or preliminary case conferencing refers to meetings of parties prior to a hearing in a child abuse and neglect case convened with a non-judicial officer serving as a facilitator. In some courts, the conference facilitator is also a case manager who tracks the case from the first hearing to permanency and case closure. Pre-hearing conferences take place prior to a formal court hearing, but their scope and purpose varies depending upon the stage of the case process they are used.

In a typical model of pre-hearing conferencing held before the preliminary protective hearing stage of a case, for example, the conference is used as an opportunity to discuss issues of placement, visitation, and services for the child and family; identify relatives; familiarize the parties with the allegations; determine whether ICWA applies in the case; and determine any outstanding issues or concerns. The pre-hearing conference facilitator keeps the discussion on track, articulating any agreements that may be reached during the conference and identifying outstanding issues or concerns that need follow-up. Typically, upon completion of the pre-hearing conference, all parties proceed to the assigned courtroom for the preliminary protective hearing. The parties present to the court any agreements reached during the pre-hearing conference, which the court may approve, modify, or disapprove. If no agreement has been reached regarding the child's placement and a parent seeks the child's return home, the court conducts an evidentiary hearing on temporary custody. Also, any disagreements regarding services and visitation are directed to the court for decision.

Studies of the use of pre-hearing conferences have found that they serve to both expedite and humanize the court process.⁵⁹ Jurisdictions using pre-hearing conferences before the preliminary protective hearing, for example, have seen improvements in the quality and timeliness of the information presented to the court, as the information-gathering process begins soon after the filing of a petition and, in applicable cases, the serving of the temporary (e.g., emergency) custody notice.⁶⁰ Caseworkers and attorneys for parents and children initiate the information-gathering process before cases ever get to court through their early contacts with parents and other family members. Workers assemble initial case plans sooner in model cases and present these plans at the preliminary protective hearings. By requiring early contact with newly assigned clients, including requirements to meet with clients before the first hearings, attorneys gain important information regarding family situations. An extraordinary amount of information can be provided at pre-hearing conferences because all parties know they need to be prepared. With early focus on placement, services, and visitation at the pre-hearing conference and the subsequent preliminary protective hearing, all parties become aware of the need for timely information. The court reinforces this need through active oversight. Agency workers start monitoring the frequency and quality of family time earlier in the process, and the court seeks regular updates on these issues. Attorneys interact with their clients sooner, providing them with sufficient information to inform the court of clients' current situation and perceptions regarding case plan compliance. With greater involvement of extended family members from the start, caseworkers can provide better information regarding potential relative placements.⁶¹ Expedited assessment and screening procedures resulting from discussion of issues at the pre-hearing conference enable the court to obtain information related to service needs and amenability to treatment.⁶² Obtaining this information early in the process can be particularly important in cases that involve serious substance abuse.



K. Reflection on the Decision–Making Process to Protect Against Bias

Racial disproportionality is a major challenge facing child welfare systems. Research has documented that minority families are more likely than white families under similar circumstances to be reported for child abuse and neglect and to have their children removed from the home.⁶³ Research has demonstrated that minority children and families experience disparate decision-making in the investigation, substantiation, removal, placement in foster care, and final permanency determinations.⁶⁴

In 2007, with the support of Casey Family Programs and the Office of Juvenile Justice and Delinquency Prevention, the NCJFCJ launched the Courts Catalyzing Change (CCC) Initiative, which brought together judges and other child welfare system stakeholders in a series of leadership and work group meetings to not only create a national agenda to reduce racial disproportionality and disparate treatment in the foster care system, but to also create and disseminate judicial tools and policy and practice guidelines that court systems can implement in their efforts to reduce disproportionality and disparate outcomes for minority children and families.⁶⁵ For example, the Initiative produced a CCC Preliminary Protective Hearing Bench Card – a practical judicial tool that built on the original RESOURCE GUIDELINES preliminary protective hearing bench card but was enhanced to help judges examine potential biases at play that may affect their decisions.

The CCC preliminary protective hearing bench card served as one of the foundational documents in developing the revised bench cards in the new ENHANCED RESOURCE GUIDELINES. Specifically, previous RESOURCE GUIDELINES bench cards were revised to incorporate the need for judges to engage in both external and internal inquiries of their own beliefs and biases (some of which may be implicit) in order to ensure the equitable treatment of all children and families by the court and the child welfare system.⁶⁶

THE NCJFCJ ENCOURAGES ITS MEMBERSHIP TO:

1. Take the lead in participating in activities to achieve the mission of reducing the disproportionate representation and disparate outcomes for children.
2. Commit to training and education for themselves and their colleagues.
3. Raise awareness about disproportionality and disparate outcomes by communicating about the pervasiveness of the problem, as well as efforts and initiatives to reduce disproportionality and disparate outcomes.

NCJFCJ Resolution No. 10: Resolution Regarding the Disproportionate Representation of Minority Children, Adopted July 2008

The external inquiry is laid out in the due process-related questions and considerations of the ENHANCED RESOURCE GUIDELINES bench cards, as well as the actual judicial inquiry of the hearing participants related to specific salient issues. The internal inquiry is set forth in a self-reflection section containing questions designed to help judges examine potential biases at play that may affect their decisions. The questions encourage the judge to pause and think about his or her own decision-making process.

The self-reflection questions acknowledge that all people, often unconsciously and without malice, ascribe a set of stereotypes to people around them. These stereotypes naturally help us categorize and organize our world. While many are not harmful, many are, especially if they bleed into the “neutral” realm of judicial decision-making. It is important not only for judges, but for all decision-makers in the child welfare system, to acknowledge this “implicit bias” and to become more conscious about potential influences on their decision-making process.

The questions also support judges in making individual decisions that consciously consider the unique concepts of self, culture, and familial context in which each child and family exist, while applying the same legal standard to all families involved in the child abuse and neglect court process. The goal is to understand the contexts of the children and families involved in the child welfare system. The strengths of a particular family, coupled with those of their cultural community, can be used as supports upon which to build a rehabilitative and supportive plan that promotes stability and permanence for the child.

As a measure of recommended practice, to protect against any institutional or implicit bias in decision-making, judges should make a habit of asking themselves:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family’s unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court’s past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as a preferred placement option as long as they can protect the child and support the permanency plan?

“All members of the court system must recognize, respect, and seek to preserve the ethnic and cultural traditions, mores, and strengths of those who appear before the court.”

“Judges must become aware of . . . their own implicit biases that may adversely affect decision-making.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

L. Engaging Families and Children

Family engagement is a family-centered and strengths-based approach to partnering with families in making decisions, setting goals, and achieving desired outcomes. It is founded on the principle of communicating with families in a way that supports disclosure of culture, family dynamics, and personal experiences in order to meet the individual needs of every family and every child.⁶⁷ Family engagement goes beyond mere involvement of families by “motivating and empowering families to recognize their own needs, strengths, and resources and to take an active role in working toward change.”⁶⁸

- Enhancing the relationship between the family and professionals involved in the case;⁶⁹
- Promoting family investment in case plans, enhancing commitment to achieving case objectives, and enhancing compliance with treatment and service requirements;⁷⁰
- Expanding options for relative placement as a permanency option;⁷¹
- Increasing placement stability;⁷²
- Improving timeliness of permanency decisions;⁷³
- Enhancing the fit between the family’s needs and services.⁷⁴

Research also suggests that early and consistent engagement opportunities for collaborative decision-making with minority youth and families increases the involvement of their immediate, extended, and fictive kin in case planning, reduces the number of children of color entering foster care,⁷⁵ leads to a greater identification of family strengths by caseworkers, results in higher reunification rates, increases placement rates with kin, and improves the stability and longevity of guardianship placements.

ENGAGING CHILDREN, YOUTH, AND FAMILIES IN THE COURTROOM

Clearly the court should do all that it can to encourage and support the meaningful engagement of children, youth, and families in the child welfare process and proceedings. In fact, once the case enters the courtroom, the judge’s initial case management responsibilities relate to family and child engagement. As noted above, positive parental, child, and family engagement is critical to successful outcomes in the case. This is particularly important at the beginning of a case, which follows almost immediately upon the trauma of the child’s removal from the parents’ custody. Emotions run high, the parents’ ability to understand the court process and make good decisions may be compromised by substance abuse or mental illness, and the anger they may experience toward the caseworker may undermine their ability to work cooperatively toward reunification. The child may be terrified by being taken and placed with strangers and may desperately want to go home. The judge has an important role to play in gaining the confidence of the

parents and reassuring the child that the proceeding will be fair and that their voices will be heard.

At the same time, the judge must accomplish a number of tasks, making procedural and substantive decisions within a limited period of time. The judge must ensure that all parties are accorded due process of law and insist that the proceedings are conducted in a manner that maintains the dignity of the court. How the judge strikes the balance between engaging the family and conducting the business of the hearing, between informality and courtroom decorum, will set the tone for the entire case.

Judges can engage parents and children in the proceedings, and also ensure their right to due process, by asking direct questions (in everyday language) about issues such as the need for an interpreter; need for representation by trained counsel; parental competence, disability, or other issues that may impact the case; and the involvement of the broader family (e.g., who else should be involved in this process?). Judges should explain the purpose of the hearing using language that is easily understood. At the preliminary protective hearing, for example, the judge should clearly explain the following to parents regarding the purpose of the hearing: ⁷⁷

- These are legal proceedings and the lawyers will help them to understand what is happening;
- Their child has been temporarily removed, and the court will decide whether there are sufficient facts to justify that removal;
- The petition is the written document they have been given (the judge can offer to read the petition and should explain it to the parents);
- The proceeding is about the safety and well-being of their child;
- If the statements in the petition are found to be true, the court may remove their child from their care;
- If that should happen, in most cases services will be offered so they can correct the problems that brought their child to the attention of the court;
- But if those rehabilitation efforts fail, parents may lose their parental rights and someone else may be given the responsibility of the care of their child, including possibly through adoption.

The judge can also encourage parental and child engagement in the process outside of court by asking what efforts were made to resolve issues through an ADR process. Many child welfare agencies attempt

Children and parents must have the opportunity to be present in court and meaningfully participate in their case planning and in the court process.

Judges should encourage and support the development of family-centered, culturally responsive processes to ensure family engagement in a way that helps families craft solutions to the issues that brought them before the court.

NCJFCJ. (2011). *Key Principles for Permanency Planning*

to resolve issues by engaging parents, children, and extended family through family group decision-making conferences (described below) and other non-adversarial processes. The judge should inquire whether the family has been invited to participate in any such process and, if so, what the outcome was. During the hearing, the judge should ask questions of the parents directly. While this may cause concern for the attorneys (and the judge can make decisions regarding those concerns), the ability of the judge to hear directly from the parents is important. The end of the hearing is another opportunity for the judge to address the parents and the child, as well as other participants as appropriate, to ensure that they understand what happened at the hearing and what is expected of them, and to answer any questions they may have.

FAMILY GROUP DECISION-MAKING

Family group decision-making (also referred to as family group conferencing, family team meetings, family unity meetings) was developed to bring families together, including children and extended family members, with the child welfare agency and community organizations to express concerns, problem solve,

Victim safety and victim empowerment must be considered when family group conferencing is proposed for cases involving family violence.

For guidance on using family group decision-making conferences in cases involving domestic violence, see Lucy Salcido Carter. (2003). *Family Team Conferences in Domestic Violence Cases: Guidelines for Practice (Second Ed.)*. Family Violence Prevention Fund

and develop plans for safety, services, and permanency. The purpose of family group decision-making conferences is to build better alliances among the family, the child welfare agency, the child's tribe (if applicable), and the court for the purpose of providing a safe and permanent home for the child. To avoid the dynamic of the "system" telling the family what they need to do to fix their problems and the family resisting the intrusion, family decision-making builds communication, cooperation and collaboration between the family, the child's tribe (if applicable), and child welfare professionals.

Family group decision-making conferences are family-focused interventions designed to build and strengthen the natural care-giving system for the child. Family decision-making recognizes that families have the most information about themselves and have the ability to make well-informed decisions. Instead of acting as adversaries trying to keep information from the authorities, family members become active participants in the decision-making process. Family members and support persons identified by the family, as well as child welfare system caseworkers or counselors and other service providers, meet together to discuss the case and reach agreement on a plan regarding the care and safety of the children. Extended family from both sides can offer a tremendous amount of support in family group decision-making conferences, reinforcing the belief that extended families can be brought into the child welfare decision-making process. Family group decision-making should be considered at all stages of the case, including prior to filing.⁷⁹

Common values across all models reflect that the process is family-focused, strengths-based, community-based, and culturally appropriate. The specific details of models vary to some degree but generally involve the following:

- All family members who wish to be present at the family meeting are invited, as long as no family member's safety will be endangered by another's attendance. Assistance, if needed, is provided to enable attendance. Some models give the parents veto power over which family members may attend. If the child is an Indian child, a representative from the child's tribe should be invited to attend.
- The family can identify other supportive non-family individuals who are also invited.
- Typically, an independent coordinator arranges the meeting, with the caseworker present.
- Information is shared by all present, usually starting with the caseworker who presents the facts of the abuse or neglect to the family. The family asks questions of the caseworker and others to make sure they have full information regarding the issues.
- In most models, the professionals leave the room and allow the family to discuss the case in private. The family's job is to create a plan to ensure that the child is cared for and protected from future harm. In some models, the professionals are permitted to remain in the room.
- The family presents and explains their plan to the professionals. The family's plan should be accepted as long as it provides for safety and permanency for the child. When issues of concern arise, consensus can usually be reached. The court must ultimately approve the plan.

Use of family group decision-making, in addition to assisting with timely reunification, can also help the family understand when reunification is not possible. Family group decision-making can also help overcome resistance to severance of parental ties. By giving the family the opportunity to understand the need for permanency and security for the child in one stable home, family group decision-making can open the door for relative or third-party guardianship or adoption and, when appropriate, create a proposed plan that includes adoption with contact. Because family group decision-making usually creates an agreed-on plan, lengthy trials of termination of parental rights and lengthy appeals can be avoided.

Studies of family group decision-making conferencing have demonstrated the power of this model to assist families with identifying strengths, resolving problems, and developing early and comprehensive service plans. Family group decision-making conferencing produces more in-depth exchange of information about the family, empowers families to engage in the court and service planning process, is effective in mobilizing more family and community resources in support of safety and permanency (e.g., more placements with family), and increases parent and participant satisfaction with the court process. Moreover, the growing body of outcome research suggests that children whose families participated in family group decision-

making conferences were both more stable in their placements and well protected.⁸³

ENGAGING CHILDREN

The meaningful participation of children and youth in court proceedings respects them as active participants in their own lives. While some may argue that attending court hearings is traumatic to children, it is important to remember that they have already lived through the trauma that brought them into care, and engaging them in planning their future and protecting their safety is empowering and critically important. Meaningful participation means taking into account children’s wishes and feelings, including their perspective in all matters affecting them, cultivates an environment that welcomes and nurtures a child or youth’s evolving developmental capacity, and is responsive to their needs, including any trauma history. Participation is a process, and children and youth will only be able to meaningfully participate in an environment that actively supports and encourages their ongoing involvement in both big and small decisions.

There has been a growing acceptance and understanding of the importance of involving children and youth in child welfare decision-making. Child welfare experts recognize the benefits of child and youth participation and the importance of the rights of children and youth. Therefore, involving children and youth in processes where decision-making occurs should be a priority. In fact, federal law asserts that the views of children and youth should be taken into account when decisions relating to them are made, and their views must be considered when determining what is in their best interests.⁸⁴

Meaningful child and youth participation in child welfare proceedings involves recognizing and nurturing their strengths, interests, and abilities through the provision of real opportunities to become involved in decisions that affect them. Real opportunities mean that the views of children and youth are sought out and taken seriously, and there is more than a token effort to involve them. Research suggests that children and youth typically want greater opportunities to provide input.⁸⁵

“It is the policy of the NCJFCJ that children of all ages should be present in court and attend each hearing, mediation, pre-trial conference, and settlement conference unless the judge decides it is not safe or appropriate.”

*NCJFCJ Children in Court Policy Statement,
Adopted by the NCJFCJ Board of Trustees,
January 2012*

A child’s removal from his or her parents’ custody is a life-altering event. The decisions that are made in child abuse and neglect proceedings will forever change that child’s future. Given the importance of these proceedings, the child should participate to the fullest extent. Judges should expect that children are brought to court when safe and appropriate – and if they are not, the court should require that the child welfare agency provide an explanation that relates to that child’s safety and well-being. Children who

are more knowledgeable about the legal system through preparation by their attorney, GAL, caseworker, caregiver, or through direct experience with the system may be less distressed about attending court. When judges observe and interact with children in court, they are powerfully reminded how the young person's life is being drastically affected. When children participate, judges receive evidence that may not otherwise be available to help them understand children's views about a variety of issues that directly affect their lives.

The court has a responsibility to proactively engage with the children and youth under its jurisdiction while creating opportunities for them to express their views and be heard. This requires careful consideration as to how to create the conditions that allow for the participation to be genuine, meaningful, and safe. Attention must be given to the physical, behavioral, emotional, cultural, and other relevant factors that affect child and youth participation, and the child/youth must have input into choosing how they participate. If not already instituted, courts need to develop policies and protocols to ensure that children have the opportunity to attend the preliminary protective hearing and subsequent hearings. Judges should expect that substitute caregivers and child welfare agencies will work collaboratively to ensure that children are able to appear in court. The court should carefully weigh whether the child should be present throughout the entire hearing or just for portions, as well as the extent to which the child should be asked to testify immediately after his removal. The judge should also consider alternative means for participating that are more comfortable for the child, such as telephonic appearances or written statements. Additionally, wherever possible, the judge should schedule hearings at times that do not conflict with the child's school, job, family time, or service appointments.

To support the participation of children and youth in dependency court, the following is recommended:

- Judges should seek and participate in training on how best to engage children in court.
- Courts should develop policies and protocols to ensure that children have the opportunity to attend all court events.
- Children should be parties to their cases and be appointed competent representation.
- Children should receive meaningful notice of and preparation for hearings.
- When children are not present in court, the judge should ask why and make findings as to why the child is not present. If the judge does not find good cause for the child's absence, the case should be continued to an expedited time-certain to secure the appearance of the child. The court should work with the agency and caregivers to ensure the child has transportation to court.
- Judges should encourage the use of family group decision-making conferences, pre-hearing and settlement conferences, and other practices which include the participation of children and youth in their jurisdiction. Judges should regularly inquire if children and youth are, in fact, participating in such practices.

M. Focus on Child Well-Being

Children who are removed from their homes and placed in foster care often have unique developmental, physical, mental, and dental health issues that need to be addressed as soon as possible in the case. Researchers estimate that 30 percent to 80 percent of children in foster care exhibit emotional and/or behavioral problems, either from the trauma of their experiences before entering foster care or from the foster care experience itself.⁸⁶ Children entering foster care may experience grief at the separation from or loss of relationship with the parents and face emotional and psychological challenges as they try to adjust to new environments which often lack stability. Research has found for example, that within three months of placement, many children exhibit signs of depression, aggression, or withdrawal.⁸⁷

“Judges are responsible for ensuring the physical, mental, emotional, reproductive health, and educational success of all children under the supervision of the court.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

Children in foster care are placed at greater risk educationally. National studies of educational outcomes for children and youth in foster care have found that these children frequently experience multiple transfers of school, function below grade level, and are often in special education to address additional educational challenges.⁸⁸ Research has found that foster children have significantly higher absenteeism and disciplinary referrals than their peers, are twice as likely to be held back in school, almost twice as likely to drop out of school, and less likely to attend a four-year college.⁸⁹ A disproportionately small number of foster children and youth

participate in extracurricular activities and receive supplementary educational opportunities such as mentoring, tutoring, and test preparation. Many have no adult overseeing their academic progress, returning teacher phone calls, or attending parent-teacher nights. Foster children often have no adult willing and capable of speaking on their behalf on educational issues.

Unfortunately, studies have shown that children in foster care are at greater risk of poor life outcomes than children in the general population and leave foster care ill-equipped to support themselves.⁹⁰ Rates of suicide and teen pregnancy, for example, are above average for foster care youth and young adults.⁹¹ Studies have found higher rates of homelessness, arrest, and incarceration among former foster youth.⁹² Greater numbers of former foster youth are unemployed and receiving public assistance when compared to their peers.⁹³

ASFA requires that the court and child welfare agency focus on the well-being of children in foster care, and clearly the research demonstrates that this focus is needed. Under ASFA, child well-being refers to factors other than safety and permanency that relate to a child’s current and future welfare – most notably, the child’s physical and mental health and educational achievement. The U.S. Department of Health and

NCJFCJ RESOLUTION IN SUPPORT OF JUDICIAL PROMOTION OF POSITIVE EDUCATIONAL OUTCOMES FOR FOSTER CHILDREN

WHEREAS, juvenile and family court judges have been given the legal responsibility for children in the foster care system; and

WHEREAS, juvenile and family court judges are charged by law with keeping these children safe, ensuring that they are well cared for, overseeing efforts to rehabilitate parents, and ensuring timely permanency for each child; and

WHEREAS, juvenile and family court judges realize that one of the critical indicators of success for a foster child is a good education and that being in foster care presents unique educational challenges for each foster child.

NOW, THEREFORE, BE IT RESOLVED, the members of the Board of Trustees of the NCJFCJ assembled in conference endorse:

1. The strong role of the juvenile court judge in overseeing the education of foster children in order to ensure that all foster children receive a good education, are not moved from school to school unnecessarily, are provided with specialized educational assistance (if necessary), and are apprised of opportunities for higher education after they leave the foster care system; and
2. The leadership responsibility of the juvenile court in holding all parties accountable for their efforts to provide an appropriate education for each foster child.

Adopted by the Board of Trustees, NCJFCJ, January 2006

Human Services' Child and Family Services Reviews (CFSR) well-being outcome goals are complementary: that families have enhanced capacity to provide for their children's needs; that children receive appropriate services to meet their educational needs; and that children receive adequate services to meet their physical and mental health needs. Given that courts have the responsibility to ensure the state is providing proper care to children in its custody, judges need to consider whether those children over whom they have jurisdiction are receiving a quality education and are physically and emotionally healthy.

The court plays a unique role in helping to improve well-being for children and youth in the child welfare system. In the courtroom, judges provide oversight to ensure that the well-being needs of children are met. Every court hearing affords the judge an opportunity to inquire about a child's physical, emotional,

and mental health⁹⁴ and educational needs and to identify any gaps in services. A judge's focus on child well-being can highlight for caseworkers, attorneys, and others involved in the case the importance of a child's healthy development to case review and permanency planning. Judicial leadership off the bench can provide sustained systems change in the community to ensure the expansion of necessary services and interventions, as well as to develop policies focused on improving the well-being for children and youth involved in the child welfare system.

Judges should set the expectation for all parties that a child's well-being will be focused on with the same urgency as the court focuses on safety and permanency, and that all children and youth in care should have the ability to engage in healthy and developmentally appropriate activities that promote their sense of normalcy and well-being.

WELL-BEING AND THE YOUNGEST OF CHILDREN IN CARE

Early experiences and relationships significantly impact a child's development. From birth to five years old, children develop the foundation for their future linguistic, cognitive, emotional, social, regulatory, and moral capabilities.⁹⁵ The science of early child development clearly shows the importance of parenting and regular, consistent caregiving to a child's healthy growth and development.⁹⁶ The health and well-being of children's parents or primary caregivers are also crucial to a child's early development.⁹⁷ The growth and development of very young children are profoundly affected by abuse, neglect, and removal.

As the largest group to enter the child welfare system, very young children who become the subject of

"What happens during the first months and years of life matters a lot, not because this period of development provides an indelible blueprint for adult well-being, but because it sets either a sturdy or a fragile stage for what follows."

Shonkoff & Phillips, supra note 95.

dependency court proceedings face multiple disadvantages, traumas, and losses during a critical time of early brain development.

Even considering other factors such as economics, policy, administrative structure, and method of service delivery, age largely determines what happens to children in foster care.⁹⁹ A baby's social-emotional development, specifically attachment to a primary

caregiver, is affected by removal from his parent and multiple placements while in care.¹⁰⁰ Research shows that young children, even newborns and infants, experience long-lasting sadness, grief, loss, and rejection.¹⁰¹ Separations occurring between six months and approximately three years of age are even more likely to cause later emotional disturbances.¹⁰² **These findings stress the need to consider the social-emotional development of very young children when making judicial decisions about removal, placement, and permanency.**

As a judge who handles child welfare cases, the cumulative effect of harmful early life experiences likely challenges efforts to seek positive developmental and permanency outcomes for children birth through five years old. However, this stage of development can also provide opportunities to intervene early and pursue strategies to clear the path for healthy growth and development. As the judge, understanding the unique needs of young maltreated children can help ensure their needs are met on all levels (developmental, physical health, mental health). By exercising a leadership role on the bench in dependency cases, judges can promote appropriate screenings, assessments, and interventions; ensure regular contact with biological families; make appropriate placements; and ultimately expedite permanency. By understanding how health issues, early child development, attachment, placement, and safety interrelate, judges can better promote positive and permanent outcomes for very young children.¹⁰³

In collaboration with system partners, judges can work to promote positive and permanent outcomes for very young children. Judges, exercising their leadership role off the bench can communicate the importance of the needs of very young children and establish a shared vision for improving their well-being and permanency outcomes. Judges can lead efforts to design court-run interventions and support multidisciplinary trainings. In fact, many judges across the country have taken the lead in elevating the needs of babies, toddlers, and preschoolers in their jurisdictions through court-run projects and interventions, such as the Zero to Three Court Teams for Change Initiative.¹⁰⁴

WELL-BEING AND “CROSSOVER” OR DUAL-STATUS YOUTH

One cohort of children and youth in foster care that requires a special focus involves children who have experienced maltreatment and engaged in delinquency – the “crossover” or dual-status children and youth. These children and youth may be “dually involved” (simultaneously receiving services, at any level, from both the child welfare and juvenile justice systems) or they may be “dually adjudicated” youth who are concurrently adjudicated by both the child welfare and juvenile justice systems.

Research shows that child abuse and neglect are among the key risk factors for delinquency, with crossover youth often having a family history of criminal behavior, mental health, and/or substance abuse problems. Between one-half and three-quarters of crossover youth have had prior contact with the juvenile justice system in some way (e.g., a status offense or delinquency charge resulting in diversion or not resulting in processing).¹⁰⁶ Crossover youth are often truant from school, and when they do attend, they often have poor academic performance and exhibit behavioral problems. Crossover youth themselves have higher rates of mental health and substance abuse problems, with many exhibiting symptoms or having diagnoses for mental health disorders or substance abuse.¹⁰⁷

In order to improve the court’s response to these youth, a judicial focus on their well-being needs – especially as those needs relate to risk factors for delinquency such as placement instability, age, and lack of social bonds¹⁰⁸ – is crucial. It is also critically important for courts to identify, as early as possible, whether a child or youth has dual system involvement. In order to improve outcomes for crossover youth, interagency collaboration is necessary and should not be limited to child welfare and juvenile justice as the involvement of educational and behavioral and mental health systems is also essential.¹⁰⁹

N. Focus on Trauma¹¹⁰

Much of what is known about the long-term impact of trauma on child and adult development, including involvement in justice systems, is likely best understood and applied through a public health lens.¹¹¹ Early adversity in life – particularly multiple traumas like abuse and neglect – puts children at risk for later involvement in the juvenile and criminal justice systems and ultimately leads to negative psychosocial and physical health outcomes later in life.¹¹² With this trajectory in mind, courts can take steps to better serve those who become system-involved.

For example, moving from a “sick-well” or “victim-offender” dichotomy to one of viewing those appearing in court as injured¹¹³ in some manner begins to change how we conceptualize human behavior. Through a public health lens, when individuals appearing before the court are viewed as likely injured in some way, it then becomes necessary to use a universal precautions approach. Specifically, a universal precautions approach to trauma in justice systems assumes that all people appearing in courts have experienced adversity in some manner. The focus for courts, then, becomes ensuring that the physical and social environments are sensitive to reducing stress, practices reflect an understanding of trauma triggers (e.g., well-designed security procedures), and policies are designed to help promote healing (e.g., screening and treatment).¹¹⁴ Inherent in this approach is that all system professionals, children, and families benefit from the focus on safety and well-being that is instilled in trauma-responsive environments.

A trauma-responsive court environment is also a developmentally responsive one.¹¹⁵ Foundationally, a developmentally informed or responsive court system recognizes that children and youth are different from adults and need to be treated as such. This requires that practices and policies reflect our understanding of those differences that exist across age, gender, and culture. Striving to implement a developmentally responsive approach to court practice is being inclusive of trauma-informed practice as trauma and development are inextricably linked. Being attuned to what a child, youth, or family needs in order to promote well-being and healthy development should incorporate consideration of prior adversities, regardless of the type of case before the court (e.g., dependency, family violence, divorce, or criminal). This approach recognizes the issues that system-involved children, youth, and families tend to encounter:



mental illness, substance abuse, family violence, educational disengagement, and trauma or adverse experiences. Approaching individuals through this holistic and contextual lens encourages responsiveness to the needs of children and families, versus processing based on the needs of institutions (e.g., hearing schedule preferences). Responding in a developmentally informed, and thus trauma-responsive manner, has also been hypothesized to enhance a sense of procedural justice by putting in place supports and interventions that are tailored to the needs of children, youth, and families, which ultimately improves case outcomes in general.

Judges should be setting the expectation early on in child abuse and neglect cases that children, youth, and families should be treated in a trauma-informed manner. The court and service providers should ensure that treatment is gender-specific and uses the principles of trauma-informed care – an approach that recognizes the impact past trauma has on a child and family’s life, as well as the potential triggers and vulnerabilities of trauma survivors. Asking trauma-informed questions can help judges identify children and families who need or could benefit from trauma-informed services from a mental health professional. For some of the questions judges may ask to ensure any care and services provided to children and families are trauma-informed, supportive, and will not exacerbate any symptoms of trauma, see the Preliminary Protective Hearing Chapter and Benchcard.¹¹⁶

Approaching parties in a developmentally informed, and thus trauma-responsive manner, encourages responsiveness to the needs of children and families versus processing based on the needs of institutions.

“Courts and judges are uniquely positioned to identify those suffering from traumatic stress, help create safe and engaging courts and court practices, and help coordinate and monitor provision of effective treatment ...”

NCJFCJ Resolution Regarding Trauma-Informed Juvenile and Family Courts, July 2015

O. A Problem-Solving Approach to Dependency Cases

The idea that judges should apply a problem-solving approach to the matters that come before them is not new. In the 1980s, for example, the substance abuse community argued that incarceration alone did little to break the cycle of drug use and crime for substance-addicted offenders. Mental health practitioners have also long contended that mental illness is a health issue rather than a criminal law matter and that the criminal justice system is ill equipped to deal with people who are mentally ill. Agencies and practitioners who confront the daily realities of family violence have made the case that focusing on guilt or innocence does little to stop the cycle of abuse or protect individuals from further assault. And tribal communities have advocated for a justice system that considers the complex historical, social, economic, and cultural factors that may cause Native American people to be in conflict with the law as well as the need for a healing approach to case resolution. All of the above have resulted in the establishment of courts and courtrooms dedicated to addressing the root problems – mental illness, addiction, limited anger and risk-management skills, cognitive impairments, poverty, and social marginalization – behind people’s interface with the legal system.

*“Judging in juvenile court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the **original problem-solving court**, must engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being.”*

*“Judges must ensure that the courtroom is a place where all who appear are treated with respect, patience, dignity, courtesy, and as part of the **problem-solving process**.”*

NCJFCJ. (2011). *Key Principles for Permanency Planning*

and legal values.¹¹⁸ A problem-solving approach to judging requires a consideration of the complex, often overlapping, and sometimes intractable social and personal issues that bring families before the court. A problem-solving approach takes a non-adversarial team approach to court processes, one that broadens the focus of the court to include a consideration of the effects of court processes on stakeholders (e.g., children, youth, families, and their wider community). A problem-solving approach aims to address the “revolving door” that keeps families coming back into the system by attempting to remediate their underlying problems.

The law’s capacity to heal or harm has been studied extensively as part of the field of therapeutic jurisprudence.¹¹⁷ This framework proposes that the justice system – and judges – take a problem-solving approach, which seeks to maximize the law’s therapeutic values and minimizes its anti-therapeutic consequences without sacrificing due process or other judicial

Problem-solving courts with a dedicated focus on substance abuse, mental health issues, and family violence are the most visible examples of therapeutic jurisprudence in action. When people think of problem-solving courts within the dependency or child abuse or neglect case context, the “specialized” courts that divert a sub-population of their cases to receive special handling come most readily to mind (e.g., family treatment drug courts or dependency drug courts). But, as valuable as these courts are (see section on family treatment drug courts under Promising Practices in this chapter), from a recommended practice perspective, **all judges in all dependency courtrooms can and should use problem-solving strategies to make their courts and their decisions more relevant, collaborative, and effective.**¹¹⁹

In fact, the juvenile court is arguably the original problem-solving court as juvenile court judges have always been tasked with attempting to identify services and strategies to rehabilitate children, youth, and family members.¹²⁰ The strong judicial oversight and substantive review of services associated with problem-solving court models is consistent with federal and state laws¹²¹ that require the same of dependency court judges. Although problem-solving courts such as drug courts and mental health courts require judicial leadership to bring the court system and service providers together and to create a collaborative environment to produce timely resolution of cases, this has long been the role of dependency court judges who are conveners of court systems and communities on behalf of children and families.¹²² Dependency court requires active judicial involvement in cases with an explicit use of judicial authority to motivate and to monitor progress and compliance. The proactive, problem-solving role of the judge involves asking more questions, seeking more information about each case, exploring a greater range of possible solutions, and motivating parents to engage in services. It also involves the judge in collaboration with multidisciplinary stakeholders and community partners to enhance the functioning of the court and outcomes for children and families.

A problem-solving approach does not ask judges to be therapists or social workers. It does not ask judges to become addiction counselors or mental health experts. It does, however, ask judges to be aware that such problems exist, to be aware of their signs and symptoms, and to consider the effects these problems may have on people in the court and on the behaviors that have brought them to court. Therapeutic jurisprudence and a problem-solving approach to dependency cases asks that all judges recognize they can be important agents of change and to acknowledge that their words, actions, and demeanor can affect the people who come before them in the courtroom. Judges who recognize their potential impact on the children and families who appear before them, consciously strive to gain knowledge about the myriad issues faced by children and families in the child welfare system, and work to develop the interpersonal skills and empathy that are the foundation of therapeutic judging, are likely to become more effective judges with improved outcomes.

P. Best or Promising Court Practices to Encourage Safe and Timely Permanency¹²³

To achieve timely permanency for an abused or neglected child, the focus on permanency must begin when the court and child welfare agency first become involved with the family. Certain critical elements must be thoroughly examined and clearly documented in the court record well before the permanency hearing, for example, or their oversight can seriously impede timely permanency for a child. Child welfare agency tools, such as family group decision-making and concurrent planning, have been implemented in many jurisdictions to significantly reduce the length of time children spend in limbo waiting for the court to make a decision about permanency. These tools also have the capacity to create options for permanency that might otherwise not be available.

1. Early Identification and Involvement of Absent Parents

At the very first hearing on a petition alleging abuse or neglect, efforts should include all parents involved in the life of the child as well as to locate absent parents. The early identification, location, and engagement of the father are critical – after all, there is no paternal side of the family until a determination is made about who the father actually is. Without that determination, the father’s relatives will not be in court, and they will not be considered as placement resources. Moreover, many states do not work with the father’s side of the family if he is not located and identified, particularly when the parents are not married.

For a number of reasons, mothers may be reluctant to name the father of their child(ren). Although judges may obtain this information from the social worker, they should be prepared to carefully question the mother about the identity of the father and impress upon her the importance of identifying and locating the father. The court should be ready to order DNA testing when there is any question about paternity.¹²⁵ It is highly encouraged that putative fathers be located and brought into the court process as quickly as possible. Timely resolution of paternity issues is both in the best interests of the child and essential to avoiding delays at subsequent points in the court process. The court must ensure that the efforts of the child welfare agency are thorough and diligent in locating and involving all legal and putative parents.

2. Early Identification and Involvement of Relatives

It is equally important, particularly when a child must be removed from the home, to identify all relatives of the mother, father, or putative father(s) and to investigate all of these relatives as potential caretakers for the child. In fact, federal law requires early identification and notification of relatives in child abuse and neglect cases.¹²⁶ Courts should not make the presumption that because the parents have serious problems,

all of the relatives must also have serious problems. Relatives generally know the child better and often have a familial commitment to the care of the child. An appropriate relative who is willing to provide care is preferable to a non-relative caretaker.

When courts and agencies have not conducted thorough relative searches and reunification is ruled out, they can be faced with the difficult choice of deciding between adoption by a foster parent with whom the child has bonded and a relative who is appropriate but did not previously know of the child's need for a permanent home. If, however, the relative search was thorough and a relative who has previously chosen not to come forward changes his or her mind, the preference for keeping the child with relatives diminishes. When courts and agencies do their job thoroughly, they should not have to choose between a foster parent adoption and a relative adoption.

**NCJFCJ RESOLUTION PROMOTING TIMELY RELATIVE PLACEMENTS
AND REASONABLY DILIGENT SEARCHES IN FURTHERANCE OF
THOSE PLACEMENTS**

“ the following represents the minimum steps to be taken by the judge in furtherance of this resolution:

1. Where not otherwise required by state law, requiring the child welfare agency to conduct a reasonably diligent search for relatives of the child who may be considered for placement within thirty (30) days following the date of physical removal of the child from the home.

Directing the child welfare agency to adopt a systematic process for conducting the search including, but not necessarily limited to, the following:

- (a) Interviews with the parents from the beginning of the case and continuing during the course of an investigation, while child protective services are provided, and while the child is in care and is supervised by the child welfare agency;
- (b) Interviews with the child throughout the case;
- (c) Interviews with relatives throughout the case;
- (d) As the child welfare agency talks with identified relatives as to their interest in being a resource for the child or parent, inquiring as to the identity, location, and interest of other relatives and other persons who have demonstrated an ongoing commitment to the child, thereby allowing the search to expand as additional relatives and other persons are identified;
- (e) Interviews with collateral sources such as school teachers, counselors, day care providers, preachers, and others who may know of relatives not yet disclosed and of other persons who

have demonstrated an ongoing commitment to the child; (f) The use of databases, including the child welfare agency's own files, the Parent Locator Service and available Internet search tools; (g) Any assessments provided by outside service providers; (h) Inquiries of attorney Guardians *ad litem* and CASAs; (i) Appropriate inquiry during the course of all hearings in the case; and (j) Any other reasonable means that are likely to identify relatives or other persons who have demonstrated a significant relationship with the child.

2. Monitoring the progress of the relative search and allocating a sufficient amount of time during all reviews and hearings to address the relative search issue, including asking parents, caretakers, and others questions in court in furtherance of the search.
3. Exercising the court's oversight authority to promote timely relative searches and safe, permanent relative placement including, where appropriate, making adverse reasonable efforts findings.
4. Where properly within ethical bounds in the judge's jurisdiction, encouraging state legislators to enact legislation acknowledging the benefit of appropriate family placements, to require the agency to timely conduct reasonably diligent searches for relatives, to provide adequate resources to conduct those searches, and to provide financial and programmatic support to families serving as placement resources in order to move children out of the foster care system.

Adopted by the Membership of the NCJFCJ, 2005

3. Ensuring Quality Plans and Services are Available to the Family to Assist with Reunification

If the needs of a child and family have not been thoroughly assessed and appropriate services made available to families to assist with reunification, the parents may have a valid argument at the permanency hearing that reasonable efforts have not been made to reunify them with their child. This situation can cause significant delay in achieving permanency for the child by delaying the child's reunification, delaying the court's ability to terminate parental rights, or by setting up the possibility of reversal of the termination by the court of appeals.

It is imperative that judges are knowledgeable about the services available in the community and their effectiveness. Judges should inquire as to whether services being offered to families are evidence-based.

Judges should also ensure that merely completing services (attending classes) is not the sole determining factor for reunification. Service providers should be required to produce objective evidence of actual changes in parental behavioral and attitude.

4. Ensuring Quality Family Time¹²⁷

Frequent and meaningful family time can enhance the child and parent relationship, as well as expedite permanency by engaging parents. Courts should discourage the use of the term “visitation” which does not communicate the intimacy and importance of the parent/child/sibling relationship. Meaningful and regular contact (in all forms) with a child removed from the parent can be critical in motivating a parent to voluntarily start on case plan tasks from as early as removal or the preliminary protective hearing, regardless of whether the dependency action is being contested. The goal of family time is to promote reunification by strengthening the parent-child relationship and reducing the potentially damaging effects of separation. Based on the individual needs of the child and the circumstances of the family, the court should consider all options available to maximize safe and nurturing family time.

The growing literature on sibling relationships throughout the lifespan indicates that sibling bonds are important to all of us, but they are particularly vital to children from disorganized or dysfunctional families. These relationships assume even greater importance when children from these families enter the foster care system. Often, children in foster care have not only lost their parents but also their siblings. Many foster children are not placed with their

siblings and have little or no contact with them; and connections to their siblings are not maintained. Unless contrary to their safety and well-being, supporting and sustaining foster children’s sibling bonds should be a priority for the child welfare system and the court. Federal law, in the Fostering

“Consistent with child safety, relationships between and among children, parents, and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child.”

NCJFCJ. (2011). *Key Principles for Permanency Planning*

Connections to Success and Increasing Adoptions Act of 2008, addresses the issue of sibling placement and contact by providing that “reasonable efforts shall be made (A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to safety or well-being of any of the siblings; and (B) in the case of siblings removed from their home who are not so jointly placed, to 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 safety or well-being of any of the siblings.”¹²⁹

BENEFITS OF FREQUENT FAMILY TIME

- Promotes healthy attachment and reduces the negative effects of separation for the child and parents.
- Establishes and strengthens the parent-child relationship.
- Eases the pain of separation and loss for the child and parent.
- Keeps hope alive for the parent(s) and enhances parents' motivation to change.
- Involves parents in their child's everyday activities and keeps them abreast of the child's development.
- Helps parents gain confidence in their ability to care for their child and allows parents to learn and practice new skills.
- Provides a setting for the caseworker or parenting coach to suggest how to improve parent-child interactions.
- Allows foster parents to support birth parents and model positive parenting skills.
- Provides information to the court on the family's progress (or lack of progress) toward their goals.
- Facilitates family assessments and can help the court determine whether reunification is the best permanency option for the child.
- Helps with the transition to reunification.

Dougherty, S. (2006). *Promising Practices in Reunification*. National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work

The Preventing Sex Trafficking and Strengthening Families Act of 2014 also reinforces the importance of the sibling bond in requiring that agencies must notify parents of a child's siblings when the child is removed from a parent's care. This includes individuals who would have been considered siblings if not for the termination or other disruption of parental rights.

Clearly, the juvenile and family court judge has an important role to play regarding sibling contact for children in foster care. The judge should insist that all social worker reports include information about sibling contact. The judge should require the child's attorney or GAL to report to the court on that issue. At each court hearing, the judge should talk with each child about regular and ongoing sibling contact and ask about the child's desires.

Children at different stages in life react differently to separation from a parent, based primarily on their ability to understand the reasons for separation and the range and maturity of their coping strategies. The younger the child, and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child. To promote attachment and strengthen the parent-child relationship, very young children in foster care need frequent and consistent contact with their parents. Therefore, frequent, meaningful parent-child contact is critical for infants and toddlers in foster care.¹³¹ Because a child's first three years of life are an essential time for attachment and relationship-building, disruptions during this period can present special challenges. The early building of positive child-parent relationships begins with sensitive nurturing, protection, and physical proximity that is consistent across time. Consequently, the ways to support a young child and build or repair the child's relationship with the parent must be adapted to the child's developmental capacities.

Meaningful reviews of the parameters, quality, and frequency of family time must take place often. The judge should review the current frequency, duration, and type of family time at each court hearing in order to determine if the best interests, health, and safety of the children require any change in the frequency and supervision of visits in order to be compliant with statutory obligations regarding family time. Judges should inquire about parental participation and engagement in family time and address and remove any barriers that exist to their participation. Family time should be presumed to be unsupervised unless the state can prove that a safety risk exists.

Some of the considerations judges should keep in mind when determining or evaluating family time:¹³²

- The safety and well-being of children should always be paramount in considerations of family time. Judges should ensure that visits are in the child's best interests.
- Judges should ensure the plan for family time is individualized and promotes permanency.
 - All family time should be based on the specific needs of the child and parent, including developmental needs and ongoing attention to the child's stress response to the visitation process. Recommended practice indicates that the frequency of visitation is linked to permanency; however, judges should exercise discretion to suspend visits if the child is showing signs of stress, or conversely to order unsupervised and increased visitation when appropriate.

- Research and practice suggest that infants and toddlers can benefit from frequent, even daily, visitation, ideally several times per week when individual circumstances permit. Judges should ensure that the frequency, length, and timing of family time promote attachment and support the child’s development.
- Efforts should be made to ensure that transportation and logistics are not barriers to visitation or visitation frequency.
- Efforts should be made to ensure that family time takes place in the most natural setting or least restrictive setting that can assure the child’s safety and well-being.
- Efforts should be made to respect the child’s routines (e.g., eating, sleeping, and other consistent daily patterns) in scheduling family time.
- Family time should be as proactive as possible and offer opportunities for mutual enjoyment for parents and children (e.g., play), opportunities to develop predictable and nurturing care (e.g., engaging in family or child-care routines such as meal time), and opportunities for developmental stimulation (e.g., reading) to help parents understand their children’s skills and needs and how to promote their learning.
- Ensure family time is well documented so the court will have sufficient evidence moving forward to order reduced or increased restrictions, reunification, or termination of parental rights.

CONSIDERATIONS FOR FAMILY TIME IN CASES INVOLVING FAMILY VIOLENCE

- Inquire if the child welfare agency assessed the family members for family violence during initial contact with the family and at other periodic intervals.
- Gather and review information needed, such as current and previous injunctions, police reports, and stalking behavior to enhance decision-making when determining supervised, unsupervised, and therapeutic visitation.
- Assess the risk posed by perpetrators to lessen perpetrator-generated safety threats to children.
- Ensure that guidelines and appropriate interventions are established for the perpetrator in cases where supervised visitation is granted.

Source: Checklist to Promote Perpetrator Accountability in Dependency Cases Involving Domestic Violence, NCJFCJ

5. Family Treatment Drug Courts or Dependency Drug Courts

Parental alcohol and substance misuse is a formidable social problem and a major risk factor for child maltreatment and neglect. Prevalence estimates suggest that parental alcohol and substance use is a significant contributor to various levels of child welfare system involvement,¹³³ with some estimates indicating that between 60 percent and 80 percent of substantiated child abuse and neglect cases involve substance abuse by a custodial guardian or parent.¹³⁴ It is not surprising that substance abuse and addiction are so frequently associated with the neglect and abuse of children. Parents battling substance abuse often put the needs created by their alcohol or drug dependency ahead of the welfare of their families. At the same time, they – and their children – often have complicating physical or mental health problems. Unable to maintain employment or provide a stable and nurturing home environment, they are unable to care for their children.

Continued substance abuse by a custodial parent is associated with longer out-of-home placements for dependent children and higher rates of child re-victimization and terminations of parental rights.¹³⁵ While parents who complete alcohol and substance abuse treatment are significantly more likely to be reunified with their children, and their children spend considerably fewer days in out-of-home care,¹³⁶ research shows that more than 60 percent of parents in dependency cases do not comply adequately with alcohol and substance abuse treatment conditions, and more than 80 percent fail to complete treatment.¹³⁷ A coordinated effort among the court, child welfare, and treatment systems is critical in handling the unique issues present in child abuse and neglect cases that involve parental substance abuse. Otherwise, parents are likely to continue their addiction, increasing the possibility that children who may have been removed under such circumstances will remain in alternative placements.

One problem-solving court approach to improving outcomes in child abuse and neglect cases with parental alcohol and substance abuse is the family treatment drug court or dependency drug court. These specialized courts are devoted to cases of child abuse and neglect that involve substance abuse by the child's parents or other caregivers and aim to protect the safety and welfare of children while giving parents the tools they need to become sober, responsible caregivers. To accomplish this, the court draws together an interdisciplinary team that works collaboratively to assess the family's situation and devise a comprehensive case plan that addresses the needs of both the children and the parents. Although family treatment drug courts or dependency drug courts vary by design, the Bureau of Justice Assistance describes such courts as: "a collaborative effort in which court, treatment and child welfare practitioners come together in a non-adversarial setting to conduct comprehensive child and parent needs assessments. With these assessments as a base, the team builds workable case plans that give parents a viable chance to achieve sobriety, provide a safe nurturing home, become responsible for themselves and their children, and hold their families together."¹³⁸ The problem-solving, therapeutic approach adopted by family treatment drug courts also

involves regular judicial review of cases, providing opportunities for regular monitoring of parents' progress and for judges to engage and motivate parents.

Dependency courts are required by law and statute to make reasonable efforts toward family reunification and reach timely permanency decisions. Family treatment drug courts have emerged as a promising model for achieving these goals. Research has found that family treatment drug courts have improved treatment retention and family reunification rates in the child welfare system.¹³⁹ A national evaluation of more than 2,000 cases found that, compared to proceedings in traditional dependency court, more family treatment drug court parents and their children were able to remain together safely. In addition, there were swifter alternative permanent placement decisions for children if their parents were unable to stop abusing alcohol and drugs, all of which meant savings on the cost of foster care during and after proceedings.¹⁴⁰ By allowing for more efficient case processing, providing a wider range of needed treatment services, and active judicial oversight over case progress, family treatment drug courts assist courts in meeting statutory obligations and improving outcomes for children and families in these cases.

6. Complying with the Interstate Compact on the Placement of Children (ICPC)

The ICPC has been enacted uniformly by state legislatures in all 50 states, the District of Columbia, and the U.S. Virgin Islands for the purpose of ensuring that children are protected when placed between states. Since jurisdiction of a child ends at the state line, without the ICPC the public authorities in the receiving state would not be obligated to make placement investigations or supervise placements, nor would the sending state be financially and legally responsible for the child until termination of the interstate placement.

Termination of the ICPC placement can occur when the child returns to the sending state, the receiving state agrees to termination, the child is adopted, or the child reaches the age of majority. Otherwise, dismissal of state custody of a child who is placed out of state or dismissal of custody

"...all states and jurisdictions subject to the ICPC [should] adopt legislation that authorizes judges in sending and receiving states and jurisdictions to communicate with one another regarding the placement of children ..."

"...all states and jurisdictions subject to the ICPC [should] adopt legislation that authorizes judges in the receiving state or jurisdiction where placement is sought to hold hearings at the request of judges in sending states or jurisdictions on the status of ICPC home study requests and enter orders to complete those home studies when they are delayed and timely decisions are not made concerning the children involved."

NCJFCJ Resolution in Support of Increased Judicial Involvement in Interjurisdictional Movement of Children through the Interstate Compact on the Placement of Children (ICPC) Adopted by the NCJFCJ Board of Trustees, 2013

of a child in an interstate placement is a violation of state law.

When courts and agencies place children out of state without following the ICPC, the receiving state may not do a home assessment, which sets up the possibility of children being placed at risk and without adequate services. This is not only harmful to the child, but could potentially disrupt a placement that with the proper services could become a permanent home. Such a placement creates the possibility of serious delays in achieving permanency should disputes occur between the sending and receiving states.

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

The Indian Child Welfare Act of 1978 (ICWA)¹⁴¹ was passed to address the removal of Indian children from their homes and their placement with non-Indian families. At that time, Indian children were becoming involved with the child protection system at four to eight times the rate of non-Indian children.

ICWA establishes special procedural and substantive safeguards to protect the interests of Indian children and families, including tribal determination of who is an Indian child, full tribal participation in planning and decision-making in the child protection case, placement preferences for extended family members and other Indian families identified by the child's tribe, and, when requested, transfer of the child protection case to the child's tribal court.

Indian children may not be placed in foster care using the same standards that the court applies to non-Indian children. Requirements to determine the need for placement are higher, placement preferences exist, requirements for

“[The] National Council of Juvenile and Family Court Judges (NCJFCJ) believes that full implementation of the Indian Child Welfare Act should be a priority for all state courts;

“[The] NCJFCJ encourages states to adopt ICWA in its entirety in state law;”

“[The] NCJFCJ encourages all judges to receive training on the ICWA, including the effects of historical trauma, and the effects of separation from family, culture, and tradition;”

“[The] NCJFCJ encourages state Court Improvement Programs to work in meaningful collaboration with tribes to develop strategic plans to effect full implementation of the Act, including data collection to track progress;”

“[The] NCJFCJ encourages courts to develop statutes and court rules to enable and welcome tribal attorneys and qualified expert witnesses in other states to appear in court on behalf of the tribe, allowing and providing for telephonic appearance when needed;”

“[The] NCJFCJ commits to working closely with state courts, Indian tribes, and tribal organizations to achieve full implementation of the Act and track progress of that implementation.”

NCJFCJ Resolution in Support of Full Implementation of the Indian Child Welfare Act

Adopted by the NCJFCJ Board of Trustees, 2013

services prior to placement and services to reunify are higher, and for some states, the burden of proof at adjudication and termination of parental rights is higher.¹⁴²

To prevent Indian children from unnecessary foster care placement or lingering in foster care, courts should:¹⁴³

- identify at the earliest possible time whether ICWA applies to one or more children in a case;¹⁴⁴
- 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 Act.

When courts fail to ensure the identification of Indian children and the requirements of ICWA are followed from the beginning of the court process, and issues concerning ICWA compliance are raised for the first time at the permanency hearing, the court may have failed to identify appropriate care options and important cultural connections for the child. This oversight may cause the unnecessary breakup of an Indian family or delay the court’s ability to provide for a permanent plan for the child and may set up the possibility of reversal of any placement decision, adjudication, or termination of parental rights by an appellate court.

TRIBAL/STATE COURT COLLABORATION

Developing relationships between tribal and state courts, in the spirit of mutual respect and learning, can be the foundation for collaborative problem-solving to improve compliance with ICWA as well as create a forum for dealing with other issues such as full faith and credit, juveniles in detention, and services to support families. An ongoing process for meaningful collaboration between tribal and state courts should be developed and supported – a process in which state courts and tribal courts identify and work toward shared goals and activities to increase the safety, permanency, and well-being of children in the child welfare system. Among the issues that such collaborations can address include issues around transfer, shared jurisdiction, and adopting tribal interventions for problem-solving in state courts. In fact, the federal state court improvement program’s formal instructions mandate tribal and state court collaboration.

8. Concurrent Planning

Concurrent planning should be done in all foster care cases. While the primary goal in the majority of cases, with the exception of those cases in which the court finds that aggravated circumstances exist, is to reunify children with their parents, establishing a concurrent goal should those efforts fail will expedite permanency. It is not sufficient for the agency to simply name a concurrent plan. Concurrent plans of reunification and adoption or some other appropriate, permanent, legally secure alternative should be actively pursued with the same sense of urgency as the primary reunification plan. Key elements of concurrent planning include:

- involvement of the parent in determining the concurrent plan and, in the case of an Indian child, involvement of the Indian custodians and the child's tribe;
- placement of the child in a relative-adopt or foster-adopt home to reduce the number of times the child must move;
- strict time limits on case progress and scheduling of hearings;
- detailed small steps to accomplish the plan, in weekly and monthly increments, accompanied by frequent court reviews;
- progress measured by behavior, documented in reports submitted to the court;
- excellent social work, supported by training, consultation, and reasonable caseloads; and
- defining success by timely permanency, whether it is reunification or the alternate plan.

In order to ensure good faith efforts at reunification under concurrent planning, it is critical that foster and relative families receive additional training and that interaction between the foster families or relatives, the birth family, and the child are carefully monitored. Using family decision-making or other means of actively involving the extended family will help ensure that active and reasonable efforts are made to reunify and the focus on the child's best interests are maintained.

When concurrent planning is used, either the parents should be ready for the child's return or a filing of termination of parental rights should be prepared prior to the time of the permanency hearing.

If reunification fails, the child should already be in the home that will become the adoptive home.

9. Best or Promising Practices in Adoption

USE FOSTER-ADOPT HOMES¹⁴⁵

“The dominant feature of the special needs¹⁴⁶ adoptive family is that the vast majority of them have been foster parents first.”¹⁴⁷ This is a vast change over practice in the 1950s, when foster parents were discouraged from forming attachments with foster children, and children were moved regularly to avoid such attachments. We now know that multiple moves break the bonds of trust and attachment formed by the child and consequently harm the child. Multiple moves compound the original trauma of abuse and neglect, often leading to long-term adjustment and attachment difficulties.¹⁴⁸

Multiple placements can be avoided for a child who cannot be placed with relatives by using foster-adopt homes, also called legal risk pre-adoptive placements. These parents have been licensed to provide a temporary foster home, but if the child cannot be reunified with the birth family, then the home becomes the adoptive home for the child. ASFA allows for the development of programs to place children with these pre-adoptive families prior to termination of parental rights when it is in the best interests of the child. Courts should work with child welfare agencies to develop a process of dual certification of these homes so delay will be reduced.

BELIEVE IN THE ADOPTABILITY OF ALL CHILDREN

Judges should not allow a concern that an adoptive home may not be found for a child as a reason to delay termination of parental rights. Termination of parental rights does not mean that prior positive relationships with the child and other adults or siblings must be discontinued. Failure to proceed with termination of parental rights in most cases when a child cannot be safely reunified practically ensures that the child will not achieve permanency.

CONSIDER ADOPTION WITH CONTACT

The terms “adoption with contact” or “open adoption” describe a variety of arrangements that involve the birth family, other individuals who were a positive part of a child’s life before entering an adoptive home, and the child who now resides with adopting parents. This contact may take place both prior to and after the adoption is finalized. It can range from sending birthday cards to the child or providing pictures to the biological parents (directly or through neutral third parties) to regular visitation. The determining factor as to whether adoption with contact is appropriate must always be the best interests of the child, not the desires of the adults. Adoption with contact recognizes that many children who move into new families

through adoption are old enough to have established strong relationships with biological parents, siblings, and others and that completely severing these relationships may not be in the child's best interests.

PROVIDE EXPEDITED APPEALS

An expedited appeals process for cases involving termination of parental rights and adoption is crucial to permanency. Attorneys should consider the use of Writs or Special Action proceedings in order to get cases before the appellate court as quickly as possible. Whether accomplished by court rule or by legislation, appellate courts at all levels should give the highest priority to hearing these appeals and issuing final decisions.

ENSURE FREQUENT REVIEW AFTER TERMINATION OF PARENTAL RIGHTS TO ACHIEVE TIMELY PERMANENCY

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

UNDERSTAND THE NEED FOR POST-ADOPTIVE SUBSIDIES AND SERVICES

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

II. GENERAL ISSUES ENDNOTES

¹ For a detailed description of the complexity of child abuse and neglect cases and proceedings, see Hardin, M. (1998). Child protection cases in a unified family court. *Family Law Quarterly*, 32, 147.

² In these GUIDELINES, unless otherwise noted, the term “judge” encompasses all judicial officers including magistrates, referees, associate judges, or others who function as judges including those appointed and serving at the pleasure of judges.

³ In these GUIDELINES, the term “child welfare agency” refers to the state or county department or any other entity tasked with bringing evidence before the court or organizing services for the child and family, and that either has legal custody or court-ordered supervision of the child and/or family. Depending on the jurisdiction, this may be a public agency or a private (contract) agency.

⁴ In keeping with the key principles outlined in this document, “family time” refers to visitation practices.

⁵ Juvenile and family court is used herein to refer to courts with jurisdiction over child abuse and neglect cases (or child protection, dependency, or child welfare cases).

⁶ For a detailed discussion of due process considerations and constitutional issues, see Ventrell, M., & Duquette, D. (Eds.). (2005). *Child welfare law and practice: Representing children, parents, and state agencies in abuse, neglect, and dependency cases*. Denver: Bradford Publishing Co.

⁷ Permanency planning refers to the practice of promoting a permanent living situation for every child entering foster care, with an adult with whom the child has a continuous, reciprocal relationship.

⁸ 42 U.S.C. § 675(5)(D).

⁹ The Board of Trustees of the National Council of Juvenile and Family Court Judges (NCJFCJ) endorsed the leadership role of the juvenile and family court judge in *Resolution No. 6: Resolution Regarding Judicial Leadership in the Juvenile and Family Courts*, July 2006. While many resolutions passed by the NCJFCJ Board of Trustees and General Membership are noted throughout the ENHANCED RESOURCE GUIDELINES, additional relevant resolutions can be accessed on NCJFCJ’s website at <http://www.ncjfcj.org/about/resolutions-and-policy-statements>

¹⁰ See, for example, Goldstein, J., Freud, A., & Solnit, A. (1973). *Beyond the best interests of the child*. Free Press, at 40-42; American Academy of Pediatrics. (2000, November). Developmental

issues for young children in foster care, *Pediatrics*, 106(5), 1145-1150; Dupree, D., & Stephens, S. A. (2002). *Foster care and early childhood development: Implications for child welfare policy and practice*. Philadelphia: Center for Assessment and Policy Development; Kools, S., & Kennedy C. (2003). Foster child health and development: Implications for primary care. *Pediatric Nursing*, 29(1); Leslie, L., Gordon, J. N., Lambros, K., Premji, K., Peoples, J., & Gist, K. (2005). Addressing the developmental and mental health needs of young children in foster care. *Developmental and Behavioral Pediatrics*, 26(2), 140-151; Lawrence, C. R., Carlson, E. A., & Eglend, B. (2006). The impact of foster care on development. *Development and Psychopathology*, 18, 57-76.

¹¹ Edwards, L. P. (2007). Achieving timely permanency in child protection courts: The importance of frontloading the court process. *Juvenile and Family Court Journal*, 58(2).

¹² For a more extensive discussion of the leadership role of the judge in child abuse and neglect cases, and strategies for exercising that leadership, see Dobbin, S. A., Gatowski, S. I., & Maxwell, M. (2004). *Building a better collaboration: Leading change for better outcomes in child abuse and neglect cases*. National Council of Juvenile and Family Court Judges and David and Lucile Packard Foundation; Edwards, L. P. (2012). *The role of the juvenile court judge: Practice and ethics*. California Judges Association; Edwards, L. P. (2006). Some thoughts on judicial leadership. *Juvenile and Family Justice Today*, 11; Edwards, L. P. (2005, Winter). The role of the juvenile court revisited. *Juvenile and Family Court Journal*, 39-56; Edwards, L. P. (1992). The juvenile court and the role of the juvenile court judge. *Juvenile and Family Court Journal*, 43(2); Gatowski, S. I., Dobbin, S. A., & Rubin, S. (2010). *Achieving excellence in judicial leadership: Leading change for better outcomes for children and families—A National Judicial Leadership Curriculum*. National Council of Juvenile and Family Court Judges and the National Child Welfare Resource Center on Legal and Judicial Issues, Washington, DC.

¹³ The American Bar Association endorsed this role for juvenile and family court judges in Principle 5 of its *Judicial Excellence in Child Abuse and Neglect Proceedings: Principles and Standards for Court Organization, Judicial Selection and Assignment, Judicial Administration and Judicial Education*, American Bar Association House Delegates, Aug. 9, 2010.

¹⁴ Increasingly, federal legislation has required more collaboration between courts, agencies, and communities in order to access federal funding streams.

¹⁵ National Council of Juvenile and Family Court Judges. (2006). *Judicial leadership and ethics: Focused on improved outcomes in dependency cases*, at 24. Reno, NV: Author.

¹⁶ See Edwards (2007), *Supra* note 11.

¹⁷ National Council of Juvenile and Family Court Judges, *Resolution No. 6—Resolution Regarding Judicial Leadership in the Juvenile and Family Courts*, adopted July 19, 2006.

¹⁸ American Bar Association, *Standards and Principles of Judicial Excellence Number 4*, *supra* note 13. The ABA *Standards and Principles of Judicial Excellence* were endorsed by the National Council of Juvenile and Family Court Judges Board of Trustees in 2009.

¹⁹ Pew Commission on Children in Foster Care. (2004). *Fostering the future: Safety, permanence, and well-being for children in foster care*, Executive Summary.

²⁰ See *PROJECT ONE Key Principles*, adopted by the NCJFCJ Board of Trustees, July 14, 2012.

²¹ National Council of Juvenile and Family Court Judges. (2011). *Key principles for permanency planning*. Reno, NV: Author.

²² In 2010, with funding from the Office of Juvenile Justice and Delinquency Prevention, the NCJFCJ began work on the Multi-Court Collaboration (MCC) Initiative (now known as Project ONE, named to signify a holistic approach to families through One Family/One Judge, No Wrong Door, and Equal and Coordinated Access to Justice Principles). Project ONE seeks to provide judges with guidance for supporting the needs of families and children no matter which jurisdictional “door” of the courthouse – family law, child welfare, family violence, juvenile justice, etc. – they enter. Central to Project ONE is a holistic view of individuals and families, a life-course perspective on human development, and a focus on ensuring equal and coordinated access to justice regardless of presenting issues. For more information, see www.ncjfcj.org

²³ See Solomon, M., & Somerlot, D. (1986). *Caseload management in the trial court: Now and for the future*. Washington, DC: American Bar Association; American Bar Association. (1986). *Defeating delay: Developing and implementing a court delay reduction program*. Washington, DC: Author.

²⁴ *Ibid.*

²⁵ For a listing of nationally recognized performance measures in child abuse and neglect cases, as well as technical assistance on how to operationalize and collect those measures and report results, see Office of Juvenile Justice and Delinquency Prevention and U. S. Department of Health and Human Services, *Children's Bureau's Toolkit for Court Performance Measures in Child Abuse and Neglect Cases*, available at <http://www.ojjdp.gov/publications/courttoolkit.html>; for more information on the Child and Family Services Reviews (CFSRs), see the Administration for Children and Families website at <http://www.acf.hhs.gov/programs/cb/>

monitoring/child-family-services-reviews.

²⁶ For strategies to facilitate early appointment of counsel, see Edwards, L. P. (2014). *Reasonable efforts: A judicial perspective*. Casey Family Programs and Philanthropic Ventures Foundation.

²⁷ See Hardin, M. (1993). *How to work with your court: A guide for child welfare agency administrators*. Washington, DC: American Bar Association.

²⁸ See also the section in this Chapter on Alternative Dispute Resolution; for a thorough discussion of the concept of frontloading the court process, see Edwards, L. (2007). Achieving timely permanency in child protection courts: The importance of frontloading the court process. *Juvenile and Family Court Journal*, 58(2), 1-31.

²⁹ See for example, Edwards, L., & Sagatun-Edwards, I. (2007). The transition to group decision-making in child protection cases: Obtaining better results for children and families. *Juvenile and Family Court Journal*, 58 (1); Gatowski, S.I., Dobbin, S.A., & Litchfield, M. (2002). *The Portland model court expanded second shelter hearing process: Evaluating best practice components of front-loading*. Reno, NV: NCJFCJ; National Council of Juvenile and Family Court Judges. (2006). *Model courts: Improving outcomes for abused and neglected children and their families*. Reno, NV: Author; Halemba, G., Siegel, G., Gunn, R., & Zawacki, S. (2002). The impact of model court reform in Arizona on the processing of child abuse and neglect cases. *Juvenile and Family Court Journal*, 53(1), 1-20; Thoennes N. (2000). Dependency mediation: Help for families and juvenile courts. *Juvenile and Family Court Journal*, 51(2), 13-22.

³⁰ National Council of Juvenile and Family Court Judges. (2011). *Key principles for permanency planning. Technical Assistance Bulletin*. Reno, NV: NCJFCJ; see also National Council of Juvenile and Family Court Judges. (1998). Child abuse and neglect cases: Representation as a critical component of effective practice. *Technical Assistance Bulletin*. NCJFCJ.

³¹ *Ibid.*

³² The National Association of Counsel for Children (NACC) recommends that “every child subject to a child protection proceeding must be provided an independent, competent, and zealous attorney, trained in the law of child protection and the art of trial advocacy, with adequate time and resources to handle the case.” NACC Recommendations for Representation of Children in Abuse and Neglect Cases. (2001). *Executive Summary*. The NACC “believes that in order for justice to be done in child abuse and neglect related court proceedings, all parties, including children, must be represented by independent legal counsel.” This principle was supported by the U.S. Department of Health and

Human Services; see also *Adoption 2002: The President's Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Permanence for Children*. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau; see also Duquette, D. N. (2000, Fall). Legal representation for children in child protection proceedings: Two distinct lawyer roles are required. *Family Law Quarterly*.

³³ This listing is adapted from the recommendations of both the American Bar Association (ABA) and the National Association of Counsel for Children (NACC) for attorney practice. Specifically, the ABA's *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* (1996), *Standards of Practice for Attorneys Representing Child Welfare Agencies* (2004), and *Standards of Practice for Attorneys Representing Parents in Child Abuse and Neglect Cases* (2007); and the NACC's *Recommendations for Representation of Children in Abuse and Neglect Cases* (2001). The ABA standards were approved by the ABA delegates. The NACC recommendations were approved by its Board of Directors. Each of these organization's standards and recommendations were written in consultation with multidisciplinary experts in the field of child welfare law, including judges, and are oriented toward the goal of improving the quality of representation practice and the court process. See also Laver, M. (2007). Promoting quality parent representation through standards of practice. *ABA Child Law Practice*, 26(1).

³⁴ *Ibid.*

³⁵ Congressional Record - House, Sept. 25, 1996, p. H11149).

³⁶ For summaries of state statutes and laws covering the qualifications, training, and responsibilities of Guardian *ad litem* in child abuse and neglect cases, see U.S. Department of Health and Human Services, Administration for Children and Families. (2014). *Representation of children in child abuse and neglect proceedings*, available at: www.childwelfare.gov; See also Grasso, K. (1998). *A judge's guide to improving legal representation of children*. Washington, DC: American Bar Association, Center on Children and the Law; Heartz, R. H. (1993). Guardian *ad litem* in child abuse and neglect proceedings: Clarifying the roles to improve effectiveness. *Family Law Quarterly*, 27(3).

³⁷ *Supra* note 32; see also National Court Appointed Special Advocates Association, National Council of Juvenile and Family Court Judges, and Office of Juvenile Justice and Delinquency Prevention. (2013, revised edition). *Judge's guide to CASA/GAL program development*.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ National CASA Volunteer Training Curriculum, available at: www.CASAforChildren.org

⁴² This listing is adapted from *Judge's Guide to CASA/GAL Program Development*, *supra* note 37, at 17.

⁴³ *Supra* note 30, *Key principles for permanency planning*.

⁴⁴ National Council of Juvenile and Family Court Judges. *Resolution No.6, In Support of Judges Assisting in the Creation and Expansion of Court Appointed Special Advocates/Guardian ad litem Programs*, Adopted July 2005.

⁴⁵ National Council of Juvenile and Family Court Judges. *Resolution No. 9, In Support of Presumptively Open Hearings with Discretion of Courts to Close*, Adopted July 2005.

⁴⁶ 45 C.F.R. 1356.71.

⁴⁷ This section is adapted and reprinted from Lund, T., & Renne, J. (2009). *Child safety: A guide for judges and attorneys*. ABA, Center on Children and the Law, and American Bar Association. (2010). Child safety assessment, planning and decision-making in the courtroom. *Court Works*, 11(3).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Edwards, L. P., & Baron, S. (1995). Alternatives to contested litigation in child abuse and neglect cases. *Family and Conciliation Courts Review*, 33(3), 275-285.

⁵¹ See the section in this Chapter on engaging parents, children, and families in the case process.

⁵² See, for example, Dobbin, S. A., Gatowski, S. I. & Litchfield, M. (2001). *The Essex County child welfare mediation program: Evaluation results and recommendations*. *Technical Assistance Bulletin*. NCJFCJ; Gatowski, S. I., Dobbin, S. A., Litchfield, M., & Oetjen, J. (2005). *Mediation in child protection cases: An evaluation of the Washington, D.C. Family Court child protection mediation program*. NCJFCJ; Giovannucci, M. (2007). Creative conflict resolution approaches for dependency cases. *Future Trends in State Courts*. Williamsburg, VA: National Center for State Courts; National Council of Juvenile and Family Court Judges. (2014). *Research report: Process evaluation of mediation in the Fifth Judicial District, Nevada*. Reno, NV: Author; National Council of Juvenile and Family Court Judges. (2013), *Research report: Outcome evaluation of mediation in Washoe County, Nevada*, Reno, NV: Author; National Council of Juvenile and Family Court Judges. (2013 & 2011). *King County mediation assessments, Phase II and III*. Reno, NV: Author; NCJFCJ. *National Council of Juvenile and Family Court Judges, Model Courts Status Reports (1999-2007)*. NCJFCJ; Thoennes, N. (1997). An evaluation

of child protection mediation in five California courts. *Family and Conciliation Courts Review*, 35(2), 185-195; Thoennes, *supra* note 29.

⁵³ See, for example, Gatowski et al., *ibid.*, finding that mediated cases facilitated more long-term permanency with lower re-entry (recidivism) into care rates than a matched comparison sample of cases that had not received mediation.

⁵⁴ See, for example, Barsky, A. E. (1996). Mediation and empowerment in child protection cases. *Mediation Quarterly*, 14(2), 111-134; Thoennes, *supra* note 29.

⁵⁵ *Ibid.*; see also Barsky, A. E., & Trocme, N. (1998). The essential aspects of mediation in child protection cases. *Children and Youth Services Review*, 20(7), 629-656. For a judicial and other system professionals' perspectives on the benefits of child protection mediation, see Edwards, L. P. et al (2002). "Mediation in juvenile dependency court: Multiple perspectives. *Juvenile and Family Court Journal*, 53(4), 49-66, and Trosch, L. A., Sanders, L.T., & Kugelmass, S. (2002). Child abuse and neglect, and dependency mediation pilot project. *Juvenile and Family Court Journal*, 53(4), 67-77.

⁵⁶ *Supra* notes 52-55.

⁵⁷ See, for example Antle, B. F., Barbee, A. P., Christensen, D. N., & Martin, M.H. (2008). Solution-based casework in child welfare: Preliminary evaluation research. *Journal of Public Welfare* 2(2), 197-227; Lohrbach, S., & Sawyer, R. (2004). Creating a constructive practice: Family and professional partnership in high-risk child protection case conferences. *Protecting Children Journal*, 19(2), 26-35; Wood, S. M., & Russell, J. R. (2011). Effects of parental and attorney involvement on reunification in juvenile dependency cases. *Children and Youth Services Review*, 33, 1730-1741.

⁵⁸ See Hannaford-Agor, P., & Waters, N.L. (2013). Estimating the cost of civil litigation. *Caseload highlights*. Williamsburg, VA: National Center for State Courts.

⁵⁹ See, for example, Giovannucci, M. (2009). Innovation in dispute resolution: Case status conferences for child protection and placement proceedings in the state of Connecticut. *Family Court Review*, 29(3), 270-290; Giovannucci, *supra* note 52; Gatowski, S. I., Dobbin, S. A., & Litchfield, M. (2002). *The Portland model court expanded second shelter hearing process: Evaluating best practice components of front-loading*. NCJFCJ; Halemba, G., & Siegel, G. (1999). *Pima County model court project summary of follow-up assessment*. National Center for Juvenile Justice; National Council of Juvenile and Family Court Judges, *Model Court Status Reports -1999-2001* editions, available at www.ncjfcj.org; Siegel, G., & Halemba, G. (2002). *The Arizona court improvement project: Five years later*. Pittsburgh, PA: National Center for Juvenile Justice.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ See, for example, Billingsley, A., & Giovannoni, J. M. (1972). *Children of the storm: Black children and American child welfare*. New York: Harcourt Brace Jovanovich, Inc.; Breggin, P.R., & Breggin, G.R. (1998). *The war against children of color: Psychiatry targets inner city youth*. Monroe, ME: Common Courage Press; Chand, A. (2000). The over-representation of black children in the child protection system: Possible causes, consequences, and solutions. *Child and Family Social Work*, 5, 67-77; Golden, R. (1997). *Disposable children: America's child welfare system*. Belmont, CA: Wadsworth; Lane, W. G., Rubin, D. M., Monteith, R., & Christain, C. W. (2002). Racial differences in the evaluation of pediatric fractures for physical abuse. *Journal of the American Medical Association*, 288, 1603-09.

⁶⁴ See, for example, Lu, Y. E., Landsverk, J., Ellis-McLeod, E., Newton, R., Ganger, W., & Johnson, I. (2004). Race, ethnicity and case outcomes in child protective services. *Children and Youth Services Review*, 25, 359-373; U.S. Department of Health and Human Services. (2014). *Child welfare outcomes report to Congress*; Yuan, J., Hedderson, J., & Curtis, P. (2003). Disproportionate representation of race and ethnicity in child maltreatment investigation and victimization. *Children and Youth Services Review*, 25, 359-373.

⁶⁵ Gatowski, S. I., Maze, C., & Miller, N. (2008). Courts catalyzing change: Achieving equity and fairness in foster care – Transforming examination into action. *Juvenile and Family Justice TODAY*, 16-20; Miller, N., & Maze, C. (2010). *Right from the start: The CCC preliminary protective hearing benchcard – A tool for judicial decision-making*. NCFJJC. The CCC initiative was funded by the Office of Juvenile Justice and Delinquency Prevention and Casey Family Programs.

⁶⁶ For research examining the effect of implementing the CCC Preliminary Protective Hearing Benchcard, see National Council of Juvenile and Family Court Judges. (2011). *Right from the start: The CCC preliminary protective hearing benchcard study report – Testing a tool for judicial decision-making*. Reno, NV: Author; National Council of Juvenile and Family Court Judges. (2014). *Process evaluation: The CCC benchcard*. Reno, NV: Author; National Council of Juvenile and Family Court Judges. (2014). *Research report: Assessing the long-term effects of the CCC preliminary protective hearing benchcard*. Reno, NV: Author.

⁶⁷ U.S. Department of Health and Human Services. (2010). Family engagement. *Child Welfare Information Gateway Bulletin for Professionals*. Washington, DC: HHS, Children's Bureau.

⁶⁸ Steib, S. (2004, March). Engaging families in child welfare practice. *Children's Voice*. Available at: www.cwla.org

⁶⁹ Lee, C.D., & Ayon, C. (2004). Is the client-worker relationship associated with better outcomes in mandated child abuse cases? *Research on Social Worker Practice*, 14, 351-357; Lohrbach, S., & Sawyer, R. (2004). Creating a constructive practice: Family and professional partnership in high-risk child protection case conferences. *Protecting Children*, 19(2), 26-35.

⁷⁰ U.S. Department of Health and Human Services. (2009). *Results of the 2007 and 2008 child and family services reviews*. Washington, DC: Author.

⁷¹ Merkel-Holguin, L., Nixon, P., & Burford, G. (2003). Learning with families: A synopsis of FGDM research and evaluation in child welfare. *Protecting Children*, 18(1-2), 2-11.

⁷² *Ibid.*; U.S. Department of Health and Human Services. (2004). *Findings from the initial child and family service reviews, 2001-2004*. Washington, DC: Author.

⁷³ Merkel-Holguin et al., *supra* note 71; Tam, T. S., & Ho, M. K. W. (1996). Factors influencing the prospect of children returning to their parents from out-of-home care. *Child Welfare*, 75(3), 253-268.

⁷⁴ Antle et al., *supra* note 57; Dawson, K., & Berry, M. (2002). Engaging families in child welfare services: An evidence-based approach to best practice. *Child Welfare*, 81(2), 293-317.

⁷⁵ See, for example, Lemon, K., D'Andrade, A., & Austin, M. (2008). Understanding and addressing racial/ethnic disproportionality. *Journal of Evidence Based Practice*, 5(1/2), 9-30.

⁷⁶ See, generally, Saywitz, K. (1994). Children in court: Principles of child development for judicial application. In J. Bulkley, C. Sandt, & L. Berliner (Eds.), *A judicial primer on child sexual abuse*. Washington, DC: American Bar Association Center on Children and the Law.

⁷⁷ The authors are grateful to Judge Leonard Edwards (Ret.) for providing this suggested opening at the preliminary protective hearing to engage parents in an understanding of the purpose of the hearing.

⁷⁸ Models termed "family meetings," "family unity meetings," and "team decision-making meetings" usually connote a less formal process. Keys, T. (1996) Family decision-making in Oregon, *Protecting Children*, 3, 11-14. In Hawaii, family group decision-making is called O'Hana conferencing (O'Hana is the term for family in native Hawaiian).

⁷⁹ The Fostering Connections to Success and Increasing Adoptions Act (2008) identified family group conferencing as a best practice

and offered grants to start programs throughout the country [P.L. 110-351].

⁸⁰ In New Zealand, where the family group decision-making model originated and is required in all cases of abuse and neglect, agreement is produced in 90%-95% of the cases. Merkel-Holguin, L. (2000). Putting families back into the child protection partnership: Family group decision-making. *Protecting Children*, 12(3).

⁸¹ See Harris, N. (2008). Family group conferencing in Australia 15 years on. *Child Abuse Prevention*, 27, National Child Protection Clearinghouse; Merkel-Holguin, L. (2003). Promising results, potential new directions: International FGDM research and evaluation in child welfare. *Protecting Children*, 18(1-2), 2-11; Robinson, S. D., Litchfield, M., Gatowski, S. I., & Dobbin, S. A. (2002). Family conferencing: A success for our children. *Juvenile and Family Court Journal*, 53(4), 43-47; Litchfield, M., Gatowski, S. I., & Dobbin, S. A. (2003). Improving outcomes for families: Results from an evaluation of Miami's family decision-making program. *Protecting Children*, 18(1-2), 48-51.

⁸² *Ibid.*; See also Berzin, S., Cohen, E., Thomas, K., & Dawson, W. (2008). Does family group decision-making affect child welfare outcomes? Findings from a randomized control study. *Child Welfare*, 87(4), 35; Berzin, S. (2006). Using sibling data to understand the impact of family group decision-making on child welfare outcomes. *Children and Youth Services Review*, 28(12), 1149; Litchfield, M., Oetjen, J., Maxwell, D., Gatowski, S. I., & Dobbin, S. A. (2003). Empowering families in child protection cases: An implementation evaluation of Hawaii's O'hana conferencing program. *Technical Assistance Bulletin*. NCJFCJ, OJJDP and the Center for the Study of Social Policy.

⁸³ See, for example, Berzin et al. (2008), and Berzin (2006) *ibid.*; Gunderson, K., Cahn, K., & Wirth, J. (2003). The Washington State long-term outcome study. *Protecting Children*, 18 (1-2), 42-47.

⁸⁴ Promoting Safe and Stable Families Act (2006); Fostering Connections Act (2008); Preventing Sex Trafficking and Strengthening Families Act (2014).

⁸⁵ See, for example, Sinclair, R. (1998). Involving children in planning their care. *Child and Family Social Work*, 3, 137-142; Sinclair, R. (2004). Participation in practice: Making it meaningful, effective, and sustainable. *Children and Society*, 18, 106-118.

⁸⁶ See, for example, Stein, E., Rae-Grant, N. I., Ackland, S., & Avison, W. (1999). Psychiatric disorders of children in care: Methodology and demographic correlates. *Canadian Journal of Psychiatry*, 39, 341-347.

⁸⁷ *Ibid.*; see also Harden, B. J. (2004). Safety and stability for foster children: A developmental perspective. *Children and Families and*

Foster Care, 14(1); Wulczyn, F., Hislop, K., & Harden, B. J. (2002). The placement of infants in foster care. *Infant Mental Health Journal*, 23(5), 454-75.

⁸⁸ *Ibid.*

⁸⁹ Research summarized is from *Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care* (2014), National Working Group on Foster Care and Education, American Bar Association. This fact sheet provides data compiled from multiple studies.

⁹⁰ See, for example, Courtney, M. E., Dworsky, A., Ruth, G., Keller, T., Havlicek, J., & Bost, N. (2005). *Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 19*. Chicago, IL: Chapin Hall Center for Children at the University of Chicago; McDonald, T. P., Allen, R. I., Westerfelt, A., & Piliavin, I. (1996). *Assessing the long-term effects of foster care: A research synthesis*. Washington, DC: Child Welfare League of America.

⁹¹ *Supra* note 87-90.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ See NCJFCJ *Resolution Regarding Judicial Oversight of Psychotropic Medications for Children Under Court Jurisdiction* (passed by NCJFCJ's Board of Trustees, July 2013), which states that judges' oversight responsibility extends to children prescribed psychotropic medications, including ensuring that medications are safe and appropriate. The resolution also outlines a list of considerations that should be made with respect to psychotropic medications.

⁹⁵ Shonkoff, J. P., & Phillips, D. (2000). *From neurons to neighborhoods: The science of early childhood development*. Washington, DC: National Academy Press.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See *Child welfare outcomes report to Congress 2009-2013*. Washington, DC: U.S. Department of Health and Human Services.

⁹⁹ Wulczyn, F., Hislop, K. B., & Harden, B. J. (2002). The placement of infants in foster care. *Infant Mental Health Journal: Special Issue – Infants in Foster and Kinship Care*, 23(5), 454-475.

¹⁰⁰ *Ibid.*

¹⁰¹ Shonkoff & Phillips, *supra* note 95.

¹⁰² Cohen, J., & Youcha, V. (2004). Zero to three: Critical issues for the juvenile and family court. *Juvenile and Family Court Journal*,

55(2), 15-27.

¹⁰³ For a discussion of strategies to improve outcomes for young children and their families in child abuse and neglect cases, see Katz, L., Lederman, C., & Ofsofsky, J. (2010). *Child-centered practices for the courtroom and community: A guide to working effectively with young children and their families in the child welfare system*. Washington, DC: American Psychological Association.

¹⁰⁴ For more information about zero to three, court teams for change, helping babies from the bench initiatives, see www.zerotothree.org; see also *Healthy beginnings, healthy futures: A judge's guide* (2009). American Bar Association Center on Children, Zero to Three Foundation, and the National Council of Juvenile and Family Court Judges; and Gatowski, S. I., & Dobbin, S. A. (2011). *Healthy beginnings, healthy futures: Faculty curriculum guide*. Washington, DC: American Bar Association Center on Children and the Law.

¹⁰⁵ For a summary review of longitudinal research sponsored by the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention examining the causes and correlates of juvenile delinquency, see Thornberry, T. P., Huizinga, D., & Loeber, R. (2004). The causes and correlates studies: Findings and policy implications. *Juvenile Justice*, 9(1).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ For court-based or court-linked strategies to address the needs of crossover or dual status youth, see Siegel, G., & Lord, R. (2005). When systems collide: Improving court practices and programs in dual jurisdiction cases. *Juvenile and Family Court Journal*, Spring; and Thomas, D. (Ed.). (2015). *When systems collaborate: How three jurisdictions improved their handling of dual-status cases*. Pittsburgh, PA: National Center for Juvenile Justice. See also the strategies noted in the NCJFCJ *Resolution Regarding the Unified Model Court Concept Paper of the NCJFCJ Crossover Committee*, adopted by the NCJFCJ Board of Trustees in 2009.

¹¹⁰ This section is adapted from Marsh, S., & Byer, J. (2013). Toward a conceptual framework for trauma-responsive practice in courts. *Criminal Law Practitioner*, 1(1), 101.

¹¹¹ See Centers for Disease Control and Prevention. (2013). *Adverse childhood experiences study (ACES)* (which demonstrates a thorough treatment of a public health approach to limiting the negative outcomes associated with adverse childhood experiences and detailing what constitutes adversity).

¹¹² *Ibid.*

¹¹³ The term “injured” represents a public health orientation. It is considered a neutral and inclusive term that captures a range of adverse experiences and associated negative outcomes without unnecessarily stigmatizing individuals as sick or other defaming labels.

¹¹⁴ See NCJFCJ *Resolution Regarding Trauma-Informed Juvenile and Family Courts*, Adopted by the NCJFCJ Board of Trustees in July 2015.

¹¹⁵ See, for example, National Research Council. (2013). *Reforming juvenile justice: A developmental approach*. Richard J. Bonnie et al., (Eds.). Washington, DC: Author.

¹¹⁶ These questions have been adapted from the *NCTSN Bench Card for the Trauma-Informed Judge*. National Child Traumatic Stress Network and the National Council of Juvenile and Family Court Judges. Only a subset of the possible questions that judges can ask to help them make trauma-informed decisions is presented. For a more comprehensive treatment of this topic and guidance for judges, please refer to the *NCTSN Bench Card for the Trauma-Informed Judge* and accompanying resource materials at www.nctsn.org

¹¹⁷ See, for example, Braithwaite J. (2002). Restorative justice and therapeutic jurisprudence. *Criminal Law Bulletin*, 38, 244; King M. S. (2008). Problem-solving court judging: Therapeutic jurisprudence and transformational leadership. *Journal of Judicial Administration*, 17, 155; Stolle, D. P., Wexler, D. B., & Winick, B. J. (2000). *Practicing therapeutic jurisprudence: Law as a helping profession*. Durham, NC: Carolina Academic Press; Wexler, D. B., & Winick, B. J. (1996). Law in a therapeutic key: Developments in therapeutic jurisprudence. Durham, NC: Carolina Academic Press; Winick, B. J., & Wexler, D. B. (2003). *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*. Durham, NC: Carolina Academic Press.

¹¹⁸ *Ibid.*

¹¹⁹ Gatowski, S. I., Dobbin, S. A., & Summers, A. (2013). Exploring the value-added of specialized problem-solving courts for dependency cases. In R. L. Wiener & E. M. Brank (Eds.), *Problem-solving courts: Social science and legal perspectives* (pp. 33-53). New York: Springer.

¹²⁰ Berman, G., & Feinblatt, J. (2005). Good courts. New York: The New Press; Edwards, L. P. (1992). The juvenile court and the role of the juvenile court judge. *Juvenile and Family Court Journal*, 43(2), 25-32.

¹²¹ ASFA, for example, and state laws such as California’s Standard of Judicial Administration.

¹²² Edwards (1992; 2005; 2006; 2012) *supra* note 12; Gatowski et al.,

supra note 119.

¹²³ This listing is not meant to be exhaustive but to highlight some key strategies to improve safety, timeliness, and permanency of children and families involved in the dependency court system. For more strategies, please see the resource listing as part of the ENHANCED RESOURCE GUIDELINES website at www.ncjfcj.org

¹²⁴ Edwards, L. P. (2009). Engaging fathers in the child protection process: The judicial role. *Juvenile and Family Court Journal*, 60(2).

¹²⁵ DNA testing can be paid for by the child support office (Title IV-D). It should be done quickly (e.g., two weeks at the most) because of the emergency nature of child protection proceedings. It is also important to give a timeframe for completion of the testing. Judges may also require the agency to check social media sites to locate fathers.

¹²⁶ Fostering Connections Act, P.L. 110-351 (2008).

¹²⁷ Because the term “visitation” does not adequately describe the quality and quantity of time that families need to spend together when children are removed, including time with siblings, child welfare experts have begun to use the term “family time,” or “family access.” See, for example, Key, M. (2006). Visitation protocol project: Providing family time for children in foster care. *The Judge’s Page Newsletter*, 17-18; Visitation/family access guide: *A best practice model for social workers and agencies*. (2006). Ohio Caseload Analysis Initiative Partnership with Protect Ohio Initiative.

¹²⁸ See, for example, Donohue, C., Bradley-King, C., & Cahalane, H. (2013). *Contemporary issues in child welfare practice*, 75-99. New York: Springer; Madden, E. E., Maher, E. J., McRoy, R. G., Ward, K. J., Peveto, L., & Stanley, A. (2012). Family reunification of youth in foster care with complex mental health needs: Barriers and recommendations. *Child and Adolescent Social Work Journal*, 29(3), 221-240; and U.S. Department of Health and Human Services, Children’s Bureau. (2011). Family reunification: What the evidence shows. *Child Welfare Information Gateway, Issue Brief*. Washington, DC: Author.

¹²⁹ Fostering Connections Act P.L. 110-351 (2008).

¹³⁰ Edwards, L. P. (2010). Connecting with siblings. *CASA Newsletter, Judge’s Page*.

¹³¹ American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. (2000). Developmental issues for young children in foster care. *Pediatrics*, 105(5), 1146; Smariga, M. (2007). *Visitation with infants and toddlers in foster care: What judges and attorneys need to know*. American Bar Association and Zero to Three Foundation.

¹³² This listing is adapted from Smariga, *ibid.*, Edwards, *supra* note 130, and Key, *supra* note 127. This listing is not exhaustive of all of the possible considerations in determining and evaluating family time, and the reader is encouraged to seek additional detail from the numerous practice guidelines and family time protocols available at www.ncjfcj.org.

¹³³ See, for example, National Conference of State Legislatures. (2000). *Linking child welfare and substance abuse treatment: A guide for legislators* (which cites estimates that substance abuse is a factor in three-fourths of all foster care placements. Some research estimates that 11%-14% of investigated cases, 18%-24% of substantiated cases, and 50%-79% of cases where the child is placed into foster care are characterized by parental substance abuse concerns). Testa, M. S., & Smith, B. (2009). Prevention and drug treatment. *The Future of Children Journal*, 19(2), 19-38.

¹³⁴ Young, N., Boles, S., & Otero, C. (2007). Parental substance use disorders and child maltreatment: Overlap, gaps and opportunities. *Child Maltreatment*, 12, 137-139.

¹³⁵ Brook, J., & McDonald, T. (2009). The impact of parental substance abuse on the stability of family reunifications from foster care. *Children and Youth Services Review*, 31, 193-198; Connell, C., Bergeron, N., Katz, K., Saunders, L., & Tebes, J. (2007). Re-referral to child protective services: The influence of child, family and case characteristics on risk status. *Child Abuse and Neglect*, 31, 573-588; Smith D., Johnson, A., Pears, K.C., Fisher, P., & DeGarmo, D. (2007). Child maltreatment and foster care: Unpacking the effects of prenatal and postnatal parental substance use. *Child Maltreatment*, 12, 150-160.

¹³⁶ Green, B. L., Rockhill, A., & Furrer, C. (2007). Does substance abuse treatment make a difference for child welfare case outcomes? A statewide longitudinal analysis. *Child and Youth Services Review*, 29, 460-473; Smith, B. D. (2003). How parental drug use and drug treatment compliance are related to family reunification. *Child Welfare*, 82, 109-127.

¹³⁷ Oliveros, A., & Kaufman, J. (2011). Addressing substance abuse treatment needs of parents involved in the child welfare system. *Child Welfare*, 90, 25-41; Rittner, B., & Dozier, D. C. (2000). Effects of court-ordered substance abuse treatment in child protective services cases. *Social Work*, 45, 131-140.

¹³⁸ Bureau of Justice Assistance. (2004). *Family dependency treatment courts: Addressing child abuse and neglect cases using the drug court model*. Washington, DC: U.S. Department of Justice, Office of Justice Programs.

¹³⁹ Green, L., Furrer, C. J., Worcel, S., Burrus, S. W. M., & Finnigan, M. W. (2009). Building the evidence base for family drug treatment courts: Results from recent outcome studies. *Drug Court Review*, 6,

53-82; Oliveros & Kaufman, *supra* note 137.

¹⁴⁰ Worcel, S., Furrer, C. J., Green, L., Burrus, S. W. M., & Finnigan, M. W. (2008). Effects of family treatment drug courts on substance abuse and child welfare outcomes. *Child Abuse Review*, 17(6), 427-443.

¹⁴¹ 25 U.S.C. § 1901 et seq.

¹⁴² See National Council of Juvenile and Family Court Judges Indian Child Welfare Act Checklists for Juvenile and Family Court Judges, available at: www.ncjfcj.org

¹⁴³ *Ibid.*

¹⁴⁴ Each Indian tribe establishes the requirements that must be met to be a member of that tribe. The tribe's determination of membership is final and entitled to full faith and credit under section 1911(d) of the ICWA and federal case law. See, for example, *Santa Clara Pueblo v. Martinez*.

¹⁴⁵ Although relative homes can be licensed as foster homes, there are significantly different dynamics between foster homes and relative homes. Consequently, we generally use the term "foster home" to mean the licensed home of a non-relative, and use the term "relative home" to include relatives regardless of whether or not they are licensed as foster homes and receiving foster care board.

¹⁴⁶ "Special needs" is a term defined by state policy that refers to factors which may make it difficult to place a child for adoption. The factors might include older age at adoption, membership in a sibling group, emotional, developmental, or behavioral problems, ethnicity, and serious medical conditions.

¹⁴⁷ McKenzie, J. (1999). Adoption of children with special needs, the future of children. *Adoption*, 31(1). David and Lucile Packard Foundation.

¹⁴⁸ *Supra* notes 110-113.

¹⁴⁹ 473A(i)(2)(F).

¹⁵⁰ 42 U.S.C. §§ 672(a)(2)(A)(ii), 673(b), and 675 and 45 C.F.R. § 1356.21(b)(2).



III. The Preliminary Protective Hearing



III. THE PRELIMINARY PROTECTIVE HEARING

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III. The Preliminary Protective Hearing

A. Introduction

The preliminary protective hearing (PPH) is the first court hearing in a child abuse or neglect case. The hearing is referred to in some jurisdictions as a “shelter care hearing,” “detention hearing,” “emergency removal hearing,” or “temporary custody hearing.” This initial hearing occurs either immediately before or immediately after a child is removed from home. This initial hearing may be preceded by an ex parte order directing placement of the child. In some cases, a child may have been removed from home without prior court approval, and the initial hearing is the first placement review by the court.

Removing a child from home, even when there is an imminent safety threat, is a life-altering experience for all those involved. Despite the intrusive and high-impact nature of the initial removal decision by child

Once a child is removed it becomes logistically and practically more difficult to help a family resolve its problems.

protective services, much about this decision is left to the subjective judgment of the child protective investigator or law enforcement officer. Judges charged with reviewing the decision to remove a child are in a powerful and challenging position as removing a child from his or her parents will likely result in removing the child from their siblings, extended family,

friends, activities, belongings, and community. Once removed, children may be placed with adults and other children whom they do not know, who may not look like them, speak their language, or follow their family’s customs. They may be separated from school, community activities, and adults that they trust.

Removing a child from home is a monumental decision and one that should not be made lightly or quickly. To have a fair, productive, and thorough hearing, judges require accurate, up-to-date information. Yet, too often, these important initial hearings are conducted in a matter of minutes, with few, if any, parties present other than the caseworker and possibly the parents, even though it is critically important for the court to hear the perspectives of the family and those who support them. The ENHANCED RESOURCE GUIDELINES’ PPH Benchcard encourages thorough exploration of alternatives to foster care, maintenance of cultural connections for children and their families, and involvement of key individuals in the family and child’s life in this important early decision-making process.

B. Purpose and Timing of the PPH

In all states, the initial hearing must take place within a short time after the child has been removed from the home. The time limit is specified by state law. In many states, the initial hearing must occur within one to three judicial working days after removal.

The main purpose of the initial hearing is to determine whether removal was necessary to prevent further child abuse or neglect. After that is established, the court must determine if the agency made reasonable efforts to prevent the removal, and if so, when the child can be safely returned home. Although the decision to remove the child is made on an emergency basis, the decision must be based upon a competent assessment of risks and dangers to the child.¹

A primary goal of the court should be to make the initial hearing as thorough and meaningful as possible. A complete initial hearing may require a substantial initial investment of time and resources, but this investment can lead to better decisions for children and their families while decreasing the substantial court and agency costs accrued during an unnecessary out-of-home placement.

The court should conduct an in-depth inquiry concerning the circumstances of the case and hear from all interested persons present. As part of its inquiry, the court should evaluate whether the need for immediate placement of the child could be eliminated by providing additional services or by implementing court orders concerning the conduct of the child's caretaker. If the court determines that the child needs to be placed, the court must evaluate the appropriateness of the placement proposed by the agency and seek the most appropriate, least restrictive alternative that can meet the needs of the child while avoiding unnecessary stress. For example, the court should explore whether the needs of the child could be met in the home of a relative.

It is important at the initial hearing that the court establishes a problem-solving atmosphere to address the needs of the child and the family so the child can either remain safely at home or be safely returned home as quickly as possible.² Parents are often angry and emotionally distraught during the initial hearing. The adversarial nature of court proceedings can aggravate tensions among the parties. The court should take active steps to defuse hostilities, to gain the cooperation of the parties, and to assist parties in attacking the problem rather than each other.

At the conclusion of the hearing, the parties should leave with a court order regarding the placement of the child that reflects an understanding of the circumstances of the case. The parties should see that the court has taken an active role in moving the case forward and making clear that the court expects the agency to respond to the needs of the family and child in a timely manner. When parties leave the hearing with the

perception that they were treated fairly by a court that is concerned about their interests and is actively encouraging a working relationship among the parties, there is a stronger likelihood that court intervention can be ended quickly.

C. Case Management Before the Preliminary Protective Hearing

*Who Should Be Present?*³

Parents, parents' partners, relatives, and any available extended family are critical to the initial hearing. Courts should ensure that all legal parents have the opportunity to attend the hearing. Parents who are incarcerated should be transported to the initial hearing or permitted to attend by phone or videoconference. The child welfare agency should be expected to locate and assess whether maternal or paternal relatives are placement or support options for the children, and have them present. Other adults connected to the child by relationships “of the heart” – such as mentors, teachers, neighbors, or members of the family’s faith community – can also be strong supporters and should be encouraged to participate at the initial hearing. Relatives and the extended networks of the parents/children are often able to provide support that may prevent removal of the child. When removal is necessary, these biological and social networks often offer a safe placement option that also keeps the child within her community or connected to her family as opposed to placement with strangers.

Diligent searches for all relatives should be standard. The Fostering Connections Act (P.L. 110-351) requires due diligence by the agency and the court to identify and provide notice to all adult relatives of the child within 30 days of removal.⁴ In addition, the Preventing Sex Trafficking and Strengthening Families Act of 2014 adds to the list of relatives that must be notified of a child’s placement “all parents of a sibling of a child, where such parent has legal custody of such sibling.”⁵ In order to ensure prompt notification of relatives, including parents of siblings, whenever a child is removed or placed, a standard court-wide protocol should be developed to promote effective and thorough diligent searches. Child protection investigators and caseworkers should be trained on the protocol. Some courts have created “diligent search” checklists or other family-finding techniques that conform to state statute.⁶ The Fostering Connections Act recommends that agencies use family finding to find parents and relatives and offer grants to agencies to implement family finding. Judges should inquire about whether the agency used family finding to locate absent parent(s) and relatives.

Children should participate in the PPH. It is the policy of the National Council of Juvenile and Family Court Judges that children of all ages should be present in court and attend each hearing, mediation, pre-trial

conference, and settlement conference unless the judge decides it is not safe or appropriate.⁷ Judges should expect that children will be brought to court when it is safe and appropriate – and if they are not, the court should require that the child welfare agency provide an explanation for the child’s absence that directly relates to that child’s safety and well-being. Many states recognize by statute or rule that children are parties and are entitled to be present at all hearings. Furthermore, there is evidence to suggest that children who are more knowledgeable about the legal system – through preparation by attorneys, social workers, caregivers, and personal experience with the system – are less distressed about attending court and value the opportunity to be heard by the judge.⁸

Courts should develop policies and protocols for ensuring that children will have the opportunity to attend the initial hearing and subsequent hearings. Courts should schedule cases in a manner least likely to disrupt the child’s school schedule. Judges should articulate the expectation that substitute caregivers and child welfare agencies will work collaboratively to ensure that children are able to appear in court. Courts should seek and participate in specific training to learn how best to engage children during hearings. The court should carefully weigh whether the child should be present throughout the entire hearing or just portions, as well as the extent to which the child should be asked to testify at the initial hearing after the removal.

All parties should be represented, and counsel and advocates should be present. All attorneys and advocates should be present at the initial hearing. Even though many jurisdictions only appoint counsel at the hearing, courts should develop a process in which parents’ attorneys are appointed prior to and are present at the initial hearing so that parents have advice and counsel at the start of the case. Active involvement of counsel at the initial hearing protects the rights of parents and promotes speedier resolution of key issues that need to be determined early in the case. Although some jurisdictions routinely provide separate counsel for each parent, in those that do not, judges should immediately determine whether there is a conflict or potential conflict for an attorney to represent both parents. In cases involving domestic violence, it is critical that separate attorneys be appointed.

Of equal importance is the legal or lay advocate for the child. Ideally, the child’s advocate(s) should be involved in the process from the first day. The advocate should be able to see and speak with the child prior to the initial hearing and present that child’s perspective or position. The advocate should also be able to present a recommendation as to the child’s best interests on issues such as removal, placement, family time, and service or treatment decisions.

Attorney representation for the child welfare agency is also essential, whether by a district attorney representing the agency’s position, or, when a conflict exists, by an agency attorney or state attorney.

When appropriate, encourage supportive individuals who can provide assistance to the parties to be present. Because the initial hearing is often very upsetting and difficult for parents, supportive individuals

PERSONS WHO SHOULD BE PRESENT AT THE PPH

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad litem* (GAL); CASA
- Child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child (42 U.S.C. § 671(a)(29)); relatives with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: ICWA-qualified expert witness; tribal representative/tribal liaison
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Education liaison/school representative
- Education surrogate parent if appropriate
- Law enforcement
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

such as parent mentors, cultural liaisons, substance abuse coaches, and domestic violence advocates, can help the parents navigate the court process. Supportive individuals can also help a parent remain engaged during and after the initial hearing. Treatment or service providers who have been working with the family prior to the court's involvement should be invited to attend. Where appropriate, judges should inquire about the whereabouts of each of these representatives if they are not present.

Tribal representatives or liaisons, cultural or community leaders or liaisons, and religious leaders should always be at the PPH when required and whenever possible if not required. Indian children cannot be placed in foster care under the same standards as non-Indian children.⁴⁰ Tribes should be engaged as partners in the effort to find community alternatives to foster care. When a child is Native American, families should be asked prior to the initial hearing which of these leaders should be invited to attend. If the Indian Child Welfare Act (ICWA) applies, an ICWA-qualified expert witness (QEW) and tribal liaison should be involved at the initial hearing to testify and to advise the court and parties. Waiting until the jurisdictional hearing for the ICWA QEW to testify could result in a child spending months in care without consideration of the higher standard for placement that ICWA requires.

Promoting Attendance at the PPH

Involving many of the previously mentioned individuals in the initial hearing can be a challenge. Inherent mistrust of the system may keep individuals away from the court. Court schedules are not particularly conducive to gathering large numbers of people together for an emergency hearing. Schedules are often more convenient for the court than they are for the individuals who must appear. However, making the court accessible and welcoming is an important part of building public trust and confidence and allowing families the best possible opportunity for involvement in the proceedings. Building relationships among the court, the child welfare agency, community leaders, and cultural liaisons can assist with promoting attendance. Implementing time-certain calendaring can support broader hearing attendance by avoiding participants being forced to wait for long periods of time for their hearing to begin. Consideration of alternative scheduling may further increase attendance and participation of families and their support systems.

In open courts, all persons present for the hearing should be allowed to enter the courtroom. In courts where the proceedings are closed, judges should make a point of requiring their court staff to invite anyone waiting for a case into the courtroom unless there is a compelling safety reason to the contrary. It is critically important that the judge, and not court personnel, make decisions about who is allowed to enter the courtroom and participate in the hearing. Judges should routinely inquire of the family and child whether there is anyone waiting outside the courtroom who should be present for the hearing.

Documentation or testimony should be provided by the child welfare agency affirming that parties and witnesses received both oral and written notice in a language that is understandable to them. Certified court interpreters should be used where available if a family is non-English speaking. Under no circumstances should a family member, party to the case, or other hearing participant interpret the proceedings for another person in attendance.

Appropriate orders should be entered to ensure that incarcerated parents are transported for initial hearings whenever possible. For parties and key witnesses who are unable to attend in person, telephonic attendance or videoconferencing should be made available.

Reviewing the Petition

While state and federal laws dictate the essential elements of the initial petition, judges can work with the agency to require that petitions contain sufficient factual and contextual information upon which to base a more thoroughly considered decision. Judges must also determine whether the petition meets the requirements of state law and whether due process requirements are met. Service of the petition at the initial hearing provides the parties with adequate notice of the reasons for the court proceedings.

Generally, petitions must be sworn and the affiant should be present in court or available to the court to

COURTS CAN MAKE SURE THAT PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom.
- Asking the child/family if there is someone else who should be present.
- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in a language understandable to each party and witness.
- Requiring service/tribal notice to include the reason for removal, purpose of the hearing, and availability of legal assistance in a language and form that is understandable to each party and witness.
- Requiring caseworkers and/or protective services investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin, and other parties.
- Facilitating telephonic or videoconferencing appearances at hearings.
- Implementing time-certain calendaring.

answer questions about the facts contained therein. Clearly stated facts should support any conclusions reached in the petition. Many petitions are vague (“the child is in need of the services of the court”) or conclusory (“the father reportedly has a substance abuse problem”). In domestic violence cases, the court should pay particular attention to whether the petition identifies the domestic violence victim as a partner in protection of the children and holds the domestic violence offender accountable for the violence.¹¹

Judges should insist that the petition include specific language that articulates the current threat to the child’s safety that necessitates removal. Additionally, the petition should be accompanied by an affidavit stating the specific reasonable or active efforts that have been made to prevent removal. It is important that the petition is filed prior to the time of the initial hearing to allow adequate time for the parents to review the petition and prepare for the hearing.

Petitions often list allegations only about the primary caretaker parent. Caseworkers or investigators are often concerned that they do not know enough about the other non-custodial, non-charged parent or guardian at the time the petition is filed. If that parent or guardian then appears at the hearing, they are sometimes ordered to participate in a series of evaluations to “convince” the child welfare agency and court that the parent is fit to care for the child. Judges must ensure that the rights of non-custodial parents or guardians are adequately protected. Ultimately, judges should carefully consider whether there is a legal basis to deprive a non-custodial parent of placement of their child if no allegations have been filed.

REVIEW THE PETITION

- A sworn petition or complaint should be filed prior to the PPH and served/provided to the parents and their counsel.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- **If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian.**
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child’s safety.

Related Cases

Courts should treat families holistically. Many times, a family may have multiple cases pending before different courts. If possible, the judge should determine prior to the initial hearing whether there are any other related court cases. Court staff should identify related cases and provide this information to the judge. If this information is not available, the judge should inquire at the hearing. The judge can then determine the appropriate steps to take to consolidate or coordinate cases. Judges should ensure that families are not subject to conflicting court orders or service plans.

Alternate Dispute Resolution¹³

Alternative dispute resolution (ADR) processes can begin even before the first hearing takes place. In some jurisdictions, the initial hearing is immediately preceded by a pre-hearing conference involving all participants except the judge. These conferences provide an opportunity for the parties to exchange information, particularly about absent parents. The conference also provides an opportunity to resolve some or all issues informally rather than through an adversarial court process. The court should encourage the development and utilization of pre-hearing conference procedures to gain the cooperation of the parents, to develop a problem-solving atmosphere, and to make better use of court time. Use of pre-hearing conferences, however, does not relieve a judge of the responsibility of making a thorough inquiry at the initial hearing, regardless of any agreements made at the conference.

CONSIDER WHETHER THERE ARE ANY RELATED CASES IN JUVENILE OR OTHER COURTS.

- Are there other family, delinquency, domestic violence, probate, guardianship, criminal, or protection orders involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

Another effective model is the family team meeting, which occurs before the initial court hearing when removal of children from their home has occurred or is at imminent risk of occurring. A coordinator engages the broadest family group possible for the meeting, and a facilitator facilitates the participation of all present. Typically, the people invited to family team meetings include the parent, guardian, and/or caregiver of the child involved; members of the extended family; the referring caseworker; the ongoing worker and supervisor who will be assigned the case at the conclusion of the family team meeting; any person identified by the family as having a significant supportive connection to the family (e.g., family

friends, neighbors, mentors, clergy); any person who can contribute to securing services or treatment and provide support to the family (e.g., public, private, community-based, and school-based service providers); and attorneys as assigned by the court. The purpose of the family team meeting is to bring everyone together who has a stake in the well-being of the child(ren) to craft a plan that will ensure their future safety, permanency, and well-being.

ADR programs should be managed by the court. Parties should be represented by counsel if at all possible. If the ADR process occurs before counsel is appointed, program guidelines should clearly indicate that any party's admissions in the ADR process cannot be used against them in later court proceedings.

Appointment of Counsel and Advocates

AGENCY ATTORNEY

The initial hearing is a critical event that will have a powerful impact on the child and family, and on the long-term outcome of the case. All parties should be represented by counsel at the hearing. Further, the court should expect counsel to have prepared for the hearing in advance. At a minimum, the attorney should interview witnesses and confer with both the agency worker and counsel for other parties before the hearing.

Jurisdictions across the country have adopted many models of agency representation. In some, the state's or county's attorney represents the agency's position. In others, the district attorney represents the position of the people rather than the agency. In jurisdictions in which the agency is not directly represented by an attorney, the attorney representing the people should give adequate notice to the agency if the attorney will not be representing the agency's position so the agency can seek independent counsel.

ATTORNEY FOR PARENTS

Because it is such a critical stage in child abuse and neglect proceedings, it is essential that parents have meaningful legal representation at the initial hearing. Most parents involved in these proceedings cannot afford counsel. Parents should be instructed to appear well in advance of the initial hearing so their eligibility for court-appointed counsel can be determined, counsel can be appointed, and parents can confer with counsel before the hearing begins. Courts should have systems in place to expedite the appointment of counsel for parents.¹⁵

LEGAL ADVOCATE FOR THE CHILD, GAL, OR CASA

Federal and state laws require legal representation for children in child abuse and neglect cases, and this should apply at the initial hearing. In different jurisdictions, the mode of legal representation for children and the responsibilities of the advocate vary. To obtain the presence of attorneys for the parents and an attorney/Guardian *ad litem* (GAL) or Court Appointed Special Advocate (CASA) at initial hearings, the court should have arrangements with the organization(s) that provide representation for children. Attorneys and advocates should be specially trained on child abuse and neglect law and court procedures.¹⁶ Although states differ in the ethical responsibilities for child representation, the court should ensure that only attorneys who have been specially trained, and preferably certified, are appointed to represent children.

Review Relevant Documents

SUBMISSION OF REPORTS TO THE COURT

Given the short time from removal of the child to the time of the initial hearing, it is not reasonable to expect lengthy reports and written assessments in advance of the hearing. However, agency staff should be expected to submit a written, factual description of the circumstances surrounding the removal of the child. The agency should also be required to submit a sworn affidavit of the reasonable or active efforts made to prevent removal and foster care placement. The report and affidavit should be provided to the other parties and their attorneys as early as possible in advance of the hearing. Advance submission of the report is needed to give the parents an opportunity to offer a defense or to propose alternatives to foster placement.

If a law enforcement agency was involved in removal of the child from home, an officer who was present should submit a report. The report should describe precisely what the officer observed during the incident. The report should be made available to the parties no later than the report by agency staff.

D. Conducting the Preliminary Protective Hearing

Opening the Hearing

The judge or judicial officer can begin by having everyone in the courtroom identify themselves and their connection to the case. Not all parties may have been identified and located before the hearing. If any are unknown or absent, the agency should describe the efforts it has made to find them and secure their attendance. This is a good opportunity to determine whether the agency has used due diligence to identify and give notice to all adult relatives about the proceeding and their options to participate, including any



parents of the child’s siblings who have legal custody of those siblings.¹⁷ The court should ask mothers and other family members to provide information concerning absent fathers and to assist the agency in locating them. The judge should also determine whether paternity has been legally established and, if not, order that appropriate action be initiated to determine paternity. Ask parents if any other persons who are significant in the child’s life should be invited to participate in future hearings.

OPENING THE HEARING

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS: IDENTIFICATION OF PARENTS AND/OR GUARDIANS

- Who are the child's parents and/or guardians?
- Have the identity and location of all parents and/or guardians been determined?
- If not, what diligent search efforts have been made for all parents and/or guardians? Are they sufficient?
- Has paternity of all children been legally established? If so, how?
- Have efforts to identify and locate fathers been sufficient? What has been done?

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS: NOTICE

- How were the parents/guardians and foster parents notified of this hearing?
- Was the notice in a language and form understandable to the parents/guardians and foster parents?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 USC § 671(a)(29))
- Has the agency exercised due diligence to provide notice to all parents of a sibling of a child, where such parent has legal custody of that child? (P.L. 113-183 § 471(a)(29))
- Verify that any relatives that requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).

WHAT JUDGES CAN DO AT THE PPH TO ENSURE THAT THE AGENCY IS WORKING TO IDENTIFY AND LOCATE FATHERS FROM THE START:

The Fostering Connections Act (PL 110-351) requires due diligence to identify and provide notice to all adult relatives within 30 days of removal (42 U.S.C. § 671(29)). This includes non-resident, non-custodial fathers and paternal relatives. The court should ask what actions the social worker has taken to identify and locate the father. Has the social worker:

- Asked the mother about the identity and location of the father?
- Used any search technology such as the child support locator to locate the father?
- Asked the mother's relatives about the father and his relatives?
- Asked the mother about the identity and location of any of the father's relatives?
- Used family-finding technology to identify the father's relatives?
- Contacted any of the father's relatives concerning his location?
- Checked with local jail or state prison representatives to determine whether the father is incarcerated?
- Checked with probation or parole authorities to determine if the father is on probation or parole?
- Talked with the child or the child's siblings about contact with the father or father's relatives?

These and other questions will inform the case manager about the thoroughness of the inquiry the court expects concerning the father's identity and location.

"...The issues discussed.....regarding identifying, locating, notifying, and engaging fathers are relevant to incarcerated fathers. The mother may finally reveal the father's identity, but she may not know if he is incarcerated. With a name, birth date, and possibly other information, the social worker should be able to locate an incarcerated father quickly. The court should insist that the caseworker contact the alleged father, inform him of the legal proceedings, and determine his desires about the child protection proceedings. The fact that he is in jail should not stop the inquiry."

If a case involves domestic violence, the court must make these inquiries in a way that will not compel the victim to provide information that may place her in danger.

Source: Edwards, L. (2009). *Engaging fathers in the child protection process*. *Juvenile and Family Court Journal*, 60(2), 1-29.

Representation

If a party is unrepresented by counsel at the initial hearing, the court should advise the party of the right to counsel, including the right to court-appointed counsel, where applicable. The judge should also ascertain whether the right to counsel is understood. If parents request counsel and claim to be indigent, the parents should complete an affidavit of indigence. If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily. If parents are ineligible for the appointment of counsel or knowingly, intelligently, and voluntarily waive appointed counsel, the court should inquire whether they want to proceed by representing themselves or hiring a private attorney. 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 judge should ensure that the child has competent representation. The child's lawyer should have met with the child in person prior to the hearing. The child's lawyer should have done sufficient investigation to be able to fully advocate for the child's position. If the child has representation by a GAL, the latter should have done sufficient investigation to permit effective best interest advocacy.

REPRESENTATION

- Are the **parents** entitled to representation?
- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the **child**?
- Does counsel have sufficient training and experience to represent the child in this case?
- Has counsel met with the child in person? Is counsel able to determine and advocate for the child's position?
- Should the court appoint a Guardian *ad litem* and/or CASA for the child?

UNDERSTANDING AND COMPETENCY

- Do the parents understand the allegations and the purpose of the hearing?
- Are there parental competency issues?

APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS

- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?

Engage parents and any children or relatives present

Judges have a significant opportunity to connect with and engage families appearing before them. Often referred to as therapeutic jurisprudence, the judge’s demeanor, behavior, and interactions with each party, relative, and community member are crucial to the perception of fairness of the court process.¹⁸ The cliché is true – the perception of justice is as important as justice itself.

The PPH represents an important opportunity to engage family. Positive parental and child engagement is critical to a successful outcome in the case.¹⁹ This is particularly important at the beginning of the case, which almost immediately follows the trauma of the child’s removal from the parents’ custody. The judge has a key role to play in reassuring the parents and the child that the proceedings will be fair and that their voices will be heard. Judges can begin engaging the family at the initial hearing by explaining the purpose of the hearing, what will occur, and the rules governing conduct. The judge should assure the parents and the child that they will be heard, whether directly, through counsel, or both.

The “Opening Discussion” questions on the Benchcards are intended to help guide the judge through the initial family engagement process. The questions will help the judge determine whether the family understands the proceedings and the process. The questioning process demonstrates the judge’s openness to including the family’s familial, social, community, and cultural support network in the court process. The opening discussion can support a sense of safety, self-determination, and connectedness for families – core conditions promoting engagement and healing. The nature of the opening discussion between the judge and the family can set the stage for the rest of the proceedings by modeling and promoting cooperation, communication, engagement, and a strengths-based, family-centered approach. Not only does this signal to the family that they will be treated fairly and openly, but the discussion also sends a clear message that those working with the family will be expected to be open and fair as well.

The Benchcard’s questions also ensure the parents’ due process rights and access to justice. Among other issues, the questions address the need for an interpreter, representation by counsel, parental competence

ENGAGE PARENTS AND ANY CHILDREN OR RELATIVES PRESENT.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
- Explain the purpose of the hearing.
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be

or disability, and involvement of the broader family. The judge can also encourage parental and child engagement in the process outside of court by asking what efforts were made to resolve the issues through alternative dispute resolution processes. Many child welfare agencies attempt to resolve issues through family conferencing, family group decision-making, and other non-adversarial processes involving the parents, child, and extended family. As previously noted, many courts use a pre-hearing conference immediately prior to the initial hearing, facilitated by a neutral party, to engage the entire family and to attempt to find common ground on contested issues rather than engaging in adversarial proceedings in court.

CONSIDERATIONS WHEN ENGAGING FATHERS IN CASES INVOLVING DOMESTIC VIOLENCE

When domestic violence is involved in a child maltreatment case, efforts to engage the father and extended family through family group decision-making or other collaborative, family-centered approaches must consider the safety and protection of the adult victim (usually mothers) and the children. Safeguards from further emotional and physical abuse should be identified and implemented, and separate parental engagement strategies should be employed (e.g., separate waiting areas, a security presence, etc.). The judge should consult with the mother and her domestic violence advocate regarding safety concerns and priorities as well as her present and future needs. The judge should encourage differentiated engagement by the caseworker that takes into consideration the expressed individual concerns and needs of the children, mother, and father.

Judges should be aware of how the alleged perpetrator may appear to be the better parent – charming, cooperative, and in control of the children. The abused parent, on the other hand, may seem stressed, depleted, and an inadequate parent. Judges should understand, and help others in the dependency system to understand, the techniques used by the perpetrator to undermine the adult victim’s parenting.

Source: Goodmark, L. (2008). *Reasonable efforts checklist for dependency cases involving domestic violence*. Reno, NV: NCJFCJ.

E. Key Inquiries, Analyses, and Decisions the Court Should Make at the Preliminary Protective Hearing

Determine Whether the Indian Child Welfare Act (ICWA) Applies

The court should require that the applicability of ICWA be determined before proceeding with the PPH. If the court has reason to believe ICWA applies, the court should proceed accordingly:

- **If yes, different standards apply; refer to the ICWA Checklist.**
- **If yes, determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e)).**

Judges must determine whether ICWA applies to the case as a threshold inquiry. Meant to safeguard and protect Indian children, ICWA was created to remedy abusive child welfare practices that separated Indian children from their families in the interest of assimilating them into white culture. Because tribal children were removed at outrageously disproportionate rates (in one state at 20 times the rate of non-Indian children),²⁰ ICWA set forth the requirement and standard that the state engage in active focused efforts to prevent the removal of Indian children from their homes and/or termination of parental rights. ICWA recognizes that a child's extended family, as well as other tribal families, should be considered first as substitute caregivers for Indian children. ICWA also provides for the right of tribes to actively participate in state court proceedings involving tribal children.²¹

INDIAN CHILD WELFARE ACT (ICWA) DETERMINATION

The court should require that the applicability of ICWA be determined before proceeding with the PPH. If the court has reason to believe ICWA applies, the court should proceed accordingly.

- If yes, different standards apply; refer to the ICWA Checklist.
- If yes, determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e)).

KEY ICWA INQUIRIES THE COURT SHOULD MAKE AT THE PPH:

- Is the child under 18, unmarried, and:
 - a member of a federally recognized tribe; or
 - eligible for membership in a federally recognized Indian tribe; and
 - the biological child of a member of a federally recognized tribe? Who are the child's parents and/or guardians?
- Was the child in the custody of an Indian custodian?
- If the child is an Indian child, does the child either reside or is the child domiciled on a reservation, or is the child already a ward of a tribal court, depriving the court of jurisdiction? If the child resides or is domiciled on a reservation but is temporarily off the reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child.
- Has the agency mailed proper notice to the child's putative father, including a father who has acknowledged paternity, even if he has not legally established paternity?
- Was proper notice and inquiry mailed to all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination?
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior?
- What efforts, if any, have been made by the agency to identify extended family or other tribal members or Indian families for possible placement? Has the agency attempted to create a family chart or genogram soliciting assistance from neighbors, family, or members of the Indian community who may be able to offer information?
- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

KEY DECISIONS THE COURT MUST MAKE:

- Is it in the best interest of the child to appoint counsel for the child?
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary of the Interior upon appointment of counsel so that reasonable fees and expenses may be appropriated?
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family are affiliated? What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?

Source: National Council of Juvenile and Family Court Judges. (2003). *Indian Child Welfare Act checklists for juvenile and family court judges*. Reno, NV: Author.

ICWA applies when the proceedings are “child custody proceedings” as defined by ICWA²² and the child is an “Indian child” as ICWA defines that term.²³ Under ICWA, child custody proceedings include:²⁴

- any action where the Indian child is removed from his or her parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship and where parent or custodian cannot have child returned upon demand but where parental rights have not been terminated;
- termination of parental rights;
- pre-adoptive placements; and
- adoptive placements.

The child is considered an “Indian child” ²⁵ if:

- he/she is an unmarried person under the age of 18; and
- the child is a member of a federally recognized Indian tribe; or
- the child is the biological child of a member of a federally recognized Indian tribe; and
- the child is eligible for membership in any federally recognized Indian tribe.

The court should make a determination about the applicability of ICWA for every child who appears before the court, and review ICWA applicability at every hearing. Once ICWA is determined to apply to the child, the court should refer to the checklists for ICWA cases that appear in the ICWA Checklists for juvenile and family court judges developed and published in 2003 by the NCJFCJ.

Most importantly, the court must apply the actual wording of ICWA to decide if removal is appropriate.

Key written findings that the court must make include:²⁶

- Whether, at the time of removal, the child was already a ward of a tribal court (if known) thereby depriving the state court of jurisdiction.²⁷
- Whether, at the time of removal, the child was in the custody of a parent or Indian custodian.²⁸
- Whether active efforts were made prior to removal of the child to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful.²⁹
- Whether there was **clear and convincing evidence**, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child**.³⁰
- Whether the parent, Indian custodian,³¹ or child’s tribe requested an additional 20 days to prepare for the hearing.³²

“Leadership by the court is essential to ensure ICWA compliance ... Much has been written in recent years about the impact to affected children if the requirements of ICWA are not met, most notably the significant delay in achieving permanency for these children as well as the widespread non-compliance with the requirement that a qualified expert testify at hearings including the initial removal hearing.”

– Honorable Dale R. Koch (Ret.)
Multnomah County, Oregon

Legal Threshold for Removal

Timeframes for the initial hearing differ by state,³³ **but no matter the timeframe, the state child protection agency is required to make a prima facie case or probable cause showing that supports removal of the child.** The question at this point is not whether the allegations are true, but whether there is an imminent safety threat to the child that requires removal. Some state statutes specifically state that the judge may make either a probable cause finding, or rule that the court requires additional time to obtain and review documents in order to determine the risk of harm to the child.³⁴

The court must ensure that its findings are based on conclusions that are supported by facts. Often, statements are made in court that are, in fact, conclusions drawn by witnesses without evidence to support the claims. For example, a neighbor may have reported to the agency that a parent has a substance abuse problem. Because the agency has not had adequate time to gather additional information, the court may simply be informed that the parent has a substance abuse problem that places the child at risk. The court should challenge every conclusion made to ensure that those conclusions are supported by facts. Conclusory statements in petitions such as “The parent was out of control” should be further explored by the judge. A parent may have behaved this way due to the trauma of having his or her children removed. In fact, the behavior may be completely uncharacteristic of the parent and does not necessarily pose a threat to the child’s safety.

When evaluating the facts contained in the petition, judges should consider whether the family’s cultural background, customs, and traditions have been taken into account regarding the events and circumstances that led to the removal. In addition, such norms and traditions should affect the types, tailoring, and appropriateness of services provided and the method by which the family was engaged in those services.

LEGAL THRESHOLD FOR REMOVAL

- Has the agency made a **prima facie case or probable cause showing that supports the removal** of the child, and that continued residence in the home would be contrary to the welfare, or that placement would be in the best interest of the child?
(45 C.F.R. § 1356.21(b)(1))
- What case-specific evidence supports this finding?
- Have the family’s cultural background, customs, and traditions been taken into account in evaluating the event and circumstances that led to the removal? Has the qualified expert witness and the parent(s) cultural or tribal liaison/relevant other(s) been asked if there is a culturally based explanation for the allegations in the petition?

“Every child who should be in care must be in care, and not one child more.”

*– Honorable R. Michael Key
Juvenile Court of Troup County,
Lagrange, Georgia*

Despite the fact that the law defines what behaviors constitute abuse or neglect, cultural norms shape the way individuals view particular behaviors and whether a child is placed at risk. Sometimes they cause caseworkers and others to find abuse where none exists. Conversely, sometimes beliefs about what is “normal” for a culture or community cause those responsible for determining safety and risk to dismiss signs of threat or harm. Thus, **a decision-maker’s cultural norms must be**

balanced by knowledge and information about cultures and communities coupled with objective and effective safety and risk assessments by professionals in the field.³⁵ There are a number of key informants on this issue in addition to the agency: the parents, the extended family, religious, cultural or tribal representatives or experts, or community leaders. Judges should inquire whether the incident(s) causing the harm or safety concerns were related to the parent engaging in a cultural or religious practice or belief. The court must carefully consider whether these customs rise to the level of child abuse or neglect. If the judge finds that cultural or community practices and beliefs contributed to the allegations, there should be an exploration of the risk of harm to the child if the practice was to continue. If the judge does believe there is a safety threat to the child, the parents’ willingness to explore different ways to respect cultural tradition without causing harm to the child must be evaluated.

If the judge determines that a prima facie case was made or probable cause was shown, additional inquiries and findings need to be made. The judge must next determine: 1) whether reasonable efforts were made to prevent removal, and 2) whether the immediate threat has diminished and/or whether adequate safeguards could be put in place to sufficiently protect the child should he/she return home today. Foster care placement should only be used as a last resort.

IF PROBABLE CAUSE IS FOUND:

- Make specific findings of fact regarding the necessity for removal, and outline the specific reasonable efforts to prevent removal; or alternatively, state that the agency is not required to make such efforts.
- **Determine whether remaining in the home is contrary to the welfare of the child, specifying the immediate safety concerns.**
- **Determine whether placement in shelter care is in the best interests of the child and that no reasonable options exist that allow the child to safely remain at home.**

THE COURT'S ROLE IN ENSURING CULTURAL AWARENESS

Falicov (1995) recommends that an inquisitive and open-minded strategy is adopted, rather than relying on stereotypical information about members of a particular group. She also cautions us to view people in all their many contexts and facets including “rural, urban, or suburban setting; language, age, gender cohort, family configuration, race, ethnicity, nationality, socioeconomic status, employment, education, occupation, sexual orientation, political ideology, migration and state of acculturation” (p. 375). In other words, knowing one particular fact about a family’s identity, such as its race or ethnic background, tells us little about who the family really is. Saba and Rodgers (1990, p. 205) offer the following guidelines:

- Clarify your assumptions (about members of the group).
- Realize that your perceptions may vary considerably from the family’s.
- Accept that a climate of mistrust exists.
- Understand that mutual stereotypes enter the interview room first.
- Be conscious of the power relationships between you and the family.
- When uncommon events occur, consider alternate explanations in addition to the obvious ones.
- Accept and admit your fallibility.
- When you discover your discriminatory behaviors, do not give up. Make changes and continue to work.
- Explore your setting for structures that foster prejudice.
- Cultivate safe collegial relationships that will permit discussion of clinical discrimination.
- Most importantly, be open to learning from the families you treat.

Source: Fontes, L. A. (2005). *Child abuse and culture: Working with diverse families*. New York: Guilford Press.

Determine Whether Reasonable Efforts Were Made to Prevent Removal.

The federally required “reasonable efforts to prevent removal” determination is one of the most critical elements of the initial hearing. Federal law requires the judge to determine whether “reasonable efforts have been made to prevent or eliminate the need for removal.”³⁶ The finding must be made by the court within 60 days from the time of removal.³⁷ However, it should be made at the first hearing where the removal can be challenged, the PPH. The reasonable efforts evaluation is the judge’s opportunity to fully assess the efforts that have been made to engage the family in services and supports that would have either eliminated the safety threat prior to placement or allowed the child to return home immediately. These findings powerfully communicate whether the court is satisfied that the agency is using foster care only as a last resort and not simply as the most expeditious intervention. The findings also provide guidance to the agency about the court’s expectations for immediate service delivery whenever possible.

It is reasonable to make no efforts in an emergency situation. Courts must carefully evaluate which situations are actually emergencies. Court and agency culture sometimes leads to a less than thorough exploration of alternatives to placement, even when a situation appears grave on its face. A judicial finding that it was reasonable to make no efforts to prevent the placement should only be made if there are no other reasonable means to protect the child from an imminent safety threat.

If the court determines that an emergency situation did not exist, the judge should inquire about the specific services provided and the specific safety concerns they were meant to ameliorate. A judicial inquiry should also be made about the cultural relevance and appropriateness of the services, including the languages in which they were offered. Proof of provision of these services, beyond a simple one-page referral sheet, is also important to consider.

The family’s past interactions with the court and the child protection agency should be considered by the judge, but care should be taken to ensure that the judge or the child protection agency is not unduly influenced by that history. The agency as well as the judge must use history as context, but also view the current situation in light of present facts, circumstances, and efforts being made to prevent removal. Past efforts that were unsuccessful do not relieve the agency from making reasonable efforts to prevent removal should a new allegation arise. Most importantly, judges should explore with the agency whether an in-home safety plan was considered prior to the removal and whether such a plan would allow the child to safely return home, with or without the involvement of the agency or court. “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.”³⁸ The elements of assessing safety and the appropriateness of an in-home safety plan are discussed more thoroughly in the next section.

REASONABLE EFFORTS (TO PREVENT REMOVAL)

- Did the agency make reasonable efforts to maintain the family unit and prevent the unnecessary removal of the child from the home? (45 C.F.R. § 1356.21(b)(1))
- What were the specific safety risks that led to removal?
- What services were considered and offered to allow the child to remain at home? Were these **services culturally appropriate**? Were these services rationally related to the safety threat?
- What was done to create a **safety plan** to allow the child to remain at home or in the home of another without court involvement?
 - Have non-custodial parents and paternal and maternal relatives been identified and explored? What is the plan to do so?
- Were there any **pre-hearing conferences** or meetings that included the family?
 - Who was present?
 - What was the outcome?
- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

Reasonable Efforts to Allow the Child to SAFELY Return Home

If the child has been removed on an emergency basis, and reasonable efforts to prevent removal were not required, determine whether anything prevents the child from SAFELY returning home TODAY.

Determining whether there are safety threats and the need for continued out-of-home placement is one of the most challenging aspects of presiding over child protection proceedings. Accurate, up-to-date information from credible sources about the threats to the child's safety must be available to the judge. At the first hearing, emphasis is frequently focused on the child's stay in substitute care rather than thoroughly assessing whether the child can safely return home immediately. Implicit bias and historical systemic practices can easily cloud the decision-making process regarding the need for the child's removal,

thus necessitating a more structured approach based on discernible criteria.

The American Bar Association's Child Safety Guide³⁹ advocates the use of six background questions to assess the threat of danger, vulnerability of the child, and protective capacities of the parent(s):

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 overall parenting practices?
6. How does the parent manage his or her own life?

There is a significant chance of missing information, misperceptions, or bias influencing the answers to these questions. For example, many women experiencing domestic violence never disclose the abuse to their closest friends and family, let alone to their attorneys or a government agency empowered to remove their children. And although professional organizations such as the National Association of Public Child Welfare Administrators have stressed the importance of screening and assessing families for domestic violence, some caseworkers may not make the necessary inquiries.⁴⁰ If this critical information is not disclosed, it is possible that negative assumptions may be made about the behavior of an abused woman, when in fact, that very behavior may be necessary to save her life or that of her children.

In another example, children may function very differently day-to-day depending on their culture. They may spend more time with grandparents than they do with their biological parents, they may share sleeping quarters with multiple siblings, and they may live in homes with dirt floors and minimal food. Failure to explore the cultural relevancy of certain behaviors or conditions may lead to assumptions about those behaviors or conditions, ultimately having a negative impact on a child.

Each case must be carefully evaluated within the family's cultural context. In making the safety decision, judges are strongly encouraged to refer directly to the self-reflection questions on the PPH Benchcard (and discussed in the General Issues Chapter of the RESOURCE GUIDELINES) to help them ensure that bias is not influencing the safety inquiry at this critical juncture.

REASONABLE EFFORTS TO ALLOW THE CHILD TO SAFELY RETURN HOME

- Is the agency making reasonable efforts to effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b)(1))
- What is preventing the child from SAFELY returning home TODAY?
- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or to the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

The decision to remove a child on an emergency basis must be factually supported even though the agency may have only limited information. The extent of maltreatment and the surrounding circumstances must be clearly explained.⁴¹ If the judge determines a safety threat does exist, the judge should then inquire whether an in-home safety plan was considered and, if found to be appropriate, implemented. The following factors must be evaluated to determine whether an in-home safety plan is feasible:⁴²

- If the family's current capacity to protect the child is limited, what other measures can be put in place to ensure safety? Considering when and how threats develop and emerge is important in making this decision. For example, in a domestic violence case, if the alleged abuser is removed from the home, can the child and the alleged victim parent remain safe?
- Based on the above analysis, is an in-home safety plan going to control the safety threats?
- What services and action steps are necessary for the in-home plan to control the threats to the child?

The judge should use answers to these questions to assess whether an in-home safety plan will be “sufficient, feasible, and sustainable.”⁴³ The safety plan is not a case plan, although some of the services and supports necessary for implementing the safety plan will also be part of the parents’ case plan. Only when the court determines that an in-home safety plan is not feasible or sustainable should the court turn its attention to the child’s out-of-home placement and ongoing contact with his or her family.

WHAT SERVICES CAN BE ARRANGED TO ALLOW THE CHILD TO SAFELY RETURN HOME TODAY?

- How are these services rationally related to the specific safety threat?
- How are the parents, extended family, and children being engaged in the development and implementation of a plan for services, interventions, and supports?
- How will the agency assist the family to access the services?
- Does the family believe that these services, interventions, and supports will meet their current needs and build upon strengths?
- Has the family been given the opportunity to ask for additional or alternate services?
- What evidence has been provided by the agency to demonstrate that the services, interventions, or supports for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?
- How are the services, interventions, and supports specifically tailored to the culture and needs of this child and family?
 - How do they build on family strengths?
 - How is the agency determining that the services, interventions, and supports are culturally appropriate?

REASONABLE EFFORTS IN DEPENDENCY CASES INVOLVING DOMESTIC VIOLENCE

In cases involving domestic violence, the court must first understand the agency's rationale for removal or for seeking removal of the child. Was the child being physically or emotionally abused by the perpetrator of abuse against the adult victim? Was the child being physically or emotionally abused or neglected by the adult victim of domestic violence? Was removal sought because the child was "exposed" to domestic violence in the home (which some states define as per se neglect)? In order to determine whether the agency's efforts to prevent removal were reasonable, the judge should consider the following:

1. How did the family come to the agency's attention? How did the investigator/case manager determine that domestic violence was an issue for the family? What injury to the child is the agency alleging?
2. How did the agency seek to address the domestic violence in the family prior to seeking removal? (Alternatively: Why was immediate removal warranted?)
 - Did the adult victim have strategies to keep the child safe? If so, why were those strategies not effective?
 - Did the investigator/case manager consult with a domestic violence expert or advocate? If applicable, did he/she consult with the perpetrator's probation or parole officer or treatment providers?
 - Was there an assessment of the likelihood of future violence?
3. What assistance and services, if any, were provided to the adult victim to keep herself and her children safe and together? (e. g., developing a meaningful safety plan; providing emergency funds; legal assistance for the adult victim; helping the victim enter shelter or obtain a protective order if she deems these necessary; connecting the adult victim with in-patient services that will allow her child to remain with her; etc.)
4. 4) How did the agency deal with the abuser? Does the petition hold the abuser accountable for his violence? Did the agency try to have the abuser removed from the home?
5. If the child has already been moved, what actions would be necessary to allow the child to return home immediately and safely and what services would be required to support the child's return?

Source: Goodmark, *supra note* 11, at 2.

“Whether or not a child is safe depends on a threat of danger, the child’s vulnerability, and a family’s protective capacity.....Vulnerable children are safe when there are no threats of danger within the family or when the parents possess sufficient protective capacity to manage any threats....Children are unsafe when threats of danger exist within a family and children are vulnerable to such threats and parents have insufficient protective capacities to manage or control threats.”

Source: Lund & Renne, *supra* note 38, at 2.

Determine Whether the Current Out-of-Home Placement Meets the Child’s and Family’s Needs

The stability and quality of placement and family time (visitation) are essential to successful reunification between children and their parents. Agencies are required to provide an out-of-home placement that is the “least restrictive” and “most family-like” for the child. Judges must consider the cultural, linguistic, environmental, and geographical aspects of the placement, as well as the substitute caregiver’s ability to maintain the child’s connection to his or her family, school, traditions, and community. Pursuant to the Preventing Sex Trafficking and Strengthening Families Act of 2014, judges must also consider if potential foster and kinship care providers have the knowledge and skill to apply a “reasonable and prudent parent standard,” while allowing children to participate in normal and beneficial activities.⁴⁴ The reasonable and prudent parent standard provides designated decision-makers with the latitude to make parental decisions that support the health, safety, and best interests of the child. Out-of-home placements should provide “normalcy” for children, supporting their participation in age- or developmentally-appropriate events and promoting their engagement in “social, extracurricular, enrichment, cultural, and social activities.”⁴⁵

Considering Kin as a First Resort

Kinship care (or relative placement) can be the best possible opportunity for maintaining familial, cultural, and community ties and reducing the overall trauma of removal and placement. Furthermore, kinship care placements generally allow for more “normalcy” – a more natural family time routine, a familiar “supervisor” if parenting time is required to be supervised, and potentially fewer logistical challenges associated with timing and transportation. Research has shown that children placed with kin experience fewer placement disruptions than children placed with non-related foster parents, and if disruption occurs, the children are more likely to be transferred to the care of another relative rather than a non-relative caregiver.⁴⁶

Because research has shown that kinship caregivers are more likely to be older, single, less educated, unemployed, and poorer than most agency foster parents,⁴⁷ they are sometimes eliminated as unable or unfit to care for the children. They typically require assistance from caseworkers in order to obtain financial, health, and social support to provide for the children placed in their care. Judges should specifically inquire about the level of support that has been offered to assist the kinship caregiver. Many jurisdictions offer



relative caregiver funds. Supplemental Social Security Income and Social Security Disability benefits are often available. The caseworker should be expected to assist the relative with school enrollment, Medicaid enrollment, and access to other entitlement programs. Institutionalized attitudes and practices that create unbalanced benefits for relatives must be eliminated. When disparities exist, judges may have influence to change them. For example, some states will pay a foster care maintenance payment to an agency foster home but not to a relative. This institutional bias prevents children from being placed with kin. Parents are often required to place severely disabled children in care because benefits are only available if the child is in foster care. Judges must weigh these institutional barriers and practices in determining whether reasonable efforts findings have been made to prevent removal.

Kinship caregivers may also find themselves facing undue bias or confronting preconceived judgments about their ability to care for their relatives based on the alleged poor behavior of the parent. Of course, proposed kinship care providers' criminal history, involvement with the child protection system, and apparent ability to provide for the children should be evaluated and may rule out some relatives as a placement option. However, even a criminal history or prior contact with child welfare should not summarily rule out a relative. The court should actively inquire about the current circumstances of the family to determine whether prior history warrants eliminating the family member from consideration as a placement option. Judges should be knowledgeable about the child welfare agency's waiver process when considering a relative with a former criminal conviction that does not jeopardize child safety.⁴⁸

Kinship caregivers should be approached from a strengths-based perspective by addressing their current situation and evaluating current and known safety risks along the same lines that child safety is evaluated to determine whether the child can return to a parent's care. **Non-relative foster care placement should be a last resort, and even if a child is placed in foster care, maintaining a connection with relatives who are important to the child and supportive of the parents is essential.**

Non-relative Foster Care

Whether in foster care or kinship care, the ability of the substitute caregiver to maintain the child's connection to his or her parents and extended family is essential. When a child must be placed in a foster home, the judge must consider a variety of factors at the initial hearing to determine whether the placement is appropriate. A key consideration is whether and how the placement supports the child's cultural identity. The judge should ask the parents, relatives, and community representatives how the child identifies culturally. The court should also explore the ways the court and the placement can best support the child's identity. The child's opinion should also be solicited in these important considerations. The most basic elements involve language, food and meal times, religious beliefs and practices, and grooming. After the trauma of removal, placing a 10-year-old in a home where he is the only Spanish speaker, expected to eat food that is unfamiliar, attend an unfamiliar church, or cut or style his hair in a way that is not acceptable in his family of origin, can erode a child of his identity. It is essential to ensure the placement supports the child's cultural identity which, in turn, can promote active communication, lessen difficulty with acclimating to a new environment, and build productive relationships among the foster family, the child, and the parents. Supporting the family's culture and traditions may also contribute to the parents' engagement with permanency planning efforts including related interventions and services.

As previously mentioned, out-of-home placements must promote "normalcy" for foster children by providing sufficient opportunity for them to engage in "social, extracurricular, enrichment, cultural, and social activities."⁴⁹ Judges should examine what steps the agency has taken to ensure that the proposed out-of-home placement will support the foster child's participation in age- and developmentally-appropriate activities.

Family Time

At the initial hearing, supervision of parent-child contact should not be imposed unless there is objective evidence suggesting that the child will not be safe in an unsupervised setting. In many jurisdictions, supervised visitation is the norm. It is critical that the court make a vigorous inquiry as to why supervised visits are necessary. To truly preserve the child's attachment to the parent, visitation should be as unrestricted as possible while ensuring the child's safety. There are jurisdictions in which visits are assumed to be unsupervised unless the agency can rebut the presumption that unsupervised visits are in the child's best interests. Again, it is important for the court to actively inquire about the facts to support any conclusion drawn. For example, reports often state that "the child acts out after visits; therefore the visits need to continue to be supervised." The court must explore the fact that the child, in fact, may be acting out because he or she misses and needs more time with the parent.

APPROPRIATENESS OF PLACEMENT

- Is the placement appropriate? (42 U.S.C. § 675(5))
- When and where did the caseworker last see the child? What was the nature of the contact?
- **Is the placement the least restrictive** (most family-like), the most appropriate available, and in close proximity to the parents? (42 U.S.C. § 675(5))
- **If the child is placed in foster care/shelter care, have kinship care options been fully explored?** If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- **If the child is placed in kinship care,** what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How does the placement support the family/child's involvement in the initial plan?
- **What are the terms of meaningful family time** with parents, siblings, and extended family members?
 - **Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?** Is the time and location of family time logistically possible for the family and supportive of the child's needs?
 - **Are siblings placed together?** If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, what efforts have been made to place the siblings together?

Appropriateness of Placement cont.

- Does the caregiver have the necessary knowledge and skill to treat a child according to the **“reasonable and prudent parent standard?”** (P.L. 113-83 § 111(a); § 471(a)(24); § 475(11))
 - Will the placement ensure children participate in **age- or developmentally-appropriate events**, promote their engagement in social, extracurricular, enrichment, and cultural activities? (P.L. 113-83 § 111(a); § 471(a)(24); § 475(11))

- **From the family and child’s perspective, is the current placement culturally and linguistically appropriate?**
 - How does the placement support the child’s cultural identity? In what ways does the placement support the child’s connection to family and community?
- **Is the placement in proximity to the child’s educational setting or does it otherwise support educational continuity?**
- **If the child has a history of trauma**, does the placement have the necessary support and training to help the child stabilize and begin the healing process?
 - **If the child is a victim of sex trafficking or is at risk of becoming a sex trafficking victim**, does the caregiver have the necessary support and training to help the child? (P.L. 113-183)

Family time has been called the “heart of permanency planning,”⁵⁰ and frequent family time can promote healthy attachment and reduce the negative impact of separation for both the child and the family.⁵¹ Research shows that regular, frequent family time or visitation increases the likelihood of an expeditious reunification.⁵² Family time should be specifically tailored to meet the individual needs of the child and family before the court. One-size-fits-all approaches place unnecessary restrictions on the child and family and may delay permanency. Many family time schedules are more focused on the needs of the child welfare workers or foster parents than the needs of the child and family. Visits should be scheduled at a time that best allows the parent to participate and disrupts the child’s schedule as minimally as possible.

Visitation should include all levels of family time with frequent face-to-face interactions. Parent-child visits should include all siblings unless there are reasons to do otherwise. If so, arrangements should be made for specific visitation time between/among siblings. Visits should take place in a natural environment – a home, family church, or park – rather than an office. Other contacts such as video contact, phone calls, emails, and letter writing should be scheduled, and parents should be expected and encouraged to participate in all school, medical, and therapeutic appointments. Parents should be allowed to participate in cultural and community events with their children.

It is important for caseworkers to personally observe family time. While workers may consider feedback from others who may be supervising the visitation, the personal observations and evaluations of the quality of family interactions by the caseworker may help guard against potential bias in describing the visits.

Judges should expect caseworkers to have the requisite education, training, and tools to make a complete and factual report about visitation that includes qualitative information about the parent’s ability to protect and keep his or her child safe as well as the worker’s assessment of parent-child attachment. Reports on these issues should be framed in a strengths-based manner, emphasizing challenges and issues in terms of additional supports and needs of the parent and child. Because a person supervising the visit may draw conclusions based on incomplete facts or assumptions about parental behavior, it is very important for the court to carefully inquire about conclusions drawn in visit reports, especially if the visits are observed outside the room.

Findings Required at the Preliminary Protective Hearing

At the initial hearing, judges must make certain findings under both federal and state law.

These determinations often affect the ability of the child welfare agency to draw federal Title IV-E matching funds for foster care placements. While this is an important consideration, judges do have the responsibility to make accurate and thorough findings, even if the agency’s ability to draw federal funds may be compromised.

The court must make a finding that continuation in the home of the parent or legal guardian would be contrary to the child’s welfare (42 U.S.C. § 672)(a)(1)-(2)). This finding must be made in the first order of removal. In states where Title IV-E is claimed for juvenile justice cases, this finding must be made in the “pick-up” or detention order. In child welfare cases, it must be made in the first order, whether it is in an order issued by the judge prior to the child being removed from the home or in the order at the initial hearing. If a contrary to the welfare finding is not in the first order of removal, the case will not be eligible for Title IV-E reimbursement for the duration of the foster care placement.⁵³

The court must make a finding that reasonable efforts were made to prevent or eliminate the need for removal from the home (42 U.S.C. § 671(a)(15), § 672(a)(1-2)). While this finding must be made within 60 days of the child’s removal from the home (45 C.F.R. § 1356.21(b)(1)), it should be made at the PPH (which is the first time the removal can be challenged).

The court must also make a finding that the placement and care of the child are the responsibility of the state agency or any other public agency with whom the responsible state agency has an agreement (42 U.S.C. § 672(a)(1-2); 45 C.F.R. § 1356.71(d)).

AGGRAVATED CIRCUMSTANCES

Under ASFA, the presumptive case plan goal is **family reunification**. In a few exceptional cases, however, ASFA allows the court to relieve the agency of the responsibility to make reasonable efforts to work toward a plan of reunification when a “court of competent jurisdiction” has determined that aggravated circumstances exist. Specifically, that:

1. the child is an abandoned infant, as defined by state law (42 U.S.C. § 675(5) (E));
2. the parent has subjected the child to aggravated circumstances (as defined by state or tribal law), which may include torture, chronic abuse, sexual abuse, or abandonment (42 U.S.C. § 671(a)(15)(D)(i));
3. the parent has committed, or assisted in the committing of, the murder or voluntary manslaughter of one of the parent’s other children (42 U.S.C. § 671(a)(15)(D)(ii));
4. the parent has committed a felony assault resulting in serious injury to the child or another child of the parent (42 U.S.C. § 671(15)(D)(ii));
5. the parent had his or her parental rights involuntarily terminated to another child (42 U.S.C. § 671(a)(15)(D)(iii)); and
6. the state has determined that another reason exists that justifies not using reasonable efforts to reunify the family, with the child’s health and safety as the paramount concern (42 U.S.C. § 671(a)(15)(A), 42 U.S.C. § 671(a)(15)(D)(i), 65 Fed. Reg. 4060 (Jan. 25, 2000)).

AGGRAVATED CIRCUMSTANCES

- If the judge makes a determination that reasonable efforts to reunify the family are not required due to aggravated circumstances as defined by state law – e.g., previous involuntary termination of parental rights, the parent has committed or assisted in the committing of the murder or voluntary manslaughter of one of the parent’s other children, or the parent has committed a felony assault resulting in serious injury to the child or another child of the parent – the judge must set a permanency hearing within 30 days (45 C.F.R. § 1356.21(h)(2)).
- Within 60 days after a child has been determined to be abandoned, the agency must file a petition to terminate parental rights (45 C.F.R. § 1356.21(i)(ii)).
- Where there is a determination that the parent has been convicted of one of the felonies listed above, the agency must file a petition to terminate parental rights within 60 days of that judicial determination (45 C.F.R. § 1356.21(i)(iii)).

State law may specify additional acts included as aggravated circumstances and determine the procedure for determining aggravated circumstances. An aggravated circumstance may be alleged in the agency’s abuse

and neglect petition and found to be proven at the adjudication.

The court should advise the state or agency that if they are seeking relief from making reasonable efforts based on aggravated circumstances they must file their motion so the matter may be set as soon as possible and prior to the adjudication.



F. Setting the Stage for Subsequent Hearings and Achieving Positive Outcomes for Children and Families

Effective Case Planning Moving Forward

The court will need a great deal of information to ensure effective case planning as the case moves forward. While much of the information outlined below may not be available at the initial hearing, the judge should be setting the expectation early on that families should be treated in a trauma-informed manner, that a child’s well-being will be focused on with the same urgency as the court focuses on safety and permanency, and that all children and youth in care should have the ability to engage in healthy and developmentally appropriate activities that promote their sense of normalcy and well-being. Courts are encouraged to provide the agency, lawyers, CASAs, and parties with the information below as well as the “*Every Hearing Update*” benchcard included in the appendix of these GUIDELINES. This will ensure that all parties and advocates understand the court’s expectations regarding the information to be provided to the court at each subsequent hearing.

The following section outlines the inquiry the court should make as soon as possible following the initial hearing and at each subsequent hearing as appropriate.

Children, Families, and Trauma

The court and service providers should ensure that treatment is gender-specific and uses the principles of trauma informed care.⁵⁴ “Trauma-informed” care recognizes the impact past trauma has on a child’s life, as well as the potential triggers and vulnerabilities of young trauma survivors. Asking trauma-informed questions can help judges identify children who need or could benefit from trauma-informed services from a

mental health professional. Among the questions judges may ask to ensure any care provided to children is trauma-informed, is supportive, and will not exacerbate any symptoms of trauma include:⁵⁵

HAVE I CONSIDERED WHETHER OR NOT TRAUMA HAS PLAYED A ROLE IN THE CHILD’S BEHAVIOR?”

- **Trauma exposure:** Has the child experienced a traumatic event? These are events that involve actual or threatened exposure of the child to death, severe injury, or sexual abuse. Exposure to domestic violence, community violence, assault, severe bullying or harassment, natural or man-made disasters such as fires, floods, and explosions, severe accidents, serious or terminal illness, or sudden homelessness may trigger trauma as well.
- **Multiple or prolonged exposures:** Has the child been exposed to traumatic events on more than one occasion or for a prolonged period? Repeated or prolonged exposure increases the likelihood that the child will be adversely affected.
- **Outcomes of previous interventions:** Has a schedule of increasingly higher levels of care proven ineffective for the child? Traumatized children may be operating in survival mode and, as a result, may respond poorly to traditional treatments and placements.
- **Caregivers’ roles:** How are the child’s caregivers or other significant adults helping the child feel safe or preventing (either intentionally or unintentionally) the child from feeling safe? Has the caregiver been a consistent presence in the child’s life? Does the caregiver acknowledge and protect the child? Are caregivers themselves operating in survival mode due to their own history of exposure to trauma?
- **Safety issues for the child:** Where, when, and with whom does this child feel safest? Where, when and with whom does he or she feel unsafe and distrustful? Is the home chaotic or dangerous? Does a caregiver in the household have a restraining order against another person? Is school a safe or unsafe place? Is the child being bullied at school, or does the child believe that he or she is being bullied?
- **Trauma triggers in current placement:** Is the child currently in a home, out-of-home placement, school, or institution where the child is being re-exposed to danger or being triggered by reminders of traumatic experiences?
- **Unusual courtroom behaviors:** Is this child behaving in a highly anxious or hypervigilant manner that suggests an inability to effectively participate in court proceedings? Such behaviors include inappropriate smiling or laughter, extreme passivity, quickness to anger, and non-responsiveness to simple questions. Ask if there is anything you as a judge can do to lower anxiety in the courtroom, increase trust, and enhance participation.

TRAUMA-INFORMED INQUIRY:

Have I considered whether or not trauma has played a role in the child's behavior?

- Trauma exposure – Has the child experienced a traumatic event?
- Multiple or prolonged exposures – Has the child been exposed to traumatic events on more than one occasion or for a prolonged period?
- Outcomes of previous interventions – Have increasingly higher levels of care proven ineffective in this case?
- Caregivers' roles – How are caregivers or other significant people helping this child feel safe?
- Safety issues for the child – Where, when, and with whom does this child feel safest?
- Trauma triggers in current or proposed placement – Is the child currently in a home, out-of-home placement, school, or institution where the child is being triggered by reminders of traumatic experiences?
- Unusual courtroom behaviors – Is the child behaving in a highly anxious or hypervigilant manner? What can you do as the judge to lower anxiety in the courtroom?

Am I sufficiently considering trauma as I decide where this child is going to live and with whom?

- Placement outcomes – How might the various placement options affect this child? Will they help the child feel safe and secure to assist in the successful recovery from traumatic stress or loss?
- Placement risks and prevention – Is an out-of-home placement truly necessary? If placement is required, what can be done to ensure that the child's traumatic stress responses will not be triggered?
- Trauma-informed approaches – Is the placement helping (or how will the proposed placement help) children cope with their traumatic reactions?
- Positive relationships – How does the planned placement enable the child to maintain continuous relationships with supportive adults, siblings, or peers?

“AM I SUFFICIENTLY CONSIDERING TRAUMA AS I DECIDE WHERE THIS CHILD IS GOING TO LIVE AND WITH WHOM?”

- **Placement outcomes:** How might the various placement options affect this child? Will they help the child feel safe and secure and to successfully recover from traumatic stress or loss?
- **Placement risks and prevention:** Is an out-of-home placement truly necessary? If placement is required, what can be done to ensure that the child’s traumatic stress responses will not be triggered?
- **Trauma-informed approaches:** How will the placement employ trauma-informed approaches to recognize, monitor, and manage traumatic stress reactions? Is the placement trained to help children cope with their traumatic reactions?
- **Positive relationships:** How does the planned placement enable the child to maintain continuous relationships with supportive adults, siblings, or peers?

If you do not have enough information, it may be useful to have a trauma assessment done by a trauma-informed professional.⁵⁶

*Child Well-Being Inquiry*⁵⁷

The court has a special responsibility to oversee the agency’s work not simply to protect the child but also to ensure that the child’s well-being needs are being met. The court is part of the healing community. Under ASFA, a child’s well-being refers to factors other than just immediate safety and permanency. Well-being also refers to a child’s future welfare. The federal Child and Family Services Review (CFSR) well-being outcome goals are: families have enhanced capacity to provide for their children’s needs; children receive appropriate services to meet their educational needs; and children receive adequate services to meet their physical and mental health needs. Because courts have the responsibility to ensure the agency is providing proper care to children in its custody, courts also need to consider whether those children are receiving a quality education, are physically and emotionally healthy, and are able to participate in age- or developmentally-appropriate events.

The judge should take the time to address these issues directly in court – as early as the initial hearing – and at every subsequent hearing. The judge should encourage input from all parties to gain perspectives that may not be reflected in agency reports and ensure that the agency and placement are sharing information and cooperating to promote the well-being of the child.

Most importantly, the judge should address the child directly and encourage the child to speak about how things are going. Whether the child speaks directly or through counsel, the length – and the depth – of the

conversation will depend on the maturity of the child and the judge's skill in making the child comfortable.⁵⁸ A child's well-being is enhanced when the child knows that the judge is concerned about him and is listening to what he has to say.

Addressing Educational Needs

The court plays a unique role in helping to improve educational outcomes for children and youth who are involved with the child welfare system. In addition, judicial leadership can provide sustained systems change in the community. In the courtroom, judges provide oversight to ensure that the educational needs of individual children are met. The educational issues judges should inquire about include:⁵⁹

- Early intervention services for young children, such as child care or pre-K services and developmental screenings that emphasize social, cognitive, and emotional development.
- Child and family involvement in determining the child's educational needs and wishes.
- Whether the current placement supports the child's educational needs and goals.
- Whether all educational records have been obtained.
- **Educational stability: States are required to make sure foster children attend school and remain in the same school when appropriate (42 U.S.C. § 675(1)(G)(ii)).** If remaining in the same school is not in the child's best interests, the court should inquire whether the child has been provided immediate and appropriate enrollment in a new school and whether all educational records have been provided to the school.
- Is there an Individualized Education Plan (IEP), if appropriate? Is the IEP current and meeting the child's needs? Are the IEP goals appropriate for the child's age and developmental status?
- How are the child's educational needs being met, and what are the plans for the future?
 - What is the child's academic performance? Are there identifiable areas in which the child is excelling? Are there areas that are posing a challenge, and how are they being addressed?
 - Are there potential barriers relating to the child's academic success that can be addressed by the court, the agency, and the caregiver?
- Are any foster parents, relatives with whom the child lives, or parent(s) whose rights have not been terminated participating in educational decision-making?⁶⁰
- Is there a need for a surrogate parent to act in the place of a parent in educational decision-making and in safeguarding a child's rights under the Individuals with Disabilities Education Act (IDEA)?

CHILD WELL-BEING INQUIRY: EDUCATION

- What are the **early intervention** considerations for young children?
- Does the current placement support the child's educational needs and goals?
- Have all **educational records** been obtained?
- Is there a plan to ensure **educational stability**? If remaining in the same school is not in the child's best interests, has the child been provided immediate and appropriate enrollment in a new school, with all of the child's educational records provided to the school? (42 U.S.C § 675(1)(G)(ii)).
- Is there an **Individualized Education Plan (IEP)**, if appropriate? Is the IEP effectively meeting the needs of the child, and are the goals appropriate for the child's age and developmental status?
- How are the child's educational needs being met, and what are the plans for the future?
 - What is the child's academic performance? Are there identifiable areas in which the child is excelling? Are there areas that are posing a challenge, and how are they being addressed?
 - Are there any potential barriers relating to the child's academic success that can be addressed by the court, the agency, and the caregiver?
- Is there a **need for a surrogate parent** to act in the place of a parent in educational decision-making and in safeguarding a child's rights under the Individuals with Disabilities Education Act (IDEA)?

Addressing Physical, Dental, and Mental/Developmental Health Needs

Children have unique physical, dental, mental (emotional), and developmental health needs that should be addressed as early as possible. Among the issues judges should inquire about include:⁶¹

PHYSICAL HEALTH ISSUES/NEEDS

- Has the child received a comprehensive health assessment (e.g., early periodic screening, well-baby exam, annual physical)? If so, have all identified needs been addressed?
- Are the child's immunizations complete and up-to-date for his or her age? If so, has an immunization record been provided to the court, and does the caregiver have a copy?
- Does the child have an acute or chronic health issue that needs to be addressed?
- Has the child received a hearing and vision screening?
- Has the child received routine medical check-ups and illness-related visits using a primary physician or specific wellness clinic?
- Has the child received all necessary prescriptions for medication and medical equipment?
- Based on the child's physical health needs, does the caregiver have the capacity to meet those needs?
- Has the adolescent received a reproductive health and family planning consultation?

DENTAL HEALTH NEEDS

- Has the child received a recent dental exam?
 - Has the child received routine dental check-ups, cleanings, etc.?
 - Does the child have dental needs that extend beyond preventive care? If yes, how are the needs being addressed?

MENTAL/EMOTIONAL/DEVELOPMENTAL HEALTH NEEDS

- What are the child's developmental and mental health needs?
 - Does the child have mental health issues that impair his or her ability to learn, interact appropriately, or attend school regularly? If yes, what is this mental health issue and how is it being addressed?

- Has the child received the age-appropriate developmental screening to assess social, cognitive, and emotional development? If delays or deficits are determined, have appropriate referrals been made?
- Is the child currently being prescribed psychotropic medications? If yes, what medications have been prescribed? Has the child's need for medication been clearly explained to him or her, the parent(s), and any caregivers?
- Based on the child's mental health needs, does the caregiver have the capacity to meet those needs?
- Does the placement facilitate a sense of normalcy for the child? Is the child's participation in healthy and developmentally appropriate events and activities such as field trips, sleepovers, and other extracurricular activities encouraged and supported? (P.L. 113-183)
- What efforts are being made to ensure children in placement will have, or be able to form and maintain, long-lasting connections to caring adults despite placement moves and changes in caseworkers? (P.L. 113-183)

CHILD WELL-BEING INQUIRY: PHYSICAL HEALTH ISSUES/NEEDS

- Has the child received a **comprehensive health assessment**?
- Are the child's **immunizations** complete and up-to-date for his or her age? If so, has an immunization record been provided to the court and does the caregiver have a copy?
- Does the child have an acute or chronic health issue that needs to be addressed?
- Has the child received a **hearing and vision screening**?
- Has the child received routine medical check-ups and illness-related visits using a primary physician or specific wellness clinic?
- Has the child received all necessary **prescriptions** for medication and medical equipment?
- Based on the child's physical health needs, does the caregiver have the capacity to meet those needs?
- Has the adolescent received a **reproductive health** and family planning consultation?

CHILD WELL-BEING INQUIRY: DENTAL HEALTH NEEDS

- Has the child received a recent dental exam?
 - Has the child received routine dental check-ups, cleanings, etc.?
 - Does the child have dental needs that extend beyond preventive care? If yes, how are the needs being addressed?

CHILD WELL-BEING INQUIRY: MENTAL/DEVELOPMENTAL HEALTH NEEDS

- What are the child's developmental and mental health needs?
- Has the child received the age-appropriate **developmental screening** to assess social and emotional development? If delays or deficits are determined, have appropriate referrals been made?
- Is the child currently being prescribed any **psychotropic medications**? If yes, what medications have been prescribed? Has the child's need for medication been clearly explained to him or her and the caregiver?
- Based on the child's mental health needs, does the caregiver have the capacity to meet those needs?
- **Does the placement facilitate a sense of normalcy** by encouraging and supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- Does the placement ensure children will be able to develop and maintain **long-lasting connections to caring adults**? (P.L. 113-183)

CHILD WELL-BEING INQUIRY: NEEDS OF VICTIMS OF SEX TRAFFICKING

- The court should ask if there is any reason to believe that the child is a **victim of sex trafficking or is at risk of becoming a victim of sex trafficking** (P.L. 113-183).
 - Is the placement able to support the needs of the child victim or child at risk of becoming a victim? Are appropriate services available and in place?

CHILD WELL-BEING INQUIRY: CHILDREN WHO HAVE BEEN MISSING FROM PLACEMENT(S)

- What factors led to the child being missing from placement? Why did the child leave? (P.L. 113-183 § 471(a)(35))
 - How will the agency address those factors in the current and subsequent placements?
 - What experiences did the child have while absent from care? Was the child exposed to traumatic events? Was the child a victim of sex trafficking or placed at risk to become a victim? How will the current and subsequent placements support the child victim's needs?

Addressing the Needs of Victims of Sex Trafficking

- Pursuant to the Preventing Sex Trafficking and Strengthening Families Act of 2014, the court should also inquire if there is any reason to believe that the child is a victim of sex trafficking or is at risk of becoming a victim of sex trafficking (P.L. 113-183). If the answer is yes, the court should inquire about whether the placement is able to provide appropriate support to the child and if the child welfare agency will ensure specific services for victims or at-risk children are provided.

Children or Youth Who Have Been Missing from Placement(s)

- If a child has been missing from placement, the court should inquire about the factors that led to the child's being absent from placement, and how the agency will address those factors in subsequent placements (P.L. 113-183 § 471(a)(35)). The court should also inquire about what is known of the child's experiences while absent from care, including whether the child was exposed to any traumatic event or was a sex trafficking victim (P.L. 113-183 § 471(a)(35)), and whether the placement will support any specific needs stemming from the child's experiences while absent from care.

CASE MANAGEMENT – PREPARE FOR THE NEXT HEARING.

- Identify tasks to be accomplished by the next hearing.
- Make oral findings and orders that all participants can understand.
- Consider the appropriateness of the ADR process and order if applicable.
- Set the date and time for the next hearing within state and federal timeframes, and identify persons who need to be present at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of the PPH order immediately following the hearing.

ENGAGE PARENTS, CHILDREN, AND FAMILY MEMBERS.

- Ask if they can tell you what happened today. Ask if they know the next steps.
- Advise parents of the importance of their active participation in all proceedings.
- Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws and the consequences of their failure to appear at any future court hearings.
- When calendaring the next hearing, all parties, including parents, should be asked if the scheduling works for them, and if not, what is a better time?
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.



G. Concluding the PPH Hearing

What the judge does at the end of the initial hearing in preparation for the next hearing is important not only for proper case management, but also to facilitate timely permanency for children. The end of the initial hearing is an opportunity for the judge to summarize what has been accomplished and identify what still needs to be done – by whom and when. The date and time of the next hearing should be set within state and federal timeframes, and should be set for the amount of time needed to review outstanding issues and monitor completion of the case plan.

The court should provide parents with a copy of the initial hearing order immediately following the hearing. The judge should also order that the child (as appropriate) and caregivers receive notice of all proceedings and hearings, that the case will be appropriately staffed between the initial hearing and disposition, and order mediation if applicable.

The end of the initial hearing provides another opportunity for the judge to directly engage parents, children, and family members. The judge should address the parents and the child (and other participants as appropriate) to ensure they understand what happened at the hearing and what is expected of them, and to answer any questions they may have. Judges should also advise parents that it is important to actively participate in all services and proceedings. Finally, the judge should remind the parents and all parties of the rigorous timeframes for child abuse and neglect cases outlined in state and federal law as well as the consequences for the parents if timeframes are not met.

III. THE PRELIMINARY PROTECTIVE HEARING

ENDNOTES

¹ For a thorough discussion of reasonable efforts decision-making, see Leonard Edwards. (2014). *Reasonable efforts: A judicial perspective*. Casey Family Programs and Philanthropic Ventures Foundation.

² See the General Issues Chapter pg. 57 for some practical steps the court can take to gain the cooperation of the parties and develop a problem-solving atmosphere.

³ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend this critically important initial hearing.

⁴ Fostering Connections Act (P.L. 110-351 § 103; 42 U.S.C. § 671(29)).

⁵ P.L. 113-183 § 471(a)(29).

⁶ ChildFocus. (2007). *Making relative search happen: A guide to finding and involving relatives at every stage of the process*. Available at: <http://www.childfocuspartners.com/toolkits%26guides.htm>

⁷ NCJFCJ Policy Statement, adopted by the NCJFCJ Board of Trustees, Jan. 20, 2012; NCJFCJ. (2012). *Children in Court*. Reno, NV: Author; See also the “Children in Court” section of the General Issues Chapter, pg. 68; NCJFCJ. (2011). Key principles for permanency planning. *Technical Assistance Bulletin*. Reno, NV: Author.

⁸ Quas, J. A., Wallin, A. R., Horwitz, B., Davis, E., & Lyon, T. (2009). Maltreated children’s understanding of and emotional reactions to dependency court involvement. *Behavioral Sciences & the Law*, 27, 97-117.

⁹ See the American Bar Association Center on Children and the Law, Bar-Youth Empowerment Project, National Child Welfare Resource Center on Legal and Judicial Issues. (2008). *Judicial benchcard for engaging children & youth in court*. Available at: www.abanet.org.

¹⁰ 25 U.S.C. § 1915(a) (b).

¹¹ Goodmark, L. (2008). *Reasonable efforts checklist for dependency cases involving domestic violence*. Reno, NV: National Council of Juvenile and Family Court Judges.

¹² In some states, failure to make allegations about both parents will

require the dismissal of the petition.

¹³ For more detail, see the discussion of alternative dispute resolution in child abuse and neglect cases in the General Issues chapter, pg. 58.

¹⁴ See, for example, Edwards, L. P. (2007). Achieving timely permanency in child protection courts: The importance of frontloading the court process. *Juvenile and Family Court Journal*, 58(2), at 13-14; Merkel-Holguin, L. (2008, October). Family team meetings: One approach to front-end, time-sensitive decision-making. *The Judges Page*. National CASA and the National Council of Juvenile and Family Court Judges.

¹⁵ NCJFCJ, Key principles for permanency planning, *supra* note 7.

¹⁶ See the ABA *Standards of Practice for Lawyers who Represent Children in Child Abuse and Neglect Cases* and the National Association of Counsel for Children *Standards for Representation of Children in Child Abuse and Neglect Cases*.

¹⁷ Fostering Connections Act (P.L. 110-351 § 103; 42 U.S.C. § 671(a) (29)); Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183 § 471(a)(29)).

¹⁸ Senjo, S., & Leip, L. (2001). Testing therapeutic jurisprudence theory: An empirical assessment of drug court process. *Western Criminology Review*, 3(1). Available at: <http://wcr.sonoma.edu/v3n1/senjo.html>

¹⁹ See the discussion on engaging children and families in the General Issues Chapter, pg. 68.

²⁰ Thorne, W. A. (2010). *An overview of the Indian Child Welfare Act (ICWA)*. *The Judge’s Page Newsletter*. National CASA in partnership with the National Council of Juvenile and Family Court Judges. Available at: http://www.casaforchildren.org/site/c.mtJSJ7MPISE/b.6143487/k.DE8A/July_2010.htm

²¹ *Ibid*.

²² 25 U.S.C. § 1903(1).

²³ 25 U.S.C. § 1903(4).

²⁴ 25 U.S.C. § 1903(1)(i-iv).

²⁵ 25 U.S.C. § 1903(4).

²⁶ For more detail, see NCJFCJ. (2003). *Preliminary protective hearing checklist for ICWA cases*. Reno, NV: Author.

²⁷ 25 U.S.C. § 1911(a).

²⁸ 25 U.S.C. § 1903(6).

²⁹ 25 U.S.C. § 1912(d).

³⁰ 25 U.S.C. § 1912(e).

³¹ 25 U.S.C. § 1903(6).

³² 25 U.S.C. § 1912(a).

³³ In Florida, for example, the statute requires a hearing within 24 hours after the removal of the child (Fla. Stat. 39.401(3)(b)). Arizona law does not require the court to hold a PPH to review the removal not fewer than five days nor more than seven days after the child is taken into custody (ARS 8-824).

³⁴ *Ibid.*

³⁵ See discussion of safety and risk assessment in General Issues Chapter, pg. 55.

³⁶ 42 U.S.C. § 672(a)(1); 45 C.F.R. § 1356.21(b)(1).

³⁷ 45 C.F.R. § 1356.21(b)(1).

³⁸ Lund, T., & Renne, J. (2009). *Child safety: A Guide for judges and attorneys*. Washington, DC: American Bar Association, p. 25.

³⁹ *Ibid.*

⁴⁰ Goodmark, *supra* note 11.

⁴¹ Lund & Renne, *supra* note 38, at 7.

⁴² *Ibid.*, at 25.

⁴³ *Ibid.*, at 25-26.

⁴⁴ P.L. 113-183; § 111(a)(3); § 471 (a)(24).

⁴⁵ Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183).

⁴⁶ Gleeson, J. P. (2007). *Kinship care research and literature: Lessons learned and directions for future research*. *Kinship Reporter*, 1(2), 1, 8-11.

⁴⁷ Cuddleback, G. S. (2004). Kinship family foster care: A methodological and substantive analysis of research. *Children and Youth Services Review*, 26, 623-639.

⁴⁸ See, for example, American Bar Association. (2010). *Relative foster care licensing waivers in the states: Policies and possibilities*. Washington, DC: ABA Center for Children and the Law.

⁴⁹ P.L. 113-183 § 111(a)(3); § 471(a)(24); § 475(11).

⁵⁰ Hess, P., & Proch, K. (1988). *Family visiting in out-of-home care: A guide to practice*. Washington, DC: Child Welfare League of

America; NCJFCJ, Key principles for permanency planning, *supra* note 7.

⁵¹ Smiagra, M. (2007). *Visitation and infants and toddlers in foster care: What judges and attorneys need to know*. ABA Center on Children and the Law and Zero to Three Policy Center.

⁵² *Ibid.*

⁵³ 45 C.F.R. § 1356.21(c).

⁵⁴ For more detail about being an trauma-informed and trauma-responsive court, see the General Issues Chapter, pg. 78.

⁵⁵ These questions have been adapted from the *NCTSN Bench Card for the Trauma-Informed Judge*, published by the National Child Traumatic Stress Network and the National Council of Juvenile and Family Court Judges. Only a subset of the possible questions that judges can ask to help them make trauma-informed decisions is presented. For a more comprehensive treatment of this topic and guidance for judges, please refer to the *NCTSN Bench Card for the Trauma-Informed Judge* and accompanying resource materials at www.nctsn.org.

⁵⁶ Judges may use the *NCTSN Bench Card for Court-Ordered Trauma-Informed Mental Health Evaluation of the Child* to help access information that will assist in making trauma-informed decisions. Available at: www.nctsn.org.

⁵⁷ For more detail on the child well-being inquiry, see General Issues Chapter section on Child Well-Being, pg. 74.

⁵⁸ See General Issues Chapter on Children in Court, pg. 68.

⁵⁹ For more detail on the questions judges should ask to ensure children's educational needs are being addressed, see National Council of Juvenile and Family Court Judges. (2008). *Asking the right questions II: Judicial checklists to meet the educational needs of children and youth in foster care*. Available at: <http://ncjfcj.org/resource-library/publications/asking-right-questions-ii-judicial-checklists-meet-educational-needs>. See also the General Issues Chapter section on Child Well-Being, pg. 68.

⁶⁰ P.L. 108-446, Individuals with Disabilities Education Act of 2004; 34 C.F.R. § 300.501(b).

⁶¹ For more detail on the questions judges should ask about physical, mental/developmental, dental, and reproductive health needs of children, see American Bar Association, Zero-to-Three, and the National Council of Juvenile and Family Court Judges. (2009). *Healthy beginnings, healthy futures: A judges' guide*. Washington, DC: American Bar Association.

⁶¹ cont. Available at: http://www.americanbar.org/content/dam/aba/administrative/child_law/healthy_beginnings.authcheckdam.pdf; Ofsofsky, J., Maze, C., Lederman, C., Grace, M., & Dicker, S. (2002). *Questions every judge and lawyer should ask about infants and toddlers in the child welfare system*, available at: http://146.201.48.7/resourceFiles/Questions_Every_Judge_Should_Ask.pdf; National Campaign to Prevent Teen and Unplanned Pregnancy and the National Council of Juvenile and Family Court Judges. (2011). *When you decide: A judge's guide to pregnancy prevention among foster youth*. Available at: <http://thenationalcampaign.org/resource/when-you-decide>; see also the General Issues Chapter section on Child Well-Being, pg. 74.



PRELIMINARY PROTECTIVE
HEARING BENCHCARD



Preliminary Protective Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the preliminary protective hearing²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- Child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)

In all states, the preliminary protective hearing must take place within a short time after the child has been removed from the home. The time limit is specified by state law and, in most states, must occur within one to three working days after removal.

The main purpose of the PPH is to determine if probable cause exists to remove a child or keep a child in shelter status pending further investigation of the case and whether removal can be avoided through reasonable efforts by the child welfare agency.

- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Education liaison/school representative
- Education surrogate parent if appropriate
- Law enforcement
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

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

- ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom;
- asking the youth/family if there is someone else who should be present;
- requiring quick and diligent notification efforts by the agency;
- requiring both oral and written notification in a language understandable to each party and witness;
- requiring service/tribal notice to include the reason for removal, purpose of the hearing, and availability of legal assistance in a language and form understandable to each party and witness;
- requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin, and other parties;
- facilitating telephonic or video conferencing appearance at hearings; and
- implementing time-certain calendaring.

Review relevant documents.

REVIEW THE PETITION.³

- A sworn petition or complaint should be filed prior to the PPH and served/provided to the parents and their counsel.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- **If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian.**
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child’s safety.

The court should require submission of agency and/or law enforcement reports at least one hour prior to the PPH.

Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent the need for removal.

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE PRELIMINARY PROTECTIVE HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.

Due Process Considerations

- **IDENTIFICATION OF PARENTS AND/OR GUARDIANS**
 - Who are the child's parents and/or guardians?
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
- **NOTICE**
 - How were the parents/guardians and foster parents notified of this hearing?
 - Was the notice in a language and form understandable to the parents/guardians and foster parents?
 - Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
 - Has the agency exercised due diligence to provide notice to all parents of a sibling of the child, where such parent has legal custody of the child? (P.L. 113-183 § 471(a)(29))
 - Verify that relatives who requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).⁴

- **REPRESENTATION**

- Are the **parents** entitled to representation?
- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the **child**?
- Does counsel have sufficient training and experience to represent the child in this case?
- Has counsel met with the child in person? Is he able to determine and advocate the child's position?
- Should the court appoint a Guardian *ad litem* and/or CASA for the child?

- **UNDERSTANDING AND COMPETENCY**

- Do the parents understand the allegations and the purpose of the hearing?
- Are there parental competency issues?

- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**

- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Interstate Compact on the Placement of Children (ICPC), or other federal law apply to this case?⁵

Engage parents and any children or relatives present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be involved in this process?

KEY INQUIRIES, ANALYSES, FINDINGS, AND DECISIONS AT THE PRELIMINARY PROTECTIVE HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

The court should require that the applicability of the ICWA be determined before proceeding with the preliminary protective hearing. If the court has reason to believe ICWA applies, the court should proceed accordingly.

- If yes, different standards apply. Refer to the ICWA Checklist.⁶
- If yes, determine whether there was **clear and convincing evidence**, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(e)).

Key ICWA inquiries the court should make:

- Is the child under 18, unmarried, and:
 - A member of a federally recognized tribe, or
 - Eligible for membership in a federally recognized Indian tribe, and
 - The biological child of a member of a federally recognized tribe?
- Was the child in the custody of a parent or Indian custodian?
- If the child is an Indian child, does the child reside, or is the child domiciled, on a reservation, or is the child already a ward of a tribal court, depriving the court of jurisdiction? If the child resides or is domiciled on a reservation but is temporarily off the reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child.
- Has the agency mailed proper notice to the child's putative father, including a father who has acknowledged paternity, even if he has not legally established paternity?
- Was proper notice and inquiry mailed to all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination?
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior?
- What efforts, if any, have been made by the agency to identify extended family or other tribal members or Indian families, for placement of the child? Has the agency attempted to create a family chart or genogram soliciting assistance from neighbors, family, or members of the Indian community who may be able to offer information?

- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

Key ICWA decisions the court must make:

- Is it in the best interests of the child to appoint counsel for the child?
- If the state law makes no provision for the appointment of counsel, has the court notified the U.S. Secretary of the Interior upon appointment of counsel so that reasonable fees and expenses may be appropriated?
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family resides, or with which the parent or extended family is affiliated?
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?

Legal threshold for removal

- Has the agency made a ***prima facie* case or probable cause showing that supports the removal** of the child or that continued residence in the home would be contrary to the welfare, or that placement would be in the best interests of the child? (45 C.F.R. § 1356.21(b)(1))
 - What case-specific evidence supports this finding?
 - Have the family's cultural background, customs, and traditions been taken into account in evaluating the event and circumstances that led to the removal?
 - Have the parent(s)' cultural or tribal liaison/ relevant other(s) been asked if there is a culturally based explanation for the allegations in the petition?

If probable cause is found:

- Make specific findings of fact regarding the necessity for removal, and outline the specific reasonable efforts to prevent removal, or alternatively, show that the agency is not required to make such efforts.
- **Determine whether remaining in the home is contrary to the welfare of the child, specifying the immediate safety concerns (42 U.S.C. § 672(a)(102)).**
- **Determine whether placement in shelter care is in the best interests of the child and that no reasonable options exist to allow the child to remain at home.**

Reasonable efforts (to prevent removal)

- **While federal law requires the judge to determine whether reasonable efforts have been made to prevent or eliminate the need for removal within 60 days of the date of removal (45 C.F.R. §1356.21(b)(1)), this finding should be made at the PPH when the removal can first be challenged.**
- What were the specific safety risks leading to removal?
- What services were considered and offered to allow the child to remain at home? Were these **services culturally appropriate**? Were these services rationally related to the safety threat?
- What was done to create a **safety plan** to allow the child to remain at home or in the home of another person without court involvement?
 - Have non-custodial parents and paternal and maternal relatives been identified and explored? What is the plan to do so?
- Were there any **pre-hearing conferences** or meetings that included the family?
 - Who was present?
 - What was the outcome?
- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

FEDERALLY REQUIRED TITLE IV-E FINDINGS AT THE PPH

The court must make a finding that continuance in the home of the parent or legal guardian would be **contrary to the child's welfare** (42 U.S.C. § 672(a)(1-2)).

- This finding must be made at the time of the first court ruling authorizing removal of the child from the home (45 C.F.R. § 1356.21(c)).

The court must order that placement and care are the responsibility of the state agency or any other public agency with which the responsible state agency has an agreement (42 U.S.C. § 672(a)(1-2); 45 C.F.R. § 1356.71(d)(1)(iii)).

While **federal law requires the judge to determine whether reasonable efforts have been made to prevent or eliminate the need for removal within 60 days of the date of removal** (45 C.F.R. § 1356.21(b)(1)), this finding should be made at the PPH when the removal can first be challenged.

Reasonable efforts to allow the child to safely return home

- Is the agency making reasonable efforts to effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b)(1))
- What is preventing the child from SAFELY returning home TODAY?⁷
- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or into the home allow the child to safely return?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

- **What services can be arranged to allow the child to safely return home today?**
 - How are these services rationally related to the *specific* safety threat?
 - How are the parents, extended family, and children being engaged in the development and implementation of a plan for services, interventions, and supports?
 - How will the agency assist the family in accessing services?
 - Does the family believe that these services, interventions, and supports will meet their current needs and build upon strengths?
 - Has the family been given the opportunity to ask for additional or alternate services?
 - What evidence has been provided by the agency to demonstrate that the services, interventions, or supports for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?
 - How are the services, interventions, and supports specifically tailored to the culture and needs of *this* child and family?
 - How do they build on family strengths? How is the agency determining that the services, interventions, and supports are culturally appropriate?

Appropriateness of placement

- **Is the placement appropriate?** (42 U.S.C. § 675(5))
- When and where did the caseworker last see the child? What was the nature of the contact?
- **Is the placement the least restrictive** (most family-like) and most appropriate available and in close proximity to the parents? (42 U.S.C. § 675(5))
- **If the child is placed in foster care/shelter, have kinship care options been fully explored?**
If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- **If the child is placed in kinship care**, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of **meaningful family time** with parents, siblings, and extended family members?

- **Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?** Is the time and location of family time logistically possible for the family and supportive of the child’s needs?
- **Are siblings placed together?** If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, what efforts have been made to place the siblings together?
- Does the caregiver have the necessary knowledge and skill to treat a child according to the **“reasonable and prudent parent standard?”** (P.L. 113-83 111(a); § 471(a)(24); § 475(11))
 - Will the placement ensure children participate in age or developmentally-appropriate events (which promote a sense of “normalcy”) by promoting their engagement in social, extracurricular, enrichment, and cultural activities? (P.L. 113-83 111(a); § 471(a)(24); § 475(11))
- How is the placement culturally and linguistically appropriate?
 - From the family and child’s perspective, is the current placement culturally and linguistically appropriate? How does the placement support the child’s cultural identity? In what way does the placement support the child’s connection to the family and community?
- Is the placement in proximity to the **child’s educational setting** or does it otherwise support educational continuity?
- **If the child has a history of trauma**, does the placement have necessary support and training to help the child stabilize and begin the healing process?
 - **If the child is a victim of sex trafficking** or at risk of becoming a sex trafficking victim, does the caregiver have the necessary support and training to help the child? (P.L. 113-183)



SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES (Refer to the PPH Chapter for more detail.)

Aggravated Circumstances: The court should advise the state or agency that if they are seeking relief from making reasonable efforts based on aggravated circumstances, they must file their motion so the matter may be set as soon as possible in the case and prior to the adjudication.

Effective Case Planning Moving Forward: Although the information might not be available as early as the PPH, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

CONCLUDING THE PRELIMINARY PROTECTIVE HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
- Make oral findings and orders that all participants can understand.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes, and identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of the PPH order immediately following the hearing.

If the court has determined that it is contrary to the welfare of the child to remain in the home, the final order should include the statement, “It is contrary to the welfare of the child to remain in the home. It is in the best interests of the child to be placed.” This language must be included in the initial hearing sanctioning removing the child from the home in order for the agency to claim federal reimbursement of placement expenses for the child for the duration of this placement episode (45 C.F.R. § 1356.21(c)).

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at any further court hearings.

- When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

III. THE PRELIMINARY PROTECTIVE HEARING BENCHCARD ENDNOTES

¹ The preliminary protective hearing is the first court hearing in juvenile abuse and neglect cases. In some jurisdictions, this may be called a “shelter care,” “detention,” “emergency removal,” or “temporary custody” hearing.

² State and federal law determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

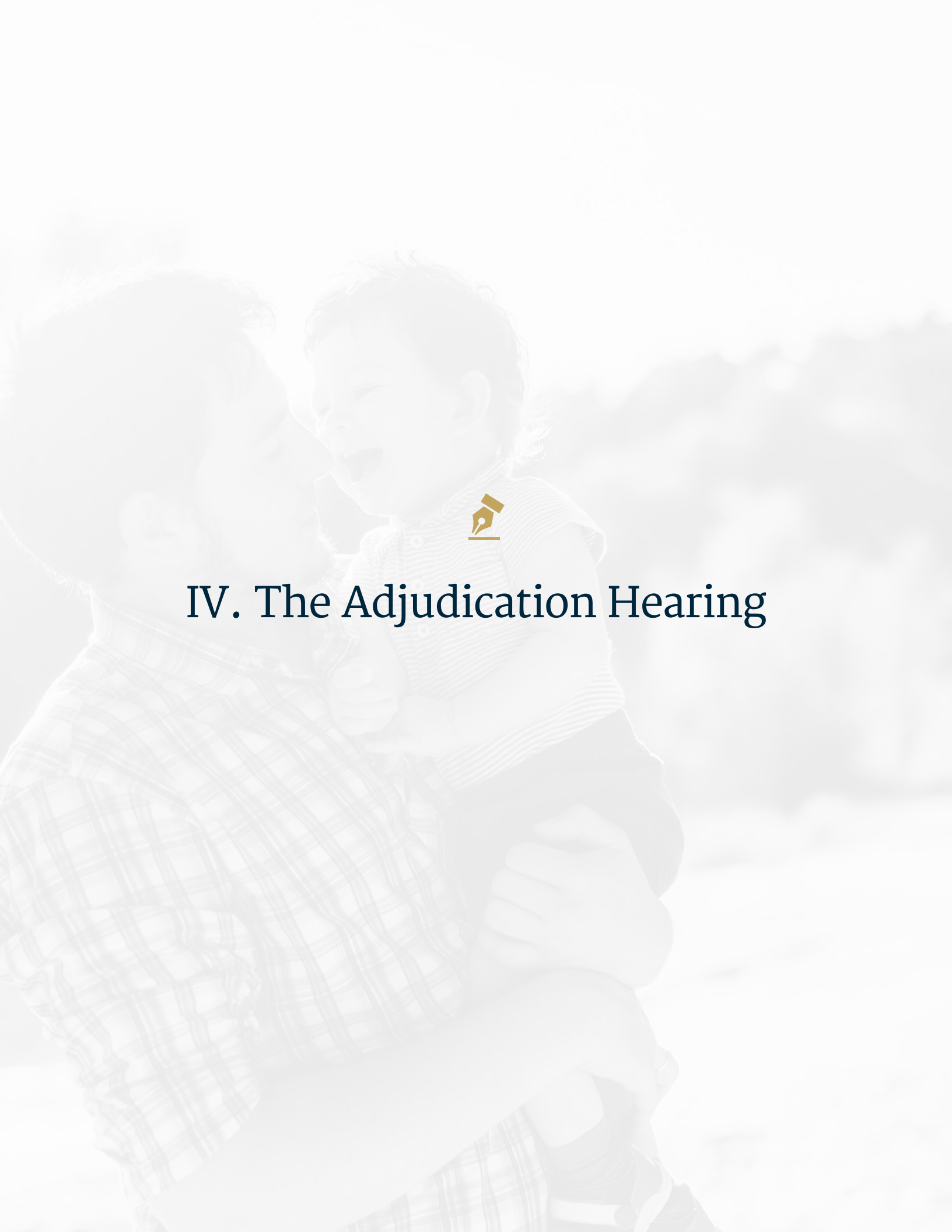
³ State and federal laws determine what must be contained in the petition.

⁴ The Fostering Connections Act requires the agency to use due diligence to identify and notify all relatives within 30 days of removal (Fostering Connections to Success and Increasing Adoptions Act of 2008, H.R. 6893 / P.L. 110-351 § 103).

⁵ See the Federal Law Chapter.

⁶ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the PPH) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁷ The intent of this inquiry is to ensure that the court is fully exploring safety and risk concerns while at the same time examining the current issues that the family faces to ensure that there is no legitimate reason why the child(ren) cannot be returned home.



IV. The Adjudication Hearing



IV. THE ADJUDICATION HEARING

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IV. The Adjudication Hearing

A. Introduction

The adjudication hearing resembles a traditional trial under rules of civil procedure and evidence. The adjudication is a hearing at which the court determines whether allegations of abuse or neglect are sustained by the evidence. Adjudication provides the basis for state intervention. In some states, the adjudication hearing is called the “jurisdictional hearing” or “fact-finding hearing.” The adjudication hearing is also the hearing at which parents or legal custodians may enter admissions to the petition alleging abuse or neglect or an amended petition based on an agreement.

The outcome of adjudication controls whether the state may intervene in the life of the child. In all cases, the legal rights of interested parties are affected by the adjudication, and they, therefore, are entitled to notice as a matter of constitutional, federal, and state law. The manner in which the adjudication is conducted also has important long-term implications for the child and family: a speedy adjudication can reduce the length of time a child spends in placement. Early adjudication provides an opportunity for the agency and parents to begin working together to provide services to address the abuse or neglect. The time in which adjudication is completed may control the timing of later judicial proceedings.

A primary characteristic of the adjudication hearing is that a formal legal process must be used to notify essential parties and witnesses of the hearing and secure their attendance. Case outcomes are improved

It is necessary to resolve issues of paternity at an early point in the litigation.

when all interested parties receive timely notice of the adjudication. Parties not only include the parent who allegedly committed the abuse or neglect, but also include non-custodial parents, putative fathers, other persons with legal custody, and, depending upon state laws, long-term physical custodians. When the parties are provided with early notice, they may make essential contributions to resolving the case by a) giving important information to the court, b) providing a placement for the child, c) paying child support, or d) offering important emotional support for the child or the parents.

When parties are not provided with notice prior to the adjudication, children’s placement in foster care is often prolonged. For example, if a non-custodial parent or putative father is not notified until after efforts to work with the custodial parent are exhausted, time is lost when new efforts must be initiated to work with the non-custodial parent or putative father. When parents are missing, parties should be expected to enlist

the assistance of the Parent Locator Service which locates missing parties in child support cases.

Paternity issues need to be resolved early in the litigation, including prompt DNA testing, if necessary. It may be necessary to resolve paternity to answer such questions as whether the putative father should be admitted as a party to the litigation, whether an attorney should be appointed to represent him if he is indigent, and whether he should be considered as a placement resource for the child.

B. Creating the Record

The court record of the adjudication proceeding should clearly state the facts supporting the adjudication so that all parties understand the specific safety risks that led the agency to remove the child from the home and that the case plan is comprised of services appropriately directed at remediating those risks. It is critically important that the judge ensure that the facts in the petition clearly outline the basis for court intervention. Ensuring that the petition clearly states the facts also enables the court to protect against the agency requiring lengthy services that are not rationally related to the jurisdictional findings of the court. Petitions that state the facts clearly and completely provide the judge with the information needed to determine whether a plea is appropriately representative of the circumstances of the case. Accepting pleas based on “watered-down” facts compromises the court’s ability to order appropriate services and ensure that the conditions that caused the child to come in to care have been ameliorated.

A clear record of the facts established at adjudication may be useful in later proceedings.

An accurate trial record at adjudication has importance beyond the adjudication itself. Adjudication should determine the precise nature of the abuse or neglect so that disposition, case work, and later court review can be focused on the specific facts which resulted in state intervention. A clear record of the facts established at adjudication may be useful in later legal proceedings as it may foreclose later factual disputes or may provide important evidence which would otherwise be unavailable.

C. Purpose and Timing of Adjudication Hearing

States bear the burden of proving dependency generally by a preponderance of the evidence standard. If the state fails to meet its burden, the case is dismissed and the caretakers regain full control of the child. If an adjudication is made, the court typically issues orders calling for further investigation, evaluations, and treatment.

Principles of sound case flow management require that there be specific and strict time limits for every stage

of the court process, including the adjudication. Due process protections dictate that parents have the right to refuse services until the case is adjudicated. Clearly, delay in adjudication can delay case resolution and needlessly extend a child’s stay in foster care.

The adjudication hearing should be held within 60 days from removal at the latest in order to comply with the ASFA goal of providing an expedited process to find children in temporary placements permanent homes.

Because of the traumatic effect of removal of a child from the home, it is essential that the adjudication hearing take place as soon as it is practical. State statutes, court rules, or guidelines should specify a time limit within which the adjudication must be completed. Court enforcement of a time limit within which adjudication must take place compels court clerks, attorneys, investigators, and social workers to adjust to a quicker pace of litigation.

Experience in many jurisdictions has shown that it is possible to conduct the adjudication within 60 days after removal of the child. Because the permanency time clock created by ASFA begins to run at 60 days from removal at the latest,¹ courts should conduct the adjudication hearing before this date. Some jurisdictions set even shorter time limits.

Accordingly, when a child is in emergency protective care, the adjudication should be completed within 60 days of the removal of the child, even if parties are willing to agree to extensions. Exceptions should be allowed only in cases involving newly discovered evidence, unavoidable delays in the notification of parties, and unforeseen personal emergencies. Juvenile court proceedings should go forward when related criminal proceedings are pending. Delays in adjudication impede progress toward family rehabilitation and reunification.

A strict no-continuance policy is recommended to ensure court control and compliance with timelines. Continuances or extensions should be permitted only in the most extraordinary circumstances.

Admissions, Stipulations, Consents, and Agreements

Court policies and procedures for uncontested adjudications are particularly important since the allegations in many petitions are not contested. An uncontested adjudication, in the form of an admission by the parents or their attorneys, or a stipulation or an agreement among the parties, may take place any time after the first court appearance up to the date of trial. When petitions are uncontested, it is essential that the court enter findings that accurately record the reasons for state intervention. Negotiated findings that do not accurately describe abuse or neglect should be avoided.

The court’s findings at adjudication should be the benchmark against which later case progress is measured.

Adjudicatory findings create the basis for the case plan and are equally important to case review.

When petitions are uncontested, it is essential that the court's findings accurately record the reasons for state intervention.

The findings entered at the adjudication hearing are critical when the court must later decide whether a child can safely return home. Since subsequent case reviews should measure the progress the family is making in eliminating the abuse or neglect that led to state intervention, it is paramount that the adjudicatory findings are specific and complete.

There are limits to a judge's role in overseeing settlement agreements because the court, as fact finder, must remain impartial. Nevertheless, judicial scrutiny is required once an agreement is reached to ensure that the facts agreed to are appropriate and sufficient to assist in case planning and the ultimate resolution of the case.

Parties should be able to stipulate or consent to adjudicatory findings without addressing dispositional issues. Similarly, they should also be permitted to reach a simultaneous settlement of adjudication and

Before accepting a stipulation or admission, the court should determine that the parties understand the content and consequences of the stipulation or admission.

disposition. However, in states where agencies are required to submit predisposition reports, no combined adjudication-disposition agreement should be approved unless the parties received the agency's predisposition report well in advance of the agreement.

Before accepting a stipulation or admission, the court should determine that the parties understand the content and consequences of the stipulation or admission. Written copies of a stipulation or admitted facts should be provided to the parties and their counsel. **A sample colloquy is included at the end of this chapter that may be amended to meet local requirements and practices.**

D. Case Management Before the Adjudication Hearing

Who Should Be Present?²

While all of the parties and witnesses must be present at an adjudication hearing, the adjudication hearing may require the attendance of many if not most of the persons required for attendance at the preliminary protective hearing. Parents, guardians, and custodians of children should be present at the adjudication hearing, even when the case is uncontested. This should include non-custodial parents and putative fathers. The presence of parents, guardians, and custodians enables the court to ensure that the parties fully

understand and approve of the facts in the stipulation, or that they can participate in a contested hearing.

When non-custodial parents and putative fathers are brought into the litigation late, children often remain in foster care longer than necessary. Judges should be exacting in requiring the presence of these parents at the adjudication hearing. If non-custodial parents and putative fathers are notified early, they may be able to take the children into their homes and provide good care for them.

There are several ways judges can encourage the presence of non-custodial parents and putative fathers at adjudication. First, as discussed earlier, non-custodial parents and putative fathers should be encouraged to attend the preliminary protective or initial hearing. Where parents have not been located, additional pretrial hearings should be convened to give them further opportunity to appear or for the agency to provide an explanation of their absence. Second, if an agency is unable to locate and personally serve a non-custodial parent or putative father prior to adjudication, the agency should be required to submit an affidavit describing the efforts to locate and serve the noncustodial parent or putative father. Finally, if there is more that can be done to locate a missing party, the judge should provide instructions to the petitioner and should then monitor the ongoing search.

When putative fathers are identified and brought into the case, the court should first determine if there is agreement among all parties concerning paternity. If it is agreed that the putative father is the birth father and there are supporting facts, this individual should be accepted as a party to the abuse and neglect case. If there is disagreement or the evidence is unclear, the court should promptly order tests for paternity with the expectation that the test results would be completed prior to the adjudication hearing.

If adjudication is uncontested, all parties who have been located and served should be present at the hearing with their attorneys. The presence of all parties and their attorneys is needed to enable them to defend the stipulation or agreement and to answer the judge's questions. In spite of agency efforts, parents, other parties, and key witnesses may be unavailable to attend adjudicatory proceedings. The court should examine agency efforts to identify and locate parties and key witnesses, and problems with the service of process. If the adjudication is contested, additional witnesses deemed necessary by the parties must be present. The court has a vital role in ensuring the identification and presence of all parties at adjudication.

PERSONS WHO SHOULD BE PRESENT AT THE ADJUDICATION HEARING:

The adjudication hearing requires the attendance of many if not most of the same persons required for attendance at the preliminary protective hearing.

Among those who should be present are:

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
- Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child and/or GAL/ CASA
- The child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child (42 U.S.C. § 671(1)(29))
 - Relatives with legal standing or other custodial adults, including adult half-siblings

- Paternal **and** maternal relatives
- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/ tribal liaison; ICWA-qualified expert witness
- Other witnesses
- Court reporter
- Court security

PERSONS WHOSE PRESENCE MAY ALSO BE NEEDED AT THE ADJUDICATION HEARING ARE:

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- Law enforcement officers
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/ available, substance abuse coach, domestic violence advocate for parent
- Education liaison/school representative
- Education surrogate parent if appropriate
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services

E. Preparing for the Hearing

The judge should review all written agreements, stipulations, and amended petitions filed prior to the hearing to determine if there are any issues concerning the legal sufficiency of the factual allegations admitted or agreed to. If the case will proceed to disposition at the adjudication hearing, the judge should consider what services would address the safety risks presented by the admitted facts.

If the case will proceed to trial, either at the preliminary protective hearing or at a pre-trial hearing, the judge should set the trial date and enter orders requiring the timely identification of witnesses and exhibits. Prior to the adjudication hearing, the judge should review the court file to determine whether all named parties or guardians have been served, whether they are represented by counsel and whether witnesses have been subpoenaed. The judge should also determine whether the time set for trial is sufficient.

- Review petition.
- Review relevant documents.
- Who should be present at the hearing?
- Are there any related cases in juvenile or other courts?
- Review reflections on decision-making process that protect against bias.
(See Adjudication benchcard.)

F. Conducting the Adjudication Hearing

Adjudication may take the form of an admission, either to the original petition or one amended by agreement. In some jurisdictions, the parent or guardian will consent to the adjudication or enter a plea of “no contest” without admitting the facts in the petition. Before accepting an admission or other non-trial resolution, the court should ensure that all parties have a copy of the written stipulation or amended petition and determine that the parties understand the agreement and the consequences of adjudication by agreement. **(See the sample colloquy at the end of this chapter.)** If the case is subject to ICWA, a different burden of proof applies and additional findings must be made; the judge should review the ICWA checklist.³

If the case will proceed to trial, either at the preliminary protective hearing or at a pre-trial hearing, the judge should set the trial date and enter orders requiring the timely identification of witnesses and exhibits. Prior to the adjudication hearing, the judge should review the court file to determine whether all named parents or guardians have been served, whether they are represented by counsel and whether witnesses have been subpoenaed. The judge should also determine whether the time set for trial is sufficient.

If the case is contested, the trial should be conducted as any other civil trial. Formal legal process must be used to notify parties of the proceedings and compel the attendance of witnesses. The agency's inability to identify, locate, or serve absent or unknown parents prior to the adjudication hearing should not prevent the trial from proceeding as to the parties who are properly before the court. The agency should be required to provide diligent search information to the court about any party who is missing at the hearing.



OPENING THE HEARING

- Call the case.
- Identify the people in the courtroom.
- Explain the type and purpose of the hearing.
- Swear in the parties, participants, and relatives.

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS

- **Identification of parents and/or guardians**
 - If the identity and location of all parents and/or guardians have not yet been determined, what diligent search efforts have been made, and are they sufficient?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
 - Has paternity of all children been legally established? If so, how? Conduct a paternity inquiry if still in dispute. If a parent has not legally established paternity, DNA testing should be ordered after proper inquiry.

NOTICE

- If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
- Verify that the agency used due diligence to notify all relatives within 30 days of removal as required by the Fostering Connections Act.
- Verify that the agency used due diligence to provide notice to all parents of a sibling of a child, where such parent has legal custody of the child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

REPRESENTATION

- If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.
- Appoint attorney and/or GAL to represent the child if one has not yet been appointed.

G. Key Inquiries, Analyses, and Decisions the Court Should Make at the Adjudication Hearing

The principal decisions that the court must make at adjudication are: 1) Which allegations of the petition have been proved or admitted, if any; and 2) Whether there is a legal basis for continued court and agency intervention. The court's findings entered at or during the adjudication hearing serve as the foundation for subsequent permanency planning. The court findings identify the issues of concern that must be corrected to allow the child to be safely returned home or safely maintained in the home. The findings not only provide direction to the agency for devising a service plan for the family, but provide a starting point for determining whether the parents have adequately responded to the issues that led to court intervention. Because adjudicatory findings are crucial to case planning, the court must be careful to address all factual allegations set forth in the petition or complaint.

Key Findings and Decisions

If the adjudication proceeds by admission or consent, is the parent knowingly, intelligently, and voluntarily waiving his/her trial rights?

Given the constitutional protection afforded to parental rights, and because abuse and neglect proceedings could lead to the termination of those rights, the court should ensure that any waivers of procedural or substantive protections afforded to parents are thoroughly reviewed. A substance-abusing parent may be under the influence at the hearing. Other parents may be adversely affected by mental illness or may not have the intellectual capacity to understand what is taking place. The judge may need to consider appointment of a Guardian *ad litem* for the parent. Even if the parent is able to make reasoned decisions, he or she may not fully understand the legal process or the rights he or she are proposing to waive. The judge should also establish on the record the steps that counsel has taken to advise the client. Following the sample plain language colloquy included at the end of this chapter, the judge should make careful and detailed inquiries to determine whether the parent fully understands his or her rights, has the capacity to waive them, and appreciates the direct and potential consequences of such a waiver, which include not only the immediate loss of custody but also the potential loss of parental rights should the parent be unable or unwilling to successfully engage in services.

Have specific factual allegations been proven as to each parent or guardian by the applicable burden of proof? Are the proven allegations legally sufficient to support the adjudication?

Whether the adjudication results from an agreement or a trial, it is critical that the petition, the record, and the court's findings clearly and accurately state and support specific reasons for the need for agency intervention. Moreover, there must be sufficient supported grounds as to each parent. If the parent consents to adjudication or pleads "no contest," the record should contain evidence, in the form of testimony or admitted exhibits, that supports the allegations against that parent. General allegations of abuse, neglect, or dependency, even if admitted, are likely to be legally insufficient without supporting facts. Without a clear factual basis for the adjudication, the court lacks basis and ability to effectively determine appropriate interventions at disposition or to assess whether the safety risk to the child has been eliminated.

Not only must the allegations be proven, they must also be legally sufficient. State laws define the grounds for adjudication and set the burden of proof. If the agency has failed to prove the allegations, or the proven allegations are legally insufficient, the judge must dismiss the petition and order the return of the child to the custody of the parents or legal guardians. Many states require proven allegations as to both parents to support the adjudication. If the proven allegations pertain to only one parent, or the agency elects to

proceed as to only one parent, the judge must determine whether the court has jurisdiction.

Is there a legal basis for continued court and agency intervention?

The court must also determine whether the responsible public agency has made reasonable efforts to prevent the removal of the child.

ICWA Considerations

Indian children cannot be placed in foster care under the same standards as non-Indian children. Although ICWA adds requirements to most abuse and neglect hearings, particular attention should be paid to its provisions at the adjudication so that the court's exercise of jurisdiction will be lawful. ICWA imposes specific procedural safeguards that the court must follow if the adjudication proceeds by agreement, including a consent executed in writing and a certification that the Indian parent(s)' rights were fully explained in a language the parents understood. In all cases, **the agency must present clear and convincing evidence, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**⁴ The court must also find that the agency made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful.⁵ The judge should carefully review the requirements of ICWA before proceeding with adjudication. For more information, see the Federal Law Chapter; also see the ICWA Checklist and accompanying technical assistance bulletin.⁶

Additional Decisions at the Adjudication Hearing

If the child is to be in foster care prior to disposition, the judge also may need to set terms for family time, support, and other intra-family communication pending disposition. This may include parent-child, sibling, and relative visits. Family time and other communication is critical to preserving and maintaining family relationships during the period of separation. Terms of parenting time also must protect the safety of the child. If disposition does not occur immediately after the adjudication, the court should also set expectations for parties and advocates regarding the information to be provided to the court at disposition and each subsequent hearing by inquiring about any trauma experienced by the child and the child's physical, dental, mental, emotional, and developmental health, education, and general well-being.⁷

H. The Court’s Written Findings of Fact and Conclusions of Law at the Adjudication Hearing

As explained previously in the section on admissions and stipulations, it is important that the adjudicatory findings accurately reflect the reasons for state intervention. The findings must be specific so that, at a later time, there will be a defensible basis for returning the child home when the issues have been ameliorated or for continuing the out-of-home placement if the parents have not improved. It is also imperative that all parties understand the court’s findings and how they relate to subsequent case planning.



DETERMINE WHETHER:

- The agency is not required to make reasonable efforts to prevent the removal, to eliminate continued removal of the child from the home, or make it possible for the child to return home (42 U.S.C. § 671(a)(15)(D)).
- It would be contrary to the welfare and best interests of the child to continue in the home (42 U.S.C. § 672, 472(1)).

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: If disposition does not occur immediately after the adjudication, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at the disposition and each subsequent hearing by inquiring about:

Trauma:

- Has trauma has played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any resulting trauma? (P.L. 113-183)

Refer to the PPH Chapter for more detail.

I. Concluding the Adjudication Hearing

A timely, careful, and complete adjudication hearing can benefit each child and family before the court by:

- Resolving disputed issues of fact in a timely manner at the adjudication hearing and addressing all the allegations set forth in the petition. The court avoids unnecessary delays that arise when the parents and agency cannot agree on what problems need to be resolved for reunification to occur or for the children to remain safely at home.
- Making a timely decision as to whether the agency is able to prove its case at the adjudication hearing. The court reduces the time that children may unnecessarily spend in foster care in those cases where the agency’s case is ultimately dismissed.

Completion of the adjudication allows the parties to move from an adversarial posture to one of cooperation and collaboration. Given the abbreviated time to work toward reunification, it is crucial that the judge encourage this transition. Whether or not the disposition is conducted during this hearing, the judge can begin a discussion with the case manager and the parents about the safety issues in the case and how they will be addressed. The judge should inquire – and include in the order – how the agency is fulfilling its responsibility to include the parents in the development and implementation of the case plan. The court must ensure that the agency is providing family time appropriate to the age and needs of the child. If the child is not placed with a relative, the judge should inquire about the agency’s efforts to find a family placement and encourage the parents to identify relatives who can participate in the case, as a placement resource or support person.

If the disposition hearing will not occur within a short time after the adjudication hearing, the judge may need to make additional temporary decisions at the conclusion of adjudication.

For example, the judge may need to:

- determine where the child is to be placed prior to the disposition hearing;
- order further testing or evaluation of the child or parents in preparation for the disposition hearing;
- make sure the agency is, in preparation for disposition, taking prompt steps to evaluate relatives as possible caretakers, including relatives from outside the area;
- order the alleged perpetrator to stay out of the family home and have no contact with the child; and
- direct the agency to continue its efforts to notify non-custodial parents including unwed fathers.



Courts should set an expectation that the dispositional hearing will immediately follow the adjudication, ideally on the same day. This should not occur, however, unless the agency, with the parents' involvement, has prepared and filed a case plan,⁸ has filed any disposition reports required by state law, and the judge has all the information needed to enter appropriate dispositional orders. See the Disposition Hearing Chapter and Disposition Benchcard.

Courts should set an expectation that the disposition hearing will immediately follow the adjudication hearing, ideally on the same day.

SAMPLE COLLOQUY: ACCEPTING ADMISSIONS⁹

Address the parents:

- I understand you are prepared to admit/consent to a petition filed with the court.
- Have you read the petition? Have you had an opportunity to review the petition with your attorney?
- Do you understand the agreement?

Before I can let you admit to anything, I need to be certain that you understand your legal rights and the possible consequences of your admission.

- You have a right to have a trial on the allegations in the petition. At the trial you have a right to be represented by an attorney and you have a right to cross-examine the witnesses called to testify.
- You also have a right to call witnesses on your own behalf. The court will issue a court order called a subpoena that orders your witnesses to come to court if, for any reason, they do not want to appear voluntarily.
- You have a right to make the state prove the allegations in the petition. The state is required to prove the allegations by a preponderance of the evidence. That means they must prove that it is more likely than not that the allegations are true.
- Those are your trial rights. Do you understand them?

There are certain consequences that attach to your admission/consent.

- Do you understand that by admitting/consenting to the allegations that there will not be a trial?
- Do you understand that I will find the allegations to be true? The court can make the same orders it could make if you went to trial and the allegations had been proven.
- I will order that your children be adjudicated dependent minors and I will place their legal care custody, and control with the child welfare agency. I now decide where your children will live and what services they require.
- I will continue the temporary order placing your children with _____ until we have our dispositional hearing.
- You will now be expected to participate in services and comply with a case plan. Failure to comply with your case plan may be considered if there is a termination of parental rights proceeding at a later date.
- You have waived your right to an appeal on whether the allegations of the petition are true.

SAMPLE COLLOQUY: ACCEPTING ADMISSIONS⁹ CONT.

- Are you today under the influence of any substance that prevents you from understanding what we are talking about?
- Has anyone threatened you in any way to get you to admit/consent?
- Has anyone promised you anything to get you to admit/consent? Did anyone tell you that if you admit these allegations that your children will return more quickly or that you can get started in services more quickly?
- Do you have any questions at all about what you are doing today?

- Do you wish to admit or consent to the petition? Do you believe that these allegations are true? (If consent, do you understand that the allegations will be considered to be true?)

- The court finds that the parent has knowingly, intelligently, and voluntarily waived his/her right to trial and the connected rights thereto, that he/she has been advised of the consequences of his/her admission/consent and freely admits.
- Based on the admission/consent, the court finds that the allegations in the petition are true by a preponderance of the evidence (or clear and convincing evidence).

It is therefore ordered that the children are adjudicated dependent minors placing their legal care, custody, and control with the child welfare agency.

If the disposition hearing is to be held on a separate date:

- The court will extend the temporary order placing the children with _____ until the dispositional hearing.

IV. THE ADJUDICATION HEARING ENDNOTES

¹ 45 C.F.R. § 1356.21(b)(1).

² State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

³ National Council of Juvenile and Family Court Judges. (2003). *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. NCJFCJ, Reno, NV.

⁴ 25 U.S.C. § 1912(e).

⁵ 25 U.S.C. § 1912 (d).

⁶ *Supra* note 2.

⁷ See the section on “setting the stage for subsequent hearings and achieving positive outcomes for children and families” in the PPH Chapter, as well as the General Issues Chapter for details about this inquiry.

⁸ The agency must develop a case plan no later than 60 days after the child’s removal from the home (45 C.F.R. § 1356.21(g)(2)).

⁹ This colloquy is designed for cases where the parent or guardian admits the allegations of the petition as originally filed or as amended by agreement. Changes may be needed in jurisdictions that accept consent to adjudication or pleas of “no contest.”



ADJUDICATION HEARING
BENCHCARD



Adjudication Hearing Benchmark

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the adjudication hearing²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives

The adjudication hearing should be held within 60 days from removal at the latest in order to comply with the ASFA goal of providing an expedited process to find children in temporary placements permanent homes. Continuances or extensions should be permitted only in the most extraordinary circumstances.

The Reasonable Efforts to Prevent Removal Finding must be:

- made within 60 days of the child’s removal (45 C.F.R. § 1356.21(b)(1));
- explicitly documented by reference to facts (45 C.F.R. § 1356.21(d)); and
- made on a case-by-case basis (45 C.F.R. § 1356.21(d)).

- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Court reporter
- Court security

Persons whose presence may also be needed at the adjudication hearing:

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- Law enforcement officers
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Education liaison/school representative
- Education surrogate parent if appropriate
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services

Review relevant documents.

REVIEW THE PETITION.³

- A sworn petition or complaint must be filed and served/provided to the parties sufficiently in advance of the hearing.
- The petition must be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- The petition must include allegations specific to each legal parent or legal guardian if appropriate.
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child’s safety.

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE ADJUDICATION HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.
- Swear in the parties, participants, and relatives.

Due Process and Due Diligence Considerations

- **IDENTIFICATION OF PARENTS AND/OR GUARDIANS**
 - Who are the child's parents and/or guardians?
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made for all parents and/or guardians? Are they sufficient?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
 - Has paternity of all children been legally established? If so, how?
 - Conduct a paternity inquiry if still in dispute.
 - If a parent has not legally established paternity, DNA testing should be ordered after proper inquiry.

- **NOTICE**

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
- Was the notice in a language and form understandable to the parents/guardians or foster parents?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal as required by the Fostering Connections Act (H.R. 6893/P.L. 110-351 § 103).
 - Verify that relatives who requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).
- Has the agency exercised due diligence to provide notice to all parents of a sibling of the child, where such parent has legal custody of the child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

- **REPRESENTATION**

- Advise any unrepresented party of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of the right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
 - Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.

- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child’s position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?

- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?

- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴

Engage parents and any children or relatives present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE ADJUDICATION HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

Inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. §§ 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

- Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Checklist.⁵
- If ICWA applies, inquire whether:
 - The party seeking the adjudication has notified the parent or Indian custodian and the Indian child's tribe of the hearing by registered mail with return receipt requested (25 U.S.C. § 1912).
 - There is a qualified expert witness who will be providing testimony about the imminent risk of serious physical or emotional harm to the child if left in the custody of the parents (25 U.S.C. § 1912(e)).
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶

Key decisions and findings at the adjudication hearing

- **BEFORE ADJUDICATION IN ANY CASE**
 - Are there specific allegations as to each parent?
 - Which allegations have been proven by the applicable burden of proof?⁷
 - Are the allegations, as proven or admitted, legally sufficient to support a finding of abuse, neglect, or dependency? If not, dismiss the dependency and order custody of the child returned to the parents or legal guardians.
 - If there are no allegations or the state is not proceeding as to one or more parents, determine whether the court has statutory authority to take jurisdiction.⁸
- **IS THE PARENT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVING HIS/HER TRIAL RIGHTS? [See sample colloquy]**
 - Does the parent have the capacity to enter an admission?
 - Has the parent been advised by counsel of, and does he/she understand, the rights waived and direct and potential short- and long-term consequences of an admission?
 - Is the admission or consent voluntary?

- Do the pleadings outline specifically the basis for state intervention in a manner that will support specific services rationally related to the jurisdictional findings the court will be asked to make?
- Have the pleadings been amended to reflect the agreement of the parties?
- Is testimony or other evidence necessary to support an admission or consent?
- Do the parents have any questions for the judge regarding the stipulation?

• **IN ICWA CASES, DETERMINE: [See ICWA Adjudication Checklist for more detail]⁹**

- Whether the child is an Indian child under ICWA (25 U.S.C. § 1903(4));
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court (25 U.S.C. § 1911(a));
- Whether there is evidence, including the **testimony of a qualified expert witness**, that proves by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e));
- Whether the agency made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful? (25 U.S.C. § 1912(d))

KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATION HEARING:

- **Which allegations of the petition have been proved or admitted, if any;**
- **Whether there is a legal basis for continued court and agency intervention.**

The court must make specific findings as to the basis of the finding of abuse and/or neglect.

Determine whether:

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely (42 U.S.C. § 671(a)(15)(D)) ;
- It would be contrary to the welfare and best interests of the child to continue in the home (42 U.S.C. § 672, 472(1)).

- **IN ICWA CASES, CERTIFY THAT:**

[See ICWA Adjudication Checklist for more detail]¹⁰

- The consent to foster placement was executed in writing and filed in court;
- The consequences of the consent were fully explained in detail in English or in a language that the parent or Indian custodian understood;
- The consequences were fully understood by the parent or Indian custodian (25 U.S.C. § 1913).

- **ADDITIONAL FINDINGS AND ORDERS IF THE DISPOSITION HEARING IS NOT HEARD IMMEDIATELY AFTER THE ADJUDICATION HEARING**

If the disposition hearing will not occur immediately after the adjudication hearing, the judge will need to make temporary decisions at the conclusion of the adjudication such as:

- Where will the child be placed prior to the disposition hearing?
- Is the temporary order placing each child extended until the disposition hearing?
- Are there any other orders that the court deems appropriate (e.g., evaluations, services, family time, etc.)?
 - Order further testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing, and ensure that all assessments or evaluations are culturally appropriate.
 - Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family as caretakers (in ICWA cases, if no family member is available, ensure other tribal members or other Indian families are being identified as possible caretakers).
 - Direct the agency to continue its efforts to notify non-custodial parents, including an unwed father whose paternity has been acknowledged or established.
 - Set terms for the type, frequency, and duration of family time, support, and other intra-family communication, including parent-child, sibling, and relative visits.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: If disposition does not occur immediately after the adjudication, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at the disposition and each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support the child’s needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any issues resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

The court's written findings of fact and conclusions of law at the adjudication hearing should:

- accurately reflect the reasons for state intervention;
- provide sufficiently detailed information to justify agency and court choices for treatment and services;
- provide a defensible basis for refusing to return a child home or terminating parental rights if parents fail to improve;
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning; and
- set date and time of next hearing, if needed.

CONCLUDING THE ADJUDICATION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes.
 - **If the disposition hearing is not held immediately after adjudication**, set disposition within 30 days and identify tasks to be accomplished, including the filing of the disposition report/case plan if not previously filed with the court.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of adjudication orders immediately following the hearing.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences of failure to appear at future court events.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

If the child remains in an out-of-home placement, the court should set the review and permanency hearings at the adjudication hearing to emphasize the importance of the legal timeframes and that the clock is ticking.

IV. ADJUDICATION HEARING BENCHCARD ENDNOTES

¹ The adjudication hearing, which may also be known as the jurisdictional or fact-finding hearing, is the hearing to determine whether allegations in the petition are substantiated by the evidence.

² State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

³ State and federal laws determine what must be contained in the petition.

⁴ See Federal Law Chapter in the GUIDELINES.

⁵ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the Adjudication Hearing) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁶ *Ibid.*

⁷ State law defines child abuse, neglect, abandonment, and dependency.

⁸ Most state statutes require allegations as to both parents in order to adjudicate the child dependent.

⁹ *Supra* note 5.

¹⁰ *Ibid.*



V. The Disposition Hearing



V. THE DISPOSITION HEARING

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V. The Disposition Hearing

A. Introduction

Disposition is the stage of the dependency court process that follows the adjudication of abuse or neglect. At disposition, the court determines who shall have custody and control of the child and how the case will proceed to achieve reunification or some other permanency plan for the child. Depending upon the powers and responsibilities of the court under state law, the court may set additional conditions concerning the child's placement and may issue specific directions to the parties to ensure the safety and well-being of the child.

At the disposition hearing, the judge must review the agency's case plan and revisit the temporary custody and other orders entered at the preliminary protective hearing. At a minimum, the judge must determine where the child will be placed while in the agency's legal custody.

ASFA requires that the agency develop a case plan within 60 days of the child's removal from the home.¹ Courts should work closely with the agency to ensure the case plan provides all the information the court needs so that the agency does not need to submit additional reports. The agency may also submit the results of parental evaluations, the child's medical or educational records, and other documents. State law or court rules typically permit the judge to consider such reports and documents prior to disposition if disclosed in a timely manner to all parties. The judge should carefully review all reports and case plans to determine whether the proposed services address all identified safety issues, are accessible, and are culturally and linguistically appropriate. The judge should also ensure that the case plan complies with the requirements of ASFA. (See textbox in this chapter on ASFA Case Plans.)

The judge should review the case plan, determine the appropriateness of the permanency plan and evaluate whether the agency is making reasonable efforts to achieve that plan.² Assuming the goal is reunification, and considering the safety risks identified, the judge must decide whether the services the agency proposes to provide will address the safety risks and meet the needs of the parents. Finally, the judge should ensure that the agency has fully assessed the child and is fulfilling its obligation to meet the child's needs, including physical, mental, emotional, and developmental health, education, and general well-being.³

When the court decides to place a child outside the home, additional steps are needed to minimize the harm of separation. The court should set terms for appropriate family time and parent-child communication. The

court may need to specify necessary services to help the child deal with the trauma of separation as well as any other special needs. When sibling separation is unavoidable, visitation and communication among siblings must be addressed during the disposition hearing.

Decisions at disposition should help the agency and parents develop an appropriate plan to address the specific reasons that the court took jurisdiction. Disposition planning should be confined to those issues upon which the court took jurisdiction. Courts should not approve case plans that go beyond the court’s jurisdictional findings. If there are other issues of concern that require services, the agency should be

Case plans should be rationally related to the jurisdictional findings of the court.

required to file and prove those allegations. If no allegations are filed related to a non-custodial legal parent, the court should return the child to that parent as long as no safety threat can be proven.

It is of paramount importance that the judge ensures parental involvement in the case planning process. Parents should have an opportunity to object to the case plan and have their objections heard by

the judge or documented in writing with the assistance of counsel. The court should accept dispositional plans that are proposed by the parents as long as they protect child safety and ensure permanency in a timely fashion.

Children should be involved in their own case planning when appropriate. Pursuant to the Preventing Sex Trafficking and Strengthening Families Act of 2014, every child in care, age 14 and older, should be actively involved in his case planning.⁴ In addition, the child may select up to two individuals (excluding those normally on his case planning team, his foster parent, or caseworker) to be involved in developing the case plan.⁵ Agencies may reject the child’s selections only if the person would not be acting in the child’s best interests. Under the Act, one of the child’s selections may also be designated as the child’s “chief advisor,” entrusted under the Act to help apply the “reasonable and prudent parent” child “normalcy” standard (e.g., facilitating and supporting the child’s involvement in social, extracurricular, enrichment, and cultural activities).⁶

B. Purpose and Timing of the Disposition Hearing

Clear and thorough disposition orders set the framework for future review hearings. Clear and thorough disposition orders provide a roadmap for all parties to understand the tasks that need to be accomplished and the criteria the judge will use to determine if safety risks have been remediated so that the child may be returned to the parents. (See the discussion on disposition and aggravated circumstances in this chapter.)

When the issues to be resolved are clearly described, appropriate services are identified, and appropriate

objectives are chosen, the court is able to establish a clear focus for subsequent review hearings. Federal law requires that the agency specify a date at which the child will leave care. This date needs to be realistic so that parents have an idea of the duration of services. The judge should ensure that case plans do not simply extend the date once every six months for a six-month period of time.⁷ In some cases, it will be clear that reunification is not an option and ASFA mandates that a different path to permanency be taken.

Disposition should occur immediately following adjudication. Courts should ensure rules are in place to provide dispositional reports to all parties with adequate time for parties to prepare their responses. Often a decision on disposition is necessary before significant case planning can begin. When children are in emergency placement, it is imperative that a careful decision on placement be made as soon as possible so that children do not spend unnecessary time away from their homes.

If the parties agree about the need for agency intervention from the outset of the case, enough work may have been done to allow for a combined adjudication and disposition at the same hearing. On the other hand, if the adjudication is contested and proceeds through trial, it is appropriate to hold a separate disposition hearing to allow the parties an opportunity to complete assessments and develop a case plan after emotions have ebbed. While the parents may be focused solely on the child's placement, the court must place equal if not greater emphasis on developing and implementing a realistic plan to eliminate safety risks, enhance child well-being, and achieve reunification. It may be necessary to gather records and complete assessments before this planning can occur, thus warranting a brief delay in holding the disposition hearing. This should not prevent the agency from initiating other services that don't require such preparatory work.

Often a decision on disposition is necessary before significant case planning can begin.

Agreements by the Parties

When parties admit to the allegations or stipulate to a set of facts, they often simultaneously submit a stipulated dispositional order. When a combined stipulation of adjudication and disposition is proposed, the judge should take special care that the stipulation is complete and well considered. The stipulated disposition should address only the services that are rationally related to the jurisdictional findings of the court. Whenever disposition is stipulated, the court should ensure the proposed dispositional issues have been thoroughly considered by all parties, especially the parents. When a proposed dispositional agreement is not complete, the parties should be required to work out the issues or to present them to the court for resolution.

The degree of detail to be included in the stipulated disposition should be consistent with the requirements concerning Findings of Fact and Conclusions of Law for contested dispositions. The character of the

dispositional findings and orders may vary according to the constitutional and statutory powers of the court. The specificity of dispositional findings and orders also may depend upon the amount of time which has elapsed since the state first became involved in the case.

C. Case Management Before the Disposition Hearing

Who Should Be Present?⁸

Witnesses other than those who were needed at the adjudication hearing may be required to address dispositional issues. Because the disposition hearing determines whether the state has made reasonable efforts to avoid the need for placement, to provide services to safely return the child home, and what services are needed, service providers may need to testify concerning factual disputes. The disposition hearing also focuses on the future safety, permanency, and well-being of the child. As a result, it is often helpful to have persons present who may be called upon to care for the child or work with the family. In addition to the caregivers or foster parents, these individuals might include a homemaker public health official, teachers, mental health professionals, other service providers, close family friends, responsible relatives, and personnel from any government agency in contact with the child or family.

Witnesses can provide the court with information on particular aspects of family functioning, and may help identify additional resources available to assist the child or family. Judges should instruct the agency to bring appropriate persons to the disposition hearing, issuing subpoenas if necessary. If necessary parties and key witnesses fail to appear, the hearing should be rescheduled at the earliest possible time and incentives identified to ensure complete participation at the rescheduled hearing.

As previously mentioned, it is the policy of the National Council of Juvenile and Family Court Judges that children of all ages should be present in court and attend each hearing unless the judge decides it is not safe or appropriate.⁹ Including children in all segments of dependency proceedings helps to ensure they have a voice in the services that are provided and ultimately in the aspects of the case that impacts their lives. Having the child physically present in court gives the judge an opportunity to observe and validate the child's well-being and to ensure that the child's needs are being identified and appropriately treated. Direct observation of and engagement with the child provides the judge with additional information necessary for making appropriate decisions about the child's placement and recommendations for services.

Furthermore, to help guide foster youth toward successful adulthood, the Preventing Sex Trafficking and Strengthening Families Act of 2014 requires that the case plan for all children age 14 and older includes a "rights document" that specifically addresses their rights to "education, health, visitation, and *court participation*."¹⁰ The Act also requires that children age 14 and older be involved in their own case planning.

Having the child present during the disposition hearing affords the court an excellent opportunity to directly engage the child in case planning efforts.

Preparing for the Hearing

REVIEW OF REPORTS TO THE COURT

In most states, rules regarding the competence of evidence apply in adjudication hearings but not in disposition hearings. As a result, written reports that are inadmissible as hearsay generally cannot be considered by the court at the adjudicatory phase. At the disposition hearing, however, written reports generally can be considered by the court. These reports might include reports submitted by a GAL or CASA appointed for the child, or psychological, medical, developmental, educational, or other reports or evaluations ordered at the adjudicatory stage.

Courts should consider accepting the federally required case plan as the dispositional report.

Federal law requires the plan be developed within 60 days. Therefore, the timing for plan development should be consistent with the scheduling of the dispositional hearing. Courts should make every effort to eliminate duplicative paperwork. If the submitted case plan is insufficient for planning purposes, the court should work with the agency to ensure the case plan template contains all of the elements needed to effectuate disposition. The submission of these reports prior to the disposition hearing can serve several purposes. The process of report writing can tighten a social service agency's analysis of a case. Submission of written reports by agency workers and other specialists can assist the parties and their counsel to think about and contribute to the dispositional decision.

- Review relevant documents
 - Case plan/disposition report
 - CASA or GAL report
- Who must or should be present at the hearing?
- Are there any related cases in juvenile or other courts?
- Review reflections on decision-making process that protect against bias.
(See Disposition Hearing Benchcard.)

The court should set rules or develop forms regarding both the timing and content of the case plan/disposition reports. Strict deadlines will ensure the report is submitted to the parties far enough in advance of the hearing to provide an opportunity to investigate statements and propose alternatives. Judges should ensure that attorneys have reviewed reports with their clients prior to the dispositional hearing. Court rules and forms for case plans/disposition reports should be carefully designed to assist judges in preparing written findings of fact and conclusions of law. The form used for the agency report/case plan should be

AMONG THOSE WHO SHOULD BE PRESENT AT THE DISPOSITION HEARING:

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- Child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child (42 U.S.C. 671 (a)(29)); relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; Paternal and maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of that sibling (P.L. 113-183).
- If ICWA applies: ICWA-qualified expert witness; tribal representative/tribal liaison
- Treatment and/or service providers
- Parent partners, parent mentors (if assigned/available), substance abuse coach, DV advocate
- Cultural leaders, cultural liaisons, religious leaders
- Education liaison/school representative
- Education surrogate parent if appropriate
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

precisely worded to address the exact issues. This allows the judge, when appropriate, to reference the agency plan.

It is important that the agency case plan/disposition report be distributed to the parties well in advance of the disposition hearing, allowing the parties time to consider agency proposals for disposition, develop alternatives, call witnesses, and subpoena and cross-examine persons who provided information relied

The court should set rules or develop forms regarding both the timing and content of case plan/agency disposition reports.

upon in the agency's report. Early report submission can improve the parties' understanding of dispositional issues and enable them to more effectively contribute to the dispositional decision, while also enhancing the court's deliberations and decisions.

The judge may also have a report from a CASA or GAL. The report should be provided to all parties and should provide additional information about the child's placement and well-being, and may include recommendations to assist the judge when making decisions about placement and services. Through their investigation, the CASA or GAL may also identify relatives and other significant adults who may be potential placements or otherwise play a role in the child's life.

THE CASE PLAN¹¹

Parents should be involved in the development of the case plan. It is important for the court to inquire as to the nature and extent of the parents' involvement in preparing the plan. The court should also inquire about the extent of the child's involvement in case planning efforts. Federal law requires that children age 14 and older be actively involved in their own case planning (P.L. 113-183). Specifically, the case plan must be developed in consultation with the child, and at the option of the child, two members of the case planning team, who are not the caseworker or foster parent can be selected by the child to be involved in case plan development.¹²

In order to achieve the timely permanency required by ASFA, it is necessary to develop, communicate, and work simultaneously on two types of placements in the event that reunification is not possible. **Concurrent planning** is the process of working toward reunification while at the same time establishing and working toward an alternative or contingency permanent plan. Concurrent case planning is a family-centered practice, bringing together the caregiver and biological family to improve the child's safety and well-being. Caregivers can offer support and parenting assistance while the

Parents and children of an appropriate age should be involved in the development of the case plan. It is important for the court to inquire as to the nature and extent of parental and child involvement in preparing the plan.

biological family works through the case plan tasks with needed services. As a team, parents and caregivers can focus on the best interests of the child. **The court should inquire about the concurrent plan in each case and ensure that concurrent planning efforts are underway to support the safety and well-being of children and families while promoting early permanency decisions for children.**

For more detail on the elements to be included in case plans, judges should familiarize themselves with the ASFA case plan requirements and the case plan requirements as modified by P.L. 113-183 in the text boxes included later in this chapter.

When the agency recommends foster placement, an **affidavit of reasonable efforts** should be submitted. The following list includes some additional key elements of an affidavit of reasonable efforts:

- A description of agency efforts made to avoid the need for placement and allow the child to safely return home, and an explanation why they were not successful;
- An explanation why the child cannot safely return home today;
- Identification of relatives and friends who have been contacted about providing a home for the child;
- A description of the placement and where it is located, including an explanation outlining why the placement is the most appropriate, least restrictive, and most family-like setting for the child;
- Proposed arrangements for family time with parents and siblings including a clear explanation of the need for supervision, which the court should carefully evaluate;
- Placement of the child's siblings and, if they are to be apart, a clear explanation of why they had to be separated, along with a plan for family time;
- An appropriate permanency plan and concurrent plan with specific implementation steps outlined for each; and
- Proposed child support.



ASFA CASE PLAN REQUIREMENTS [42 U.S.C. 675]

(1) The term “case plan” means a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section.

(B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitating return of the child to his or her own safe home or the permanent placement of the child, and addressing the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(C) The health and education records of the child, including the most recent information available regarding—

(i) the names and addresses of the child’s health and educational providers; (ii) the child’s grade level performance; (iii) the child’s school record; (iv) a record of the child’s immunizations; (v) the child’s known medical problems; (vi) the child’s medications; and (vii) any other relevant health and education information concerning the child determined to be appropriate by the state agency.

(D) Where appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living. [See P.L. 113-183 – this age has been lowered to age 14 and older.]

(E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of state, regional, and national adoption exchanges including electronic exchange systems to facilitate orderly and timely in-state and interstate placements.

ASFA CASE PLAN REQUIREMENTS [42 U.S.C. 675] CONT.

(F) In the case of a child with respect to whom the permanency plan is placement with a relative and receipt of kinship guardianship assistance payments under section 473(d), a description of—

(i) the steps that the agency has taken to determine that it is not appropriate for the child to be returned home or adopted; (ii) the reasons for any separation of siblings during placement; (iii) the reasons why a permanent placement with a fit and willing relative through a kinship guardianship assistance arrangement is in the child's best interests; (iv) the ways in which the child meets the eligibility requirements for a kinship guardianship assistance payment; (v) the efforts the agency has made to discuss adoption by the child's relative foster parent as a more permanent alternative to legal guardianship and, in the case of a relative foster parent who has chosen not to pursue adoption, documentation of the reasons therefore; and (vi) the efforts made by the state agency to discuss with the child's parent or parents the kinship guardianship assistance arrangement, or the reasons why the efforts were not made.

(G) A plan for ensuring the educational stability of the child while in foster care, including—

(i) assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; and (ii) (I) an assurance that the state agency has coordinated with appropriate local educational agencies (as defined under section 9101 of the Elementary and Secondary Education Act of 1965) to ensure that the child remains in the school in which the child is enrolled at the time of each placement; or (II) if remaining in such school is not in the best interests of the child, assurances by the state agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school.

**PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES
ACT – MODIFICATIONS TO CASE PLAN REQUIREMENTS AND
MODIFICATIONS WITH IMPLICATIONS FOR CASE PLANS (P.L. 113-183)**

Adds new Title IV-E/IV-B case plan and case review system requirements for youth with a plan of APPLA and for children over the age of 14.

- Limits APPLA as a permanency plan for youth age 16 and older.
- For children age 14 and older, the case plan must:
 - document the child’s education, health, visitation, and court participation rights, the right to receive a credit report annually, and a signed acknowledgment that the child was provided these rights and that they were explained in an age-appropriate way;
 - be developed in consultation with the child, and at the option of the child, two members of the case planning team, who are not the caseworker or foster parent;
 - describe the services to help the youth transition to successful adulthood; and
 - must provide a copy of the child’s credit report annually and assistance in fixing any inaccuracies.
- Youth who are 18, or 19, 20, 21 as elected by the agency under section 475(8) of the Act, must be provided with their birth certificate, Social Security card, driver’s license or identification card, health insurance information, and medical records. Children who have been in foster care for less than six months are exempt.

Modifications to Title IV-E requirements related to the reasonable and prudent parent standard, developmentally appropriate activities for children in foster care, and facilitating long-lasting connections to caring adults.

- Caregivers and foster parents must have the skills and knowledge necessary to apply the “reasonable and prudent parent standard.”
- Court should inquire what “normalcy” steps have been taken and encourage agency and

care provider to help the child participate in developmentally appropriate activities. (Such an inquiry is required at every permanency hearing.)

- Court should inquire and should be conscious of the need for foster children to have and maintain long-lasting connections to caring adults, even when they must move to another foster family or be placed under supervision of a new caseworker. The court should inquire about efforts to ensure at least one adult is consistently involved to provide support during the child's involvement in and transition from the child welfare system.

Modifications to Title IV-E requirements for identifying, reporting, and determining services to victims of sex trafficking.

- If a child has been found to be a victim of sex trafficking, or was at risk of becoming a victim of sex trafficking, the case plan should include specific appropriate services.
- If a child has been absent from foster care, an identification of the factors that led to the child's absence and the experiences the child had while absent (including whether the child is a sex trafficking victim), and how those factors and experiences will be addressed in the current or proposed placement.

Sources: P.L. 113-183; U.S. Department of Health and Human Services, Administration on Children, Youth and Families. (2014). Information Memorandum: Public Law 113-183, the Preventing Sex Trafficking and Strengthening Families Act; Davidson, Howard. (2015). *Congress passes new federal child welfare law – How can it be used by legal advocates?* Washington, DC: American Bar Association Center for Children and the Law.

D. Conducting the Disposition Hearing

The disposition hearing provides another important opportunity to engage the parents and facilitate a collaborative relationship among all participants in the process: case manager, family, child, foster parents, and service providers. The judge should encourage attendance and participation by family and friends – anyone who can play a supportive role to the parents and the child. If all parents have not been adjudicated, the judge should again inquire into the agency’s efforts to identify, locate, and serve absent parents and enlist the assistance of family members. The judge should continue to inquire as to the applicability of ICWA until a definitive determination can be made. (See ICWA Disposition Hearing Checklist¹³ and Federal Law Chapter.)

The judge must also thoroughly review the provisions of the case plan that pertain specifically to the child. Although much of the focus will be on the parents’ issues, needs, and the services offered to them, it is equally important that the child’s needs be identified and met. Particular attention should be paid to the child’s well-being, as many of the court’s decisions will have a significant impact on the child’s life. In addition to basic medical, dental, and behavioral health screenings, the child should be assessed for trauma resulting from abuse, neglect, and the removal from the home. The case plan should identify appropriate services to meet any needs identified as a result of these assessments. The case manager should have obtained the child’s health and educational records and provided them to the child’s foster or relative family placement.

Additionally, the case manager must ensure that the child is enrolled in and attending school.¹⁴ For children placed with caregivers or in foster care, case plans should outline what “normalcy” steps have been taken to ensure children will be able to participate in age- or developmentally-appropriate events, promoting their engagement in social, extracurricular, enrichment, cultural, and social activities.¹⁵

To the extent possible given the child’s age and individual circumstances, the judge should hear directly from the child, particularly about his or her desires as to placement and services. As a reminder, federal law requires that the case plan must be developed in consultation with children age 14 and older.¹⁶

OPENING THE HEARING

- Call the case.
- Identify the people in the courtroom.
 - Verify that the court has current addresses for parents/guardians. (Do not openly identify addresses when one or more parents are party to an injunction for protection against domestic violence.)
- Explain the type and purpose of the hearing
- State the number of days the child has been in care and the number of placements to date.

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS

Notice

- If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
 - Verify that the agency used due diligence to identify and notify all adult relatives within 30 days of removal and their options to participate in the child's care and placement (42 U.S.C. § 671(a)(29)).
 - Verify that the agency used due diligence to provide notice to all parents of a sibling of a child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
 - Verify that any relatives that requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

Representation

- If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.

UNDERSTANDING AND COMPETENCY

- Do the parents understand the allegations and the purpose of the hearing?
- Are there parental competency issues?

APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS

- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?
 - Verify timely compliance with all ICPC requirements.

ENGAGE PARENTS AND ANY CHILDREN OR RELATIVES PRESENT.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
- Explain the purpose of the hearing.
- Were you involved in any ADR process before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Should any other individuals be involved in the court matter? Who else is significant in the child's life?

E. Key Inquiries, Analyses, and Decisions the Court Should Make at the Disposition Hearing

The key decision in a disposition hearing is whether a child must be placed away from home. The court must decide whether there are ways of protecting the child in the home. If the child is to remain at home, the judge usually needs to impose specific conditions on both the parents and the agency. In considering conditions to be imposed on the agency, the judge should determine what agency supervision is needed for the child's protection and what services must be provided.

There are several issues of parental responsibility when a child is allowed to remain at home. The court needs to clarify the parents' obligations to cooperate with the child welfare agency. In many cases, the judge must also establish or modify the child support obligations and visitation arrangements of the non-custodial parent. In some cases, the judge may need to issue a no-contact order for the protection of the child and, when appropriate, a parent victim of domestic violence. At disposition, unresolved issues of paternity and child support must be addressed.

A number of critical issues must be considered when children are to be removed from home. Primarily, the court must determine custody of the child, either to a relative or other responsible adult with or without ongoing agency supervision. If the agency is to have custody of the child, the court may need to set specific



conditions concerning the child's placement, depending on whether the judge has this responsibility under state law. For example, the court may require the child to be placed in a certain type of home or facility, to be placed with siblings, or even to be placed in foster care with a specific relative or family friend if that person meets agency foster care licensing requirements.

Other important issues for the judge to determine when a child is placed away from home include parental and sibling family time and communication and the types of services to be provided to the family. In many states, a detailed case plan must be approved by the judge either during or soon after the disposition hearing.

All of the key decisions that were addressed at the preliminary protective hearing are revisited at the disposition hearing. In the course of evaluating these issues, the court must make formal legal decisions regarding the following:

What is the appropriate statutory disposition of the case and permanency plan for the child?

If a child is adjudicated abused or neglected, a permanency plan must immediately be developed to guide agency and court decision-making on the child's behalf. The court may allow the child to remain in the home of a parent, relative, or other responsible adult, subject to orders of protective supervision. This is the most appropriate disposition when the child can remain safely at home with the provision of special services or orders that help to ensure the child's safety. Regardless of the reason for removal and adjudication, the court must carefully consider the current safety threat in weighing whether the child should be returned home at this hearing. Courts should consider carefully – and explain fully – whether parents can provide a minimally adequate standard of care for their child. All issues in the case do not need to be resolved before a child can return home. A child should be returned home when he or she can be safe in the home with supportive services and protective supervision.

In cases involving domestic violence, when the victim parent has the capacity to protect the child, the court should view that parent as a partner in protection and ensure the abuser is held accountable for the behavior. Courts should not treat battered parents as perpetrators of abuse or neglect based solely on the fact that the parent was abused. Often, children can remain at home with the parent victim of domestic violence as long as safety plans are in place.

The court may grant an agency custody of a child for placement in foster care. This is an appropriate disposition when the child cannot yet be safely returned home, but reunification may occur at a future date after the parents have ameliorated the conditions that caused the removal of the child. Custody in an agency may also be an appropriate disposition when the plan is to work toward placement of the child with a relative who is unable to assume immediate custody.

The court may choose to award custody of a child to a relative or other responsible adult. This is an appropriate disposition when the long-term plan is for the child to be raised by that relative or other individual, and further agency involvement is not planned or warranted. In addition to the above, the court should always inquire whether there is a concurrent plan, and if so, what is included in the concurrent plan?

Where should the child be placed?

When a child, for safety reasons, cannot be placed at home or with a family member, the best alternative placement must be sought, pending reunification with a parent or completion of another long-term plan

for the child. The court must decide whether the type of placement proposed by the agency is the least restrictive, most family-like, and meets the needs of the child. If the case falls under ICWA, tribal placement preferences must be considered.¹⁷ Among factors affecting placement suitability are the potential for the foster family to facilitate timely family reunification; maintenance of sibling groups in a single placement; the primary language spoken by a child in need of placement; and geographic proximity to family members, schools, places of worship, and friends.

Courts should first seek to place children with relatives when placement with a parent is not possible. If a relative placement is unavailable, then a foster home placement should be considered. Residential or group home placements may be necessary for children unable to function in a family-like setting or when less disruptive placements are unavailable.

Is the agency-proposed case plan rationally related to the jurisdictional findings of the court?

By the time of the disposition hearing, the agency should be required to present a written case plan that addresses all aspects of the agency's involvement with the family. A key decision to make at the disposition hearing is whether to approve, disapprove, or modify the case plan proposed by the agency.

If approval of the case plan is a function assigned to the court by state law, the case plan should identify issues to be resolved before the court's involvement ends: changes in parental behavior that must be achieved; services to be provided to help achieve these changes; and the deadlines and respective responsibilities of each party, including the agency, in providing services and achieving case plan goals. The case plan should also identify any special needs of the child and the services to be provided to meet those needs. Finally, the case plan should set forth the terms and conditions of family time with parents and siblings.

The court should take time reviewing the plan to ensure that all parties understand the plan and what is expected of them. If the court is dissatisfied with the proposed plan, it can reject it and require the agency to submit a new plan.

If empowered to do so under state law, the court can order modifications of the proposed plan. For example, the court might modify the plan if parties dispute its terms and the evidence sustains their position. The court might determine that the plan fails to meet legal requirements. The court might modify the plan because services to be provided are not related to the jurisdictional findings of the court.

If the court enters an order requiring the agency to provide a placement or services not suggested by the agency, the court should make sure the order is clear and includes findings or conclusions setting forth the basis for the order. In particular, the court should set forth the legal or evidentiary basis for its decision. The

court should make sure that the agency ordered to provide the services had notice and the opportunity to be heard.

Has the agency made reasonable efforts to eliminate the need for placement or prevent the need for placement?¹⁸

Reasonable efforts should be addressed at every hearing. After examination of agency efforts at the preliminary protective hearing, and again at the adjudicatory hearing, the court must again at the disposition hearing examine and determine the reasonableness of agency efforts to rehabilitate and reunite the family. Changes in family functioning, membership, attitude, skills, finances, and other pertinent developments can be made between court hearings. Although statutory requirements differ from state to state, a judicial determination of reasonable efforts is good practice at each stage of the dependency process.

What, if any, child support should be ordered?

The court should order child support for children in foster care whenever parents are able to help cover the costs. Child support should be addressed in the disposition order unless the state sets child support determinations through a different forum for children in foster care. Regardless, the court should be aware of the child support obligations of each parent.

Child support obligations of parents with children in foster care should not be unduly burdensome. When setting support amounts, the court should consider any special financial costs arising from foster care placement. Such costs might include the maintenance of extra living space in preparation for the child's return home, services to facilitate the child's safe return home, transportation to family visits or to participate in services, and time off work to allow participation in services.

When will the case be reviewed?

After the disposition hearing is completed, the court will need to set additional hearings to review progress toward case plan goals and to make timely changes or corrections in the case plan. The next review hearing should be set at the conclusion of the disposition hearing, although parties to the case should be permitted to request a case review hearing at any time. If reviews are conducted by citizen or agency panels, the court should ensure these reviews are coordinated with court review. The court may request that the parties submit written progress reports at specified dates concerning case plan progress or other ongoing issues in the case.

F. The Court's Written Findings of Fact and Conclusions of Law at the Disposition Hearing

Detailed dispositional findings can help to structure the court's decision-making, establish a more complete record, and encourage more thorough consideration of the decision to place a child away from home. The burden of preparing findings can be reduced by ensuring that the agency's case plan covers the same issues as the court's findings. If the agency report is well prepared and supported, the court can repeat, modify, or refer to portions of the report in its findings.

When there has been a recommendation that a child be placed outside the home, judicial findings should address the feasibility of in-home services as an alternative to removal. When the court consistently makes findings concerning whether in-home services can or cannot prevent the need for placement, the agency is encouraged to be more diligent and thorough in exploring possible safe alternatives to removal. Determining whether available services can prevent the need for removal is also very closely related to the federally required judicial determination of reasonable efforts to prevent placement and, after placement, to make it possible for the child to safely return home.

The court's written Findings of Fact and Conclusions of Law at the disposition hearing should:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under state law.
- State the permanency and concurrent plans for the child (e.g., maintenance of the child in the home of a parent, reunification with a parent or relative, permanent placement of the child with a relative, placement of the child in a permanent adoptive home).
- When applicable, specify why continuation of the child in the home would be contrary to the child's welfare.
- Where charged with this responsibility under state law and based upon evidence before the court, approve, disapprove, or modify the agency's proposed case plan.
- Determine whether there is a plan for monitoring the implementation of the case plan and assuming the child's continued well-being.
- When placement or services are ordered that were not agreed upon by the parties, specify the basis upon which the order is made.



- State whether reasonable efforts have been made to prevent or eliminate the need for placement.
- Specify the terms of family time.
- Specify parental responsibilities for child support.
- Be written in easily understandable language so that parents and all parties fully understand the court's order.
- Be stated in open court on the record whenever possible.
- Set a date and time for the next hearing and provide this information to the parties at the conclusion of the hearing.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma has played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child will live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support his or her needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183).
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any resulting trauma? (P.L. 113-183)

Refer to the PPH Chapter for more detail.

G. Concluding the Disposition Hearing

A timely, careful, and complete disposition hearing can benefit each child and family before the court by:

- Providing the time necessary to develop a comprehensive case plan, which addresses all issues in need of resolution, carefully identifies the responsibilities of all parties, and incorporates the legitimate concerns and interests of all parties. The allocation of time and careful case planning increases the likelihood that the plan will be implemented successfully and in a timely manner.
- Devoting the time to develop a carefully drafted and comprehensive case plan, reducing the need to schedule subsequent hearings to make changes and corrections in the plan.
- By carefully devising a case plan and identifying appropriate services, the court may, at the conclusion of the disposition hearing, be able to return children to their parents' home with protective orders.
- Allocating enough time for the completion of careful and complete contested disposition hearings. Each court must determine the typical range in length of contested hearings and establish a calendar to accommodate such hearings without the need for routine postponements and delays. Courts must require that all necessary participants be present and on time. In determining the number of judges and organizing the court calendar, the court must calculate both the frequency of contested hearings and their average length.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review or permanency hearing, and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The first review should be set within three to six months of disposition. The case must be reviewed no less frequently than every six months (42 U.S.C. § 675(5)(B)).

If the court determined that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15) (E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii) and (iii)).

V. THE DISPOSITION HEARING

ENDNOTES

¹ 45 C.F.R. § 1356.21(g)(2).

² Although federal law expressly requires a judicial determination of reasonable efforts to finalize a permanency plan only every 12 months, state case review plans and state law commonly require such determinations at disposition and every subsequent review hearing. Recommended practice also calls for more frequent review of the agency's efforts if the permanency goal is to be achieved within the federal timeframe. See the Review Hearing Chapter.

³ 42 U.S.C. § 675(1).

⁴ P.L. 113-183 § 475(1)(B).

⁵ P.L. 113-183 § 475(5)(C)(iv).

⁶ P.L. 113-183 § 475; see the discussion of the “reasonable and prudent parent” standard in the Preliminary Protective Hearing and General Issues chapters.

⁷ 42 U.S.C. § 675(5)(B).

⁸ State and federal laws determine who must be present for any hearing to proceed. Noted participants may not be required by law.

⁹ NCJFCJ Policy Statement, adopted by the NCJFCJ Board of Trustees, Jan. 20, 2012; NCJFCJ. (2012). *Children in court*. Reno, NV: NCJFCJ. See also “children in court” section of the General Issues Chapter. In addition, many states recognize by statute or rule that children are parties and are entitled to be present at hearings.

¹⁰ P.L. 113-183 § 475(1)(D) and (5)(C)(i).

¹¹ See General Issues Chapter section on Effective Case Plans pg. 84 for more detail.

¹² P.L. 113-183 § 475(1)(B) and (5)(C)(iv).

¹³ National Council of Juvenile and Family Court Judges (2003). *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. NCJFCJ, Reno, NV.

¹⁴ See generally 42 U.S.C. § 671.

¹⁵ P.L. 113-183 § 471(a)(24); 113(a)(3).

¹⁶ P.L. 113-183 § 475(11).

¹⁷ See the Federal Law Chapter section on ICWA.

¹⁸ Edwards, L. (2014). *Reasonable efforts: A judicial perspective*. Casey Family Programs and Philanthropic Ventures Foundation.



DISPOSITION HEARING
BENCHCARD



Disposition Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the disposition hearing'

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)

The disposition hearing is the hearing at which the judge considers reports, recommendations, and other evidence regarding the child's placement.

The judge also reviews the case plan developed by the parties.

ASFA requires that the agency must develop a case plan “within a reasonable period” which can be no more than 60 days after the removal of the child (45 C.F.R. § 1356.21(g)(2)). The agency must involve the parents in case plan development (45 C.F.R. § 1356.21(g)(1)). If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).

- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review reports submitted to the court

- ***Case plan/disposition report should include:***²
 - a statement of family changes needed to correct the problems necessitating state intervention, along with timetables for accomplishing them;
 - a description of services to be provided to assist the family; and
 - a description of actions to be taken by parents to correct the identified problems and any steps the parent has taken thus far.
- ***When the agency recommends foster placement, an affidavit of reasonable efforts (ACTIVE EFFORTS in ICWA cases)***³ ***should be submitted. The following are some additional key elements of the affidavit:***
 - A description of the efforts made by the agency to avoid the need for placement and an explanation why they were not successful;
 - An explanation of why the child cannot be protected from the identified problems in the home even if services are provided to the child and family; and

- Identification of relatives and friends who have been contacted about providing a placement for the child.
- ***Other information that should be included in either the affidavit of reasonable efforts or an accompanying court report:***
 - a description of the placement and where it is located;
 - proposed arrangements for family time;
 - placement of the child’s siblings and, if they are to be apart, proposed arrangements for visitation;
 - an appropriate long-term plan for the child’s future; and
 - proposed child support.

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE ADJUDICATION HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Verify that the court has current addresses for parents/guardians. (Do not openly identify addresses when one or more parents is party to an injunction for protection against domestic violence.)
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process and Due Diligence Considerations

• IDENTIFICATION OF PARENTS AND/OR GUARDIANS

- Have the identity and location of all parents and/or guardians been determined?
- If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
- Has paternity of all children been legally established? If so, how?
- Have efforts to identify and locate fathers been sufficient? What has been done?

• NOTICE

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed (P.L. 110-351 § 103).
- Was the notice in a language and form understandable to the parents/guardians?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal (P.L. 110-351 § 103).
- Verify that the agency used due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

• REPRESENTATION

- Advise any unrepresented parties of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.

- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.
- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?
- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴
 - Verify timely compliance with all ICPC requirements.

Engage parents and any children or relatives present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Were you involved in any ADR processes used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Ask parents if any other individuals should be involved in the court matter, or who else is significant in the child's life.

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE DISPOSITION HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

- ***Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Disposition Hearing Checklist.***⁵
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶
 - If needed, inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. § 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

Key decisions and findings at the adjudication hearing

HAS THE AGENCY MADE REASONABLE EFFORTS TO ELIMINATE THE NEED FOR PLACEMENT (ACTIVE EFFORTS IN ICWA CASES)⁷ OR PREVENT THE NEED FOR PLACEMENT?

- **Can the child be SAFELY returned to a parent today?**
 - What specifically prevents the parent from providing the minimally adequate standard of care?

REVIEW THE CASE PLAN.

- ***Verify that the agency has filed the case plan in a timely manner.***
 - The agency must file the case plan within 60 days of removal (45 C.F.R. § 1356.21(g)(2)).
- ***Verify that the agency has involved parents in case plan development (45 C.F.R. § 1356.21(g)(1)).***
 - If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).
- ***Verify that the agency has involved children age 14 and older in case plan development (P.L. 113-183 § 475(1)(B)).***
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent. (P.L. 113-183 § 475(5)(C)(iv)).

- Verify that the case plan documents the child’s education, health, visitation, and court participation rights, the right to receive a credit report annually, and a signed acknowledgment that the child was provided these rights and that they were explained in an age-appropriate way (P.L. 113-183 § 475(A)).

KEY DECISIONS THE COURT SHOULD MAKE AT THE DISPOSITION HEARING:

Determine whether:

- The agency made or failed to make reasonable efforts to prevent the removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely, with a description of the services and why those services did not prevent removal or enable the child to return home;

OR

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely;

AND

- It would be contrary to the welfare and best interest of the child to continue in the home (42 U.S.C. § 672, 472(1)).

REVIEW CASE PLAN

- Verify that the agency has filed the case plan in a timely way, involved parents in case plan development, and involved children age 14 and older in case plan development.
- What is the permanency plan?
- What are the terms of meaningful family time?
- How does the plan address and support the child’s well-being?

Is the case plan rationally related to jurisdictional findings?

In making dispositional orders, consider the best interests of the child.

- **Verify that the agency has involved children age 14 and older in case plan development (P.L. 113-183 § 475(1)(B)).**
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent. (P.L. 113-183 § 475(5)(C)(iv)).
 - Verify that the case plan documents the child’s education, health, visitation, and court participation rights, the right to receive a credit report annually, and a signed acknowledgment that the child was provided these rights and that they were explained in an age-appropriate way (P.L. 113-183 § 475(A)).
- **What is the permanency plan?**
 - **If the permanency plan is reunification**, what services will be offered to the parents?
 - How do the services specifically address the safety concerns supporting jurisdictional findings?
 - Do the parents believe the services will meet their needs and build on their strengths?
 - How does the agency assist the family in accessing services?
 - Has the agency demonstrated that the services offered are culturally appropriate and proven effective for families with similar issues and characteristics?
 - **If the permanency plan is not reunification**, has there been a judicial determination that reasonable efforts are not required due to aggravated circumstances? (42 U.S.C. § 671(a)(15))
 - What is the **concurrent case plan**, and what steps are being taken to implement that plan?
 - APPLA is limited as a permanency plan for youth age 16 and older (P.L. 113-183 § 475(5)(C)(i)).
- **What are the terms of meaningful family time with parents, siblings, and extended family members?**
 - Do the terms of family time match the safety concerns?
 - Is there evidence supporting supervised visitation if this is recommended?
 - Are the time and location of family time logistically possible for the parents and extended family, and supportive of the child’s needs?
- **Is the case plan rationally related to jurisdictional findings?**

REVIEW THE CHILD’S PLACEMENT.

- Is the placement appropriate? (42 U.S.C. § 675(5)(A))
 - When and where did the caseworker last see the child? What was the nature of contact?
 - Is the child safe? Is the placement least restrictive (most family-like), the most appropriate available, and in close proximity to the parents? (42 U.S.C. § 675(5)(A))
 - If the child is in foster care, what efforts are being made to fully explore kinship options? (42 U.S.C. § 671(a)(19) and (29))
 - Have relatives been deemed inappropriate? If so, why? Were waivers to foster care licensing considered?
 - If child is in kinship care, how is the relative linked with all available training, services, and financial support?
 - Has the agency made reasonable efforts to place siblings together? If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, what efforts have been made to place the siblings together? (42 U.S.C. § 671(a)(31))
 - If an ICWA case, is the placement consistent with ICWA placement preferences? (25 U.S.C. 1915)
 - From the family’s perspective, is the placement culturally and linguistically appropriate?
 - Is the placement in proximity to the child’s educational setting, or does it otherwise support educational continuity? (42 U.S.C. § 675(1)(G))
 - Is the placement trained to help children with traumatic stress reactions cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
 - Verify that the case plan outlines efforts to ensure caregivers and foster parents are able to apply a reasonable prudent parent standard (P.L. 113-183 § 471(a)(24); 111(a)(3)).
 - Caregivers and foster parents should support the child’s participation in age- or developmentally-appropriate activities.

CHILD WELL-BEING⁸

- **What is the specific plan to assess and ensure the child’s well-being, including, as applicable, his/her educational, developmental, emotional and mental health, medical, dental, medication, and reproductive health needs?**

- Verify that the child’s mental, physical, dental, and educational needs are being addressed. Get input from all parties/participants, including child (if appropriate) and caregiver.
- Verify that the child has received all health assessments, immunizations, hearing and vision screenings, dental check-ups and services, prescriptions for medications, and medical equipment as needed.
- Is a trauma assessment of the child by a trauma-informed professional needed?
- What monitoring, treatment, or other supports might be needed to help children cope with any traumatic stress reactions?
 - Verify that if the child is a victim of sex trafficking, or at risk of becoming a victim of sex trafficking, that the case plan includes appropriate and necessary services for the child (P.L. 113-183 § 471(a)).
- If the child has been missing from placement, inquire about the factors that led to the child being absent from care, and to the extent possible how those factors will be addressed in subsequent placements (P.L. 113-183 § 471(a)(35)).
- If the child has been missing from placement, inquire about what is known of the child’s experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization – and if so, what services will be offered (P.L. 113-183 § 471(a)(35)).
- Verify that parents are participating in the child’s medical and educational appointments.
- Review appropriate school records, including any Individualized Education Program (IEP).
- Verify that the child is attending the same school as when he/she entered care. If not, ask what has been done to ease the transition.
- Verify that the child is attending school on a regular basis and has adequate transportation.
- How are the child’s educational needs being met, and what are the plans for the future?
 - What is the child’s academic performance? Are there identifiable areas in which the child is excelling? Are there areas that are posing a challenge, and how are they being addressed?
 - Are there any potential barriers related to the child’s academic success that can be addressed by the court, the agency, and the caregiver?
- Is there a need for a surrogate parent to act in the place of a parent in educational decision-making and in safeguarding the child’s rights under the Individual with Disabilities Education Act (IDEA)?

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

The court's written findings of fact and conclusions of law at the disposition hearing should:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under state law.
- State the permanency plan for the child (e.g., maintenance of the child in the home of a parent, reunification with a parent or relative, permanent placement of the child with a relative, placement of the child in a permanent adoptive home).
- When applicable, specify why continuation of child in home would be contrary to the child's welfare.
- Where charged with this responsibility under state law and based upon the evidence before the court, approve, disapprove, or modify the agency's case plan.
- Determine whether there is a plan for monitoring the implementation of the service plan and assuming the child's continued well-being.
 - Is a GAL/CASA available to do this?
- When placement or services are ordered that were not agreed by the parties, specify the evidence or legal basis upon which the order is made.
- Specify whether reasonable efforts have been made to prevent or eliminate the need for placement.
- Specify the terms of family time and communication with parents, extended family, and siblings.
- Specify parental responsibilities for child support.
- Be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning.
- Set the date and time of the next hearing, if needed

CONCLUDING THE DISPOSITION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.

- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Schedule review and permanency hearings within state and federal timeframes.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide all parties with a copy of orders immediately following the hearing.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The first review should be set within three to six months of disposition. The case must be reviewed no less frequently than every six months (42 U.S.C. § 675(5)(B)).

If the court determined that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. §1356.21(i)(ii) and (iii)).

- Advise parents of the consequences for failure to appear at future court hearings.
- When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

V. THE DISPOSITION HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the hearing.

² If an ICWA case, see Disposition Hearing Checklist for ICWA cases, in *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. (2003). Reno, NV: NCJFCJ.

³ *Ibid.*

⁴ See Federal Law Chapter.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ *Supra* note 2.

⁸ Judges may wish to re-visit the child well-being questions listed in the PPH Benchcard to supplement this inquiry.

VI. The Review Hearing





VI. THE REVIEW HEARING

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VI. The Review Hearing

A. Introduction

Review hearings are the court proceedings which take place after disposition in which the court comprehensively reviews the status of the case. Review is vital to cases involving each child within the court's jurisdiction, whether or not the child is in placement. Review hearings examine progress made by the parties since the conclusion of the disposition hearing. They also provide an opportunity for correction and revision of the case plan. Review hearings ensure that cases progress and children spend as short a time as possible in temporary placements. No matter how carefully initial case planning is examined at the disposition hearing, periodic, thorough review is needed to keep cases moving toward successful completion.

ASFA requires that the status of each child in out-of-home care be reviewed at least once every six months by either a court or an administrative body.¹ The review hearing must examine:²

- the ongoing safety of the child;
- the continuing necessity for out-of-home placement;
- the appropriateness of the out-of-home placement;
- the extent of the agency's and parents' compliance with the case plan;
- the extent of progress that has been made toward alleviating or mitigating the reasons the child was placed in foster care; and
- the likely date by which the child may be returned home or placed for adoption or legal custody.

At the disposition hearing, the permanency plan for the child was determined and a case plan developed to accomplish the goal. Periodic review is needed to ensure that the parties are making progress on the plan and that the child spends as little time as possible in temporary placement, a primary goal of ASFA. At review hearings, judges should carefully re-examine case goals and change any 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 abandoned as a goal because a child cannot safely be returned home in a timely fashion.

B. Purpose and Timing of Review Hearings

Review hearings provide regular judicial oversight of children in foster care and can help judges identify strengths and inadequacies in the government’s response to child abuse and neglect. For example, incomplete case plans can prolong foster care placement by failing to clearly specify what each party must do to facilitate family reunification. Agency case plans may be based on boilerplate forms which fail to adequately document a case. A case plan may be developed solely by agency staff, without the collaboration of parents or the child. A plan may fail to specify agency services or particular behaviors and changes expected of the parents.

Unresolved case disputes may block case planning progress. Each party may be proceeding unilaterally without confronting a disputed issue, although the dispute may constitute a roadblock to family reunification. When agency caseloads are high, cases may be neglected. If things are going “smoothly” in a child’s foster home, appropriate attention may not be paid to family rehabilitation and progress toward reunification. The agency may unnecessarily restrict parent-child contacts, accelerating breakdown of the parent-child relationship. Frequent parental visitation is essential as long as children are safe. Parents may be unaware that they can challenge visitation arrangements and may become discouraged by the terms imposed.

Judicial review helps a case progress by requiring the parties to set timetables, take specific actions, and make decisions.

Agencies may fail to take timely action to move children out of foster care. Such inertia may be due to an abundance of caution, indecision, or subtle incentives to maintain the legal status quo. Bringing a termination of parental rights proceeding is time consuming and may even appear forbidding to individual caseworkers. Without prodding by the review process, workers may forgo legal action.

Effective review hearings can address problems and improve case planning for children. Judicial review helps a case progress by requiring the parties to set timetables, take specific actions, and make decisions. Review hearings provide a forum for the parents, helping assure that their viewpoint is considered in case planning. Terms of the plan can be specified so that all parties understand their obligations, and the court can assess progress. Through careful scrutiny of the case plan by the attorneys and the court, case planning problems can be identified and addressed by all parties.

Regular and thorough review hearings create incentives for the agency to make decisions concerning the permanent status of a child. When the review hearing is challenging and demanding, greater consideration is given to the examination of all placement and service options. Review hearings also create a valuable record of the actions of the parents and agency since the last hearing.

Unfortunately, there are a number of formidable pitfalls that can thwart effective review hearings. Regular review hearings can consume a great deal of time. Careful docket management and appropriate judicial caseloads are needed to prevent caseworkers, parents, attorneys, and other parties from having to spend long hours in the courthouse waiting for a review hearing.

Reviews can malfunction if they become a rubber stamp for agency recommendations or produce arbitrary decisions based on inadequate information. Effective review hearings require adequate court time and properly paid – and trained – lawyers to determine what information comes before the court. Lawyers must be expected to do their job and come to court with a clear position on the case. If volunteers such as Guardians *ad litem* or CASAs are assigned, they should be prepared to make recommendations regarding the best interests of the child.

Irregular or infrequent review hearings may inhibit agency case planning. Long delays between court hearings may deprive the agency and the parents of the flexibility needed to move toward case resolution. For example, if the judge orders parents to participate in a particular program which proves to be inappropriate, the parent is under a continuing obligation to remain in the program until the case is brought back to court. Parties must have the means to obtain timely review when issues affecting case progress and resolution arise.

Federal law requires that reviews be conducted by either a court or an “administrative body,” such as a panel of volunteer citizen reviewers.³ While it is optional under federal law whether courts themselves conduct the review hearings, federal law does contemplate a thorough review of case progress to make sure cases are not neglected and, if necessary, to refine case plans. Specifically, review is required:

“...to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal custody.”⁴

States that require courts to conduct periodic review hearings must make sure that courts are able to perform this function properly. Some states have chosen not to have judges conduct reviews. The best alternative or complement to judicial review is review by panels of judicially appointed citizen volunteers. Whatever form of review is used, it is critical that the parties be present and that questioning is rigorously

PERIODIC REVIEW IS REQUIRED:

“...to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal custody.”

42 U.S.C. § 675(5)(B), 675(6)

conducted. Members of citizen review panels should be carefully recruited, screened, trained, and supervised by court personnel. Citizen review panels should be judicially appointed and supervised. There should be an adequate ratio of court staff to volunteers and at least one panel per 100 children to be reviewed. A professional staff person should be present at all panel reviews. Citizen review should be coordinated with court review so that families and other case participants do not spend unnecessary time in duplicative reviews. Courts should receive and consider reports generated by citizen review panels. Judges should set court reviews if a citizen panel has identified issues of concern regarding the progress of the case.

C. Timing of Review

Timetables for review hearings are governed by both federal and state statute. Federal law specifies that review of children in foster care (by a court or administrative body) must occur at least once every six months from the date the child entered care, a term of art defined in P.L. 105-89. The date a child is considered to have entered foster care means either the date of the first judicial finding that the child has been subjected to child abuse or neglect, or the date that is 60 calendar days after the date on which the child is removed from the home, whichever is earlier.⁵ A state may use a date earlier than that required, such as the date the child is physically removed from the home. This definition determines the date used in calculating all time period requirements for the periodic reviews, permanency hearings, and termination of parental rights provision in section 475(5) of the Act and for providing time-limited reunification services described at section 431(a)(7) of the Social Security Act.⁶

While federal law would permit the first review hearing to be held up to eight months after a child's placement date, most courts conduct these hearings at six months from the date the child was actually placed in care. Some state statutes require more frequent oversight and many courts conduct case review more frequently than statutes require. Frequent review hearings require that courts have sufficient personnel to conduct the hearings properly.

Whatever the frequency of mandatory review, the court should have the ability to conduct hearings more frequently than the minimum intervals. Where review hearings are mandated at least every six months, it should still be common to hold reviews at two or three month intervals at particularly critical stages of a case. In special circumstances, it also should be common to bring matters back to court on short notice.

D. Case Management Before the Review Hearing

*Who Should Be Present?*⁷

JUDGE OR JUDICIAL OFFICER

Although states can comply with the review requirements under federal law through a citizen or administrative review process, **it is important that when review hearings are conducted by the court, they are conducted by the same judge or judicial officer who hears other stages of the proceedings.** The involvement of one judge creates consistency in the directions given the family and agency, avoids rehashing old arguments, and allows the judge or judicial officer who presides over the review to be thoroughly familiar with the facts presented during previous hearings.

PARENTS WHOSE RIGHTS HAVE NOT BEEN TERMINATED, INCLUDING PUTATIVE FATHERS (OR OTHER PERSONS WITH WHOM THE AGENCY IS WORKING TOWARD REUNIFICATION)

If the court-approved plan is to reunify the child with a parent, whether or not the child lived with the parent prior to placement into foster care, it is essential for that parent to participate in the review. Parents can provide the court with important information about their progress and concerning their perception of problems encountered in completing tasks or obtaining services, difficulties encountered in working with the agency, and concerns they may have regarding the care of their children. Parents must be present during the review hearings to receive information from the court and agency. At the review hearing, the parents also can receive important feedback from the court and agency as to what tasks must be completed and when, and also how they are progressing toward achieving the disposition goal.

ATTORNEY FOR THE PARENT(S)

The presence of the parents' attorney at the review hearing is vital to ensure that the agency is carrying out its responsibility to assist the parents. The attorney must be prepared and able to correct the record to clarify any inaccurate information about the parents' participation in the case or compliance with the case plan. The attorney needs to make sure that the parents' interests and views are taken into account in all decisions on placement, visitation, services, and case plan modifications.

CHILDREN

Children should be present at the hearing to give the judge the opportunity to engage them directly as appropriate.⁸ Courts should consult with the child in fashioning an appropriate plan. This consultation can be done in numerous ways including actual presence in court, virtual participation in the hearing, letters written by the child, an in camera meeting with the child, or through the child's advocate. Judges are encouraged to see children regularly and speak with them directly. Age-appropriate conversations with children can provide the court with information as to their perception of their needs, interests, and concerns.⁹ Older children will often have recommendations and questions regarding their circumstances, the case plan, and projected timeframes for achieving case plan goals. Their questions can be answered at review. Pursuant to federal law, judges should also verify that children age 14 and older have been involved in case plan development.¹⁰

A court may choose to have children present only during portions of a hearing or have an in camera meeting with the child. Special circumstances may justify the absence of children from an entire hearing. The court should document the reasons children are not in court.

LEGAL ADVOCATE FOR THE CHILD AND/OR GAL/CASA

A well-trained legal advocate for the child, GAL, or CASA must be present to ensure that the child's best interests are protected and the child's interests are not subordinate to the organizational needs of the agency or the convenience of agency personnel. Advocates also need to ensure that the views of children are considered by the court. The role of the child's attorney differs from state to state. Some must advocate for the child's wishes, others for the child's best interests. It is important for the court to know the child's wishes and weigh them carefully with the child's best interests.

ASSIGNED CASEWORKER

The caseworker with primary responsibility for the case must be present to provide the court with complete, accurate, and up-to-date information at the hearing. Judges should not continue or delay a review hearing due to lack of information or case involvement by a caseworker. When important facts are not known, the hearing should be reset for an early date and, if necessary, appropriate subpoenas should be issued.

AGENCY ATTORNEY

It is important that the agency have effective representation at the review hearing because the court's decisions concerning the case plan are crucial to its success. Important information is elicited at the review

hearing, and the record established at that time can be critical to later case outcomes. An attorney is needed to help develop the record and note important evidence. Depending on the jurisdiction, the agency may be represented by an attorney employed by the agency, the state attorney general, the county attorney, or the county prosecutor.

FOSTER AND PRE-ADOPTIVE PARENTS

Foster and pre-adoptive parents are entitled to notice of the review hearing¹¹ and have a right to be heard. The child's foster parent(s) or pre-adoptive parents are often in the best position to describe the present status of a child. Judges should engage foster and pre-adoptive families directly during the hearing. They can provide valuable information regarding the child's functioning, behavior, and overall adjustment to the placement, and information that may help to determine any further services needed to help the placement succeed.

RELATIVES WITH LEGAL STANDING OR OTHER CUSTODIAL ADULTS

Similarly, relatives with legal standing, representatives of facilities where children are placed, or other custodial adults who work directly with the child can often provide valuable information at review concerning adjustment of children to placement, their special needs, and any additional services required.

SERVICE AND TREATMENT PROVIDERS

Persons who provide services to the parents and children, such as therapists, teachers, domestic violence advocates, and parenting instructors, can often provide valuable information to the court concerning the family's progress and recommendations for additional services. If a particular service provider is not available to attend the hearing, the court should make certain that the agency caseworker has obtained detailed information on the participation and progress of the parents in that service. Ideally, written reports from all service providers should be provided to the court and to the parties in advance of the hearing.

It is often helpful for all persons who are involved with the family to meet with each other before the review so everyone understands case plan goals and the treatment needs of the family. The involvement of service and treatment providers at reviews helps to coordinate services with court-approved treatment goals.

**AMONG THOSE WHO SHOULD
BE PRESENT AT THE REVIEW
HEARING:**

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad litem* (GAL); CASA
- Child’s current placement (foster parents, caregivers, custodial adults, adoptive parents)
- All adult relatives of the child (42 U.S.C. § 671(a)(29); relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- Non-related extended family, fictive kin
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors (if assigned/available), substance abuse coach, DV advocate
- Cultural leaders and liaisons, religious leaders
- Education liaison/school representative
- Educational surrogate parent if appropriate
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter and Court security

E. Preparing for the Hearing

Review of Reports to the Court

Courts should work with the child welfare agency to ensure that the agency case plan, which is required to be updated every six months, meets the court’s need for new and updated information for the review hearing.

Courts should work with the agency to ensure the case plan contains the information the court needs to conduct a thorough review and accept the case plan document as the court report. Requiring additional court reports in addition to an updated case plan results in agency staff spending more time on paperwork than in direct contact with families.

It is important that reports be distributed to the parties well in advance of the review, which allows time for the parties to consider agency proposals. Strict deadlines for the filing of reports are needed to ensure that the report is submitted to the parties in advance of the hearing, giving all involved the opportunity to investigate statements in the report and propose alternatives to meet the case plan goals.

- Review updated case plan.
- Who must or should be present at the hearing?
- Review reflections on decision-making process that protect against bias.
(See the Review Hearing Benchcard.)

F. Conducting the Review Hearing

During judicial reviews, judges should conduct a thorough review to determine whether the child can return home, and explore and determine the plan to resolve any safety issues. The judge should decide if more frequent reviews should be held. Prior to the judicial review, the caseworker should staff the case with all service providers, the caregiver, the parent, the child, and their lawyers or advocates.

G. Key Inquiries, Analyses, and Decisions the Court Should Make at Review Hearings

Is there a need for continued placement of the child out of home?

If a child is placed outside a parent’s home, the court should determine the continuing necessity of placement at each review hearing. At each review hearing, the court should insist on a clear articulation of the current safety threat keeping the child in care today. Children should not remain in foster care until the case plan is “completed.” They should be returned home immediately once they can safely be returned.

When deciding whether the family can be safely reunited, the court should consider:

- the extent to which the parents have engaged in and benefited from services outlined in the case plan;
- the capacity and willingness of the parents to care for the child;
- the extent to which changed parental behavior allows for the child's safe return home;
- the extent to which parental behavior may continue to endanger the child;
- the appropriateness of interactions between parents and children during family time; and
- and the recommendations of service and treatment providers.

If the court determines that a child should not be returned home, it should identify the additional steps that must be taken to allow for safe family reunification.

Is the court-approved, long-term permanent plan for the child the best plan for the child?

In assessing the appropriateness of the plan, the court should ensure that all parents have been actively engaged in plan development and identifying required services. Judges should actively engage parents in the review hearing to ensure that their perspectives are heard directly by the court, even if reunification is not the disposition goal.

Age-appropriate children should be involved in the development of their case plans and judges should inquire about the nature and extent of their involvement. Federal law requires children age 14 and older to be actively involved in their case planning.¹² Judges should also determine whether a child in care who is 14 or older has been able to select and include up to two individuals (excluding those normally involved on their case planning team) to be involved in developing his or her case plan as required by federal law.¹³ During the permanency hearing review of an APPLA plan, children must be asked about their desired permanency outcome.¹⁴

Federal law requires the court to ensure that the most appropriate permanency plan for the child is in place.¹⁵ Circumstances may change, relatives may come forward, and parents may rehabilitate at any stage of a dependency proceeding. At the review hearing, each of the permanency plans specified in federal law should be examined: return to parent, adoption, placement with a fit and willing relative, guardianship, or APPLA. The court should ensure that the plans at the top end of the hierarchy cannot be achieved before moving to those lower on the permanency scale.¹⁶ The court should examine the plans at every review hearing, regardless of how long a plan has been in place. Even if the plan becomes another planned permanent living arrangement, the court should continually inquire as to the appropriateness

of return home, adoption, or guardianship. The use of another planned permanent living arrangement (or independent living or emancipation) is prohibited by federal law for any child under the age of 16.¹⁷ **If APPLA is to remain the goal, a judicial determination must be made regarding the compelling reasons why APPLA remains the best permanency plan for that child.**¹⁸

Is the agency making reasonable efforts to assist the child in safely returning to the child's home? In making any reasonable efforts finding, the child's health and safety must be the paramount concern.^{19,20}

When the case plan goal is family reunification, the agency should be held accountable for meeting its obligation to provide services to the family. The court should make a thorough inquiry at every review hearing, along with specific factual, about the efforts the agency is making to eliminate the need for placement of the child and whether such efforts are reasonable. The court should identify any areas in which agency efforts are inadequate and enter orders to address the inadequacies.

At the review hearing, the court should also inquire as to the concurrent permanency plan for the child. The agency, consulting with the parents, should have identified a concurrent permanency goal and be actively working on that goal in addition to the primary plan goal. Simply identifying a concurrent plan and not pursuing it creates unnecessary delay should the primary plan change.

Is the agency making reasonable efforts to place the child in a timely manner in accordance with the permanency plan? Is the agency completing whatever steps are necessary to finalize the permanent placement of the child?

When safe return of the child to the family home is no longer possible, the agency must make reasonable efforts to place the child in a timely manner in accordance with the permanency plan (an adoptive home, placement with a relative) and complete the steps necessary to finalize the permanent placement of the child. The court should be aware of the steps necessary to effectuate any permanency plan. Judges should actively inquire about each step in the process of finalizing the current permanency plan, and issue orders clearly articulating the subsequent steps the agency must take to finalize the plan and the timeframes for the completion of those steps. Issuing general orders to “proceed to finalization of an adoption,” for example, do not outline the specific steps and timelines needed to actually complete the adoption process so the court can adequately assess progress at its next hearing. Courts will have a difficult time holding agencies accountable for making reasonable efforts if those efforts are not spelled out in court orders at each review hearing.

Are services set forth in the case plan, and do the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances?

It often becomes obvious during a review hearing that the timelines or case plan should be revised to reflect changed circumstances or new information. Additional or different services may be needed than those identified in the original case plan. Children may be able to return home immediately. If the parents have not complied with a court-ordered case plan, the judge should inquire whether the parents are capable of complying. If so, the court should remind the parents of the consequences of non-compliance. At the review, the court can correct any misunderstood expectations. Before making the decision whether and how to revise the case plan, the judge should question the parents about whether or not they can meet the case plan requirements.

The case plan must include services for the child, the parents, and the foster parents to:

- assure that the child receives “safe and proper care” and address the child’s needs;
- improve conditions in the parents’ home; and
- facilitate the child’s reunification or other permanent placement.

42 U.S.C. § 675(1)(B)

Is the child in an appropriate placement which adequately meets all physical, emotional, and educational needs?

The review should address the child’s placement to ensure that the child is safe, and to determine whether the child’s health, educational, cultural, and emotional needs are being met. The court should review information on the behavior and overall adjustment of each child to his or her placement and to school. The court should be informed of the specific services being provided to meet each child’s physical, emotional, and educational needs. During the review, judges should examine the steps the agency is taking to ensure foster families are following the “reasonable and prudent parent standard” and that the child has regular opportunities to participate in age- or developmentally-appropriate events such as sports, field trips, and overnight activities.²¹ The court should ensure that all health and education information is up-to-date and that children are receiving health and education services. In addition, the court should ensure that caretakers of a child with trauma history have the specialized training and support needed for the placement to succeed. Courts should also ensure that a child’s connections to his or her cultural heritage are preserved and promoted.

The Fostering Connections to Success Act (P.L. 110-351) requires the child welfare agency to make reasonable efforts to place brothers and sisters together when they must be removed from their parents’ home, provided it is in the children’s best interests. In the case of separated siblings, the child welfare

agency must make reasonable efforts to provide for frequent visits or other interaction, unless it would be harmful to the children. The Act also requires states to make sure children placed in foster care can stay in the same school, if possible, or be transferred promptly to a new school. The Act also provides federal support for school-related transportation costs.²²

To help guide foster youth toward successful adulthood, federal law also requires the case plan for all youth age 14 and older to include a “rights document” that specifically documents the youth’s rights to education, health, visitation, and court participation and the right to receive a credit report annually.²³ There must be a signed acknowledgment that the youth was provided these rights, that the rights were explained in an age-appropriate way, and that the youth demonstrated that he or she understood those rights.²⁴

Do the terms of family time need to be modified?

Courts should ensure that family time is at a level appropriate to the current safety risk. Courts should actively inquire about the need for supervised visits at every review. Often, supervision is ordered early in the case and is not revisited even though the parents have made progress and the safety threat is diminished. As parents successfully engage in services and modify behaviors, it is often appropriate to provide less restrictive, more extensive family time. The court should review the terms of family time at the hearing to determine whether terms and conditions of visits should be modified. As the time for reunification approaches, there is often a need to expand visits to include overnight visits in the parents’ home.

Do terms of child support need to be set or adjusted?

Parents who are able to pay should be expected to help cover the costs of foster care. Support amounts should either be reviewed or adjusted during review hearings. The court should take care to avoid financial burdens that interfere with family reunification. Delays in setting support followed by retroactive lump sum support orders are problematic for families, often making it impossible for parents to obtain or maintain a safe home in preparation for the child’s return.

Do any additional court orders need to be made to move the case toward successful completion?

Additional court orders may be needed to move the case toward successful completion. For example, if a child can return safely to one parent but not the other, it may be possible to return the children to that parent with orders limiting contact with the other parent, if necessary.

What is the timeframe to achieve reunification or other permanent plan for each child?

The court should always determine what additional actions are necessary to successfully complete the case plan goals and set forth reasonable timeframes in which such actions should be completed. By setting deadlines, the court emphasizes the importance of time in the lives of children and makes clear the court's expectations. The timeframes set forth in the court's written Findings of Fact and Conclusions of Law can later be used by the court to hold all parties accountable by requiring explanations when reasonable deadlines are not met.

H. The Court's Written Findings of Fact and Conclusions of Law at the Review Hearing

The court's written Findings of Fact and Conclusions of Law at the review hearing should:

- be written in easily understandable language that allows the parents and all parties to fully understand what action they must take to have their children returned to their care, as well as timeframes for completion of various tasks;
- set forth findings as to why the children are in need of continued placement outside the parents' home, including specific and current safety risks;
- set forth findings as to whether and why family reunification and an end to court supervision continues to be the long-term case goal;
- set forth findings as to whether the agency has made reasonable efforts to eliminate the need for placement, with specific findings regarding the actions the agency is taking;
- set forth detailed Findings of Fact and Conclusions of Law as to whether the parents and the agency are in compliance with the case plan and identify specifically what further actions the parents and agency need to complete;
- approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review;
- identify an expected date for final reunification or the concurrent permanency plan for the child;
- make any other orders necessary to resolve the problems that are preventing reunification or the completion of another permanency plan for the child; and
- set date and time of next hearing, if needed.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the PPH Chapter for more detail.

Post-Permanency Review

The focus of a review held after the permanency hearing will depend upon the permanency plan approved by the court. If the court determines that the goal should continue to be family reunification, the focus will continue to be on the appropriateness of services offered to the parents and their progress on eliminating safety risks. If the goal is no longer reunification, the focus will be on the agency's efforts to finalize the concurrent plan as the new permanency plan. If the child is not in a permanent placement (such as an adoptive home or with a relative guardian, for example), the actions the agency has taken to find a home for the child must be carefully examined. The less successful the agency is in fulfilling its responsibility to place the child in a "family-like" setting, the more likely it is that the child will spend many months, and even years, in foster care.²⁵

Attention should also be given to the child's well-being in the broadest sense. The inquiry must go beyond the basic questions of personal safety and physical health. If reunification is not possible, the child welfare system stands in loco parentis to the child and is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for transition to life as an adult.²⁶

Pursuant to the Preventing Sex Trafficking and Strengthening Families Act of 2014, every court hearing related to a youth's exit from the child welfare system at age 18 or later should include an inquiry as to whether the youth has received key documents that help the transition to independence. These key documents include, for example, an official or certified birth certificate, a Social Security card, health insurance information, a copy of medical records, and either a driver's license or a state-issued official identification card. In addition, the court should inquire if a "successor guardian" has been named for the youth, as federal law allows continuation of Title IV-E kinship guardianship assistance payments if the relative guardian dies or is incapacitated and a successor guardian is named in the agreement or amendments to the agreement.²⁷

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set further reviews and/or permanency hearing, and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

I. Concluding the Review Hearing

The court should enter comprehensive and clear Findings of Fact and Conclusions of Law at each review hearing. Judicial findings can strengthen the court’s decision-making and create a more complete record. When there are detailed findings at adjudication, disposition, review, and permanency hearings, it is far easier to move toward a permanency plan for each child. Clear findings at the previous hearings, including specific instructions to the parties, increase the likelihood that there will be consistent decisions in the case. Without a strong written record, there is a risk that the same issues and excuses for parental or agency inactivity will be repeated, prolonging case resolution. The burden of preparing findings can be reduced by ensuring that the agency’s report covers the same issues as those that are to be addressed in the court’s findings. If the issues are the same and the report is well prepared, the court can repeat, modify, or refer to portions of the report in its findings.

Compliance with the case plan must be “reviewed periodically,” but not less than every six months (42 U.S.C. § 675(5)(B)).

The case plan goal, or permanency plan, must be re-evaluated and determined at a permanency hearing to be held no less than 12 months after the child has been removed (42 U.S.C. § 675(5)(B)).

If the court determines that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii) and (iii)).

VI. THE REVIEW HEARING

ENDNOTES

¹ 42 U.S.C. § 675(5)(B); 45 C.F.R. § 1355.34(c)(2)(ii).

² 42 U.S.C. § 675(5)(B).

³ See 42 U.S.C. § 675(5)(B), 675(6); ASFA REGs, p. 4035.

⁴ 42 U.S.C. § 675(5)(B).

⁵ C.F.R. § 1356.21(k).

⁶ See 42 U.S.C. § 675(5)(B).

⁷ State and federal laws determine who must be present for any hearing to proceed. Noted participants may not be required by law.

⁸ As previously mentioned, it is NCJFCJ policy that children of all ages should be present in court and attend each hearing unless the judge decides that it is not safe or appropriate (see NCJFCJ *Children in Court Policy Statement*, adopted by the NCJFCJ Board of Trustees, Jan. 20, 2012).

⁹ See American Bar Association Bar Youth Empowerment Project's *Engaging Youth in Court Benchcards* (pg. 19).

¹⁰ P.L. 113-183 § 475 (1)(B); federal law requires that during any permanency hearing the child is asked by the court about his/her desired permanency outcome (see Permanency Hearing Chapter and Benchcard).

¹¹ 42 U.S.C. § 675(5).

¹² P.L. 113-183 § 475(1)(B).

¹³ P.L. 113-183 § 475(5)(C)(iv).

¹⁴ P.L. 113-183 § 475(A)(a)(2). See also the Permanency Hearing Chapter and Benchcard.

¹⁵ C.F.R. § 1355.20.

¹⁶ For more discussion of the permanency plans specified by ASFA, see the Permanency Hearing Chapter.

¹⁷ P.L. 113-183 § 475 (5)(C)(i).

¹⁸ P.L. 113-183 § 475A(a)(2).

¹⁹ 42 U.S.C. § 671 (a)(15).

²⁰ For a thorough discussion of reasonable efforts, see Leonard Edwards. (2014). *Reasonable efforts: A judicial perspective*. Casey Family Programs and Philanthropic Ventures Foundation.

²¹ P.L. 113-183 § 475(5)(B); § 475A(a)(3).

²² Casey Family Programs. (2009). *Fostering Connections to Success and Increasing Adoptions Act Summary*. Available at <http://www.casey.org/Resources/Publications/pdf/FosteringConnectionsSummary.pdf>

²³ P.L. 113-183 § 475(A).

²⁴ *Ibid*.

²⁵ 42 U.S.C. § 675(5)(A).

²⁶ 42 U.S.C. § 671(A)(30); § 675(1)(G); § 675(1)(H); P.L. 113-183.

²⁷ P.L. 113-183, 473(d)(3)(C).



REVIEW HEARING
BENCHCARD

| Review Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the disposition hearing¹

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives

In the review hearing, the court determines the status of the child, reviews compliance with the case plan, and the possible need for case plan and placement changes to maintain focus on safety and permanency. Review is required for both out-of-home and in-home placements.

ASFA requires that the case plan be “reviewed periodically,” but not less than every six months (42 U.S.C. §675(5)(B)). Additionally, a permanency hearing must be held no more than 12 months after the date the child was first considered to have entered foster care (42 U.S.C. § 675(5) (C)) or no later than 30 days after a court determines that reasonable efforts to return a child to either parent are not required, whichever occurs first.

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review reports submitted to the court

- ***Pre-review reports should include:***²
 - a statement of family changes needed to correct the problems necessitating state intervention, along with timetables for accomplishing them;
 - a description of services to be provided to assist the family; and
 - a description of actions to be taken by parents to correct the identified problems and any steps the parent has taken thus far.
- ***When the agency recommends foster placement, evidence of reasonable efforts (ACTIVE EFFORTS in ICWA cases)***³ ***must be presented to the court, which allows parents and counsel to challenge the quality and quantity of those efforts. In some jurisdictions an affidavit of reasonable efforts in lieu of live testimony may be permitted. The following are some additional key elements of an affidavit of reasonable efforts:***
 - a description of the efforts made by the agency to avoid the need for placement and an explanation of why they were not successful;

- an explanation of why the child cannot be protected from the identified problems in the home, even if services are provided to the child and family; and
- identification of relatives and friends who have been contacted about providing a placement for the child.
- ***Other information that should be included in either the affidavit of reasonable efforts or an accompanying court report:***
 - a description of the placement and where it is located;
 - proposed arrangements for family time;
 - placement of the child’s siblings and, if they are to be apart, proposed arrangements for visitation;
 - an appropriate long-term plan for the child’s future; and
 - proposed child support.

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE ADJUDICATION HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process and Due Diligence Considerations

IDENTIFICATION OF PARENTS AND/OR GUARDIANS

- Have the identity and location of all parents and/or guardians been determined?
- If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
- Has paternity of all children been legally established? If so, how?
- Have efforts to identify and locate fathers been sufficient? What has been done?

NOTICE

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed (P.L. 110-351 § 103).
- Was the notice in a language and form understandable to the parents/guardians?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal (P.L. 110-351 § 103).
- Verify that the agency used due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

REPRESENTATION

- Advise any unrepresented parties of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.

- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.
- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?
- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴
 - Verify timely compliance with all ICPC requirements.

Engage parents and any children or relatives present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Were you involved in any ADR processes used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Ask parents if any other individuals should be involved in the court matter, or who else is significant in the child's life.

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE DISPOSITION HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

- ***Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Disposition Hearing Checklist.***⁵
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶
 - If needed, inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. § 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

Key decisions and findings at the review hearing

Can the child be SAFELY returned to a parent today?

- ***Is there a continuing necessity for out-of-home placement?*** (42 U.S.C. § 675(5)(B))
 - If not, and the court finds that the child can be safely placed at home, order that the child be returned to the parent's custody. Keep the case open for a period of time to monitor the situation. If the court is satisfied that the family has fully completed all services, and the family is ready, the court can dismiss.
 - If yes, what are the specific safety risks preventing the child from being placed with the parents today?
 - What services or supports, rationally related to the specific safety risks, can be arranged to allow the child to be maintained at home or safely returned home today?
 - Will the removal of someone from the home or addition of someone in the home allow the child to be safely placed in the home?

Does the court-approved, long-term permanent plan for the child remain the best plan for the child?

- ***Is the placement appropriate?*** (42 U.S.C. § 675(5))
 - When and where did the caseworker last see the child? What was the nature of the contact?
 - Is the child safe? Is the placement the least restrictive (most family-like) and most appropriate available and in close proximity to the parents? (42 U.S.C. § 675(5))

- If the child is in foster care, what efforts are being made to fully explore kinship options? (42 U.S.C. § 671(a)(19))
- If the child is in foster care, what efforts are being made to fully explore kinship options? (42 U.S.C. § 671(a)(19))
- Have relatives been deemed inappropriate? If so, why? Were waivers to foster care licensing considered?
- If the child is in kinship care, how is the relative linked with all available training, services, and financial support?

KEY DECISIONS THE COURT SHOULD MAKE AT THE REVIEW HEARING:

Determine whether:

- There is a continuing necessity for out-of-home placement of the child (42 U.S.C. § 675(5)(B)).
- The agency is making reasonable efforts to effect the safe reunification of the child and family (45 C.F.R. § 1356.21).
- The agency is making reasonable efforts to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child (42 U.S.C. § 671(a)(15)(C)).
- Any progress has been made toward alleviating or mitigating the causes necessitating placement in foster care? (42 U.S.C. § 675(5))
- Services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- The child's placement is an appropriate placement that adequately meets all physical, emotional, and educational needs (42 U.S.C. § 675(5)).
- There is a need for any additional court orders to move the case toward successful completion.

- Are siblings placed together? If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, has the agency made reasonable efforts to place siblings together? (42 U.S.C. § 671(a)(31))
- From the child's and family's perspective, is the placement culturally and linguistically appropriate?
- Is the placement in proximity to the child's education setting or does it otherwise support educational continuity? (45 C.F.R. § 1356.21(g)(3); P.L. 110-351)
 - For children in foster care, what is the educational stability plan? (P.L. 110-351)
 - Are children able to remain in the school they were attending at the time of placement (unless not in their best interests) even if they move away from that school's boundaries? (P.L. 110-351) When it is not in the best interests of the child to remain, are children immediately enrolled in a new school with all educational records following them? (P.L. 110-351)
- If it is an ICWA case, is the placement consistent with ICWA preferences? (25 U.S.C. § 1915)
- Is the placement trained to help children with traumatic stress reactions cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
- Verify that the case plan outlines efforts to ensure caregivers and foster parents are able to apply a reasonable prudent parent standard (P.L. 113-183 § 471(a)(24); 111(a)(3)).
 - Caregivers and foster parents should support the child's participation in age- or developmentally-appropriate activities.
 - Caregivers and foster parents should support the child's participation in age- or developmentally-appropriate activities.

Is the agency making reasonable efforts to rehabilitate the family and effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b))

- What specifically prevents the parents from safely providing the minimally adequate standard of care?
- What specific reasonable efforts have been made to reunify the child with his/her parents?

Is the agency making reasonable efforts to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child? (42 U.S.C. § 671(a)(15)(C))⁷

- **What timeframe should be followed to achieve reunification or another permanency plan for each child?**
 - What steps have been implemented to effectuate any permanency plan?
 - What steps are still required to finalize any permanency plan?
 - What is the likely date by which the child may be returned to and safely maintained in the home OR placed for adoption or legal guardianship? (42 U.S.C. § 675(5))

What is the extent of progress toward alleviating or mitigating the causes necessitating placement in foster care? (42 U.S.C. §675(5))

- What are the barriers to progress, and what steps have been taken to eliminate those barriers?
- What is the concurrent case plan goal, and what steps are being taken to implement that plan?
- Should the case plan goal be changed?

Which services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances?

- How are the parents, extended family, and children being engaged in the development of the case plan? (45 C.F.R. § 1356.21(g)(1))
 - Verify that children age 14 and older have been involved in case plan development (P.L. 113-183 § 475(1)(B)).
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent (P.L. 113 § 475(5)(C)(iv)).
 - If parents are unwilling or unable to participate in the case plan, the agency must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).
- Does the family believe the services, supports, and interventions will meet their needs and build on their strengths?
- Has the family been given the opportunity to ask for additional services?

- How is the agency assisting the family in accessing services?
- Has the agency demonstrated that the services offered are culturally appropriate and proven effective for families with similar issues and characteristics?
- What are the terms of family time with parents, siblings, and extended family members?
- Do the terms of family time match the safety concerns? Is there evidence supporting supervised visitation?
- Are the time and location of family time logistically possible for the family and supportive of the child's needs?
- Do the terms of child support need to be set or adjusted?

What is the specific plan to assess and ensure the child's well-being, including, as applicable, his/her educational, developmental, emotional and mental health, medical, dental, medication, and reproductive health needs?

- Verify that the child's mental, physical, dental, and educational needs are being addressed. Get input from all parties/participants, including child (if appropriate) and caregiver/foster and pre-adoptive parents.
- Verify that parents are participating in the child's medical and educational appointments.
- Review appropriate school records, including any Individualized Education Program (IEP). Verify that the child is attending the same school as when he/she entered care. If not, ask what has been done to ease the transition.
- Verify that the child is attending school on a regular basis and has adequate transportation.
- Verify that the child is able to participate in developmentally age-appropriate activities that promote a sense of normalcy (P.L. 113-183).
- If the child has been missing from placement, inquire about what is known of the child's experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization; if so, what services will be offered? (P.L. 113-183 § 471(a)(35))
- Is the child in an appropriate placement which adequately meets all physical, emotional, and education needs?
 - Are any identified trauma needs being supported?

- If the child was a victim of sex trafficking, or at risk of being a victim of sex trafficking, are appropriate and necessary services being addressed? (P.L. 113-183 § 471(a))

Do any additional court orders need to be made to move the case toward successful completion?

The court’s written findings of fact and conclusions of law at the review hearing should:

- be written in easily understandable language, which allows the parents and all parties to fully understand what action they must take to have their children returned to their care as well as timeframes for completion of various tasks;
- set forth findings explaining why the children are in need of continued placement outside the parents’ home or continued court supervision, including the specific risks to the children;
- set forth findings as to whether and why family reunification and an end to court supervision continues to be the long-term case goal;
- set forth findings as to whether the agency has made reasonable efforts to eliminate the need for placement, with specific findings about actions the agency is taking;
- set forth detailed Findings of Fact and Conclusions of Law about whether the parents are in compliance with the case plan, and identify specifically what further actions the parents need to complete;
- approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review;
- identify an expected date of final reunification or other permanency plan for the child;
- set forth orders for the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion;
- make any other orders necessary to resolve the problems that are preventing reunification or the completion of another permanency plan for the child; and
- set a date and time for the next hearing, if needed.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

CONCLUDING THE REVIEW HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Schedule review and permanency hearings within state and federal timeframes.
- Identify persons whose presence is needed at the next hearing.
- Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
- Provide all parties with a copy of orders immediately following the hearing.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Do you understand what happened here today?
 - Do you understand what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at future court hearings.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.

- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
 - Ask if there are any questions for the court.
-

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The case must be reviewed no less frequently than every six months (42 U.S.C. § 675(5)(B)).

The case plan goal, or permanency plan, must be re-evaluated and determined at a permanency hearing to be held within 12 months of the date the child entered care (42 U.S.C. § 675(5)(B)). If the court determines that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii), and (iii)).

VI. THE REVIEW HEARING

BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

² If an ICWA case, see Review Hearing Checklist for ICWA cases, in *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. (2003). Reno, NV: NCJFCJ.

³ *Ibid.*

⁴ See Federal Law Chapter.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ ASFA anticipates that a finding of reasonableness of the agency's efforts will be made at the permanency hearing, as it requires such a finding within 12 months of the date the child first entered care and every 12 months afterward (45 C.F.R. § 1356.21(b)(2)(i)). If the review hearing is prior to the permanency hearing, judges should inquire about progress made toward finalizing the plan.



VII. The Permanency Hearing



VII. THE PERMANENCY HEARING

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VII. The Permanency Hearing

A. Introduction

Every child and young person deserves a permanent family relationship. For young people in out-of-home placement, planning for permanence should begin at their entry into care. Judges should remember that permanency is not a philosophical process, a plan, or a foster care placement. Permanency is the creation or preservation of a family relationship that lasts well beyond the child reaching the age of majority. Permanency planning focuses on locating and supporting a lifetime family and connections for children and youth. Permanence can be the result of preservation of the family, reunification with birth family, or legal guardianship or adoption by kin, fictive kin, or other caring and committed adults. The permanency hearing represents a deadline for the court to determine the final plan in a neglect or abuse case that will move the child out of temporary foster care and into a safe, nurturing, and permanent home. At the permanency hearing, the judge makes a determination about the permanency plan for the child. The permanency hearing is a crucial means of implementing ASFA's mandate of achieving expeditious permanency for children, ending foster care drift, and ensuring compliance with federal requirements.

B. Purpose and Timing of Permanency Hearings

Many jurisdictions refer to review hearings as permanency hearings or permanency planning reviews. **However, there is a distinction between a review hearing and a permanency hearing. The permanency hearing requires judicial inquiry and specific findings that differ from the inquiry and findings at a review hearing.**

ASFA describes a permanency hearing as a procedure to:

- Ensure that the court carefully reviews the situation of a child in foster care under court supervision to determine a permanency plan in light of the policy of expeditious permanency (42 U.S.C. § 675(5)(c), and
- Make one or more reasonable efforts findings (or active efforts if ICWA applies).

At the permanency hearing, the judge must order one of the following permanency plans for the child and specify the date that the plan will be implemented:

- Return to the parent.
- Proceed with adoption by a relative, foster parent, or other non-relative with the state filing a petition to terminate parental rights if necessary.
- Proceed with legal guardianship.
- Proceed with permanent placement with a relative, foster parent, or other non-relative.
- Provide another planned permanent living arrangement (APPLA), if there is a compelling reason why it would not be in the best interests of the child to proceed with one of the other options. APPLA is not an appropriate permanency plan for any child under the age of 16.¹

Federal and state statutes govern timetables for permanency hearings. ASFA requires that a permanency hearing must take place no later than 12 months after a child has entered foster care.²

Children are considered to have “entered foster care” on the date of the first judicial finding that the child has been subjected to child abuse or neglect or the date that is 60 days after the date on which the child is removed from the home, whichever is earlier.³ Many states have shortened this deadline to nine or even six months.⁴

A permanency hearing must also be held within 30 days of a court order that reasonable efforts to reunify the family are not required.⁵ The agency must use reasonable efforts to “place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.”⁶ ASFA anticipates that a finding regarding the reasonableness of the agency’s efforts will be made at the permanency hearing since the finding is required within 12 months of the child’s removal and every 12 months thereafter.⁷

It is important to note that these timeframes are *maximum* timeframes. A case may move to this hearing as soon as 30 days after adjudication when it is clear that reasonable efforts to reunify need not be made.⁸ In these circumstances, the permanency hearing and dispositional hearing are held concurrently. Reasons

Time is of the essence for permanency of children in the dependency system.

A permanency hearing must be held no later than 12 months after the date the child was first considered to have entered foster care (42 U.S.C. § 675(5)(C)) or no later than 30 days after a court determines that reasonable efforts to return a child to either parent are not required, whichever occurs first.

The purpose of the permanency hearing is to determine when the child will achieve the permanency goal or whether modifying the current goal is in the best interests of the child.

After the initial permanency hearing, subsequent permanency hearings must be held every 12 months while the child is in care (45 C.F.R. §1356.21(b)(2)(i)).

why a judge might determine that reasonable efforts need not be made include:

- parents subjected the child to aggravated circumstances as defined by state law (examples cited in ASFA include abandonment, torture, chronic abuse, and sexual abuse);
- the parent has aided, attempted, conspired, solicited, or committed the murder or voluntary manslaughter of another child of that parent;
- the parent has committed a felony assault resulting in serious bodily injury to the child or another of the parent’s children; or
- the parent had his or her rights involuntarily terminated to another child.⁹

In addition, ASFA states that when a child has been in foster care for 15 of the last 22 months, the agency “shall file or join a petition to terminate the parental rights of the child’s parents” unless the child is being cared for by a relative, the state has documented a “compelling reason for determining that filing such a petition would not be in the best interests of the child,” or the state has not made the reasonable efforts necessary to achieve the goal of the case plan where the goal is reunification.¹⁰

ASFA requires the agency to file or join a petition for TPR when a child has been out of the home for 15 of the last 22 months, unless the agency has documented why it is not filing such as: the child is being cared for by a relative; there are compelling reasons that it would not be in the child’s best interests to file; or the reasonable efforts necessary to achieve the case plan goal of reunification have not been made (42 U.S.C. § 675(5)(C); 65 Fed. Reg. 4062 (Jan. 25, 2000)).

C. Case Management Before the Permanency Hearing

Who Should Be Present?¹¹

All parties should be present for a permanency hearing because it is where the court hears evidence to determine the permanency plan for the child. It is especially important that the agency worker primarily responsible for case planning and case management attend the hearing because the worker is most familiar with the family, the child, and with the treatment issues presented.

Parents, children, and other parties and appropriate persons such as CASAs, foster parents, relatives, and tribes when appropriate, should be permitted and encouraged to participate fully in permanency hearings. The court must ensure that all opinions are heard because there may be differing opinions on the issues. The child should be present for the permanency hearing, and if a child is of the age of maturity to express an interest in the permanency plan, the child’s wishes should be considered by the court. Federal law requires

that children age 14 and older be actively involved in their own case planning,¹² and that they are asked about their desired permanency outcome.¹³

Foster parents and pre-adoptive parents or relatives providing care for the child should be provided notice of, and a right to be heard in, **any** proceeding held with respect to the child. These individuals can be valuable sources of information to assist the judge in determining the child’s condition. If they are not present at the permanency hearing, the court should ask the caseworker whether they were informed of the hearing and their right to be heard, and why they are absent.

If ICWA applies in the case, it is critical to include the tribe in the decision-making throughout the case. It is important that tribal representatives be present, even if the tribe has not intervened in the case. The tribe should be aware of all planning from the earliest possible time.

Competent legal representation must be available at this stage of the case to ensure that procedural protections are afforded to the parties. Ideally, the same representatives who have served the parties in the early stages of the case will be available to continue with the case to its resolution.

D. Preparing for the Hearing

The Child Welfare Agency and Other Parties

The child welfare agency’s proposed case plan should be provided to all parties and their legal representatives; for Indian children, the child’s tribe should receive the case plan sufficiently in advance of the hearing to allow for preparation and response. If not specified in statute, court rules should set the number of days prior to the hearing on which the reports should be furnished. Reports should cover all of the issues listed under “Questions that Must be Answered” in later sections of this chapter. If there are differing opinions from the Guardian *ad litem*, CASA, or tribe, each should also submit a report to the court and to all parties.

Reports should be written in language clearly understandable by the parties and should set out facts to support the recommended permanent plan for the child. The report should be written to assist the court in preparing substantive Findings of Fact and the permanency hearing order. If there

- Review reports, case file, and case plan.
- Review information from the child, current caregiver, and foster parents.
- Determine who must or should be present at the hearing.
- Review reflections on decision-making process that protects against bias (see the Permanency Hearing Benchcard).

has been a family decision-making conference or team meeting, a report and recommendation from that conference or team meeting should be included with the agency report.

The Court

The court must schedule and conduct the permanency hearing at a time and date in accord with statutory timeframes. The hearing should be scheduled before the same judicial officer who has handled the case since the original filing. Sufficient time should be scheduled so that the hearing can be completed in one sitting. For a routine permanency hearing, 60 minutes is the recommended amount of time to be allotted.¹⁵ The court should maintain and enforce a no-continuance policy to discourage delay.

The court must ensure that all parties have been provided notice of the permanency hearing. If applicable, the citizen review board should be notified of the hearing date, along with volunteer CASAs and, if the child is Indian, the child's tribe. **Under ASFA, foster parents and pre-adoptive parents are entitled to notice of the hearing and have a right to be heard (42 U.S.C. §675(5)(G)).** Prior to the hearing, the judge should review the court file, case plan, and any reports from bodies who have reviewed the case in the interim.¹⁶

E. Conducting the Permanency Hearing

The Child Welfare Agency and Other Parties

The permanency hearing is the point in the case when a clear, permanent goal must be identified, along with steps and timelines to accomplish the goal. The court must make independent findings concerning reasonable efforts (or active efforts in ICWA cases) and what goal is in the child's best interests. **The judge must determine the permanency plan. The court is not bound by the plan recommended by the agency.** If the permanency plan does not involve the reunification of the child with the family, then reasonable efforts inquiries focus on finding another permanent home for the child. Under ASFA, Title IV-B of the Social Security Act (42 U.S.C. § 671 (15)) was amended to authorize reasonable efforts to place a child for adoption or legal guardianship to be made concurrently with reasonable efforts to preserve or reunify the child with birth parents. If concurrent planning was used in the case and reunification has failed, the alternate plan may already be sanctioned by the court. Regardless, it is imperative at every permanency hearing that the court examine each permanency option and rule out the appropriateness of the more permanent options anytime another is selected.

This hearing is such an important step in the move to permanency for a child that the judge should

not accept stipulations to the plan or agreed orders without fully examining the parties to ensure they understand the issues under consideration.

Reasonable efforts findings (or active efforts findings in ICWA cases) are among the most important made at a permanency hearing. These findings help courts ensure that the constitutional rights of the parents and child are preserved during government intrusion into a family's life. In addition, federal reviewers as well as compliance managers in local agency offices review permanency hearing orders to see that the court has made the required findings.

Finally, federal funding to support the child who is subject of the hearing depends on the agency making the efforts required under ASFA. It is the court's role, and the purpose of the reasonable/active efforts findings, to certify to the federal government that the agency is making efforts. Failure to make reasonable efforts to implement the permanency plan may result in loss of federal matching funds from the date of the finding until cured by a subsequent positive finding.



OPENING THE HEARING

- Call the case.
- Identify the people in the courtroom.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS

Notice

- If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
 - Verify that foster parents and pre-adoptive parents were provided with notice (42 U.S.C. § 675(5)(G)).
 - Verify that the agency used due diligence to provide notice to all parents of a sibling of a child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

Representation

- If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.

F. Key Inquiries, Analyses, and Decisions the Court Should Make at the Permanency Hearing

Determine the Permanency Plan: (42 U.S.C. § 675(5)(c))¹⁷

- What plan does the agency recommend?
- How was that plan determined and who was involved in developing the plan?
- What is the child's position? How was the child consulted?
- What is the concurrent plan? What efforts are being made to implement it?

In determining the permanency plan, the court must review family time (if applicable), the child's current placement, the needs of the child, and child well-being. To determine the most appropriate permanency plan, the court must ensure that all of the following issues are addressed and questions are answered.¹⁸

If Reunification Is Recommended:

- Why is reunification in the best interests of the child?
- Can the child be safely reunified today?
- If the child cannot be returned home today, what specific steps will be taken to promote reunification within a reasonable amount of time?
- What is the child's position regarding reunification?
- How often is parenting time occurring, and what is the impact on the child?
- What is the date and detailed plan for the child's safe return home and follow-up supervision after family reunification?
- What are the plans to continue any necessary services to the child?
- What are the plans to continue any necessary services to the family?
- If a change in school will occur, what will be done to prepare for the transition?

If Termination of Parental Rights and Adoption Are Recommended:

- Why is this plan preferable to reunification? Why is it in the best interests of the child?
- If the child is an Indian child, what is the tribe's position on termination of parental rights? Does the tribe have a practice of customary adoption that the state might adopt?
- Has the TPR petition been filed and, if not, what date will it be filed? If the TPR petition has been filed, what is the anticipated trial date?
- Are there relatives who will adopt the child if TPR is granted? If so, is the child living with the relative? If not, why not? If the child is not placed with relatives, what efforts have been made to identify a willing and able relative to adopt the child?
- If there are no relatives willing and able to adopt, has the agency identified a non-relative adoptive family? If relative adoption is not the plan, is adoption by the foster parents the plan? If not, why not?
- If an adoptive home must be recruited, what efforts are being made to identify potential adoptive homes both locally and in other jurisdictions? Are there adults with whom the child has or has had a positive relationship who may be potential adoptive families?
- Are there relatives interested in permanent guardianship but not willing or able to adopt? If so, why is non-relative adoption preferable to permanent guardianship with a relative?
- If relatives have been ruled out as placement resources due to prior criminal records, have non-safety licensing waivers been pursued? If not, why not?
- What is the child's position regarding adoption?
- Will adoption with contact be recommended? Why or why not?
- What counseling is needed and will be provided to assist the child to understand and participate in reaching the new goal?
- If the child is an Indian child, have the ICWA requirements been met?¹⁹ Does the tribe support the plan? If not, why not?

If the agency is required to file or join a termination of parental rights petition (because the child has been in foster care for 15 of the last 22 months),²⁰ but has not done so or has expressed an intention not to file, the judge should state whether: 1) the child is placed with a relative; 2) the agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or 3) if reasonable efforts are required, the agency has not provided to the family of the child such services as the agency deems necessary for the child's safe return home consistent with the time period established in the case plan.

If Permanent Guardianship or Permanent Custody Is Recommended:

Why is this option preferable to reunification, or TPR and adoption? Why is it in the best interests of the child?

- What reasonable efforts were made to reunify?
- What is the relationship between the proposed permanent guardian and the child?
- Is the child placed with the proposed permanent guardian? If not, what is the plan to place the child with the proposed permanent guardian?
- Is the proposed guardian willing to fill the parental role for the child beyond the age of majority and through adulthood?
- Is the proposed guardian financially able to care for the child through the age of majority? If not, has the agency explored opportunities for relative caregiver payments (if a relative) and/or entitlements (e.g. subsidy, if available; Social Security payments; food stamps; Medicaid, etc.)?
- Has there been full disclosure to the family of the child's circumstances and special needs?
- What contact will occur between the child and parents, siblings and other family members? If the parents are not to have contact with the child, will the proposed guardian be able to protect the child from further maltreatment?
- What is the child's position regarding permanent guardianship with the proposed guardian?
- Will financial support be provided by the biological parents?
- What are the plans to continue any necessary services to the child? How will these services be funded after guardianship or custody has been granted?
- Does the proposed guardian have the necessary skills and knowledge to apply a "reasonable and prudent parent standard" while at the same time allowing children to participate in normal and

beneficial activities? (P.L. 113-183 § 111(a)(3))

- If the child is not already placed in this home, why not, and:
 - How often is family/parenting time occurring, and what is the impact on the child? Will contact continue after finalization of the guardianship?
 - What is the date and detailed plan for the child's placement in this home and follow-up supervision after placement?
 - If a change of school will occur, what will be done to prepare for the transition?

If Placement with a Fit and Willing Relative Is Recommended:

- How is placement with a fit and willing relative rather than reunification, adoption, or a permanent guardianship in the child's best interests?
- Were the relatives fully informed about the benefits of adoption and/or permanent guardianship?
- Have the relatives been offered assistance in answering questions they may have about adoption or guardianship?
- What is the nature of the relationship between the relative and the child?
- What is the child's position on the placement?

If Another Planned Permanent Living Arrangement (APPLA) Is Being Recommended:

- Is the child under the age of 16 thereby making APPLA an inappropriate plan under section 475(5)(C)(i) of the Preventing Sex Trafficking and Strengthening Families Act of 2014?
- What are the compelling reasons for determining that it is not in the child's best interests to return home, to pursue a termination of a parental rights and adoption, or to pursue placement with a guardian or fit and willing relative?
- What reasonable efforts were made to reunify the child with the parents?²²
- What efforts has the agency made to identify, locate, and contact relatives or non-relatives who may be willing to care for the child on a permanent basis?
- What is the identified, specific, and long-term placement for the child? How will this plan provide

stability and permanency for the child?

- What is the child’s position regarding this plan?
 - The judge is required to ask the child about his/her desired permanency outcome (P.L. 113-183 § 475 (A)(a)(2)).
- What steps have been taken by the agency to ensure that the foster family follows the “reasonable and prudent parent standard?” Does the child have regular opportunities to engage in age or developmentally-appropriate activities? (P.L. 113-183 §§ 475(5)(B) and 475(A)(a)(3)).
- If the child’s placement includes a group facility or institutional setting, how is this placement the most home-like environment for the child based on her physical and/or mental health needs? What efforts have been made to provide additional services that would allow the child to reside in a more permanent family-like environment?
- What contact will occur between the child and parents, siblings, and other family members?
- What are the plans to continue any necessary services for the child?
- If the child is 16 or older, what is the plan to prepare the child for independent living?
- If the child is not already placed in a facility or home, why not, and:
 - How often is family/parenting time occurring, and what is the impact on the child?

APPLA is limited as a permanency plan to youth age 16 and older (P.L. 113-183 § 475(5)(C)(i)).

For all children in foster care with a permanency plan of APPLA, the Title IV-E agency is required to document at each permanency hearing the efforts to place a child permanently with a parent, a relative, or in a guardianship or adoptive placement (P.L. 113-183 §§ 475(A)(1), 475(B), and (C)(i)).

At the permanency hearing, the court must ask the child about his/her desired permanency outcome and make a judicial determination at each permanency hearing that APPLA is the best permanency plan for the child and compelling reasons why it’s not in the best interests of the child to be placed permanently with a parent, relative, or in a guardianship or adoptive placement (P.L. 113-183 §§ 475(A)(a)(2)).

The agency must document at the permanency hearing (and the six-month review) the steps taken to ensure that the foster family follows the “reasonable and prudent parent standard” and that the child has regular opportunities to engage in “age- or developmentally-appropriate activities” (P.L. 113-183 §§ 475(5)(B), 475(A)(a)(3)).

- What is the date and detailed plan for the child’s placement in this home and follow-up supervision after placement?
- If a change of school will occur, what will be done to prepare for the transition?

In all Cases, Inquire About the Child’s Well-Being.²³

- Obtain updates on health and educational information.
- Obtain a description of the child’s current placement and behavior.
- Obtain a description of the services that have been provided to the child, the progress the child has made, and any issues that still need to be addressed, including cultural needs.
- If the child is a victim of sex trafficking (or was determined to be at risk of becoming a sex trafficking victim), inquire if appropriate services have been put in place pursuant to Titles IV-B and IV-E as amended by P.S. 113-183 (Preventing Sex Trafficking and Strengthening Families Act).
- If a child has siblings, obtain information on the status of the relationship and contact between siblings.
- Determine if the child has been absent or missing from placement (e.g., run away). If the child has been missing from placement, require the agency to determine the factors that led to the child’s being absent from foster care, and to the extent possible, address those factors in subsequent placements. Also determine the child’s experiences while absent from care, including whether the child is a sex trafficking victim (P.L. 113-183, amending Title IV-E at 471(a)(35)).

G. The Court’s Written Findings of Fact and Conclusions of Law at the Permanency Hearing

Findings of Fact and Conclusions of Law should be stated in language understandable by the parties and with enough detail to support future court action. The court’s findings and conclusions should be set out orally and in writing and made available to all parties at the conclusion of the hearing. They should include:

- Persons present at the hearing and whether absent parties were provided with appropriate notice. It should also be verified that reports offered into evidence have been provided to all parties in advance of the hearing.
- **Whether the agency has made reasonable efforts to safely return the child to the child’s home. If so, the order must state what specific actions the agency took.**

- **Whether the agency has made reasonable efforts to finalize the permanency plan.**
- **A finding as to what reasonable efforts the agency has made to reunify the family and to finalize a permanency plan.**²⁴ If it is found that additional remedial steps are necessary, specific expectations should be stated in a detailed order that includes a short timeframe (e.g., 90 days) before the follow-up permanency hearing.
- **The court's determination of the permanency plan for the child and why the plan is in the best interests of the child.** The order should state the specific steps to be taken and timelines for accomplishing this goal.
- A statement addressing special factors or conditions of the child that are identified as special needs, the services to be provided to address the needs or conditions, and who is responsible for providing the services.
- **If the plan is reunification,** the date for reunification. If the permanency plan is **reunification** and the child is not yet returned to the parent(s), whether reunification is achievable within a reasonable amount of time, taking into consideration the child's age and any special needs.
- **If the agency is required to file a termination of parental rights petition,** but has not done so or has expressed an intention not to file, state whether: 1) the child is placed with a relative; 2) the agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or 3) if reasonable efforts are required and the agency has not provided them consistent with the time period in the case plan. **If the termination of parental rights petition has been filed,** the court should proceed to schedule pre-trial conferences, mediation, and the trial dates.
- **If the plan is termination of parental rights and a parent wishes to relinquish parental rights at the permanency hearing,** the court should be prepared to accept the relinquishment and include the relinquishment in the permanency hearing order. (See section on accepting relinquishments in the Termination of Parental Rights Chapter).
- **In all cases,** orders necessary to address issues or concerns identified in the health and education records or during the permanency hearing.
- **Where appropriate,** order parties to engage in alternative dispute resolution.
- **In all cases,** a next hearing date and purpose.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.



POST-PERMANENCY REVIEWS

- If the court determines the goal should continue to be family reunification, the focus will continue to be on the appropriateness of services offered to the parents and their progress on eliminating safety risks.
- If goal is no longer reunification, the focus will be on the agency's efforts to finalize the concurrent plan as the new permanency plan.
- If reunification is not possible, the child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child to transition into adulthood.

H. Concluding the Permanency Hearing

Permanency hearings and subsequent reviews are required when children are to remain either in foster care or under agency supervision. Regularly scheduled review hearings should continue until the child is placed at home free of agency supervision, custody is awarded to a fit adult, the child is placed for adoption, or the child reaches the age of majority or the court otherwise loses jurisdiction.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set further reviews and/or permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

Compliance with the case plan must be “reviewed periodically,” but not less than every six months (42 U.S.C. § 675(5)(B)).

After the initial permanency hearing, subsequent permanency hearings must be held every 12 months while the child is in care (45 C.F.R. § 1356.21(b)(2)(i)).

If the court determined that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15) (E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i) (ii), and (iii)).

VII. THE PERMANENCY HEARING ENDNOTES

¹ P.L. 113-183 § 475(5)(C)(i).

² 42 U.S.C. § 675(5)(C).

³ 45 C.F.R. § 1355.20(a).

⁴ Some state statutes provide even shorter timelines when very young children are involved. See, for example, California Welfare and Institutions Code 361.25 (1997), and Mississippi Code 43-15-13 (1997) dealing with children ages three or younger.

⁵ 42 U.S.C. § 671(a)(15)(E)(i).

⁶ 42 U.S.C. § 671(a)(15)(C).

⁷ 45 C.F.R. § 1356.21(b)(2)(i).

⁸ 42 U.S.C. § 671(a)(15)(E)(i).

⁹ See discussion of aggravated circumstances in the Adjudication Chapter, pg. 179.

¹⁰ 42 U.S.C. § 675(5)(E)).

¹¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may not be required by law.

¹² P.L. 113-183 § 475(1)(B).

¹³ P.L. 113-183 § 475A(a)(2).

¹⁴ 42 U.S.C. § 675(5)(G).

¹⁵ Recommendations for hearing times were first made in the original RESOURCE GUIDELINES in 1995. The Conference of Chief Justices, the board and membership of the NCJFCJ, and the American Bar Association endorsed the document.

¹⁶ See the Disposition Chapter for more detail on what should be included in the case plan.

¹⁷ State laws may require judicial approval of the permanency plan. See 65 Fed Reg 4053 (Jan. 25, 2000).

¹⁸ Judges should make this list available to the child welfare agency, the Guardian *ad litem*, and CASA so that they can be covered in staff training to prepare individuals for court hearings.

¹⁹ For Indian children, ICWA requirements indicate the need for additional information when termination of parental rights is being considered. Please see the Permanency Planning Hearing and Termination of Parental Rights Hearing checklists in: *Indian Child*

Welfare Act Checklists for Juvenile and Family Court Judges. (2003) Reno, NV: NCJFCJ.

²⁰ 42 U.S.C. § 675(5)(E).

²¹ For Indian children, ICWA requires that efforts to reunify be active (25 U.S.C. § 1912(d)).

²² *Ibid.*

²³ See the Permanency Hearing Benchcard for more detail.

²⁴ *Supra* note 7.



PERMANENCY HEARING
BENCHCARD



Permanency Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the disposition hearing¹

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives

Hold the permanency hearing no later than 12 months after date the child was first considered to have entered foster care (42 U.S.C. § 675(5)(C)) or 30 days after the court determines reasonable efforts to return the child to the parent are not required, whichever is first (42 U.S.C. § 671(a)(15)).

After the initial permanency hearing, subsequent permanency hearings must be held every 12 months while the child is in care (45 C.F.R. 1356.21(b)(2)(i)).

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review the relevant documents.

- Current and updated case plan
- CASA, GAL, or Foster Care Review Board report
- Information from the child
- Information from the current caregiver, foster parents
- Service provider reports
- Medical and education records
- For children placed out of state, the report documenting the visit by the caseworker

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?

- What is update or status of those cases?
 - What are the steps required for obtaining update/status?
- What is the impact on this hearing?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE PERMANENCY HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Swear in the parties, participants, and relatives.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process Considerations

- **NOTICE**
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made? Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - How were the parents and/or guardians notified of this hearing?
 - Was the notice in a language and form understandable to the parents and/or guardian?
 - If child, parents, legal custodians, caregivers, or relatives who requested notice are absent, confirm that they were properly noticed.

- If parent is absent and has not been served, inquire about the diligent search.
 - Require a thorough description of efforts to locate and advise any absent parent of the hearing and confirm that a diligent search was begun. If needed, ask parents.
- Have the foster parents, pre-adoptive parent, or relative providing care for the child been provided notice of, and an opportunity to be heard in, the hearing? (42 U.S.C. § 675(5)(G))
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Has the agency exercised due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.
- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?

- **REPRESENTATION**

- Address any outstanding or new representation issues.
 - If the parents do not have representation, are they entitled to representation?
 - Determine if the right to counsel is understood.
 - Are there language issues to consider in appointing counsel?
 - If parents request counsel and claim to be indigent, have parents filled out affidavit for indigence?
 - If parents are ineligible for the appointment of counsel or knowingly, intelligently, and voluntarily waive appointed counsel, ask if they want to proceed pro se or hire a private attorney. Explain pro se if necessary.
 - Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
 - Has counsel been appointed to represent the child? If not, appoint counsel to represent the best interests of the child if it has not yet been appointed.



- Has counsel met with the child in person? Is counsel able to determine and advocate the child’s position?
- Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- If any counsel needs to be appointed, ensure that orders appointing counsel are expedited.

Engage parents, children, relatives, and foster parents present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
 - Explain the purpose of the hearing.
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be involved in this process with us?
 - Ask parents if any other individuals should be involved in this court matter, or who else is significant in the child’s life.
- Consult with the child in an age-appropriate manner regarding the permanency plan and/or transition to independent living (42 U.S.C. § 675(5)(c)(iii); P.L. 113-183 § 475A(a)(2)).

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE PERMANENCY HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

ICWA Inquiry and Determination

- Was the ICWA inquiry made by the agency? Whom did the agency ask?
- Has an ICWA determination been made?
 - If yes, different standards apply; refer to the ICWA Checklist.²
 - If yes, determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(e)).
- If ICWA applies:
 - Determine whether the state court has jurisdiction.³
 - Have the parent or Indian custodian and the Indian child’s tribe been notified of this hearing by registered mail with return receipt requested?
 - Has the case been evaluated for transfer to a tribal court?
 - Has the tribal court accepted jurisdiction?
 - Has either parent vetoed the transfer?
 - Does good cause exist to deny the transfer?

If ICWA applies, or the court has reason to believe ICWA applies, the court should refer to the ICWA Checklist.

Determine the permanency plan (42 U.S.C. § 675(5)(c))

- What plan does the agency recommend?
- How was the plan determined, and who was involved in developing the plan?
- What is the child’s position? How was the child consulted?
- What is the concurrent plan? What efforts are being made to implement it?

Does the court-approved, long-term permanent plan for the child remain the best plan for the child?

In determining the permanency plan, review the following:

REVIEW FAMILY TIME (IF APPLICABLE).

- Reassess the type, frequency, duration, and quality of family time.
- Consider who should supervise (a visitation center, a caseworker, or an approved third party).
- Outline incentives to gradually increase family time or reduce limits. Indicate if the agency is given discretion to increase (and whether this includes up to reunification) or is automatic upon proof of satisfying the announced incentive (such as approved housing or completion of a specified case plan task).
- If a child is placed in permanent guardianship, the court should specify the frequency and nature of family time between the child and the child's parents, siblings, and other family members in the written order.
- If siblings are unable to be placed together, verify sibling visitation is occurring. The agency must make reasonable efforts to provide frequent sibling visitation, even with previously adopted siblings (P.L. 110-351).
- Inquire if transportation has been an issue and determine who has been present and has participated in the visits.
- If family time is not possible because of the distance of the parent, the court should specify what alternative forms of contact are permitted (such as phone, email, webcam, or video conferencing).
- If the case involves domestic violence, ensure family time practices are adequate to protect the child.
- Ensure that there is ongoing supporting documentation regarding the frequency, quality, and progress of family time.
- Verify that the family time is consistent to meet the developmental, emotional, and mental health needs of the child.

REVIEW THE CHILD'S CURRENT PLACEMENT.

- **Determine if safety is still an issue.** Consider reunification when the circumstances that caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent.⁵

- **Ask what changes, if any, have been made to the child’s living arrangement and/or placement since the last hearing.** If there has been a change, ask if the change is necessary to achieve the child’s permanency goal or meet the child’s service needs.
- **If siblings are not placed together,** determine why not, and ask about efforts made (when appropriate) to keep them together.
 - Has every possible effort been made to place siblings together, when appropriate, in the same home? And, in the event of permanent placement of the siblings, has every effort been made to place them in the same adoptive home or, if the siblings are separated, to keep them in contact with each other? (P.L. 110-351)
- Verify that the caseworker advised the child and the individuals with whom the child will be placed of the availability of more permanent and legally secure placements and the type of assistance associated with each placement.
- Inquire of the child, caregiver, GAL, and caseworker of any issues with the current placement.
 - **Consider the child’s preference** – conduct an age-appropriate consultation with a child during a permanency hearing (42 U.S.C. § 675(5)(c)(iii); P.L. 113-183 § 475(A)(a)(2)).⁶
- Determine if **concurrent planning** is appropriate based on the facts of the case.⁷
- Verify that the caregiver is willing and able to meet the needs of the child.
 - Does the current placement apply the reasonable and prudent parent standard and permit the child to engage in age- or developmentally-appropriate activities? (P.L. 113-183 § 475(5)(B), § 475(A)(a)(3))
 - Is the placement trained to help children with traumatic stress cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
 - Is the placement trained to help children who have been victimized by sex trafficking? (P.L. 113-183)
- Is the placement in proximity to the child’s education setting or does it otherwise support educational continuity? (42 U.S.C. § 675(1)(G))
- If the case involves domestic violence, ensure safety provisions exist, the placement is appropriate to protect the child, there is safety plan compliance, and visitation practices are adequate to protect the child.⁸

REVIEW AND ADDRESS THE NEEDS OF THE CHILD AND CHILD WELL-BEING.⁹

- What services, interventions, and/or supports are in place to assess and ensure the child’s well-being?
 - Does the agency have the child’s most current health and education records?
(42 U.S.C. § 675 (1)(C))
 - Have they been provided to the child’s current foster/kinship caregiver?
 - Verify that the child’s mental, physical and dental, medication, and reproductive health care needs have been addressed. Get input from all parties or participants, including the child and caregiver.
- Verify that the parents are participating in the child’s medical, educational, and other appointments related to the child’s well-being as appropriate.
- Are the services specifically tailored to address this child’s unique issues?
 - If applicable, are services related to the child’s traumatic stress being provided? Ensure sufficient supports and treatments are in place to address any of the child’s trauma issues.
 - If applicable, are services related to the child’s victimization as a result of sex trafficking being provided? Ensure sufficient supports and treatments are in place to address any issues stemming from the child’s victimization (P.L. 113-183).
- How has the agency assessed the quality of any services provided?
- How are the child’s connections to his/her cultural heritage being preserved and promoted?
- What efforts has the state made to ensure children in foster care form and maintain long-lasting connections to caring adults, even when a child in foster care must move to another foster family home or when the child is placed under the supervision of a new caseworker? (P.L. 113-183 § 105(3))
- What progress has the child made? What are the barriers to progress, if any? What additional services, interventions, and supports will be provided to assist the child in overcoming these barriers?
- What is the status of the child’s education?
 - Review educational records, including any individualized education plan. If an educational surrogate parent has been appointed, the educational surrogate parent should report to the court as appropriate.
 - Verify that the child is attending school on a regular basis and has adequate school supplies and transportation.

- Has the agency developed a plan to ensure educational stability? (42 U.S.C. § 675(1)(G))
 - Verify that the child is attending the same school as when he or she first entered care. If not, verify what has been done to ease the transition.
- **If the child is 14 or older**, has the agency developed a transition plan, personalized at the direction of the child, including specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services? (42 U.S.C. § 675(H))
 - Has the agency documented the child’s education, health, visitation, and court participation rights, and the right to receive a credit report annually? Have those rights been fully explained to the child in an age-appropriate way? (P.L. 113-183 § 475(A))
 - Verify that children age 14 and older have been able to select and include up to two individuals (excluding those normally involved on their case planning team) to be involved in developing their case plan (P.L. 113-183 § 475(1)(B)).
 - If aging out of foster care (18, 19, 20, or 21), has the youth been supplied with his or her birth certificate, Social Security card, driver’s license or identification card, health insurance information, and medical records? (P.L. 113-183 § 475(5)(I))
- What are the child’s interests? What are the agency and the placement doing to support those interests?
 - Is the child able to participate fully in age- or developmentally-appropriate activities such as sports, field trips, and overnight activities? (P.L. 113-183 § 475(5)(B); § 475(A)(a)(3))
- Order child support, if not already ordered. If already ordered, review compliance.
- **If the child has been missing from placement**, inquire about the factors that led to the child being absent from care and to the extent possible, how those factors will be addressed in the current or subsequent placements (P.L. 113-183 § 471(a)(35)).
 - If the child has been missing from placement, inquire about what is known of the child’s experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization, and if so, what services will be offered (P.L. 113-183 § 471(a)(35)).

To determine the permanency plan, conduct a five-plan analysis.

IF THE PLAN IS REUNIFICATION

- Why is this plan in the child's best interests?
- What is the expected reunification date? Is reunification achievable within a timeframe consistent with the child's developmental needs?
- What services are in place to support successful reunification?
- What is the plan for follow-up supervision upon reunification?
- Are the parents in compliance with the case plan?
- What is preventing the child from returning SAFELY home TODAY?
- What is the current and immediate safety threat?
 - Has the threat been diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
 - What type of safety plan could be developed and implemented in order for the child to return home today?
- What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

IF THE PLAN IS ADOPTION

- How is adoption rather than reunification in the best interests of the child?
- Is the child of an age where his/her consent is required by state law?
- What is the status of proceedings to terminate parental rights?
 - Determine the date by which the agency must file a petition to terminate parental rights.

- Is the child currently in an adoptive placement? If not, what is the plan to place the child in an adoptive placement?
- What efforts were made to identify relatives willing and able to adopt the child?
- How have alternatives to adoption and/or other options been discussed and resolved, including:
 - Cultural/customary adoptions for an Indian child
 - Relative guardianship v. non-relative adoption
 - Adoption subsidies and supports
 - Open adoption or post-adoption contact
- Determine the agency's timeframe for completing legal proceedings, home study, adoption subsidy, and other steps in the adoption process.
- Has the agency made full disclosure about the child's current and prospective needs?
- What, if any, services for such needs will continue after the adoption is finalized?

IF THE PLAN IS PERMANENT GUARDIANSHIP

- How is permanent guardianship rather than reunification or adoption in the best interests of the child?
- What is the relationship between the proposed permanent guardian and the child? Can the proposed permanent guardian provide the child with a safe, nurturing home?
- Is the child placed with the proposed permanent guardian? If not, what is the plan to place the child with the proposed permanent guardian?
- Has the agency disclosed to the proposed permanent guardian the child's current and prospective needs? What, if any, services for such needs will continue after the guardianship is finalized?
- Has the agency identified, and is it able to assist in securing, the resources the proposed



permanent guardian will need to support the child through the age of majority, including:

- Guardianship subsidy
 - Child support
 - Social Security
 - Food stamps
 - Medicaid
- Determine the timeframe for completion of the permanent guardianship process.

IF THE PLAN IS PLACEMENT WITH A FIT AND WILLING RELATIVE

- How is placement with a fit and willing relative rather than reunification or adoption in the child's best interests?
- Has the agency fully informed the relatives about the benefits of adoption and/or permanent guardianship?
- What is the nature of the relationship between the relative and the child? Can the relative provide the child with a safe, nurturing home?
- Is the child placed with a relative? If not, what is the plan to place the child with a relative?
- What contact will occur between the child and parents, siblings, and other family members?
- Has the agency fully disclosed to the relative the child's current and prospective needs? How will the relative be able to meet those needs? What, if any, services for such needs continue after the permanency plan is finalized?
- Is the relative financially able to care for the child through the age of majority? Has the agency informed the relative about any aid or benefits that may be available to support the child?

IF THE PLAN IS ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT (APPLA)

- Has the agency documented a compelling reason for this plan? (42 U.S.C. § 675(5)(C))
- What is the child's position regarding APPLA as the permanent plan? How was the child consulted?
- How will this plan provide stability and permanency for the child?

- Does the child have any special needs? If so, will services for such needs continue after this plan is finalized?
- What is the identified, specific, permanent placement for the child? Is the child already placed in this home? If not, what is the plan for placement?
- What efforts has the agency made to identify, locate, and contact relatives or non-relatives who may be able and willing to care for the child on a permanent basis?
- How will connections and relationships important to the child be maintained through this permanency goal?
- If the child is placed in congregate care or an institutional setting, how is this least restrictive, most family-like, and consistent with the best interests and special needs of the child? What efforts have been made to provide additional services that would allow the child to reside in a more permanent, family-like environment? (42 U.S.C. § 675(5)(A))
- **If the child is 14 years old or older**, determine whether the agency is providing services needed to assist the child to make the transition from foster care to successful adulthood (P.L. 113-183 § 475(5)(I)).

Summary of key findings/orders

- **If the child has been in foster care 15 of the past 22 months, has a termination of parental rights petition been filed? If not, is there a compelling reason not to file a TPR petition?**
(42 U.S.C. § 675(5)(E))
 - If the agency is required to file a termination of parental rights petition, but has not done so or has expressed an intention not to file, state whether:
 1. the child is placed with a relative;
 2. the agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
 3. if reasonable efforts are required, the agency has not provided to the family of the child, consistent with the time period in the case plan, such services as the agency deems necessary for the safe return of the child to the child's home.
- **Has the agency made REASONABLE EFFORTS to finalize the permanency plan?**
(45 C.F.R. § 1356.21(b)(2))
 - The court's **determination of the permanent plan** for the child and **why the plan is in**

the child's best interests. The order should state the steps to be taken and timelines for accomplishing the permanent goal.

- If the permanent plan is **reunification** and the child is not yet returned to the parent(s), whether reunification is achievable within a reasonable amount of time taking into consideration the child's age and unique needs. Specify a date for reunification.
- **If the plan is termination of parental rights** and a TPR petition has not been filed, the order should state the expected timeframe for filing a TPR, which must be within 30 days. If the petition has been filed, the court should schedule pre-trials, mediation, and trial dates.
- **If the plan is TPR**, and a parent wishes to relinquish parental rights at the permanency hearing, the court should be prepared to accept the relinquishment and include the relinquishment in the order.
- **If the permanency plan is adoption, permanent guardianship, placement with a fit and willing relative, or APPLA, and the child is not living with the proposed permanent family**, did the agency provide documentation that includes child-specific recruitment efforts such as use of state, regional, and national adoption exchanges, including electronic exchange systems? (45 C.F.R. § 1356.21(g)(5))
- **If the child is placed out of state, determine whether:**
 - The placement continues to be appropriate and in the best interests of the child (42 U.S.C. § 675(5)(C));
 - The child has been visited every 12 months by a caseworker;
 - The required report has been submitted.
- **If the child is 16 years old at the time of the review**, determine whether the agency is providing services needed to assist the child to make the transition from foster care to independent living.

Whether the agency provided, and the court reviewed, the **health and education records of the child**, including the most recent information available regarding the names and addresses of the child's health and educational providers; the child's grade level performance; the child's school record.

- A record of the child's immunizations; the child's known medical problems; the child's medications; and any other relevant health and education information concerning the child determined to be appropriate by the agency.

- Orders necessary to address issues or concerns identified in the health and education records or during the court hearing.
- Order that parties engage in alternative dispute resolution, if applicable.

FINDINGS AND CONCLUSIONS

- Persons present and whether absent parties were provided with appropriate notice; verification that reports offered into evidence have been provided to all parties in advance of the hearing.
- A finding of the reasonable efforts made to reunify the family and a finalized permanency plan. A well-designed, appropriate case plan and meaningful case reviews should prevent unexpected findings of “no reasonable efforts” at this stage of a case. Should it be found that additional remedial steps are necessary, specific expectations should be set out in a detailed order, with a short timeframe (e.g., 30 days) for holding the follow-up permanency hearing. A copy of the order should be forwarded to the head of the agency.
- A statement addressing special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing the services.
- The court’s determination of the permanency plan for the child and why the plan is in the best interests of the child. The order should state the steps to be taken and timelines for accomplishing the permanent goal. If the plan is reunification, the date for reunification should be specified.
- If the plan is TPR and the petition has not yet been filed, the order should state expected timeframe for filing a TPR petition, which must be within 30 days. If the petition has been filed, the court should schedule pre-trials, mediation, and trial dates.
- If the plan is TPR, and a parent wishes to relinquish parental rights at the permanency hearing, the court should be prepared to accept the relinquishment and include the relinquishment in the order.
- For any plan, the next hearing date and purpose unless all court and agency involvement is terminated.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

POST-PERMANENCY REVIEWS

- If the court determines the goal should continue to be family reunification, the focus of post-permanency hearing reviews will continue to be on the appropriateness of services offered to the parents and their progress on eliminating safety risks.
- If goal is no longer reunification, the focus of post-permanency hearing reviews will be on the agency's efforts to finalize the concurrent plan as the new permanency plan.
- If reunification is not possible, the child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for transition to an adult as appropriate.

CONCLUDING THE PERMANENCY HEARING

Case Management – Prepare for the next hearing

- Make oral findings and orders that all participants can understand.
- Enter additional orders necessary to move the case toward permanency.
- Set review or permanency hearing and identify tasks to be accomplished.
 - Focus on permanency. State the number of months the child has been in care and how many months before the permanency hearing.
 - Identify an expected date for final reunification or achievement of another permanency plan for each child.
 - Set the date and time of the next hearing within state and federal timeframes. Review hearings should be set for at least 30 minutes.
- Identify persons whose presence is needed at the next hearing.
- Consider appropriateness of alternative dispute resolution process.

- Complete a detailed written order.
 - Ensure all orders are written, signed, copied, and distributed to all parties at the end of the hearing.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at future court hearings.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings, and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The first review should be set within three to six months of the permanency hearing. The case must be reviewed no less frequently than every six months (42 U.S.C. § 675 (5)(B)).

VII. PERMANENCY HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

² *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

³ *Ibid.*

⁴ State law may require judicial approval of the permanency plan. See 65 Fed Reg 4053 (Jan. 25, 2000).

⁵ See Lund, T., & Renne, J. (2009). *Child safety: A guide for judges and attorneys*. Washington, DC: American Bar Association.

⁶ See section of General Issues Chapter covering children in court, pg. 72.

⁷ See section of General Issues Chapter covering concurrent planning case models, pg. 93.

⁸ See section of General Issues Chapter covering domestic violence considerations, pg. 57.

⁹ Judges may wish to re-visit the child well-being questions listed in the PPH Benchcard to supplement this inquiry.

¹⁰ See *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*, *supra* note 2.



VIII. The Termination of Parental Rights Hearing



VIII. THE TERMINATION OF PARENTAL RIGHTS HEARING

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VIII. The Termination of Parental Rights Hearing

A. Introduction

Termination of parental rights severs all legal familial rights between parent and child. After termination, parents are no longer entitled to notice of future court proceedings concerning the child, and termination ends the duty to provide continuing child support and a parent’s right to visit the child. Termination ensures that children have the opportunity to live in a stable, permanent family through adoption.

According to the most recent national statistics,¹ about half (51 percent) of children who left foster care in FY 2012 were reunited with their parents or primary caretakers, while 21 percent of the children in care exited the system through the termination of parental rights and adoption. Termination of parental rights is the most severe action that can be taken in dependency court.

Termination proceedings must be conducted with great care and with full due process protections for parents and children.

Termination creates a possibility for a new parental relationship and permanent family for children who cannot be safely reunified with their biological parents. It is consistent with the key foundational principle that: “All children have the right to a healthy and safe childhood in a nurturing, permanent family...”

NCJFCJ Key Principles for Permanency Planning

B. Purpose and Timing of Termination of Parental Rights

Termination of parental rights may be voluntary or involuntary. Parents who wish to place their children for adoption may voluntarily relinquish their rights. In termination proceedings, a judge must make Findings of Fact and Conclusions of Law, based on clear and convincing evidence,² or beyond a reasonable doubt in an ICWA case, that termination is in the best interests of the child.³ Enough time must be set aside for the completion of the termination of parental rights hearings, especially in contested cases. Each court must determine the amount of time required if the termination is contested and establish a calendar to accommodate these hearings without postponements or delays.

Timing Issues Regarding the Decision to Pursue Termination of Parental Rights (TPR)

There are certain circumstances under which it is appropriate to proceed directly to termination of parental rights after the adjudication of abuse or neglect. **The Adoption and Safe Families Act, for example, requires states to file or join a petition to terminate parental rights, with certain exceptions, when:**

- A court has determined a child to be an abandoned infant;
- The parent committed murder or voluntary manslaughter of another child of the parent; aided, abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter; or committed a felony assault that resulted in serious bodily injury to the child or another child of the parent. (42 U.S.C. § 671 (a)(15)(D)).

In addition, under ASFA, termination of parental rights proceedings must be filed – or joined, if filed by another party – by the state for any child who has been in foster care for 15 of the most recent 22 months, unless the child is being cared for by a relative; the state has documented “compelling reasons for determining that filing such a petition would not be in the best interests of the child”; or the state has not made the reasonable efforts necessary to achieve the goal of the case plan where the goal is reunification.⁴ The 15 out of 22 months termination of parental rights filing requirement was included because of substantial and unjustified delays in freeing children for adoption, caused by child welfare agencies as well as juvenile and family courts in many states. In response to ASFA, many states limit the time a child can spend in foster care before termination of parental rights proceedings can be initiated. Typically, states have adopted the ASFA standard of 15 out of the most recent 22 months in care. Some states, however, specify shorter time limits, particularly for very young children.

ASFA states that when a child has been in foster care for 15 of the last 22 months, the agency “shall file a petition to terminate the parental rights of the child’s parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) absent compelling reasons not to do so, the child is being cared for by a relative or the state has not made reasonable efforts to reunify” (42 U.S.C. § 675(5)(E)).

In every case in which the agency does not file for the termination of parental rights after the child has been in care 15 of the last 22 months, the agency must document why not filing for the termination of parental rights is in the child’s best interest (65 Fed. Reg. 4062, Jan. 25, 2000).

The calculation of how much time the child has spent in care is cumulative rather than consecutive (45 C.F.R. § 1356.21(i)(i)(C)).

Compelling Reasons Not to File

Compelling reasons not to file for the termination of parental rights include, but are not limited to:

- “adoption is not the appropriate permanency goal for the child” (45 C.F.R. § 1356.21(i)(2)(ii)(A));
- there are no grounds for the termination of parental rights (45 C.F.R. § 1356.21(i)(2)(ii)(B));
- the child is an unaccompanied refugee (45 C.F.R. § 1356.21(i)(2)(ii)(C)); or
- “international legal obligations” or “compelling foreign policy reasons” prevent the termination of parental rights (45 C.F.R. § 1356.21(i)(2)(ii)(D)).

Although the federal law and regulations require the termination of parental rights absent a compelling reason, **the U.S. Department of Health and Human Services has indicated that it will not take federal funds away from the states if they do not file for the termination of parental rights by 15 months if the parent is “diligently working toward reunification and the state and court expect that reunification can occur within a time frame that is consistent with the child’s developmental needs”** (65 Fed. Reg. 4035, Jan. 25, 2000). This is consistent with the reasonable efforts compelling reason explained above. In every case in which the agency does not file for the termination of parental rights after the child has been in care 15 of the last 22 months, the agency must document why not filing for the termination of parental rights is in the child’s best interest (65 Fed. Reg. 4062, Jan. 25, 2000). The calculation of how much time the child has spent in care is cumulative rather than consecutive (45 C.F.R. § 1356.21(i)(i)(C)). Runaway episodes and trial home visits do not count toward the 15 months (45 C.F.R. § 1356.21(i)(i)(C)).

While ASFA requires the agency to file for the termination of parental rights when a child has been out of the home for 15 of the last 22 months, ASFA does not preclude filing for termination sooner if circumstances and the best interests of the child necessitate doing so. It is not appropriate to wait for the permanency hearing to file the TPR petition when it can be documented well in advance of the scheduled permanency hearing date that termination is the necessary direction. Finally, termination should not be delayed until adoptive families have been identified. Although some judges and other professionals in the past have been disinclined to terminate parental rights unless they were certain a new family was available to adopt the child, this does not comply with the ASFA requirements. There are several reasons for this position:

- Many families interested in adopting hesitate to commit to a specific child if the child is not legally freed for adoption.
- Adoption with contact is often in the best interests of the child and enables relationships to continue with family members and other significant persons in the child’s life after termination of parental

rights has occurred.⁶ “There is a significant difference between terminating rights and terminating relationships and one does not require the other.”⁷

- In cases involving Indian children, a customary adoption may be the most appropriate course of action. Tribes can inform the court whether they utilize customary adoption and the manner in which it is accomplished. Practices differ among tribes.

Timing Issues Regarding Filing and Hearing the TPR Petition

Recommended practice dictates that the petition to terminate parental rights be filed and served on all parties no later than 30 days after the agency or court makes a determination that the filing is appropriate. Good practice dictates that the trial, if necessary, should begin within 90 days of the date the petition is filed and that the court should enter its written decision to all parties no later than 14 days after the completion of the trial.

C. Reducing Delays from Trials and Appeals

Various jurisdictions have demonstrated significant success in avoiding trials on termination of parental rights through mediation and other pre-trial negotiations. Some have also expedited permanency for children who cannot be reunified with their parents through Adoption with Contact or Open Adoption. Many states have adopted expedited appeals in termination cases. Delays in appeal are problematic, and courts who have not adopted expedited appeals should strongly consider doing so.

Mediation and Other Pre-Trial Negotiations

Although there are technical differences between mediation and pre-trial or settlement conferences, all have the potential to result in the voluntary termination of parental rights and settlement of related issues while avoiding the time and cost of contested hearings and any subsequent appeals. Mediation and other pre-trial negotiations:

- provide parents with factual information that offers a realistic prospect of trial outcome and helps to separate personal issues and biases from factual information;
- give parents a sense of participation in future planning for the child and a sense of significance and closure with dignity that will rarely be available if the case goes to trial;

- help the child, parents, and relatives understand the importance of one stable home for the child and overcome objections to terminating parental rights, opening the door to relative adoption; and
- provide a forum to discuss the appropriateness of adoption with contact and to develop a proposed plan for the contact.

Mediation programs should be court-based or court supervised with strong judicial support. Mediators must be highly trained, experienced, and skilled professionals who have credibility with the court and related professionals. Family members and other participants must perceive them as neutral. All parties, including the child where developmentally appropriate, attorneys, CASAs, and other relevant case participants should be included in the mediation process. Mediated agreements must be specific and detailed and made a part of the court record.

Pre-trial conferences and settlement conferences can occur with or without judicial supervision. When there are disputes concerning discovery, evidentiary, or other legal issues, judicial involvement is preferred. As with mediation, all parties, including age-appropriate children, and their attorneys and CASAs should be involved.

If mediation and other negotiations do not lead to a voluntary termination agreement, the processes can help narrow the focus of the trial and ensure that all parties are prepared well in advance of the trial.

Adoption with Contact/Open Adoption

Because these GUIDELINES address permanency for neglected and abused children who are often old enough to remember their biological parents, relatives, and others with whom they have had relationships, it is recommended that adoption with contact always be considered. Historically, adoptions have varied in the degree of confidentiality among birth parents, adopting parents, and the child. Prior to the 1930s, confidentiality was the exception; however, from the 1930s forward, the practice of confidentiality among all parties became the norm. Even when older children were adopted, courts and child welfare agencies often attempted to maintain total separation between the child, the biological parents, and the adopting family.

Adoption with contact arrangements should be negotiated among birth parents, siblings, relatives, other significant individuals from the child's past relationships, the child, and the adopting family. This contact can occur both prior to and after the adoption. Examples of this range of contact include, but are not limited to, the following:

- The identity of the adoptive parents is not made known to the biological parents, but they are permitted to send cards or letters using an intermediary. The adoptive family decides whether to share the communications from the biological parent(s) with the child. The child may also send return letters and pictures through the intermediary.
- Biological parents receive pictures and annual progress reports from the adoptive family.
- Biological parents know the identity of the adoptive family and are permitted occasional or regular visitation with the child.

When considering adoption with contact, it is important to consider the enforceability of any agreement. The most effective adoption with contact agreements include the following characteristics:

- Legally approved by case law or statute.
- Negotiated based upon full disclosure to all parties.
- Agreed to by a child of sufficient age and maturity to specify a position on the matter or by the Guardian *ad litem* or attorney for the child if of insufficient age.
- Clearly set out in writing and incorporated into the adoption decree.
- Modifiable based upon changes in circumstances and the best interests of the child.
- Enforceable, but not grounds for setting aside the adoption.

D. Filing the Termination of Parental Rights Petition

Content of the Petition

Although facts may be alleged in summary form due to the breadth of material at issue, the allegations must be sufficiently precise to give the parties notice of the issues at stake. The court should require that the petition cite the statutory grounds relied upon and provide a summary of facts in support of each statutory ground. When the child is an Indian child, the petition must rely upon 25 U.S.C. § 1912 and should include a summary of facts supporting those requisite findings.⁸ The petition must be filed with the court and served on all parties.

The Court's Response to the Filing of the Petition

The court should ensure that all parties are represented by counsel. Preferably, all counsel representing the parties at the original filing would still be assigned to the case. If not, the court must expeditiously appoint new counsel for any indigent parties. Immediately upon the filing of the petition, the court should review issues of counsel so that counsel can be present at the first pre-trial hearing.

The court should immediately proceed to set a pre-trial date within 30 days. The pre-trial and all of the subsequent hearings, unless prohibited by statute, should be scheduled before the same judge who has handled the case since the original filing. At the pre-trial, the court should establish all of the following additional dates:

- The date for discovery to be completed that is sufficiently in advance of the mediation or settlement conference to allow all parties to review the material in full.
- The date for mediation, pre-trial, or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made, but another meeting is required to reach full agreement, there is adequate time for a second meeting. The recommended timeframe for this meeting to be held is two to four weeks prior to the trial date. Counsel must notify the court immediately following the meeting whether agreement was reached or whether the trial will proceed as scheduled.
- A final pre-trial date, if necessary.
- Trial dates should be consecutive, and the trial should begin within 90 days of the filing of the TPR petition.
- The judge should also reserve time on his or her personal calendar within seven days after the final trial day for the writing of the TPR findings and order.
- The court must establish strict expectations insisting all parties commit to the dates scheduled at the pre-trial. Barring extraordinary circumstances, all should be held to these dates.⁹

E. Voluntary Relinquishment of Parental Rights

The seriousness of termination of parental rights and the importance of avoiding collateral attacks on the decree make it important to ensure that any consent to termination is voluntary and informed. If the court already has jurisdiction, it is advisable to take the voluntary relinquishment in court. Judges should take the time to make sure that parents understand the consequences of termination, their right to a trial and to counsel, and the availability of less drastic legal alternatives.

Voluntary relinquishment of parental rights is a very difficult step. It may be hard for parents to admit their inability to care for their own children and devastating to lose contact with them. If state law permits written relinquishments without parents' presence in court, the judge should thoroughly question the agency witnesses regarding whether the consent was voluntary and knowledgeable. The judge should determine whether there has been compliance with all state requirements regarding written, voluntary relinquishment of parental rights. The judge should also inquire whether parents were thoroughly advised of and understood the consequences of termination of parental rights, less drastic alternatives, and the parents' right to trial and representation by counsel. If a parent has not signed a relinquishment of parental rights and has failed to appear at the termination proceeding, the judge must determine whether the parent has been afforded proper notice.

Judges should take the time to make sure that parents understand the consequences of termination, their right to a trial and to counsel, and the availability of less drastic legal alternatives.

Some questions to determine whether a plea is entered knowingly, intelligently, and voluntarily when parents appear and enter an oral consent include:

- Have you read the petition or had someone read it to you?
- Did you have enough time to consult with your attorney?
- Were you promised anything or threatened in any way to get you to enter this plea?
- Are you under the influence of any drugs, alcohol, or medications at this time?
- Are you suffering from a mental illness that you are being treated for or have been treated for in the past?

See also the sample colloquy for taking admissions or pleas in the Adjudication Hearing Chapter.

F. Case Management Before the Termination of Parental Rights Hearing

Who Should Be Present? ¹⁰

All parties, participants, and persons entitled to notice, and their attorneys, should be present at the termination of parental rights hearing. Summons and notice requirements for termination of parental rights proceedings are similar to those for adjudication, with one significant difference: **Efforts required to identify or locate parents, and constructive notice in termination, should be stricter than for adjudication.**

Defects in notice can invalidate a termination of parental rights and disrupt the child's permanent placement. Consequently, there must be personal service on parties whenever possible, and when it is not possible, there must be full compliance with the requirements of constructive service under state law.

PERSONS WHO SHOULD BE PRESENT AT THE TERMINATION OF PARENTAL RIGHTS HEARING:

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- Child's current placement (foster parents, caregivers, custodial adults, adoptive parents)
- All adult relatives of the child (42 U.S.C. § 671(a)(29)); relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- If ICWA applies: ICWA-qualified expert witness; tribal representative/tribal liaison; Indian custodian, representative of the child's tribe and attorney
- Additional witnesses if termination is contested
- Court reporter
- Court security

When agencies do not conduct effective searches for missing parties, termination proceedings can be substantially and needlessly delayed. Courts should specify all steps to be taken to locate missing parents and should dictate times within which these steps are to be completed. This can be accomplished by monitoring individual cases, setting guidelines and rules, and training attorneys and agency staff. Judges can help reduce or eliminate notice-related delays by making sure that all parties are notified early in the court process. When only one parent receives actual notice prior to adjudication, efforts to locate the other parent should continue after adjudication, and the second parent may be able to enter the litigation when located. In contrast, the finality of termination proceedings makes subsequent notice and involvement of the parties impossible. When judges insist on serious efforts to locate and notify parties whenever they are not present at earlier stages of litigation, there are far fewer situations where an extensive search after the filing of a termination of parental rights petition must be conducted.

G. Preparing for the Hearing

Information the Court Should Have

At this point in the court process, one of two circumstances will exist – either the parents have voluntarily relinquished parental rights or the case moves to trial. In each instance, the court should address whether sufficient grounds exist to terminate parental rights, whether termination is in the best interests of the child, and whether reasonable efforts are being made toward adoption and to finalize the permanency plan.¹¹

It is important to note that when pre-trial negotiations result in an agreement that the parents will voluntarily relinquish parental rights, counsel must notify the court immediately. The court can then use the pre-trial or the trial dates for the final termination of parental rights hearing.

Prior to hearing cases involving voluntary relinquishment or a termination trial, the judicial officer should review the court file, which should provide the following information for each child and parent in the case:

- Reports, case plans, findings, orders, and a chronology of the child’s out-of-home placements and treatment.
- The age of the child and needs at removal.
- A current report of the child’s status and well-being.

- Review TPR petition and other relevant documents.
- Who must or should be present at the hearing?
- Are there any related cases in juvenile or other courts?
- Review reflections on decision-making process that protect against bias. (See TPR Benchcard.)

- Circumstances leading to the filing of a termination of parental rights petition.
- A social service agency report of concurrent efforts to identify, recruit, and place the child with an adoptive family.



H. Conducting the Termination of Parental Rights Hearing

The court should have set the termination of parental rights hearing date and time at the time of the filing of the termination of parental rights petition. The hearing should be set for the earliest possible date, monitored by the court for trial readiness, and continued only when necessary.

As previously mentioned, the court must hold the agency to a high standard in terms of timely notice and service on parties of the hearing and in making a diligent search for any missing parties.

OPENING THE HEARING

- Call the case.
- Identify the people in the courtroom.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

DUE PROCESS AND DUE DILIGENCE CONSIDERATIONS

Notice

- If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
- Verify that the agency used due diligence to provide notice to all parents of a sibling of a child, where such parent has legal custody of the child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

Representation

- If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.

I. Key Inquiries, Analyses, and Decisions the Court Should Make at Termination of Parental Rights Hearings

Questions that Must Be Answered to Determine Whether Grounds Exist for Termination of Parental Rights and Whether Termination and Adoption are in the Best Interests of the Child¹²

WHEN MEDIATION RESULTS IN VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

Because of the seriousness of termination of parental rights and the importance of avoiding collateral attacks on the termination order, judges should ensure that whenever the court is involved in relinquishment of parental rights, the court should determine that the consent is voluntary and informed. The judge should take the time at the hearing to make sure that each parent understands the consequences of termination and the right to a trial. Among the questions judges should ask:

- Was the parental consent to relinquishment voluntary and informed?
- Have both biological parents consented to relinquishment?
- Why is relinquishment and adoption in the best interests of the child?
- Is there a recommendation for adoption with contact? How is this recommendation, or lack thereof, in the best interests of the child?

For Indian children, the court must comply with the requirements of ICWA (25 U.S.C. 1913), which states that voluntary relinquishments must be:

- executed in writing;
- recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
- certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood;
- any consent given prior to or within 10 days after the birth of the child shall not be valid; and

- any parent or Indian custodian may withdraw consent for any reason at any time prior to the entry of a final termination of parental rights decree (25 U.S.C. § 1913(c)).¹³

WHEN THE CASE GOES TO TRIAL

When mediation or other pre-trial negotiations have not produced an agreement for relinquishment of parental rights, the court is ready to proceed with the trial. The concurrent dates for the trial have already been set, counsel has been appointed, and discovery completed. (See the section of this chapter on filing the TPR petition.)

Terminations of parental rights should be based upon clear and convincing evidence,¹⁴ and in ICWA cases, beyond a reasonable doubt (25 U.S.C. 1912(f)). If the adjudication and other findings in the child abuse and neglect case are also made on clear and convincing evidence, it can be easier to incorporate those findings at the termination of parental rights trial.

As previously mentioned, state law determines grounds for termination of parental rights. **Among the grounds commonly found in statutes for termination are:**

- abandonment;
- imprisonment of the parent, taking into account the parent-child relationship and the likelihood of release within a specified period of time;
- the passage of a specified period of time, with failure of the parent to correct the problems requiring the child's out-of-home placement (timeframes vary according to state statutes);
- minimal contacts with the child by parents exhibiting extreme disinterest for a prescribed period of time (e.g., six months);
- parental drug or alcohol impairment which creates an inability to care for the child and refusal or failure to respond to substantial treatment efforts;
- physical, emotional, or mental incapacity of the parent so severe as to create an inability to care for the child, taking into account the particular needs of the child;
- for a father, if paternity is not established or custody of the child is not sought within 30 days' notice of a child's birth;
- serious physical abuse or neglect or prior abuse or neglect of the child or a sibling, so extreme that returning the child would be an unacceptable risk to the child's safety and well-being;

- failure to comply with case plans; or
- prior involuntary terminations.

AMONG THE QUESTIONS THAT MUST BE ANSWERED WHEN TERMINATION MOTIONS GO TO TRIAL:

- Were all parties properly identified and served?
- Is the evidence sufficient to prove that the statutory grounds for termination of parental rights exist?
- Were reasonable efforts made to reunify?
- Is termination of parental rights in the best interests of the child?

Questions that Must Be Answered to Determine Whether Reasonable Efforts are being made Toward Adoption and to Finalize the Permanent Plan

Once the court has determined that sufficient facts exist to support termination and that termination is in the best interests of the child, termination of parental rights should be granted. Then, in a follow-up hearing without the birth parents present, the court should determine whether reasonable efforts have been – and will continue to be – made toward adoption and finalization of the permanency plan. Among the questions the judge should ask:

IN ALL CASES, WHAT ARE THE CHILD’S NEEDS?

- Current health and education information.
- A description of the child’s current placement.
- A description of the services that have been provided to the child, the progress the child has made, and the issues still to be addressed, including cultural needs.
- Has the child received counseling with regard to termination of parental rights?
- How is the child adjusting to the plan of adoption?

IF THE PLAN IS RELATIVE OR FOSTER HOME ADOPTION:

- What, if anything, remains to be done before the home is approved as the adoptive home? Can the adoption home study be waived and replaced with the kinship care or foster home study?
- Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness?
- Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- What is the timeframe for finalization?
- Have all appropriate subsidies been identified, and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?

IF AN ADOPTIVE HOME HAS BEEN RECRUITED:

- A detailed description of the family. Is there another person who spends significant time in the home and if so, has that individual been interviewed for appropriateness? Have all relatives been explored?
- If the child is an Indian child, does the home meet the placement preferences under ICWA, and if not, why not? What efforts has the agency made to identify a placement under ICWA?
- Has there been full disclosure to the adoptive family of the child's circumstances and special needs?
- What remains to be done, if anything, to process and approve the home?
- What are the transition and placement plans and timeframe? If visits have begun, how are the child and the adoptive family adjusting?
- What efforts will be made to ensure that the child's cultural and ethnic heritage and relationships are preserved? Does the adoptive family understand the special aspects of the child's cultural and ethnic heritage?
- If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- Have all appropriate subsidies been identified, and has all paperwork been completed regarding these subsidies? Will services follow the family if they move out of the state? Is the adoptive family aware of the details of the appropriate subsidy issues?

- After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adoptive family agreeable to a contact plan that may have been recommended with the biological parent(s) and relatives?

IF AN ADOPTIVE HOME MUST BE RECRUITED:

- What efforts are being made to identify potential adoptive homes both locally and in other jurisdictions? On what adoption exchanges and Internet sites is the child listed? What other efforts are being made?
- What is the status of the investigation of adults with whom the child has or has had a positive relationship regarding their potential to become adoptive families?
- How many potential families have expressed interest in the child, and what is the status of the investigation of each family?

If the child is an Indian child, what efforts are being made to identify potential adoptive homes in the child’s tribal community, and what efforts are being made by the agency to comply with the ICWA placement preferences? (25 U.S.C. 1915)

J. The Court’s Written Findings of Fact and Conclusions of Law at the Termination of Parental Rights Hearing

Because of the complexity of Findings of Fact and Conclusions of Law in a termination of parental rights case, it will probably not be possible to write and distribute the findings to parties in the courtroom at the end of the hearing. However, when possible, it is recommended that the court give a verbal statement of how it intends to rule at the end of the hearing. The final order arising from the termination of parental rights trial should be issued within 14 days of the close of the hearing. This timeframe is achievable when the judge has reserved time on the calendar to write the court’s decision.

Findings of Fact and Conclusions of Law should be set forth with clear and complete detail, sufficient to withstand appellate review. Termination of parental rights hearing entries should be divided into two separate sets of findings. The first set of findings should include:

- Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present.
- If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment was voluntary and informed.¹⁵ If the child is an Indian child, assurances that the

provisions regarding relinquishment outlined in ICWA were accomplished.

- How reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that *based on family circumstances and child health and safety, all reasonable efforts were made.*¹⁶
- If the case went to trial, whether or not termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case.¹⁷ **For Indian children,** findings must include the special requirements of ICWA.
- Why termination of parental rights and adoption is in the best interests of the child.

In order to achieve timely permanency, set the next review within 90 days of the termination of parental rights.

When termination of parental rights is granted, the following additional findings addressing the plans to finalize a permanent placement should be made in a separate entry:

- What is being done to ensure that reasonable efforts to find an adoptive home and to finalize a permanent placement are being made, with specific steps and timeframes that are to be met;
- A description of any special factors or conditions of the child that are identified as special needs, what services will be provided to address these needs, and who is responsible for providing each service;
- The date and time of the next review hearing.

Avoiding Appeals

Even with fairness in procedures, competent attorneys, and full disclosure of facts, a significant percentage of involuntary termination cases will be appealed.

Appeals create another layer of process and potential for delay in achieving permanency for the child. Delays can occur in preparing transcripts and assembling the record for appeal. Even though a number of appellate courts have instituted “fast tracking” of termination cases through direct appeal to a designated court and expedited hearings, the process still takes months. All of these issues delay permanence for a child and extend the period of uncertainty for the child and the adoptive family.

The best way to avoid the delay of appeals is to institute practices that decrease the likelihood that an appeal will be filed. The following list summarizes points made throughout these GUIDELINES that can help to avoid appeals:

- Institute relinquishment counseling for parents;
- Require mediation or another alternative dispute resolution process after termination of parental rights becomes part of the permanency plan;
- Conduct procedurally correct hearings, and be scrupulous about due process and evidentiary rulings;
- Ensure competent representation of parties throughout the child protection case; and
- Make clear and legally sufficient findings of fact, including reasonable efforts findings and conclusions of law at each hearing, and make the statutorily required findings of fact in ICWA cases, including the heightened burdens of proof.



SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support the child’s needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any issues resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

K. Concluding the Termination of Parental Rights Hearing

Timely, careful, and complete termination of parental rights hearings can help judges avoid mistakes with potentially tragic consequences for children and families. Timely termination of parental rights can spare children and families from extended periods of uncertainty; shorten the time children spend in foster care; and facilitate permanency planning for children, potentially speeding progress toward adoption or another permanent placement.

Post-TPR Reviews

Whenever permanence has not been fully achieved, it is the responsibility of the court to continue to review the case. The court has the continuing responsibility to evaluate whether reasonable efforts are being made by the agency to achieve permanence. The child welfare agency remains responsible to make sure that timely efforts are being made to implement the permanency plan, to finalize the adoption, or to find an adoptive family. Review hearings are important to ensure continued momentum toward achieving permanence and case closure.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set further reviews and/or permanency hearing, and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

At the conclusion of the termination of parental rights hearing, the court should establish a timeframe for further reviews and permanency hearings. Reviews should continue on a regular basis until the permanent home is finalized and court involvement ends. Timely attention to case progress is just as important post-termination of parental rights as it is in the preceding stages of the case. The court must ensure that the child does not languish without permanence while the court or the child welfare agency turns their attention to other crises.¹⁸

POST-TPR PERMANENCY REVIEWS

- Because the goal is no longer reunification, the focus is on the necessary steps the agency is taking to finalize the new permanency plan.
- The child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child to transition into adulthood, if appropriate.

VIII. THE TERMINATION OF PARENTAL RIGHTS HEARING ENDNOTES

¹ U.S. Department of Health and Human Services. (2012). *Child welfare outcomes report to Congress*.

² The U.S. Supreme Court, in *Santosky v. Kramer* (455 U.S. 745 (1982)), set the standard of proof in termination of parental rights proceedings at clear and convincing evidence.

³ The grounds for termination of parental rights are established by the states and vary from state to state.

⁴ 42 U.S.C. § 675(5)(E).

⁵ Hardin, M. (1999). *Mandatory termination of parental rights petitions: Compelling reasons and other exceptions under the Adoption and Safe Families Act*. Washington, Dc: ABA Center on Children and the Law.

⁶ See the section on Adoption with Contact in this chapter.

⁷ Quote from Susan H. Badeau, formerly project manager, National Adoption Center.

⁸ See Termination of Parental Rights Checklist in *Indian child welfare act checklists for juvenile and family court judges*. National Council of Juvenile and Family Court Judges. (2003). Reno, NV: NCJFCJ.

⁹ Most states require the parents to be present at all hearings. Parents should be reminded repeatedly that failure to appear at any hearing in the termination of parental rights process, including

pre-trial conferences, will result in the state putting on their case and a judgment being entered against the parents if the evidence presented in their absences is legally sufficient.

¹⁰ State and federal laws determine who must be present for any hearing to proceed. Some participants may not be required by law.

¹¹ In some states (e.g., California) voluntary relinquishments are out-of-court proceedings, and the court has no involvement.

¹² The “questions that must be answered” throughout this chapter should be provided to child welfare agency workers, Guardians *ad litem*, and CASA organizations to be used to train workers how to prepare for court.

¹³ Several states have eliminated the requirement that the state grounds be proven beyond a reasonable doubt. Case law has narrowed this requirement to only the ICWA findings.

¹⁴ *Supra* note 3.

¹⁵ For Indian children, this must include the special requirements of ICWA previously described in this chapter.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ For a detailed discussion of process and outcomes associated with the post-termination reviews conducted by the Salt Lake City, Utah Model Court, see the Appendix of the *Adoption and permanency guidelines: Improving court practice in child abuse and neglect cases*. (2000). Reno, NV: NCJFCJ.



TERMINATION OF
PARENTAL RIGHTS HEARING
BENCHCARD



Termination of Parental Rights Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the disposition hearing¹

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child’s current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives

ASFA states that when a child has been in foster care for 15 of the last 22 months, the agency “shall file or join a petition to terminate the parental rights of the child’s parents” absent compelling reasons not to do so, the child is being cared for by a relative or the state has not made reasonable efforts to reunify (42 U.S.C. § 675(5)(E)).

In every case in which the agency does not file for the termination of parental rights after the child has been in care 15 of the last 22 months, the agency must document why not filing for the termination of parental rights is in the child’s best interests (65 Fed. Reg. 4062, Jan. 25, 2000).

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child’s tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Among the persons whose presence may also be needed at the TPR hearing:

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Education liaison/school representative/educational surrogate parent if appropriate
- Court-certified interpreters or court-certified language services

Review the relevant documents.

- TPR petition
- In both instances of voluntary relinquishment and trial, prior to the court hearing the judge should review the court file which should provide:
 - reports, case plan, findings, orders, and a chronology of the child's out-of-home placements and treatment;
 - the age of the child and needs at removal;
 - a current report of the child's status and well-being;
 - circumstances leading to the filing of a termination of parental rights petition; and
 - an agency report of concurrent efforts to identify, recruit, and place the child with an adoptive family or other permanent placement.

Consider whether there are any related cases in juvenile or other courts.

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
 - What are the steps required for obtaining update/status?
- What is the impact on this hearing?
- Is there any impact on this hearing?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE TERMINATION OF PARENTAL RIGHTS HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Swear in the parties, participants, and relatives.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process Considerations

- **NOTICE**
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made? Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - How were the parents and/or guardians notified of this hearing?
 - Was the notice in a language and form understandable to the parents and/or guardian?
 - If child, parents, legal custodians, caregivers, or relatives who requested notice are absent, confirm that they were properly noticed.
 - If parent is absent and has not been served, inquire about the diligent search.
 - Require a thorough description of efforts to locate and advise any absent parent of the hearing and confirm that a diligent search was begun. If needed, ask parents.
 - Have the foster parents, pre-adoptive parent, or relative providing care for the child been provided notice of, and an opportunity to be heard in, the hearing? (42 U.S.C. § 675(5)(G))
 - Has the agency exercised due diligence to identify and provide notice to all adult relatives of the



child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))

- Has the agency exercised due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.
- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/ UCCJEA, ICPC, or other federal laws apply to this case?

- **REPRESENTATION**

- Address any outstanding or new representation issues.
 - If the parents do not have representation, are they entitled to representation?
 - Determine if the right to counsel is understood.
 - Are there language issues to consider in appointing counsel?
 - If parents request counsel and claim to be indigent, have parents fill out an affidavit of indigency.
 - If parents are ineligible for the appointment of counsel or knowingly, intelligently, and

voluntarily waive appointed counsel, ask if they want to proceed pro se or hire a private attorney. Explain pro se if necessary.

- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the child? If not, appoint counsel to represent the best interests of the child if it has not yet been appointed.
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- If any counsel needs to be appointed, ensure that orders appointing counsel are expedited.

Engage parents, children, relatives, and foster parents present.

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain purpose of hearing.)
- Do you understand the petition?
 - Do parents understand the consequences of termination, their right to a trial and to counsel, and the availability of less drastic legal alternatives?
 - If a plea is entered, determine whether it is entered knowingly, intelligently, and voluntarily.
- Was any alternative dispute resolution process used prior to the hearing? Who was involved in that process? What was the outcome?

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE PERMANENCY HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

ICWA Inquiry and Determination

- Was the ICWA inquiry made by the agency? Whom did the agency ask?
- Has an ICWA determination been made?
 - If yes, different standards apply; refer to the ICWA Checklist.²
 - If yes, determine whether **active efforts** were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and whether the active efforts were unsuccessful (25 U.S.C. § 1912(d)).
 - If yes, determine whether there is evidence **beyond a reasonable doubt**, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(f)).

If ICWA applies, or the court has reason to believe ICWA applies, the court should refer to the ICWA Checklist.

Questions that Must Be Answered to Determine Whether Grounds Exist for Termination of Parental Rights and Whether Termination and Adoption are in the Best Interests of the Child

WHEN AN AGREEMENT OR MEDIATION RESULTS IN VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

At the hearing, the judge should take the time to make sure that each parent understands the consequences of termination and the right to a trial. Among the questions judges should ask are:

- Was the parental consent to relinquishment voluntary and informed?
- Have both biological parents consented to relinquishment?
- Why is relinquishment and adoption in the best interests of the child?
- Is there a recommendation for adoption with contact? How is this recommendation, or lack thereof, in the best interests of the child?

For Indian children, the court must comply with the requirements of ICWA (25 U.S.C. 1913), which states that voluntary relinquishments must be:

- executed in writing;

- recorded before a judge and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
- certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood;
- any consent given prior to or within 10 days after the birth of the child shall not be valid; and
- any parent or Indian custodian may withdraw consent for any reason at any time prior to the entry of a final decree of termination of parental rights (25 U.S.C. § 1913(c)).

WHEN THE CASE GOES TO TRIAL

Questions that must be answered when termination motions go to trial include:

- Were all parties properly identified and served?
- Does the evidence presented show that statutory grounds for termination of parental rights exist?
- Were reasonable efforts made to reunify?
- Is termination of parental rights in the best interests of the child?

Questions that Must Be Answered to Determine Whether Reasonable Efforts are Being Made Toward Adoption and to Finalize the Permanency Plan

IN ALL CASES, WHAT ARE THE CHILD’S SPECIAL NEEDS?

- Is current health and educational information available?
- Is a description of the child’s current placement available?
- What services have been provided to the child, what progress has the child made, and what issues still need to be addressed, including cultural needs?
- Has the child received counseling with regard to termination of parental rights, and how is the child adjusting to the adoption plan?

IF THE PLAN IS RELATIVE OR FOSTER HOME ADOPTION

- What, if anything, remains to be done before the home is approved as the adoptive home? Can the adoption home study be waived and replaced with the kinship care or foster home study?
- Is there another person who spends significant time in the home involved with the family, and if so, has that individual been interviewed for appropriateness?
- Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- What is the timeframe for finalization?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?

IF AN ADOPTIVE HOME HAS BEEN RECRUITED

- A detailed description of the family is needed. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness? Have all relatives been explored?
- If the child is an Indian child, does the home meet the placement preferences in ICWA, and if not, why not? What efforts has the agency made to identify a placement under ICWA?
- Has there been full disclosure to the adoptive family of the child's circumstances and special needs?
- What remains to be done, if anything, to process and approve the home?
- What are the transition and placement plans and timeframe? If visits have begun, how are the child and the adoptive family adjusting?
- What efforts will be made to ensure that the child's cultural and ethnic heritage and relationships are preserved? Does the adoptive family understand the special aspects of the child's cultural and ethnic heritage?
- If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- Have all appropriate subsidies been identified, and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of the state? Is the adoptive family

aware of the details of the appropriate subsidy issues?

- After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adoptive family agreeable to any contact plan that may have been recommended with the biological parent(s) and relatives?

IF AN ADOPTIVE HOME MUST BE RECRUITED

- What efforts are being made to identify potential adoptive homes both locally and in other jurisdictions? On what adoption exchanges and Internet sites is the child listed? What other efforts are being made?
- What is the status of investigating adults with whom the child has or has had a positive relationship regarding their potential as adoptive families?
- How many potential families have expressed interest in the child, and what is the status of the investigation of each family?

If the child is an Indian child, what efforts are being made to identify potential adoptive homes in the child's tribal community, and what efforts are being made by the agency to comply with the ICWA placement preferences? (25 U.S.C. 1915)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE TERMINATION OF PARENTAL RIGHTS HEARING

- Persons present and how notice was provided to absent parties, paying particular attention to any biological parent, tribal representative or Indian custodian not present.
- If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment were voluntary and informed.³
- How reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that based on family circumstances and child health and safety, all reasonable efforts were made.⁴
- If the case went to trial, whether or not termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case.⁵ **For Indian children,** findings must include the special requirements of ICWA.
- Why termination of parental rights and adoption is in the best interests of the child.

IN A SEPARATE ENTRY:

- What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and timeframes that are to occur?
- A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs and who is responsible for providing each service.
- The date and time of the next review hearing (set for within 90 days).

POST-TPR PERMANENCY REVIEWS

- Because the goal is no longer reunification, the focus is on the agency taking all steps necessary to finalize the new permanent plan.
- The child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for successful transition to an adult, if appropriate.



SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child’s behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of “normalcy” by supporting the child’s participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

CONCLUDING THE PERMANENCY HEARING

Case Management – Prepare for the next hearing

- Make oral findings and orders that all participants can understand.
- Enter additional orders necessary to move the case toward permanency.
- Set review or permanency hearing and identify tasks to be accomplished.
 - Focus on permanency. State the number of months the child has been in care and how many months before the permanency hearing.
 - Identify an expected date for final reunification or achievement of another permanency plan for each child.
 - Set the date and time of the next hearing within state and federal timeframes. Review hearings should be set for at least 30 minutes.
- Identify persons whose presence is needed at the next hearing.
- Consider appropriateness of alternative dispute resolution process.
- Engage parents, children, relatives, and foster parents (see sample questions below).
- Complete a detailed written order.
 - Ensure all orders are written, signed, copied, and distributed to all parties at the end of the hearing.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set further reviews and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders on the record.
- Engage parents, children, and other participants.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- When calendaring the next hearing, all parties should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that all remaining parties have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

If the court determines that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii), and (iii)).

VIII. TERMINATION OF PARENTAL RIGHTS HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

² *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

³ For Indian children, this must include the special requirements of ICWA previously described in this Chapter.

⁴ *Ibid.*

⁵ *Ibid.*



Appendix

Appendix: Federal Law

Introduction

The federal laws governing the foster care system have expanded greatly in the past two decades. While some laws are more detailed than others, it is important for judges to remember that federal law sets minimum requirements for states to access federal dollars. Most states have gone above and beyond federal law, and many courts set their sights on best practices, serving as model courts, committed to a diligent pursuit of the best practices outlined in these ENHANCED RESOURCE GUIDELINES.

There are a few overarching federal statutes and regulations that have changed the face of foster care systems in the United States. These include the Adoption and Safe Families Act of 1997, the Child Abuse Prevention and Treatment Act Amendments of 1996 and CAPTA Reauthorization Act of 2010, and Fostering Connections to Success and Increasing Adoptions Act of 2008. These laws detail minimum standards, timelines, training, and grants, among other things.

Several federal laws also remedy problems in the nation's foster care system: the Indian Child Welfare Act (1978); Multi-Ethnic Placement Act (1994)/Inter-Ethnic Placement Act (1996); Chafee Foster Care Independence Program (1999); and Special Immigrant Juvenile Status (1990). The Interstate Compact for the Placement of Children (ICPC, 1960) and the Safe and Timely Interstate Placement of Foster Children Act of 2006 both provide structure for the placement of children across state lines. In addition, there are other federal laws that assist children in foster care, which are briefly summarized at the end of the chapter.

I. The Adoption & Safe Families Act of 1997 (ASFA)

The purpose of ASFA is to further remedy chronic problems with the nation's foster care system, establishing children's health and safety as paramount concerns. ASFA emphasizes timely decision-making for children and families as well as circumstances under which states can move expeditiously to permanency for children in care.

ASFA amended Title IV-B and IV-E of the Social Security Act (SSA) in 1997. The regulations are codified at 45 C.F.R. sections 1355, 1356, and 1357. Consistent with ASFA, the regulations make children's health and safety paramount and emphasize timely decision-making.

ASFA TIMELINES AND REQUIREMENTS

ASFA set out new requirements for state compliance in the foster care system. The court must make specific findings regarding children in care in order for the state to receive funds for foster care. The specific “judicial determinations” are set out below:

A. Contrary to the Welfare Determination

In the first order of removal, the court must make a judicial determination that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child (42 U.S.C. § 472(a)(1); 45 C.F.R. § 1356.21(c)).

B. Reasonable Efforts

A judicial determination of reasonable efforts to prevent a child’s removal from the home is required. When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required, to prevent the removal must be made no later than 60 days from the date the child is removed from the home unless there are aggravating circumstances (42 U.S.C. § 471(a)(15)(A)(b)(i); 45 C.F.R. § 1356.21(b)(1)(i)).

If the above judicial determination is not made within the specified timeframe, the child is not eligible under the Title IV-E foster care maintenance payments for the duration of that stay in foster care (45 C.F.R. § 1356.21(b)(1)(ii)). If the hearing to address the “no reasonable efforts finding” is set within 30 days, or in some cases, within the same month, a positive finding that reasonable efforts have now been made would then “cure” the prior negative finding. That is, due to the timing of the Title IV-E funding, the funding stream would not be affected with such quick, diligent efforts.

C. Aggravated Circumstances

There are certain situations in which reasonable efforts to prevent a child’s removal or to reunify the child and family may not be required. This can only occur when the state agency obtains a judicial determination that such efforts are not required because:

- i. the parent has subjected the child to aggravated circumstances. Aggravated circumstances are defined by state law, which may include, but not be limited to, abandonment, torture, chronic abuse, and sexual abuse (45 C.F.R. § 1356.21(b)(3)(i));

- ii. a court of competent jurisdiction has determined that the parent has been convicted of murder, voluntary manslaughter, aiding and abetting, attempting, conspiring, or soliciting to commit murder or voluntary manslaughter, or felony assault resulting in serious bodily injury to the child or a sibling (45 C.F.R. § 1356.21(b)(3)(ii); or
- iii. the parental rights of the parent with respect to a sibling have been terminated involuntarily (42 U.S.C. § 471(a)(15)(D); 45 C.F.R. § 1356.21(b)(3)(iii)).

ASFA does not set the standard by which the court must determine aggravated circumstances. Several states have set the burden at clear and convincing evidence, to match the burden of proof for termination of parental rights. (*Santosky v. Kramer*, 455 U.S. 745 (1982)).

In addition, the timeframe for the determination of “aggravated circumstances” is not delineated in the statute or regulations. A court can make a determination that there have been “aggravated circumstances” at different hearings, depending on the case. See the Benchcards for Jurisdiction, Disposition, and Permanency Hearings for more information.

ASFA ALSO SET OUT SPECIFIC HEARINGS AND THE TIMEFRAMES IN WHICH SUCH HEARINGS MUST OCCUR.

A. Review Hearings

Section 475 (5)(B) of the SSA provides that, “the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review.”

B. Permanency Hearings

The state agency must obtain a judicial determination of reasonable efforts to finalize a permanency plan. This must be made within 12 months of date the child is considered to have entered foster care and then at least once every 12 months thereafter (42 U.S.C. § 475(5)(C) and 45 C.F.R. § 1356.21(b)(2)(i)).

If the above judicial determination is not made in the specified timeframe, the child becomes ineligible under Title IV-E at the end of the month in which the judicial determination was made, and remains ineligible until such a determination is made (45 C.F.R. § 1356.21(b)(2)(ii)). If the hearing to address the “no reasonable efforts finding” is set within 30 days, or in some cases, within the same month, a positive finding that reasonable efforts have now been made would then “cure” the prior negative finding. That is, due to the timing of the Title IV-E funding, the funding stream would not be affected with such quick,

diligent efforts.

Note: If there were aggravated circumstances such that reasonable efforts to prevent removal were not required, then a permanency hearing shall be set within 30 days (45 C.F.R. § 1356.21(h)(2)). Then, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child (42 U.S.C. § 471(a)(15)(E)). Also, reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family (42 U.S.C. § 471(a)(15)(F) of the SSA; 45 C.F.R. § 1356.21(b)(4)).

C. Trial Home Visits

Title IV-E funds can be used for trial home visits for six months, or a period determined by the court. When any visit longer than six months has not been authorized by a court, and the child is then returned to foster care, that placement is a new foster placement for Title IV-E purposes and eligibility must be newly established (45 C.F.R. § 1356.21(e)).

D. Termination of Parental Rights

Termination of parental rights petitions must be filed if the child is in foster care for 15 of the previous 22 months, not including the time spent in trial home visits (42 U.S.C. § 475(5)(E)(i) – (iii); 45 C.F.R. § 1356.21(i)) unless:

- iv. the child was placed into a relative's care by the state;
- v. the case plan documents why termination is not in the child's best interest; or
- vi. the state has not provided to the family, consistent with the time period in the case plan, services that the state deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required (42 U.S.C. § 475(5)(E)(i) – (iii); 45 C.F.R. § 1356.21(i)(2)).

If there were aggravated circumstances, the petition to terminate parental rights must be filed within 60 days of the judicial determination that reasonable efforts to reunify were not required (45 C.F.R. § 1356.21(i)(1)(ii)). The same exceptions detailed above apply, however.

DOCUMENTATION OF JUDICIAL DETERMINATIONS REQUIRED

ASFA regulations require explicit documentation on a case-by-case basis of the judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan (45 C.F.R. § 1356.21(d)). The documentation must be in the court orders, and if not, in the transcript of the court proceedings (45 C.F.R. § 1356.21(d)(1)). Note: Nunc pro tunc orders or affidavits of reasonable efforts will not be acceptable for IV-E funding eligibility (45 C.F.R. § 1356.21(d)(2)).

CASE PLAN REQUIREMENTS

ASFA regulations detail case plan requirements. The case plan must be a written document; a discrete part of the case record (45 C.F.R. § 1356.21(g)(1)). It must be developed by the state agency no later than 60 days from the child's removal from the home (45 C.F.R. § 1356.21(g)(2)).

Substantively, when the goal is reunification, the case plan must state how to accomplish a safe placement for the child in the least restrictive, most family-like setting available and in close proximity to the parents (45 C.F.R. § 1356.21(g)(3)). The case plan shall include a description of the services provided to prevent removal of the child (45 C.F.R. § 1356.21(g)(4)), and document the steps to achieve the case plan goal (45 C.F.R. § 1356.21(g)(5)).

APPLICATION OF THE PERMANENCY HEARING REQUIREMENTS

Section 475(5)(c) of the Social Security Act outlines the levels of priority placed on different permanency plans, including the requirements needed for the court to order adoption, guardianship, or another appropriate plan (45 C.F.R. § 1356.21(h)). The order of preference for permanency plans is reunification, adoption, legal guardianship, permanent placement with a fit and willing relative, and another planned permanent living arrangement (APPLA).

The state must document to the court compelling reasons why APPLA is the most appropriate permanency plan (45 C.F.R. § 1356.21(h)(3)). Examples are:

- A. an older teen who specifically requests emancipation as his/her permanency plan (45 C.F.R. § 1356.21(h)(3)(i));
- B. there is a significant parent and child bond, but the parent is unable to take care of the child because of emotional or physical disability, and the child's foster parents have committed to raising him/her to the age of majority (45 C.F.R. § 1356.21(h)(3)(ii)); or

C. the tribe (in ICWA cases) has identified the APPLA plan for the child (45 C.F.R. § 1356.21(h)(3)(iii)).

FOSTER CARE LICENSING

The law requires that states maintain the same licensing standards for all foster placements, including relatives of the child, in order to receive IV-E funding for the placement. Background checks must be conducted for every foster and adoptive parent (45 C.F.R. § 1356.30(a)). State licensing and child placement regulations may not discriminate against any race, color, or national origin. (See Section V, Multi-Ethnic Placement Act, for more details.)

NOTICE AND OPPORTUNITY TO BE HEARD

Section 475(5) of the SSA was amended to add section (G), which provides foster parents and relative caregivers the right to be noticed of review hearings, and a chance to be heard at such hearings, without being made parties to the action.

REQUIREMENTS FOR FUNDING FOR VOLUNTARY PLACEMENTS

Federal funds in foster care maintenance payments for a dependent child removed from his home under a voluntary placement agreement are only available for expenditures made within the first 180 days of the child's placement in foster care, unless there has been a judicial determination within the first 180 days of such placement that the continued voluntary placement is in the best interests of the child (45 C.F.R. § 1356.22(b)).

II. Child Abuse Prevention and Treatment Act Amendments of 1996 (CAPTA) and CAPTA Reauthorization Act of 2010

CAPTA provides federal funding to states and tribes in support of prevention, assessment, investigation, prosecution, and treatment of child abuse and neglect. CAPTA also provides grants to public agencies and nonprofit organizations for demonstration programs and projects.

FEDERAL ROLE

CAPTA sets forth the role of the federal government in supporting research, evaluation, technical

assistance, and data collection activities (42 U.S.C. § 5105). It establishes the Office on Child Abuse and Neglect (42 U.S.C. § 5101). In addition, CAPTA sets forth a minimum definition of child abuse as, at a minimum, “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation,” or “an act or failure to act which presents an imminent risk of serious harm.” CAPTA also defines sexual abuse and the withholding of medically necessary treatment (42 U.S.C. § 5106g).

CAPTA was reauthorized and emphasized the link between child abuse and domestic violence. States and communities should adopt assessments and intervention procedures aimed at enhancing the safety both of children and victims of domestic violence, since both child maltreatment and domestic violence occur in up to 60 percent of the families in which either is present.

CAPTA provides grants to states and tribes for the development of programs for investigating child abuse and neglect, case management systems, and training programs. In addition, it sets aside grants to assess community resources, and interagency collaboration in the field of prevention, identification, and treatment of child abuse and neglect, including the links between domestic violence and child abuse and neglect. Finally, under CAPTA, states are to develop or expand effective collaborations between child protective service entities and domestic violence service entities to improve collaborative investigation and intervention procedures, provisions for the safety of both the non-abusing parent involved and children, and provision of services to children exposed to domestic violence that also support the caregiving role of the non-abusing parent (42 U.S.C. § 5106).

DIFFERENTIAL RESPONSE

The 2010 CAPTA reauthorization strongly encouraged states and local agencies to utilize the practice of differential response. Differential response is described as a state or community-determined formal response that assesses the needs of the child or family without requiring a determination of risk or occurrence of maltreatment. Such response occurs in addition to the traditional investigatory response.

CONFIDENTIALITY AND PUBLIC ACCESS TO COURTS

Public Law 102-586, Section 9, amended CAPTA by changing federal child abuse and neglect confidentiality requirements. This revised legislation emphasizes the need for states to maintain the confidentiality of child abuse and neglect information, while at the same time providing for disclosure of information to persons and entities with a need for the information directly related to the purposes of CAPTA.

States must have in place methods to preserve the confidentiality of all records in order to protect the

rights of the child and of the child's parents or guardians. Yet, while confidentiality of records is important, communication among persons and entities working on investigation, prosecution, and service provision should not be obstructed.

Nothing in CAPTA removes the state's flexibility to allow public access to court proceedings that determine child abuse and neglect, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families (42 U.S.C. § 106(b); 42 U.S.C. § 5106a(b)(2)).

III. Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections)

The purpose of the Fostering Connections Act is to connect and support relative caregivers, improve outcomes for children in foster care, provide for tribal foster care and adoption access, and improve incentives for adoption.

Fostering Connections amended the Social Security Act to increase opportunities for relatives to step in when children are removed from their parents. This includes grants for kinship guardianship (42 U.S.C. § 471(a), specific requirements detailed in § 483). In order to qualify for this assistance, relatives caring for children in foster care must undergo background checks (42 U.S.C. § 471(a)(20)).

For some relatives, the background check would stop the licensing process. However, the new law allows states to waive non-safety-related licensing standards for relatives on a case-by-case basis (e.g., square footage requirements), and states have discretion to establish licensing standards and define which are non-safety standards.

Fostering Connections improves the quality of and funding to other important programs for permanency. It increases adoption assistance (42 U.S.C. § 473(A)(D)(1)); expands health care services and provides for coordinated health planning (42 U.S.C. § 422(b)(15)); provides access to education training vouchers for youth in kinship care (42 U.S.C. § 477(i)(2)) and independent living programs for youth in kinship care (42 U.S.C. § 477(a)); and extends eligibility to IV-E funds to tribes (42 U.S.C. § 479(B)).

Fostering Connections addresses many issues facing children in foster care. To provide continuity in their lives, the law provides for educational stability for children removed from their parents' care by requiring coordination with education authorities to keep the children in their same school unless not appropriate (42 U.S.C. § 475(G)). In addition, as long as the youth is still in school, employed, or medically incapacitated, the law allows the extension of federal benefits to youth still in care up to age 21 (42 U.S.C. § 475(8)(A)). To ensure families stay together if possible, reasonable efforts are required to place siblings together unless

such a joint placement would be contrary to the safety or well-being of any of the siblings, and if siblings are not placed together, provide for frequent contact (42 U.S.C. § 471(a)).

To ensure compliance with the law, Fostering Connections also provides funding for training for agency staff, judges, attorneys, Guardians *ad litem*, and relative caregivers (42 U.S.C. § 474(A)(3)(B)).

COURT’S ROLE

The family court judge can ensure compliance with Fostering Connections at each hearing. Specifically, within 30 days of removal, the state must exercise due diligence to notify grandparents and other relatives about the removal and provide them information on becoming foster parents and other legal placement options (42 U.S.C. § 471(a)). The court can make sure this notification occurred.

To increase the licensing of relative foster parents, the court should understand state waiver process for non-safety related licensing barriers to placement. In many ways, the court has a role of ensuring compliance with the law and seeking ways to utilize the federal laws to improve the lives of children in foster care. To that end, the court can:

- A. Ensure that efforts to promote educational stability are weighed with new opportunities that may better the child’s life;
- B. Ensure case plan requirements are met, detailed in 42 U.S.C. § 475(1), including the reasons why a permanent placement with a fit and willing relative through a kinship guardianship assistance arrangement is in the child's best interests;
- C. Ensure the state agency meets the transition plan requirements for children aging out of foster care. Specifically, at least 90 days before the child will transition out of care, a transition plan is to be developed to include specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services (42 U.S.C. § 475(H)).

IV. Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act (ICWA) is a federal law that seeks to keep American Indian and Alaska Native children with American Indian and Alaska Native families. Congress passed ICWA in 1978 in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and

to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of, or eligible for membership in, a federally recognized tribe.

ICWA is an integral policy framework on which tribal child welfare programs rely. It provides a structure and requirements for how public and private child welfare agencies and state courts view and conduct their work to serve tribal children and families. It also acknowledges and promotes the role that tribal governments play in supporting tribal families, both on and off tribal lands. However, as is the case with many laws, proper implementation of ICWA requires vigilance, resources, and advocacy.

APPLICABILITY

Indian child is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” (25 U.S.C. § 1903(4)).

ICWA sets specific standards that must be followed when a case involves an Indian child. There are requirements about notice, expert testimony, and the burden of proof required to remove a child and place a child permanently away from the parents. There are also placement preferences. Below are the standards and requirements set out in ICWA.

ACTIVE EFFORTS

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful (25 U.S.C. § 1912(d)).

QUALIFIED EXPERT WITNESS

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e)).

NOTICE AND COUNSEL

Notice must be sent to the tribe, parents, and Indian custodian by registered mail with return receipt (25 U.S.C. § 1912(a)). The court shall appoint counsel for an indigent parent (25 U.S.C. § 1912(b)).

CLEAR AND CONVINCING EVIDENCE

The court must find by clear and convincing evidence that the foster care placement of an Indian child is necessary because continuance in the home is likely to result in serious emotional or physical damage (25 U.S.C. § 1912(e)).

PLACEMENT PREFERENCES

ICWA provides the placement preferences for an Indian child in the following order: “(i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by the Indian child’s tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs” (25 U.S.C. § 1915(b)). For good cause to modify preference, courts should review the BIA Guidelines for State Courts: Indian Child Custody Proceedings (80 Fed. Reg. No. 37, Feb. 25, 2015).

PERMANENCY HEARING

Active efforts shall be made throughout an Indian child’s case to maintain and reunite the child with his or her family or tribal community (80 Fed. Reg. No. 37 §§ A.2, D.2(a), Feb. 25, 2015). If the permanency plan does not reunify the child with his or her parents, then ICWA requires the party petitioning for termination of parental rights to demonstrate that active efforts have been made prior to and until the commencement of the proceeding and that these efforts were unsuccessful (25 U.S.C. § 1912(d)). To be compliant with the statute, judges should make findings that active efforts were or were not made on the record at this hearing.

TERMINATION OF PARENTAL RIGHTS

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(f)).

IMPROPER REMOVAL OF INDIAN CHILD

If a child subject to a petition was improperly removed, “the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger” (25 U.S.C. § 1920).

EMERGENCY REMOVAL OR PLACEMENT OF CHILD; TERMINATION; APPROPRIATE ACTION

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable state law, in order to prevent imminent physical damage or harm to the child (25 U.S.C. § 1922).

ADOPTIVE COUPLE V. BABY GIRL (2013)

On June 25, 2013, the United States Supreme Court rendered a decision interpreting ICWA in *Adoptive Couple v. Baby Girl, A Minor Child Under the Age of Fourteen Years, et al.* Justice Alito delivered the majority opinion of the court. The case involved an adoption proceeding that originated in the South Carolina Family Court and was appealed to the Supreme Court of South Carolina, which affirmed the lower court decision. The U.S. Supreme Court reversed the South Carolina Supreme Court decision and remanded the case for further hearings in the South Carolina court. The Court issued a narrow decision interpreting three specific sections of ICWA and did not find ICWA to be unconstitutional.

What the Court held:

- a. The heightened standard of proof for termination of parental rights (25 U.S.C. §1912(f)) does not apply when a parent has never had prior legal or physical custody, although Justice Breyer in his concurrence suggests that there may be exceptions to this rule.
- b. Active efforts (25 U.S.C. § 1912(d)) are not required to prevent the breakup of an Indian family when a parent abandons a child before birth and has never had physical or legal custody of the child, although Justice Breyer’s concurrence indicates that the section may apply to a non-custodial parent in other factual circumstances.

- c. Adoption placement preferences (25 U.S.C. § 1915(a)) are not triggered until a party within the placement preferences (relative, tribal member, or other Indian person) seeks to adopt the child.

REVISED BUREAU OF INDIAN AFFAIRS INDIAN CHILD WELFARE ACT GUIDELINES

On February 24, 2015, the Bureau of Indian Affairs (BIA) released revised ICWA GUIDELINES, effective immediately (80 Fed. Reg. No. 37, Feb. 25, 2015). The GUIDELINES have not been revised since they were first released in 1979. The revisions were created in response to feedback received at listening sessions and through written public comments regarding concerns about the effectiveness of the 1979 GUIDELINES. In particular, the GUIDELINES were intended to address ambiguities that have made it difficult for judges around the country to consistently comply with the Act. This section summarizes several key changes in the GUIDELINES from the original 1979 version. While the language is advisory in nature, the GUIDELINES have been cited in numerous court cases around the country and assist with statutory compliance concerns.

The following list of changes is organized by section instead of topic in order to make it easier to look up the exact language. This list is not intended to be comprehensive, but it does include a large number of changes included in the 2015 revision.

Section A: This section expands the original introduction beyond a statement of policy to include purpose, definitions, applicability, tribal contact information, and an explanation of how the guidelines interact with state law. The definitions need to be reviewed to ensure consistent compliance.

A.2: Provides examples of “active efforts” to make the term less ambiguous and explains that active efforts are separate and distinct from requirements of the Adoption and Safe Families Act. ASFA’s exceptions to reunification efforts do not apply to ICWA proceedings.

A.3: States that the Existing Indian Family Doctrine (EIF) is not a valid exception to ICWA. This section clarifies that agencies and courts must ask whether the child is or could be an Indian in every child custody proceeding until the matter has been resolved, and even when the child is not removed from the home, courts and agencies should follow the ICWA verification and notice provisions. Also, if there is reason to believe a child is an Indian child, the agency and court must treat the child as an Indian child, unless and until it has been determined that the child is not a member or is not eligible for membership. Finally, this section explains that while voluntary placements are not covered by ICWA, it is a best practice to follow the procedures regarding determining membership and notification in voluntary placement cases.

B.1: Clarifies that the requirement to engage in active efforts begins from the moment the possibility arises that an agency case may result in the need for an Indian child to be placed outside

the custody of a parent or Indian custodian. The section also clarifies that active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of a tribe or eligible for membership.

B.2: Sets out the steps for verifying the child's tribe(s) and how to provide notice to the tribe(s), including guidance about the evidence a court may require an agency to provide regarding their investigation into whether or not the child is an Indian child.

B.3: Clarifies that only an Indian tribe, not the state or the Bureau of Indian Affairs, may make the determination whether the child is a member or is eligible for membership. This section also explains that a child does not need a degree of contact with the tribe or a certain blood degree or be formally enrolled to be considered a tribal member for ICWA purposes.

B.4: Expands upon the procedures for determining membership when a child may be eligible for enrollment in more than one tribe. In this section, the criteria for determining which tribe the child has "significant contacts" has been changed, adding factors like parental preference and deleting factors that are too subjective or inapplicable to infants.

B.5: Emphasizes that quick decisions must be made regarding jurisdiction in child custody proceedings and reminds state courts to give notice to the tribe when they dismiss a claim for transfer to a tribal court in addition to sending case information.

B.6: Clarifies that notice is required for each proceeding, not just the first or last, that sending notice by registered mail, return receipt requested, is the minimum requirement, that the tribe has the right to intervene at any time, and explains how the guidelines apply to interstate transfers. Regardless of whether the ICPC applies, both the originating state court and the receiving state court must provide notification to the tribe(s) and seek to verify whether the child is an Indian child.

B.8: Clarifies that emergency removals must be as short as possible, the hearing must be held promptly, and the emergency removal should be terminated immediately once it is determined that the emergency has ended. The standard for emergency removal is "necessary to prevent imminent physical damage or harm to the child." Finally, the time period for temporary custody without a hearing or extraordinary circumstances was shortened from 90 days to 30 days.

C.1: Deletes the requirement that requests to transfer to a tribal court be made "promptly after receiving notice of the proceeding" and clarifies instead that the right to transfer is available at any stage of a proceeding, including during an emergency removal. This section also clarifies that the

right to request a transfer occurs with each distinct proceeding.

C.2: Updates the “good cause” factors for denying transfer to tribal court, specifically omitting some factors listed in the 1979 guidelines and highlighting factors that should not be considered. For example, you should not consider whether the proceeding is at an advanced stage, the level of contacts the child has had with the tribe, socio-economic conditions or any perceived inadequacy of the tribal or BIA services or systems, or the tribal court’s prospective placement for the child. This section also describes the best interest standard in ICWA cases. It explains that the provisions of ICWA create a presumption that ICWA’s placement preferences are in the best interests of the Indian child. Therefore, it is inappropriate to conduct an analysis inconsistent with ICWA’s placement preferences.

D.2: Expands on the active efforts requirement by requiring a demonstration that active efforts were made prior to the commencement of the proceeding and that they continued until the commencement of the proceeding. Guidance is given about the documentation of active efforts and requires a showing that active efforts have been unsuccessful.

D.4: Establishes a preferential order for qualified expert witnesses, prioritizing witnesses who are experts in the culture and customs of the Indian child’s tribe.

E.1: Clarifies that even in voluntary proceedings, it is necessary to determine whether ICWA applies and to comply with ICWA’s provisions.

E.3: Requires the consent document for termination of parental rights, foster care placement, or adoption to identify any conditions to the consent and requires the court to explain the consequences of the consent before its execution.

E.4, E.5: Explains the steps for the withdrawal of consent for a voluntary foster care placement and a voluntary adoption.

F.1: States that the agency bears the burden of proof and must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options in line with the ICWA placements and why those preferences could not be met. The court must then determine if good cause to deviate from placement preference exists before departing from placement preferences.

F.4: Clarifies when good cause to depart from placement preferences exists. Good cause does not include: normal bonding or attachment that may have resulted from a placement that did not comply with the Act; an independent consideration of the child’s best interest; the socio-economic

status of any placement relative to another; and a placement may not be considered unavailable if it conforms to the prevailing social and cultural standards of the Indian community.

G.2: Explains that an Indian child, parent or Indian custodian, or tribe may petition to invalidate an action if the Act has been violated, regardless of which party's rights were violated.

V. Multi-Ethnic Placement Act (1994) / Inter-Ethnic Placement Act (1996)

The Multi-Ethnic Placement Act (MEPA) prohibits the routine consideration of ethnicity when making decisions about placement of children in foster care or for adoption. The goals are to: decrease the length of time that children wait to be adopted, facilitate identification and recruitment of families that can meet the child's needs, and prevent discrimination on the basis of race, color, or national origin (RCNO).

Title VI of the Social Security Act prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The state may not deny to any person the opportunity to become a foster or adoptive parent based on race, color, or nation of origin. (42 U.S.C. § 471(a)(18)). Nor may the state delay or deny placement of a foster or adoptable child based on race, color, or nation of origin (42 U.S.C. § 471(a)(18)).

The agency has the flexibility to determine which factors it will consider when individually assessing a child as long as it does so in accordance with the law. The U.S. Department of Health and Human Services does not prescribe those factors. However, when it becomes apparent that the agency might need to consider RCNO, the agency must individually assess a child to determine whether considering RCNO is in the best interests of that particular child in light of the child's unique circumstances. In addition, the agency may not rely or act upon generalizations about the child's needs, based on the child's membership in a particular RCNO group and may not routinely consider RCNO during the individualized assessment.

MEPA applies to any state child welfare agency or entity within the state that receives Title IV-B or IV-E funds (i.e., contractors), and is involved in adoption or foster care placements or child welfare agency contracts. The state is subject to the Title IV-B diligent recruitment provision and must have an identifiable process for the diligent recruitment of racially diverse foster homes (42 U.S.C. § 422(b)(9)). The court should encourage social services to use diligent efforts in recruiting all possible placement options for children.

VI. Chafee Foster Care Independence Program (CFCIP) (1999)

The Chafee Foster Care Independence Program (CFCIP) or the Foster Care Independence Act (FCIA) ensures that state social service agencies can access flexible funding to support comprehensive independent living programs for all teens in care and can continue providing certain supports to these young adults even after they have left the system. It offers assistance to help current and former foster youth achieve self-sufficiency. Activities and programs include, but are not limited to: help with education, employment, financial management, housing, emotional support and assured connections to caring adults for older youth in foster care (42 U.S.C. § 477).

The following youth are eligible: youth who are likely to remain in foster care until age 18 (42 U.S.C. § 477(a)(1)-(3)); youth who, after attaining 16 years of age, have left foster care for kinship guardianship or adoption (42 U.S.C. § 477(a)(7)); and young adults ages 18-21 who have “aged out” of the foster care system (42 U.S.C. § 477(a)(4) and (6)).

The FCIA sets the tone for courtroom proceedings for all children who are aging out, or on the brink of aging out, of the foster care system, especially at the time of permanency planning hearings. As part of youth case planning under ASFA, juvenile and family courts can ensure that teens preparing to exit the foster care system are accessing and receiving the independent living services necessary to become independent. Although approval is not required, the court must address, as part of the permanency hearing, the services needed to assist youth ages 16 and over to make the transition from foster care to independent living. It is considered a best practice for the court to oversee and ensure that older youth in the foster care system are receiving the appropriate services and life skills education they will need to exit the foster care system.

VII. Special Immigrant Juvenile Status (SIJ) (1990)

Special Immigrant Juvenile Status was enacted to provide a remedy in immigration law for children in juvenile court proceedings who could not be returned to their parents due to a finding that the child is dependent on the court due to abuse, abandonment, and/or neglect (8 U.S.C. § 1101(a)(27)(J), 8 C.F.R. § 204.11, et seq).

To be eligible, a child who is under age 21 and unmarried at the time the SIJ petition is filed may qualify if the juvenile court has been involved. Specifically, the child must be declared dependent on a juvenile court located in the United States or a juvenile court has legally committed to or placed the child under the custody of an agency or department of a state, or an individual or entity appointed by a state or juvenile court

located in the United States, and whose reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law (8 U.S.C. § 1101(a)(27)(J)(i)). In addition, it must have been determined in administrative or judicial proceedings that it would not be in the child's best interests to be returned to the child's or home country or country of last habitual residence (8 U.S.C. § 1101(a)(27)(J)(ii)).

The process requires two applications, an I-360 petition to be qualified as a Special Immigrant Juvenile and the I-485 Application for Adjustment of Status to Lawful Permanent Residence (8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(c)(1)). These applications can be filed by the social services agency or the child's attorney. U.S. Citizenship and Immigration Services (USCIS) must adjudicate SIJ petitions within 180 days of filing, so the child should be scheduled for adjustment of status interview within six months of the filing date. If petitioners file their petition for SIJ before they turn 21, CIS cannot deny the SIJ petition due to age regardless of how old they are at the time CIS adjudicates their petition.

Court involvement is necessary in SIJ cases. The I-360 petition requires that the court order from the juvenile court judge establishes the child's dependency on the juvenile court or his or her being committed or placed under the custody of an agency or department of a state or an individual or entity appointed by a state or juvenile court. It is essential for the order to also establish the requirements that:

- a. it would not be in the child's best interest to be returned to his or her home country or country of last habitual residence, and
- b. reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law.

VIII. Interstate Compact for the Placement of Children (ICPC) (1960) / The Safe and Timely Interstate Placement of Foster Children Act of 2006

The purpose of the ICPC and the Safe and Timely Act is to ensure that a child placed across state lines for foster care or adoption is placed with persons who are safe, suitable, and able to provide proper care. The ICPC also fixes legal and financial responsibility and responsibility for supervision and provision of services for the child.

The ICPC applies to three types of situations in which a child may be sent to other states: placement preliminary to an adoption; placements into foster care, including foster homes, group homes, residential treatment facilities, and institutions (for the treatment of chronic mental conditions, behavioral conditions, or a developmental disability requiring ongoing treatment); and placements with relatives when a parent or relative is not making the placement.

The ICPC applies when the following entities listed below “send, bring, or cause a child to be brought or sent” to another party state: a state that is party to the ICPC; a court of a party state; or child-placing private agencies of a party state; or any person (including parents and relatives in some instances, such as a birth parent placing a child for a private adoption out of state; or a parent or relative arranging for an out-of-state residential treatment for a child).

ICPC MODEL REGULATIONS

The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) was established in 1974 and consists of members from all 50 states, the District of Columbia and the U.S. Virgin Islands. The AAICPC has authority under ICPC to “promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.” Thus far, the AAICPC has promulgated 12 regulations for the implementation of the ICPC. These are detailed below.

REGULATION 1: FAMILY RELOCATION

When a child is in an approved placement with a family that is preparing to move out of state, and the child will remain living with that family, this regulation outlines the ICPC process to be followed so as not to disrupt placement. This regulation shall apply to the relocation of a child and the new placement resources where supervision is ongoing. Prompt handling is requested by the receiving state. Documents and communications can be made by recognized methods of expedited communication. A court order will be required to demonstrate jurisdiction over the child.

REGULATION 2: PUBLIC COURT JURISDICTION CASES: PLACEMENTS FOR PUBLIC ADOPTION OR FOSTER CARE IN FAMILY SETTINGS AND/OR WITH PARENTS, RELATIVES

The intent of this regulation is to provide, at the request of a sending agency, a home study and placement decision by a receiving state for the proposed placement of a child with a proposed caregiver who falls into the category of “placement for public adoption, or foster care and/or with parents, or relatives.” This applies when the court has the authority to determine supervision, custody and placement of the child or

has delegated said authority to the child welfare agency, and the child is being considered for placement in another state.

This does not apply when the placement is with a parent from whom the child was not removed. When the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent, the receiving state shall have no responsibility for supervising or monitoring the placement.

REGULATION 3: DEFINITIONS AND PLACEMENT CATEGORIES: APPLICABILITY AND EXEMPTIONS

The intent of this regulation is to provide guidance in navigating the ICPC regulations and to assist its users in understanding which interstate placements are governed by, and which are exempt from, the ICPC. Regulation 3 also provides definitions for terms commonly used in the ICPC process.

Placement of a child requires compliance with the compact if such placement is made under one of the following four types of placement categories:

- i. Adoptions: Placement preliminary to an adoption (independent, private, or public adoptions);
- ii. Licensed or approved foster homes (placement with related or unrelated caregivers);
- iii. Placements with parents and relatives when a parent or relative is not making the placement; and
- iv. Group homes/residential placement of all children, including adjudicated delinquents in institutions in other states.

The compact does not apply in court cases of paternity, divorce, custody, and probate pursuant to which or in situations where children are being placed with parents or relatives or non-relatives, nor when children are placed pursuant to any other compact. In addition, the following placements are without ICPC protection

- i. A placement with a parent from whom the child was not removed and the court relinquishes jurisdiction over the child immediately upon placement with the parent, as defined in Regulation 2
- ii. Sending court makes parent placement with courtesy check: When a sending court/agency seeks an independent (not ICPC-related) courtesy check for placement with a parent from whom the child was not removed.

- iii. Placements made by private individuals with full legal rights to place the child.

REGULATION 4: RESIDENTIAL PLACEMENT

It is the intent of Regulation 4 to provide for the protection and safety of children being placed in a residential facility in another state. This regulation applies to cases involving children who are being placed in a residential facility by the sending agency, regardless of whether the child is under the jurisdiction of a court for delinquency, abuse, neglect, or dependency, or as a result of action taken by a child welfare agency.

A qualifying residential facility or residential treatment center or group home is a facility providing a level of 24-hour, supervised care that is beyond what is needed for assessment or treatment of an acute condition. For purposes of the compact, residential facilities do not include institutions primarily educational in character, hospitals, or other medical facilities.

Definition of institutional facilities not covered by this regulation:

- i. Primarily educational institution.
- ii. Hospital or other medical facility means an institution for the acutely ill that discharges its patients when they are no longer acutely ill, which does not provide or hold itself out as providing child care in substitution for parental care or foster care, and in which a child is placed for the primary purpose of treating an acute medical problem.
- iii. Institution for the mentally ill or mentally defective minors means a facility that is responsible for treatment of acute conditions, both psychiatric and medical, as well as such custodial care as is necessary for the treatment of such acute conditions of the minors who are either voluntarily committed or involuntarily committed by a court of competent jurisdiction.
- iv. If the treatment and care and other services are entirely out-patient in character, an institution for the mentally ill or developmentally disabled may accept a child for treatment and care without complying with ICPC.

Emergency Residential Facility Placement Temporary Decision: Occasionally residential facility placements need to be made on an emergency basis. In those limited cases, sending and receiving state offices may, with mutual agreement, proceed to authorize emergency placement approval. Such emergency placement decisions must be made within one business day or within another mutually agreed timeframe, based upon receipt by the receiving state of the ICPC-100A request and any other document required by the receiving

state to consider such emergency placement, e.g., a financial medical plan and a copy of a court order or other authority to make the placement. If emergency placement approval is temporarily granted, the formal ICPC placement approval will not be final until there has been full compliance with Sections 5 and 7 of this regulation.

REGULATION 5: CENTRAL STATE COMPACT OFFICE

It shall be the responsibility of each state party to the ICPC to establish a procedure by which all Compact referrals from and to the state shall be made through a central state compact office.

REGULATION 6: PERMISSION TO PLACE CHILD: TIME LIMITATIONS AND REAPPLICATION

The receiving state's approval of a placement is valid for six months. If the child is not placed within six months, the sending agency may reapply. Upon reapplication, the receiving state will not require a new home study or new license. Instead, documents will just need to be updated.

REGULATION 7: PRIORITY PLACEMENTS

The intent of this regulation is to expedite ICPC approval or denial by a receiving state for the placement of a child with a parent, stepparent, grandparent, adult uncle or aunt, adult brother or sister, or the child's guardian, and to help protect the safety of children while minimizing the potential trauma to children caused by interim or multiple placements. This regulation provides the sending state court and/or sending agency with expedited approval or denial. An expedited denial would underscore the urgency for the sending state to explore alternative placement resources.

This regulation applies under the following circumstances:

- i. unexpected dependency due to a sudden or recent incarceration, incapacitation, or death of a parent or guardian; or
- ii. the child is under four years of age; or
- iii. the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource; or
- iv. the child is in an emergency shelter.

This regulation shall not apply if the child has already been placed in violation of the ICPC in the receiving state, unless a visit has been approved in writing by the receiving state Compact Administrator, and a subsequent order entered by the sending state court authorizing the visit with a fixed return date in accordance with Regulation No. 9.

Upon request of the sending agency and agreement of the receiving state to make a provisional determination, the receiving state may, but is not required to, provide provisional approval or denial for the child to be placed with a parent or relative. Determination made under a request for provisional approval or denial shall be completed within seven calendar days of receipt of the completed request packet by the receiving state Compact Administrator.

The regulation details the timeframe for the receiving state ICPC office to render expedited placement decisions. No later than 20 business days from the date that the forms and materials are received by the receiving state Compact Administrator, the receiving state Compact Administrator shall make a determination pursuant to Article III(d) of the ICPC and shall send the completed 100-A to the sending state Compact Administrator by expedited transmission.

REGULATION 8: CHANGE OF PLACEMENT PURPOSE

If a home changes from a foster home to an adoptive home, Regulation 8 states that an ICPC 100B form must be sent to receiving state by the social worker and Compact Administrator.

REGULATION 9: DEFINITION OF A VISIT

Regulation 9 defines how long a child can visit someone out of state before it becomes a placement. An out-of-state visit is defined as follows: a social experience of short duration with a predetermined end date. The visit shall not extend beyond 30 days unless specifically in the confines of a school vacation (i.e., summer vacation). A visit is not subject to the ICPC.

REGULATION 10: GUARDIANS

This regulation defines “Guardian” (public or private agency) and “Nonagency Guardian.” If a child’s permanent plan is guardianship with a current out-of-state caretaker, upon finalizing the guardianship, the ICPC case would terminate upon the concurrence of both the sending and receiving states.

REGULATION 11: RESPONSIBILITY OF STATES TO SUPERVISE CHILDREN

This regulation defines the responsibility of the receiving state to supervise a child placed under the ICPC, and the duration of such supervision. Supervision must begin when the child is placed in the receiving state pursuant to an approved placement under Article III(d) of the ICPC, and the receiving state has received a form 100B from the sending state indicating the date of the child's placement. Duration of supervision must continue until:

- i. the child reaches the age of majority or is legally emancipated; or
- ii. the child's adoption is finalized; or
- iii. legal custody of the child is granted to a caregiver or a parent and jurisdiction is terminated by the sending state; or
- iv. the child no longer resides at the home approved for placement of the child pursuant to Article III(d) of the ICPC; or
- v. jurisdiction over the child is terminated by the sending state; or
- vi. legal guardianship of the child is granted to the child's caregiver in the receiving state; or
- vii. the sending state requests in writing that supervision be discontinued, and the receiving state concurs.

Supervision must include face-to-face visits with the child at least once each month beginning no later than 30 days from the date on which the child is placed, or 30 days from the date on which the receiving state is notified of the child's placement, if notification occurs after placement. A majority of visits must occur in the child's home. Face-to-face visits must be performed by a child welfare caseworker in the receiving state.

The child welfare caseworker assigned to supervise a child placed in the receiving state shall complete a written supervision report at least once every 90 days following the date of the receipt of form 100B by the receiving state's central compact office notifying the receiving state of the child's placement in the receiving state.

REGULATION 12: PRIVATE/INDEPENDENT ADOPTIONS

Applicability of ICPC: This regulation applies to children being placed for private adoption or independent adoption whether being placed by a private agency or an independent adoption entity, as defined herein,

or with the assistance of an intermediary, as defined herein, and as in compliance with the other articles and regulations. The intent of this regulation is to provide guidance and apply ICPC requirements for the processing of private agency or independent adoptions. The ICPC process exists to ensure protection and services to children and families involved in executing adoptions across state lines and to ensure that placements are in compliance with all applicable requirements.

COURT INVOLVEMENT

Early inquiry by the court into a possible out-of-state placement will ensure fewer placement delays for a child as the case proceeds. Once legal custody is awarded, social services has the required authority to initiate an ICPC referral at any time.

Under the Safe and Timely Act, courts are now authorized and encouraged to obtain information and testimony from agencies and parties in other states without requiring interstate travel (42 U.S.C. § 438(a)(1)(E)); and permit the participation of parents, children, and other necessary parties at hearings without requiring interstate travel (42 U.S.C. § 438(a)(1)(E)).

The court can ensure the case plan follows the requirement to include the most recent information available regarding the health and education records of the child (rather than the existing requirement to include such information to the extent available; 42 U.S.C. § 5(1)(C)).

For a child in an ICPC placement, the court must maintain jurisdiction in order for the child to receive services from the receiving state, paid for by the sending state. Regulation 11 details the reasons a case may close.

IX. The Preventing Sex Trafficking and Strengthening Families Act (2014)

The Preventing Sex Trafficking and Strengthening Families Act was passed to protect children and youth in foster care by taking steps to prevent them from becoming victims of sex trafficking. It also makes certain improvements to processes and practices that will increase the likelihood for positive outcomes, such as providing funds to encourage the maintenance of permanent caregivers, gathering data on runaways, and attempting to prevent youth from lingering in the system – particularly in non-family settings.

The Act improves adoption incentives and amends the Social Security Act to require state foster care and adoption plans to demonstrate that the state has policies and procedures for identifying and documenting

youth or children when there is reasonable cause to believe the youth or child is or is at risk of being a victim of trafficking. The plan must also identify appropriate services for kids in this identified group.

PROTECTING CHILDREN AND YOUTH AT RISK OF SEX TRAFFICKING

The first section of the Act sets processes for identifying and protecting children and youth at risk of sex trafficking, improving opportunities for children in foster care, supporting permanency, and creating a national advisory committee on sex trafficking. Some specific requirements are set out below.

A. Identifying, Documenting, and Determining Services for Children and Youth at Risk of Sex Trafficking and Reporting Instances of Trafficking

States are now required to identify children and youth at risk of sex trafficking, collect and report data about these children and youth, and determine appropriate services for them. This only applies to children for whom the state has a responsibility for placement, care, or supervision. This also includes children who have an open case but were not removed from home and children in foster care who have run away (P.L. 113-183 § 101(I)).

State agencies must inform law enforcement within 24 hours of receiving information on a child or youth identified as a sex trafficking victim (P.L. 113-183 § 102(a)(3)(A)). The state must also report the total number of youth sex trafficking victims to the Secretary of HHS who will then report this number to Congress and post the information on the HHS website (P.L. 113-183 § 102(a)(3)(B)).

Using the definition of “sex trafficking victim” found in the Trafficking Victims Protection Act of 2000 (TVPA), states must report the annual number of children in foster care who are identified as sex trafficking victims to the Adoption and Foster Care Analysis and Reporting System (AFCARS). They could have been victims either before they were in foster care or during their time in care (P.L. 113-183 § 103).

B. Locating and Responding to Runaway Children and Youth

States must develop a plan to expeditiously locate any child missing from foster care (P.L. 113-183 § 104(2)(A)(i)). The state must also work to determine the primary factors that contributed to the child’s running away from care and determine the child’s experiences while absent from care including screening for the possibility that the child was a victim of sex trafficking (P.L. 113-183 § 104(2)(A)(ii)-(iii)). Within 24 hours of receiving information on a missing or abducted child, states must report this information to law enforcement authorities so that it can be entered into the National Crime Information Center (NCIC)

database and also report this information to the National Center for Missing and Exploited Children (NCMEC) (P.L. 113-183 § 104(2)(B)).

C. Normalcy for Children in Foster Care

States are now required to implement a “reasonable and prudent parent standard” for decisions made by foster parents or officials in child care institutions. The standard is defined as “careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child” (P.L. 113-183 § 111(a)(1)(A)). This standard is applied when determining whether to allow children in foster care to participate in age- and developmentally-appropriate extracurricular, cultural, social, and enrichment activities (P.L. 113-183 § 111(a)(1)(B)(i)-(ii)). The ultimate goal for this standard is to provide a sense of normalcy for children in care.

D. Another Planned Permanent Living Arrangement (APPLA) as a Permanency Option

The APPLA option for permanency has been prohibited for children under the age of 16 (P.L. 113-183 § 112(a)). At each permanency hearing when APPLA is the current option, the state is now required to demonstrate several things. First, it must document intensive, ongoing, and unsuccessful efforts for a family placement including searches for biological family members. Second, the child must be asked about his or her desired permanency outcome. Third, a judicial determination must be made explaining why APPLA is the best permanency option and why it is not in the child’s best interests to be returned home or placed with a legal guardian, fit and willing relative, or adopted. Fourth, steps need to be specified for the agency to ensure that the reasonable and prudent parent standard is followed and the child has regular opportunities to engage in appropriate activities (P.L. 113-183 § 112(b)).

E. Empowering Children 14 and Older to Participate in Case Plan and Transition Planning

Children age 14 and older have the right to be consulted in the development of their case plan and are allowed to invite two individuals other than foster parents or caseworkers to be part of the case planning team (P.L. 113-183 § 113(a)). Information on what must be included in the case plan can be found in section 675 of Title IV-E. The state may reject the chosen individuals if there is reason to believe that they would not act in the best interests of the youth (P.L. 113-183 § 113(b)).

The state also must provide the youth with several items. The first is a written “list of rights” that outlines the youth’s rights relating to education, health care, visitations, court hearings, and the right to stay safe. The state must have a document signed by the youth stating that he or she received the list of rights and that they were explained in an age-appropriate way. Second, a free annual credit report must be provided along with assistance to clear up any inaccuracies (P.L. 113-183 § 113(d)).

F. Ensuring Foster Children Have Important Documents

Youth aging out of foster care who have spent at least six months in care must receive copies of the following important documents: birth certificate, Social Security card, health insurance information, medical records, and a driver’s license or state identification card (P.L. 113-183 § 114(a)(2)).

IMPROVING INCENTIVES AND EXTENDING FAMILY CONNECTION GRANTS

The second section of the Act changes certain requirements related to incentive payments and how states may spend certain funds. In addition, an emphasis is placed on consistency in caregivers by expanding certain forms of assistance to reduce the likelihood that a child or youth may be put in a position that would make him or her vulnerable to sex traffickers. Some of the key changes are listed below.

A. Incentive Payments Programs

States are now eligible to receive incentive payments from the Adoption and Legal Guardianship Incentive Payments Program that are based on moving children out of foster care to adoption or guardianship (P.L. 113-183 § 202(b)). Additional incentives for timely adoptions (finalized in less than 24 months) will be awarded when funds are available (P.L. 113-183 § 202(c)(3)(A)-(C)). The incentive payments must be used to supplement other funds being used for services under Title IV-E or IV-B of the Social Security Act, not to replace those funds (P.L. 113-183 § 204).

The Act also requires states to calculate and report savings from having federal adoption assistance dollars replacing state dollars. Thirty percent of the savings need to be spent on post-adoption and post-guardianship services and services to prevent foster care (P.L. 113-183 § 206). In addition, children who lose a guardian can continue to receive kinship guardianship assistance payments if they are with another legal guardian who is named in the kinship guardianship assistance agreement (P.L. 113-183 § 207).

B. Sibling Placements

All parents of a child's siblings (when the parent has legal custody of the sibling) must be identified and notified within 30 days after the removal of a child from parental custody. Sibling is defined under state law and includes those who would have been considered siblings had not termination or another disruption of parental rights occurred (P.L. 113-183 § 209).

X. Other Federal Laws that May Impact Certain Dependency Cases

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (20 U.S.C. § 1400 ET SEQ; 34 C.F.R. 300 AND 301)

The Individuals with Disabilities Education Act (IDEA) provides tools to help some children in foster care. Under the federal IDEA, students who qualify for special education are eligible for services and individualized education plans that may be essential to the academic success of the child. Children who are eligible for special education must be provided with a “free appropriate public education” in the “least restrictive environment.”

In 1986, IDEA was amended to help states provide early intervention services to children with disabilities who had not yet reached school age. The part of IDEA that applies to children from birth to their third birthday is now called “Part C.” IDEA was again significantly changed in 2004, including some key amendments to Part C. On October 28, 2011, final regulations implementing the Part C changes went into effect.

IDEA and other regulations now require that all infants and toddlers for whom abuse and neglect have been substantiated, or who are directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, be referred to the Part C system for screening and/or evaluation (34 C.F.R. § 303.303(b)). The state's lead agency must ensure the state's “child find” system targets infants and toddlers who are “in foster care” or who are “wards of the State” (34 C.F.R. § 303.302(b)(1)(ii)).

A child under age three qualifies for Part C services if the child: 1) is experiencing a developmental delay, as measured by appropriate diagnostic instruments and procedures or through informed clinical opinion, in one or more of the following areas of development: cognitive, physical (including vision and hearing), communication, social or emotional, or adaptive (self help); or 2) has a physical or mental condition that has a high probability of resulting in a developmental delay (for example, severe attachment disorders,

disorders secondary to exposure to toxic substances including fetal alcohol syndrome, and chromosomal abnormalities such as Down Syndrome).

Under Part C, a parent, foster parent, an individual legally acting as a parent, or a surrogate parent will make decisions and advocate on behalf of the child. A judge overseeing the child's case can appoint a surrogate parent for a child who is a ward of the state (Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.515; 34 C.F.R. § 303.27(b)).

MCKINNEY-VENTO HOMELESS ASSISTANCE ACT (42 U.S.C. 11434A)

The McKinney-Vento Homeless Assistance Act ensures educational rights and protections for homeless children. "Homeless children" includes children who "are awaiting foster care placement" (42 U.S.C. § 11434a(2)). The Act allows children to remain in their school of origin until the end of any academic year or, if longer, the duration of the youth's homelessness or enroll in a new, more convenient school.

SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. APP. §§ 501-593)

The Soldiers and Sailors Civil Relief Act applies to persons in active federal duty (50 U.S.C. § 511(2)). This Act prohibits a default judgment against a service member not represented by an attorney for any court proceeding (50 U.S.C. § 520). It allows the reopening of any default judgment as long as the service member had requested a stay (50 U.S.C. § 520(4)) and provides for a stay of any court proceedings upon motion by the service member (50 U.S.C. § 521).

AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) AND ADA AMENDMENTS ACT OF 2008 (P.L. 110-325)

The Americans with Disabilities Act prohibits discrimination of individuals with disabilities. The ADA applies to actions of the public child welfare agency as well as private adoption agencies (42 U.S.C. § 12181(7)(K)).

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (9(1A) U.L.A. 657) / PARENTAL KIDNAPPING PROTECTION ACT (28 U.S.C. § 1738A)

The Uniform Child Custody Jurisdiction And Enforcement Act (UCCJEA) / Parental Kidnapping Protection Act (PKPA) vests "exclusive [and] continuing jurisdiction" for child custody litigation in the courts of the child's home state, which is defined as the state where the child has lived with a parent for six consecutive months prior to the commencement of the proceeding (or since birth for children younger than six months).

A state which does not otherwise have jurisdiction may enter a temporary emergency order if the child is in danger and needs immediate protection. After issuing such order, the state court should determine if there is an existing custody order from another state in effect. If there is an existing order, the emergency court must allow a reasonable time period for the parties to return to that state and argue the issues to the court with jurisdiction.

Notes:



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