CHAPTER 12:
Special Topics in Child Protection Cases

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

12.1 RELEVANT FEDERAL STATUTES

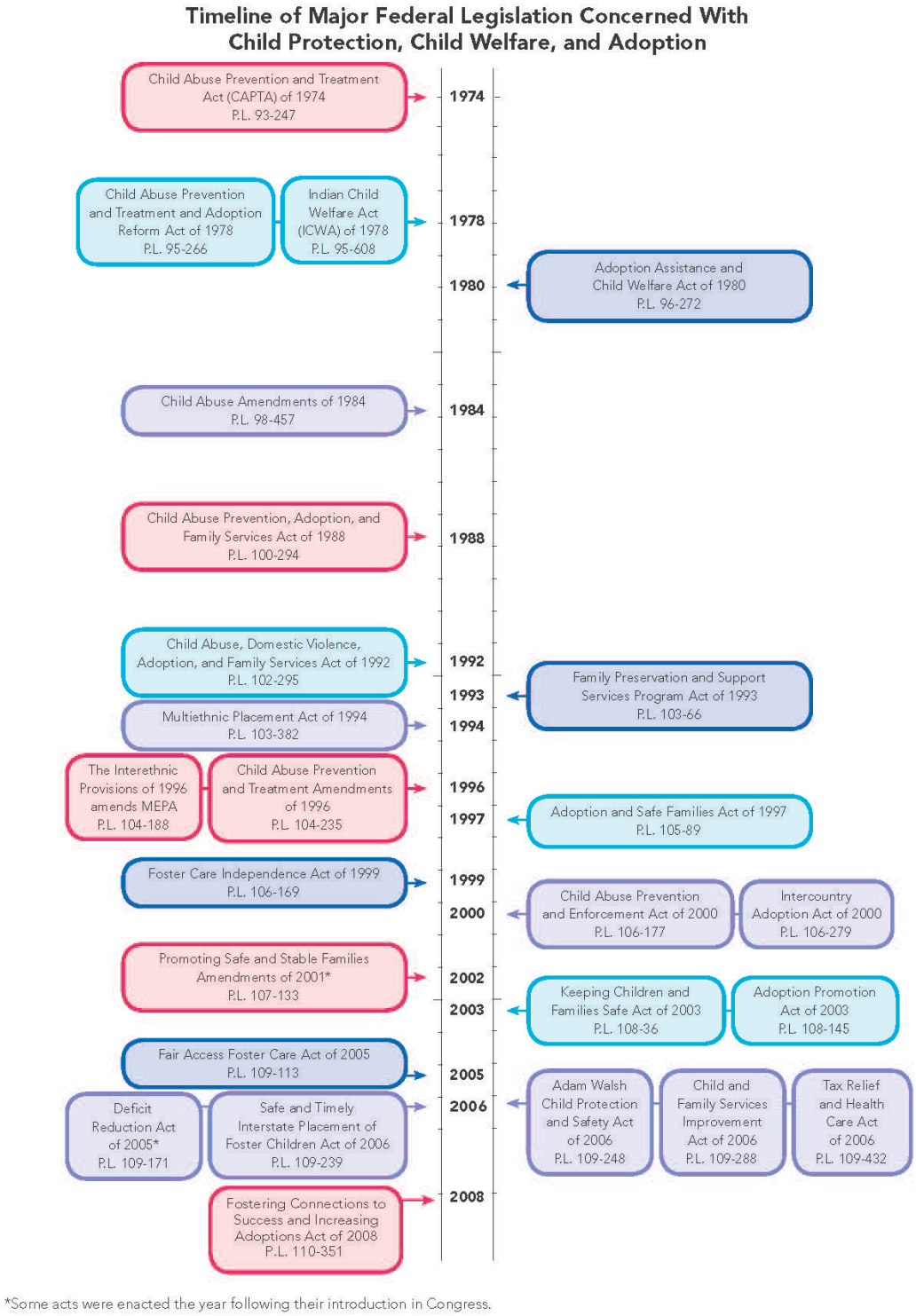

Table 12.7: Relevant Federal Child Protection Statutes
Courtesy: Child Welfare Information Gateway, 2009.

12.2 IDAHO JUVENILE RULE EXPANSIONS

Idaho Juvenile Rule 16[1] is a powerful tool, used by judges in Juvenile Corrections Act (JCA) cases to ensure collaboration between the juvenile justice system and the child protection system. Each system offers different services and resources and each system trains their workers in different skills. The rule provides a basis for sharing resources to serve the needs of the child. Both may be needed to meet the needs of a child and her/his family.

Without notice, a chance to plan, or an opportunity to follow normal investigative procedures, Rule 16 expansions may not feel like a "collaboration" but rather a "clobberation" to the Department. Sometimes there are no other options; when possible, however, actions can be taken to more effectively use a Rule 16 expansion.

In some cases, the facts present decisions makers with a choice regarding whether a child shows up before a judge in a juvenile corrections case or whether her/his parents appear in a child protection case. Assume, for example, that "Bobby" is caught stealing food at a local market. Bobby can be charged with violation of the JCA. The officer might charge and release, or charge and notify parents, or charge and take Bobby to detention. If the officer choses any of these options, Bobby becomes subject to the jurisdiction of the Juvenile Justice system. In the alternative, the officer may decide to take Bobby home where the officer may discover that Bobby's parents cannot be located. Upon further questioning, the officer learns that Bobby's father is not part of Bobby's life and that Bobby's mother is away with friends for a few days. The house where Bobby lives with his two younger siblings has no heat, water, or food. Rather that pursuing one of the options provided by the JCA, the officer may decide to make a declaration of imminent danger. If this happens, Bobby, and most likely his siblings, will become part of the child protection system.

Much research has focused on the link between juvenile justice and child welfare.[2] "The Child Welfare System has an important impact on the juvenile justice system. Research is clear that youth who have been abused and neglected are at heightened risk for early onset of delinquency."[3] This causal link is discussed further in the journal *Criminology*, with an article by C.S. Widom which states: "Over the last forty years, researchers have repeatedly demonstrated the connection between childhood maltreatment and delinquency. Many of our maltreated youths cross over into the juvenile justice and other systems of care, as child abuse and/or neglect increases the risk of arrest as a juvenile by 55% and the risk of committing a violent crime by 96%."[4]

An Idaho judge may not always choose how the child's case enters the court system, however the judge does have the authority to take actions to meet the needs of the child. Idaho Juvenile Rule 16 allows a juvenile court, acting under the Juvenile Corrections Act, to reach across

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[1] The statutory basis for Rule 16 is found in Idaho Code § 20-520 (m) (2010) and Idaho Code § 16-1613(3). IDAHO CODE ANN. §§ 20-520 & 16-1613(3)(2010).
[2] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 21 (2005).
[3] Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice: Two Sides of the Same Coin, Part II*, JUV. & FA, JUSTICE TODAY (Winter 2009), p. 21.
[4] *Id*.

systems and agencies to the Child Protection Act (CPA). The CPA and Rule 16 also permit a child protection judge to reach across to the juvenile justice system and its resources under the JCA.[5] Rule 16 provides: "At any stage of a proceeding under this chapter, if the court determines that it is the best interests of the child or society, the court may cause the proceedings to be expanded or altered to include full partial consideration of the cause under the juvenile corrections act without terminating the original proceeding under this chapter."[6]

Tools in both systems allow a judge to collect information and recommendations to assist in good decision making and in providing appropriate services. These include:

1. Idaho Juvenile Rule 16(a) also allows the court to order the Department of Health and Welfare to investigate and report to the court without expanding to a CPA.
2. Idaho Code § 20-520 allows the court to order the Department of Health and Welfare to conduct "A comprehensive substance abuse assessment of the juvenile."[7]
3. Idaho Code § 20-523 allows the court to order a screening team composed of officers or agencies designated by the court to screen and make recommendations to the court.
4. Idaho Code § 20-511A allows the court to order assessment and screening teams for juveniles with mental health issues.[8]
5. Idaho Code § 20-520(m) also supports cross-system intervention when necessary. It provides: "Order the proceedings expanded or altered to include consideration of the cause pursuant to Chapter 16, Title 16, Idaho Code."[9]
6. Idaho Juvenile Rule 19 also allows the court to convene screening teams with state agencies (eg: the Department of Health and Welfare and the Department of Juvenile Corrections), and local entities (eg: county Juvenile Probation and school districts), and the family of the child, required by the court to cooperate in planning for the child.

Each of these tools has its own purpose. The key is using each tool at the proper time to alleviate the child's issues and to provide resources from different sources. The court can ensure collaboration instead of letting each system view the child as someone else's problem.

The division of responsibilities within the Department of Health and Welfare and within the Department of Juvenile Corrections should not be allowed to hinder delivery of services. The court can motivate cooperative work within Health and Welfare between departments such as Children's Mental Health, Adult Mental Health, Substance Abuse, Family and Children's Services, Child Support, Vital Statistics, and others.

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[5] IDAHO CODE ANN. § 16-1613(3)(2010); IDAHO JUV. R. 16.
[6] § 16-1613(3).
[7] § 20-520(1)(m)
[8] § 20-511A. Childhood maltreatment and neglect can cause a host of short and long term negative consequences. Early physical abuse and neglect may impede development and cause adverse alterations to important regions of the brain, which can have long-term cognitive, emotional, and behavioral consequences. Children abused early in life may exhibit poor physical and mental health well into adulthood. ROBIN KARR-MORSE, ET AL., GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE (1999).
[9] § 20-520(m)

Best practice recommendations in the use of Rule 16 include:

1. Inviting a Health and Welfare representative to JCA hearings when the use of Rule 16 is contemplated.
2. When possible, use the option of ordering an investigation instead of a full expansion.
3. Use Screening Teams where possible.
4. If expansion or investigation is ordered, provide a copy of court records to Health and Welfare from the JCA proceedings.

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12.3 NOTIFYING AND INCLUDING UNWED FATHERS IN CHILD PROTECTIVE ACT PROCEEDINGS

The Idaho Child Protective Act (CPA) does not define the term "parent." As a result significant issues can arise in determining whether and when an absent father should be joined as a party in a CPA proceeding. Courts and lawyers confronted with questions regarding the status of an alleged father in a CPA case should carefully evaluate related statutory definitions of parents contained in the Idaho adoption and termination of parental rights statutes and in the Idaho law regarding the establishment of paternity. In addition, state and federal case law regarding the constitutional rights of unwed fathers also should be considered.

A. Idaho Statutory Provisions Regarding the Definition of "Parent"

1. *Paternity Statute*

The paternity statute establishes two processes for legally establishing paternity. Paternity proceedings may, first, be initiated by the filing of a verified Voluntary Acknowledgement of Parentage[10] or second, by filing a verified complaint naming a defendant who is the alleged father of the child.[11]

The Paternity Statute does not define the term "parent." However, the term "father" is defined as "the biological father of a child born out of wedlock."[12] In *Johnson v. Studley-Preston*,[13] the Idaho Supreme Court interpreted the phrase "born out of wedlock" in this definition to refer to the status of the biological parents' relationship to each other. Thus the Court concluded that a child born to a married woman, but biologically conceived with a man other than her husband, was "born out of wedlock" even though the biological mother of the child was married, because the biological parents of the child were not married to each other.[14] Based on this reasoning, the Court concluded that the father of a child born while the mother was married to another person had standing to bring an action under the Paternity Statute.

2. *Adoption Statute*

The adoption statute does not define the term "parent." By implication, as following analysis indicates, however, the statute provides guidance on who might be considered a parent through its provisions regarding who must consent to and/or receive notice of an adoption.

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[10] IDAHO CODE § 7-1111(1) (2010); Voluntary Acknowledgments of Paternity are discussed later in this section and are governed by § 7-1106.
[11] § 7-1111.
[12] § 7-1103(4).
[13] 119 Idaho 1055, 812 P. 2d 1216 (1991). *But see* Doe v. Roe, 142 Idaho 202, 127 P. 3d 105 (2005)(*Doe I 2005*). In *Doe I 2005*, the married, presumed father brought an action to terminate the parental rights of the unmarried, biological father of the child. In *Doe I 2005*, the Court held that an unmarried biological father was not a "father" and that he had no rights that required termination because he had not pursued a paternity action, filed a voluntary acknowledgement of paternity, or taken steps to establish a relationship with his child.
[14] *Id*. at 1057, 812 P. 2d at 1218.

a. Consent

The consent of the man who fits in one of the following four groups is required for an adoption:

1. **The consent of both parents (including the father) is required for the adoption of a child who was "conceived or born within a marriage**."[15] This provision implies that a man who is married to the mother at the time a child is conceived or born has at least an interest in being considered the father of the child. In addition, the notice provisions of the Adoption Statute provide that "any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption" is entitled to notice of the adoption proceeding.[16] These provisions are consistent with the Termination of Parent-Child Relationship Statute ("TPR Statute") which defines a "presumed father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated." [17]

   This provision of the adoption statute is also consistent with the Paternity Statute which provides a means by which the man married to the mother at the time of the conception or birth of a child, can file an "affidavit of non-paternity."[18] The negative implication is that, without such a process, the man married to the mother at the time of the conception or birth of a child might otherwise be considered the father of the child.

2. **A man who has been adjudicated the biological father by a court**, prior to the mother's execution of consent to the adoption, must consent to an adoption.[19] Pursuant to this provision, any man who obtains a timely adjudication of paternity must consent to a subsequent adoption of the child.[20]

3. **An unmarried biological father who has filed a Voluntary Acknowledgement of Paternity** pursuant to the paternity statute.[21] The Paternity Statute provides that an appropriately executed, notarized Voluntary Acknowledgement of Paternity filed with the Idaho Department of Health and Welfare "shall constitute a legal finding of paternity."[22] While the language of the Adoption Statute could be read to imply that the father can file such an acknowledgment on his own, the Paternity Statute makes clear that a Voluntary Acknowledgement of Paternity must be executed by both the "alleged father" and the mother of the child.[23]

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[15] IDAHO CODE § 16-1504(1)(b) (2010).
[16] § 16-1505(1)(f).
[17] *See* § 16-2002(12), discussed later in this Chapter.
[18] § 7-1106(1).
[19] § 16-1504(1)(d).
[20] Interestingly, the Paternity Statute assumes that a man would either voluntarily acknowledge paternity or would resist the allegation that he is the father of a child, as it provides the verified complaint in a paternity proceeding must allege that "the person *named as defendant* is the father of the child." § 7-1111(1)(emphasis added).
[21] § 16-1504(1)(i).
[22] § 7-1106(1).
[23] § 7-1106(1).

4. **An unmarried biological father who demonstrates through his conduct that he is committed to fulfilling his responsibilities as a father** toward the child must consent to an adoption if he meets certain requirements and conditions.[24] Pursuant to the Adoption Statute, the unmarried biological father must fall within one of these three categories:[25]
    a. If the child is more than six months of age at the time of placement, the unmarried biological father must have "developed a substantial relationship with the child, taken some measure of responsibility for the child and the child's future, and demonstrated a full commitment to the responsibilities of parenthood by financial support of the child," and, when not prevented from doing so by a third party, either visited the child monthly or communicated with the child regularly;
    b. The unmarried biological father must have lived openly with the child for a period of six months within one year after the birth of the child and immediately preceding the placement of the child with adoptive parents, and must have "openly held himself out to be the father of the child"; or,
    c. If the child is under six months of age at the time of placement, the unmarried biological father must have commenced paternity proceedings and must file an affidavit stating that he is fully able and willing to have full custody of the child, setting forth his plans for the care of the child, and agreeing to a court order of child support and payment of expenses incurred in connection with the mother's pregnancy and the child's birth. In addition the unmarried biological father must file a notice of his commencement of paternity proceedings with the Bureau of Vital statistics pursuant to Idaho Code § 16-1513. Finally, if he had actual knowledge of the pregnancy he must pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth in accordance with his means and assuming he was not prevented from doing so by a third party. Idaho Code § 16-1513 provides that the required notice of commencement of paternity must be filed prior to the placement of the child for adoption.[26]

In *Doe I 2005*[27] the Idaho Supreme Court interpreted these provisions in the context of a termination of parental rights case. The TPR Statute cross-references and incorporates the notice and consent provisions of the Adoption Statute.[28] In *Doe I 2005* the Idaho Supreme Court held that an unmarried biological father was not a "father" whose rights had to be terminated under the TPR Statute. It reasoned that the father in the case was not entitled to notice of the termination of parental rights action because he did not fall within any of the categories of men under the TPR Statute or under the incorporated Adoption notice and consent provisions, who were entitled to notice. The unmarried biological father had not filed in the putative father registry nor had he attempted to file a Voluntary Acknowledgment of Paternity. He had not

[24] § 16-1504(1)(e).
[25] These provisions are all set forth in § 16-1504(2).
[26] § 16-1513(2). *But see* Burch v. Hearn, 116 Idaho 956, 782 P. 2d 1238 (1989)(A paternity action may be filed at any time within the Paternity Statute's time limitations if it is not connected to an adoption or action to terminate parental rights).
[27] *Doe I 2005*, 142 Idaho 202, 127 P. 3d 105.
[28] *See* § 16-2007, cross-referencing and incorporating the adoption notice provisions in Idaho Code § 16-1505. Section 16-1505, the adoption notice provision, cross-references and incorporates the adoption consent provision, section 16-1504.

commenced paternity proceedings. And finally, he had never even attempted to support his child or establish a relationship with his child over a four year period of time.[29] Since the child's birth, the father had had no contact with the child and had not paid support; he only had expressed interest in the child at the urging of the mother in order to assist her in her custody dispute with her husband (the "presumed father"[30] of the child).

The Court recently affirmed the reasoning of *Doe I 2005* in *Department of Health & Welfare v. Doe* (hereinafter *Doe 2010*).[31] The Court held that an unmarried biological father was not a person whose rights had to be terminated under the TPR Statute. In *Doe 2010*, the Court concluded that there was no reason to terminate the rights of an unmarried biological father who had not been adjudicated the father of the child, had not filed a Voluntary Acknowledgement of Paternity, and had not established a relationship with the child or supported the child. In the four years after the child's birth, the biological father had been in prison, had only two contacts with the child, and had contributed only a very small amount indirectly to the child's support.

b. Notice

In addition to the consent provisions outlined above, the adoption statute provides that certain additional men, whose consent is not required by the statute, must nonetheless receive notice of an adoption proceeding. The adoption statute expressly provides that the purpose of notice is to enable the notified person to "present evidence to the court relevant to the best interest of the child."[32] Three categories of people are entitled to such notice:

- Any person who is recorded on the birth certificate as the child's father with the knowledge and consent of the mother unless such right to notice or parental rights have been previously terminated.[33]
- Any person who is openly living in the same household with the child at the time the mother's consent is executed or relinquishment made, and who is holding himself out to be the child's father, unless such rights to notice or parental rights have been previously terminated.[34]
- Any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption.[35]

These notice provisions are especially ambiguous. The first two provisions expressly condition the right to notice on the fact that the parental rights of the covered persons have not been terminated. Yet some individuals who come within these notice provisions would not be required to consent to an adoption of the child, and under *Doe I 2005* and *Doe 2010* do not have parental rights that must be terminated. The consent of a man under the third provision is expressly required by the adoption statute.

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[29] *Doe I 2005*, 142 Idaho at 205, 127 P. 3d at 108.
[30] The Idaho TPR Statute provides that the man married to the mother at the time the child is conceived or born is the "presumptive father." § 16-2002(12).
[31] ___Idaho ___, 244 P. 3d 232 (2010)(*Doe III 2010*).
[32] § 16-1505(9).
[33] § 16-1505(1)(d).
[34] § 16-1505(1)(e).
[35] § 16-1505(1)(f).

The Idaho Supreme Court has not interpreted these provisions of the adoption statute. Thus, it is not clear whether this right to notice for the purpose of presenting evidence regarding the child's best interest means that men covered under these provisions but not fitting in any of the provisions regarding consent to adoption would be considered to be a father of the child.

B. Termination of Parental-Child Relationship Statute

The TPR Statute defines "parent" as:

(a) The birth mother or the adoptive mother;
(b) The adoptive father;
(c) The biological father of a child conceived or born during the father's marriage to the mother; and
(d) The unmarried biological father whose consent to an adoption of the child is required pursuant to section 16-1504, Idaho Code[36]

With regard to part (d), any person in one of the four adoption consent categories discussed above would be considered a "parent" for purposes of termination of parental rights.

The TPR statute further provides that a "presumptive father" is "a man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated."[37]

Finally, the TPR statute provides that "unmarried biological father "…means the biological father of a child who was not married to the child's mother at the time the child was conceived or born."[38]

While the definitions of a parent whose rights may be terminated under the TPR statute appear at first blush to be consistent with the provisions for consent to adoption (although not the provisions for notice of adoption), the notice provision in the TPR statute creates new ambiguity. It states that where a "putative father" has failed to commence paternity proceedings in a timely fashion notice is not required "*unless such putative father is one of those persons specifically set forth in section 16-1505(1), Idaho Code*."[39] The referenced provision is the adoption *notice* provision. Thus, it appears that by its express language the TPR statute requires notice to be provided to any person whose consent would be required for adoption because such persons are "parents" for purposes of the TPR statute, as well as any person who is entitled to notice of an adoption action. Like the adoption statute's notice provisions, the TPR notice provisions do not clarify whether the parental rights of a man entitled to notice but not fitting the definition of "parent" must be terminated.

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[36] § 16-2002(11). In *Doe v. Doe*, 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*) the court reasoned that a father who, with the mother, had completed a "Voluntary Acknowledgement of Paternity Application" and who was subsequently listed as the father on the child's birth certificate was an "unmarried biological father" under § 16-2002(p). This section has been amended and is now section 16-2002(11)(11).
[37] § 16-2002(12)
[38] § 16-2002(15)
[39] § 16-2007(5)

C. U.S. Supreme Court Authority Relevant to the Constitutional Rights of Unmarried Fathers

In a series of cases beginning with *Stanley v. Illinois*,[40] and through *Lehr v. Robinson*,[41] the United States Supreme Court has made clear that an unwed father has a constitutionally protected liberty interest in establishing a relationship with his child. The Court has concluded that this interest is strongest when the father has lived together with the child in a family unit and that the right cannot be unilaterally terminated without notice by a state's failure to provide an adequate procedural framework that allows the unwed father to protect his rights.

In *Stanley*, the unwed father and mother had lived together for approximately 18 years, during which they had three children. When the mother died suddenly, the state of Illinois initiated a dependency proceeding, took custody of the children as wards of the state, and declined to give Stanley, the father, an opportunity to be heard. The state court reasoned that Stanley did not have a right to be heard because he was not married to his children's mother. The state statutory scheme assumed that "an unwed father is not a 'parent' whose existing relationship with his children must be considered."[42]

The Supreme Court rejected the implicit state presumption that all unwed fathers were unfit. Rather, the Court held that a state cannot terminate the parental rights of an unwed father who has lived together with his children in a family unit without first conducting a hearing to determine whether the father is unfit. It rejected the state's argument regarding efficient handling of adoption, concluding instead that:

> [p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[43]

The *Stanley* reasoning was extended by the U. S. Supreme Court in *Quilloin v. Wolcott*[44] and *Caban v. Mohammed*.[45] In both of these cases, stepfathers sought to adopt stepchildren over the objections of the children's biological fathers. As in many states at the time, statutes in both jurisdictions provided that an unmarried father's child could be adopted without his consent if the court found the adoption to be in the child's best interests. However, the statutes also allowed other categories of parents, "married fathers and all mothers," to veto adoption of their children unless the vetoing parent was found to be unfit or to have abandoned the child. In both *Quilloin* and *Caban*, the unmarried fathers challenged the constitutionality of these statutory schemes on equal protection and substantive due process grounds arguing that, like other parents, their parental rights could not be terminated without notice and a hearing, at which they would be accorded the opportunity to present evidence regarding the best interests of the child.

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[40] 405 U.S. 645 (1972).
[41] 463 U.S. 248 (1983).
[42] *Stanley*, 405 U.S. at 649-50.
[43] *Id.*
[44] 434 U.S. 246 (1978).
[45] 441 U.S. 380 (1979).

In *Quilloin*, the unwed father had had little or no contact with the child or mother in the nine years after the child's birth. He had not paid child support, had rarely visited or contacted the child, and had not filed any action to establish his paternity. Only after the stepfather began proceedings to adopt the child did the unwed birth father make any attempt to assert his parental rights. The Court held that because the father had not lived together in a family unit with his child and had not "seized his opportunity interest," he had no protectable liberty interest in establishing his parentage.[46] Thus it upheld the statutory scheme.

In *Caban*, the father had lived together with his children and their mother for two years, and thereafter had substantial, although sometimes indirect, contact with the children. The Court reasoned that he had a cognizable liberty interest in continuing his relationship with his children. He had lived with them and their mother for the first two years of their lives. After that he had indirect contact with them through their grandmother over a period of several years. He did not seek to establish his paternity formally. Nor did he pay child support to the children's mother. However, the Court recognized that, despite failing to comply with formal obligations of parenthood, Caban had "established a parental relationship" with his children, and the Court thus concluded that the statutory scheme that treated an unwed father with an established parental relationship differently from mothers and married fathers violated Caban's equal protection rights.[47]

Together, *Stanley*, *Quilloin,* and *Caban* established the fundamental principle that an unwed father who has lived in a family unit with his children or otherwise has established a relationship with them through contact, establishing paternity, and/or paying child support has a constitutionally protected liberty interest that cannot be ignored because he has not filed a paternity action and was not married to his children's mother. The most important factor considered by the court in this trio of cases was whether the father actually had resided with the children as part of a family unit. The cases did not address the rights of unwed fathers who had not yet had the opportunity to establish a parental relationship.

This latter situation was addressed in *Lehr v. Robinson*.[48] In *Lehr*, the father had expressed his interest in parenting the child since the child's birth but never had the opportunity to establish a relationship with the child because of the interference of the mother and because of his own ineffectiveness. The Court recognized than even a father with no established relationship with his child has a liberty interest protected by the Constitution:

> [T]he significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."[49]

[46] *Quilloin,* 434 U.S. at 256.
[47] *Caban,* 441 U.S. at 385.
[48] 463 U.S. 248 (1983).
[49] *Lehr*, 463 U.S. at 262.

The Court concluded that a state could terminate the parental rights of an unwed father who had not established a relationship with his child only if the state provided the opportunity for the father to assert his relationship. Such an opportunity is provided where the state has a statutory scheme that is likely to notify most interested fathers and that provides the father a way of asserting parental rights independent of the mother. In *Lehr*, the Court found that the New York statute in question required notice be provided to seven categories of men who might be interested in being a father, including men who had resided with the mother during the pregnancy and/or after the child's birth and who held themselves out as the father of the child. In addition, the Court approved New York's "putative father registry", which permitted men to register their interest in paternity by filing a post card with the state.

The most recent U.S. Supreme Court case in this area is *Michael H v. Gerald D.*[50] The Court held that California's conclusive presumption that the man married to the mother at the time of the child's birth is the legal father of the child did not violate the due process rights of the unwed biological father. The case involved a situation in which the mother, while separated from her husband, had a child and lived with the child and the child's biological father in a family unit for a period of time. The relationship between the mother and father broke up and the mother reconciled with her husband. When the biological father attempted to formally establish his paternity and obtain visitation with the child, the mother and her husband argued that California law barred the father's action. The Supreme Court recognized the constitutional rights of the unwed father, but reasoned that a state could constitutionally prefer the marital father to the unwed father because of the importance of protecting the marital relationship.

Read together, *Stanley*, *Quilloin*, *Caban*, and *Lehr* stand for the proposition that all fathers have a constitutionally protected interest in parenting their children. While fathers who have established relationships with their children are entitled to more constitutional protection than fathers who have not yet established their relationships with their children, even unwed fathers in this latter group cannot be completely foreclosed from decision making regarding their child under all circumstances. These men, according to *Lehr*, have an "opportunity interest" that no other man has to establish a relationship with their children. Because of this interest, states may not terminate the parental rights of a man who has an established family relationship with his children without providing notice and a right to be heard on the question of the children's best interests. Furthermore, states must have a statutory scheme that is calculated to include most responsible unwed fathers within the requirement for notice and which provides an unmarried father the ability to assert parental rights that is within the reach of the putative father and not subject to veto through the actions of a third party (such as the child's mother). Finally, however, the constitutional rights of an unwed father may be secondary to a state's interest in protecting and fostering marriage.

D. Idaho Supreme Court and Court of Appeals Cases Relevant to the Rights of Unmarried Fathers

The Idaho Supreme Court and Court of Appeals have decided a number of cases in recent years relevant to the interpretation of the Idaho provisions regarding unwed fathers.

[50] 491 U.S. 110 (1989).

The first such case was *Steve B.D. v. Swan*[51]. There, the Idaho Supreme Court adopted some of the reasoning of *Lehr*. In *Steve B.D.* the father knew of the child's birth and visited the child and mother in the hospital. After that time, however, he had no contact with the child, offered no financial support for the child, refused to sign an affidavit of paternity, and did not marry the child's mother. The father also did not file in the Idaho Putative Father Registry, which existed at that time.[52] After the child's birth, the mother, without the knowledge of the father, placed the child for adoption and stated under oath that she did not know who the father of the child was.

Subsequently, the mother attempted to revoke her consent to the adoption[53]. At the time, efforts were being made to provide the father with notice by publication (based on the mother's testimony that she did not know who the father was), and the unwed father was subsequently permitted to intervene in the mother's action to revoke her consent to adoption. The father argued that he relied on the mother's representations that she planned to keep the child. Under those circumstances, the Idaho Court found that although the father had an "opportunity interest" under *Lehr v. Robinson*, he had not established a substantial relationship with the child and had not seized his interest in any other cognizable way. Thus, the Court concluded that the father's consent was not needed for the adoption.

Interestingly, the Idaho Court, while relying on *Lehr*, did not review the constitutional sufficiency of the Idaho statutory scheme for notice of adoption and TPR proceedings. Instead, the Court focused on the quality of the father's relationship with the child. It is not clear whether the scheme in force at the time was constitutionally sufficient.

The Idaho Supreme Court next addressed the rights of unwed fathers in *Johnson v. Studley-Preston*.[54] In *Johnson*, the Court reversed the trial court's holding that an unwed father lacked standing to file a Paternity action because he had failed to establish a substantial relationship with the child. The Supreme Court held that the adoption notice provisions regarding putative fathers only applied to limit paternity claims where such claims arise in connection with an adoption or termination of parental rights case. In *Johnson*, no action for adoption or TPR had been filed. Instead, after the mother left her relationship with the unwed biological father and married another man, the unwed biological father sought to establish his parental relationship by seeking an order of paternity. Further, the Court held that although the mother of the child was married at the time of the child's birth, the child was, nonetheless, a "child born out of wedlock" for purposes of the Paternity Statute because the mother was not married to the biological father. Thus the unwed biological father's paternity action was not barred by his failure to register in the putative father registry and was properly filed under the provisions of the Paternity Statute.

In *Roe Family Services v. Doe (Doe 2004)*[55] the Court addressed the requirements for notice to an unwed father under the TPR Statute. It held that an unmarried biological father who was

[51] 112 Idaho 22, 730 P. 2d 732 (1986).
[52] The statutory scheme in existence at the time of the *Steve B.D.* decision was completely revised in 2000.
[53] *See* DeBernardi v. Steve B.D., 111 Idaho 285, 723 P. 2d 829 (1986)(denying the mother's attempt to revoke her consent to adoption).
[54] 119 Idaho 1055, 812 P. 2d 1216 (1991).
[55] 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*).

recorded on the birth certificate as the child's father was entitled to notice of a TPR proceeding pursuant to the TPR Statute. That provision (now Idaho Code section 16-2007) required then, and still requires today, that notice be provided to any person included in the adoption notice provision – Idaho Code section 16-1505. Thus, the Court concluded that the unmarried father, listed on the birth certificate, was entitled to notice of the TPR proceeding. Furthermore, the Court held that where the mother and the father both acknowledged the father's paternity, the father's action should not be barred by his failure to register in the putative father registry pursuant to Idaho Code section 16-1513.

In *Doe I 2005*,[56] the Supreme Court held that an unmarried, biological father was not a parent whose rights must be terminated because he had not established paternity, had not filed a Voluntary Acknowledgement of Paternity, and had not established a relationship with his child. In *Doe I 2005*, the mother was married at the time the child was born. The husband was listed as the father of the child on the birth certificate and thereafter held himself out and functioned as the child's father in every way. Several years later, during a pending divorce action, the husband learned that he was not the father of the child. Nonetheless, the magistrate in the divorce case found that the husband was the presumed father of the child by virtue of his marriage to the mother, and the Court gave full custody to the husband. In response to the award of custody, the mother contacted the biological father of the child and urged him to obtain a paternity test and to pursue his parental rights. To secure his relationship with the child, the husband then filed an action to terminate the parental rights of the unmarried biological father. The unwed father was named as the defendant, was notified of the action, and participated in it.

In *Doe I 2005*, the Court reasoned that the parental termination statute was premised on the assumption that the "defendant parent has some parental right to his or her child, which should be terminated…."[57] Based on the facts of the case and on both Idaho and U.S. Supreme Court precedent, the court held that the biological father did not have such a parental right. It reasoned that to have parental rights a father must 1) establish paternity through a court decree, 2) file a Voluntary Acknowledgment of Paternity, or 3) his consent to an adoption must be required pursuant to the adoption statute.[58] The unmarried biological father had not established paternity, had not filed a Voluntary Acknowledgment, nor had he established any relationship with the child. The Court reasoned that its holding was consistent with both *Steve B.D.* and with *Lehr v. Robinson.* Based on those cases, it rejected the biological father's argument that he had not established paternity because the mother lied to him and told him that the child was not his. The Court reasoned that the father had plenty of time and opportunity to question the mother's representations and to seek to establish his relationship with the child, but had not done so.

In (*Doe 2010*)[59], the factual situation was similar to *Doe I 2005*. The mother was married at the time of the child's birth to a person who was not the biological father of the child. While the mother was pregnant, the biological father was sent to prison. Mother told the biological father

[56] 142 Idaho 202, 127 P. 3d 105 (2005).
[57] *Id*. at 204, 127 P. 3d at 107
[58] As discussed previously, the following men must consent to an adoption : 1) the man married to the mother at birth or conception; 2) a man who has established paternity through a court decree; 3) a man who has filed a Voluntary Acknowledgment of Paternity; or 4) a man who has established a sufficiently close relationship with the child as defined in the adoption statute.
[59] ___ Idaho ___, 244 P. 3d 232 (2010).

that he might be the father of the child and he made inquiries into the possibility of establishing paternity. However, he never pursued any formal steps to establish paternity. Prior to the biological father's release from prison, the child and her siblings were removed from the care of the mother and her husband by IDHW, and a child protective case was initiated. The husband was listed as the father of the child in the CPA proceeding. The Department became aware of the biological father at some point during the case and attempted to contact him in Walla Walla, where he lived after his release from prison. He did not respond. The child was not reunified with the mother, and the Department filed a TPR proceeding against the mother, her husband, and the biological father. Relying on *Doe I 2005*, the Idaho Supreme Court affirmed the magistrate's finding that the biological father did not have parental rights that required termination. Although he had a paternity test, he never filed a paternity action. Nor did the biological father file a Voluntary Acknowledgment of Paternity. Finally, the court reasoned that the biological father's two brief contacts and payment of a very small amount of support did not establish a sufficient relationship to constitute a parental right that must be terminated. The Court concluded that the father's due process rights were not violated, relying on *Doe I 2005*, *Caban*, *Lehr*, and *Steve B.D.*

In *Department of Health and Welfare v. Doe* (*Doe III 2010*),[60] the Idaho Court of Appeals held that a man who believed that he was the child's father and who had resided with the child and the child's mother, was not a "father" whose rights had to be terminated prior to an adoptive placement. In *Doe II 2010*, paternity testing during the child protective proceeding revealed that Doe was not the biological father of the child. He argued that he had standing to participate in the proceeding and to object to the termination of his parental rights. His theory was that he was a "presumed father" under Idaho Code section 16-2002(12), or that, in the alternative, he should be considered a parent under the equitable doctrine of *in loco parentis*. Although Doe believed he was the father, had resided with the child and the child's mother as a family unit, and had actively participated in the child's case plan, he had never married the mother. The court held that Doe did not meet the definition of "presumptive father" because he never married the child's mother. Further, the court declined to extend the doctrine of *in loco parent* to the facts of the case. Thus, it affirmed the magistrate's conclusion that Doe was not a father and that he did not have standing to object to the termination of parental rights. Finally, the court concluded that Doe's constitutional rights to access the courts and to due process were not impaired by the court's conclusion. Regarding access to the courts, the Court pointed out that Doe had been permitted to fully participate in the proceeding on the issue of whether he was the child's father. Regarding due process, the Court concluded that Doe did not have a cognizable liberty interest because he was not the biological parent of the child. It reasoned, "[t]his Court declines to recognize a liberty interest in this case. No jurisdiction has identified a liberty interest in a non-biological person who is neither a legal guardian, adoptive parent, step-parent, bold relative, nor foster parent."[61]

Despite the Court's frequent consideration of issues regarding notice of unwed fathers, it has never had the opportunity to evaluate the constitutionality of the current adoption and parental termination notice provisions. Rather, the Idaho Court has evaluated the quality of an unwed father's relationship to determine whether he has established a constitutionally sufficient interest

[60] ___ Idaho ___, 245 P. 3d 506 (App. 2010).
[61] *Id*. at ___, 245 P. 3d at 511.

to challenge a TPR proceeding or adoption. In each of the Idaho cases, with the exception *Steve B.D.* and *Doe 2004*, the unmarried father had received notice and was permitted to participate in proceedings for the purpose of determining whether his relationship with the child warranted recognition. *Steve B.D.* was decided prior to the current notice provisions. In *Doe 2004*, the court did not reach the constitutional question because it found that the Idaho TPR Statute required that the father be notified.

E. Best Practice Recommendations in CPA Proceedings Based on the Idaho Statutory Scheme

Based on the Idaho statutory scheme, the following individuals should be notified of a CPA Proceeding. This recommendation, which harmonizes the disparate provisions of the statutes discussed above, is made because such individuals may become integral to the case at any of its stages (removal and legal custody, TPR, and adoption), and failure to notify them may cause delays in permanency for the child.

- The man married to the mother at the time the child is conceived or born.
- Any man who has been adjudicated the father by a court of competent jurisdiction.
- Any man who has, with the mother, signed a Voluntary Acknowledgement of Paternity.
- Any man who is able to demonstrate that he has maintained a substantial relationship, as defined in § 16-1504(2), with a child who is more than 6 months of age.
- Any man who has lived with the child for at least six months, within the first year after the child's birth and immediately preceding the initiation of an adoption proceeding, and who has openly held himself out as the father of the child.
- Any man who, prior to the child's placement for adoption, has commenced a paternity proceeding, and who has filed a notice of commencement of paternity proceedings and an affidavit of support and care for the child.
- Any man who is recorded on the birth certificate as the father of the child with the knowledge and consent of the mother.
- Any man who is openly living in the household with the child at the time the mother's consent to adoption is executed and who holds himself out as the father of the child.

* * *

12.4 THE IDAHO SAFE HAVEN STATUTE

In 2001, Idaho adopted the Idaho Safe Haven Act. Similar statutes have been enacted in most states as a response to reported increases in infanticide and the abandonment of infants.[62] The Idaho Safe Haven Act is codified in Title 39, Chapter 82 of the Idaho Code. The Act permits a parent to safely relinquish a baby to a designated location where the baby will be protected and cared for until a permanent home can be found. The law permits the parent to remain anonymous and be shielded from prosecution for abandonment or neglect. It also establishes procedures to secure permanency for the child.

A. Who May Leave a Baby at a Safe Haven

A custodial parent may deliver a child to a safe haven in Idaho. Pursuant to the Act, the custodial parent is the parent with whom the child resides.[63] A child left at a safe haven must be no more than thirty days of age at the time it is left at the safe haven.[64] If a custodial parent leaves a child at a safe haven the parent is not subject to prosecution for abandonment.[65]

B. Save Havens

In Idaho, safe havens authorized to receive a child pursuant to the Safe Have Act, include: Idaho licensed hospitals or physicians, staff working at a licensed office or clinic, Idaho licensed or registered advanced practice professional nurses and physician assistants, or emergency medical personnel responding to a "911" call from a custodial parent.[66]

C. Responsibility of Safe Havens

If a safe haven takes custody of a child, it has a number of responsibilities under the Act. The safe haven must "perform any act necessary in accordance with generally accepted standards of professional practice, to protect, preserve, or aid the physical health and safety of the child during the temporary physical custody, including but not limited to, delivering the child to a hospital for care or treatment."[67] The safe haven also is required to "provide notice of the abandonment to a peace officer or other person appointed by the court."[68]

The safe haven may not "inquire as to the identity of the custodial parent."[69] Moreover, if the identity of the parent is known to the safe haven, it must "keep all information as to the identity

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[62] *See* Child Welfare Information Gateway, *Infant Safe Haven Laws: Summary of State Laws*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm (2010).
[63] IDAHO CODE § 39-8203(1)(b)(2010)(specifying that the child must be delivered by the custodial parent) and IDAHO CODE § 39-8202(1)(2010)(defining the term custodial parent).
[64] § 39-8203(1)(a).
[65] § 39-8203(5).
[66] § 39-8202(2).
[67] § 39-8203(2)(a).
[68] § 39-8203(2)(b).
[69] § 39-8203(3).

confidential."[70] In addition, the parent cannot be required to provide "any information" to the safe haven, although the safe haven may collect information voluntarily offered by the parent.[71] A safe haven exercising its responsibilities under the statute is immune from civil or criminal liability "that otherwise might result from their actions", so long as the safe haven is acting in good faith in receiving the child and performing its duties.[72]

D. Permanency for the Relinquished Child

Once a peace officer or other person designated by the court is notified by a safe haven that it has taken custody of a child, the officer must take protective custody of the child and immediately deliver the child to the care, control, and custody of the Department of Health and Welfare. If the child needs further medical care, the child may be left in the care of a hospital and the peace officer must notify the court and the prosecutor of the child's location.[73]

Once the child is delivered to the Department, the Department must "place the abandoned child with a potential adoptive parent as soon as possible."[74]

The Safe Haven Act provides that a shelter care hearing must be held pursuant to Idaho Code § 16-1615, and that the *Department* must file a "petition for adjudicatory hearing pursuant to Idaho Code § 16-1621."[75] The process envisioned by these provisions is ambiguous. Idaho Code § 16-1615 requires a shelter care hearing to be held within 48 hours of a child's emergency removal from the home pursuant to the Child Protective Act (CPA). Presumably, the Safe Haven Act anticipates that the shelter care hearing in a safe haven case should take place within 48 hours of the child's relinquishment to a safe haven, although this timing is not specified in the Act. As a matter of best practice to ensure the safety of the child, the appropriateness of the safe haven's actions, and to begin the investigation into the other parent of the child, the shelter care hearing should be held within 48 hours of the time the child is left at the safe haven.

A second ambiguity in the Safe Haven Act is the cross reference to Idaho Code § 16-1621 regarding the filing of a petition and the adjudicatory hearing. Section 16-1621 is the Case Plan Hearing section of the CPA. Presumably, this cross reference should refer to the CPA provision regarding the CPA petition – § 16-1610 – and/or the provisions of the CPA regarding the adjudicatory hearing – § 16-1619.

A third ambiguity is that the Safe Haven Act requires that the *Department* file a CPA petition. The CPA provides that either the county prosecutor or a deputy attorney general – not the Department – file the petition in a CPA case.[76] The best practice is for the Department to consult

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[70] *Id*.
[71] *Id*.
[72] § 39-8203(4).
[73] § 39-8204(1). The Safe Haven Act further provides that the peace officer or other authorized person acting pursuant to the statute will not be held liable unless "the action of taking custody of the child was exercised in bad faith." § 39-8204(3).
[74] § 39-8204(2).
[75] § 39-8205.
[76] § 16-1610(1)(a).

with the prosecutor, who can then file the petition at the time of the shelter care hearing as provided for in the CPA.

The Safe Haven Act requires that an adjudicatory hearing must be held pursuant to Idaho Code § 16-1619 and § 16-1621.[77] This section repeats the confusing cross reference to the CPA Case Plan Hearing provision (§ 16-1621), but also directly cross-references the CPA adjudicatory hearing provision. The adjudicatory hearing in a safe haven case should be held within thirty days after the petition is filed. Within the initial thirty (30) days after the safe haven assumes custody of the infant, the Department is also required to conduct an investigation to ensure that the infant is not a missing child[78] and may, if ordered by the court, initiate a child protective or criminal investigation if a claim of parental rights has been made.[79] In addition, the Department must conduct the investigations required by the CPA.[80]

As soon as practicable, after the first thirty days in which the child is in custody, the Department must petition to terminate the parental rights of the parent who abandoned the child and of any absent parent.[81]

No further procedures are set forth in the Safe Haven Act itself. The inference is that the case should proceed as a typical CPA proceeding to the final adoptive placement of the child. This proceeding is likely to be truncated because the parents of the child are not participating in the action. Also, the Safe Haven Act seems to anticipate that the permanent placement for a safe haven child is adoption.

E. Parental Rights

Care must be taken to respect the parental rights of the absent parent in a Safe Haven Act proceeding. Two potential issues could arise regarding the rights of that parent that can affect the stability of the child's placement.

1. *Constitutional Rights of Parents*

The absent parent has a constitutionally protected liberty interest in establishing a relationship with the child. Both federal and state law regarding the nature and scope of this liberty interest are discussed in the section of this chapter regarding the rights of unwed fathers.

2. *Indian Child Welfare Act*

If the child is an Indian Child, any adoption may be void if the provisions of ICWA are not complied with. Chapter 11 of this manual contains a detailed discussion of ICWA. Care must be taken in a safe haven case to ensure that the child's status as an Indian Child is investigated. Although there is no case law on this point, it is likely the federal requirements of ICWA would

[77] § 39-8205(4).
[78] § 39-8205(3).
[79] § 39-8205(2).
[80] § 16-1616(1).
[81] § 39-8205(5).

prevail: that the state's duty to determine the child's status under ICWA pre-empts inconsistent state laws providing that inquiry into the parents' identity and background cannot be made. This direct statutory clash between state and federal law poses serious issues where there is any indication that the child may be an Indian child.

3. *Procedural Requirements of the Safe Haven Act to Protect Parental Rights*

a. Registration in the Abandoned Child Registry and Notice

The Safe Haven Act contains some provisions aimed at protecting the parental rights of the absent parent. Although the act specifically disallows inquiry into the identity of the custodial parent, it provides that during the first thirty days the child is in custody, "the department shall request assistance from law enforcement officials to investigate through the missing children information clearinghouse and other state and national resources to ensure that the child is not a missing child."[82]

The act also provides that the vital statistics unit of the Department must maintain a "missing children's registry" where a parent may make a claim of parental rights of an abandoned child.[83] To be effective, the act provides that a claim of parental rights must be filed before an order terminating parental rights is entered by a court. The act states that "[a] parent that fails to file a claim of parental rights prior to entry of an order termination their parental rights is deemed to have abandoned the child and waived and surrendered any right in relation to the child, including the right to any judicial proceeding in connection with the termination of parental rights or adoption of the child."[84] Prior to a hearing on a petition to terminate parental rights, the Department must file a certificate from the Department of Vital Statistics stating that a diligent search of the missing children registry was conducted and setting forth the results of the search or stating that no claim of parental rights was made.[85]

The Safe Haven Act specifically provides that registration of notice of the commencement of paternity proceedings pursuant to Idaho Code section 16-1513 does not satisfy the requirements of the Safe Haven Act.[86] Given that unwed parents have a constitutional right to parent their children, this provision may be of doubtful constitutionality. The federal and state cases regarding parental rights are discussed in the unwed fathers section of this chapter. For example, an unwed father who resided with the mother and supported her during her pregnancy and who timely filed pursuant to § 16-1513, but did not file a claim of parental rights of an abandoned child pursuant to the Safe Haven Act, might nonetheless be constitutionally entitled to notice of an action terminating parental rights or an adoption action. Likewise, a father who lived together in a family unit with the child's mother and the child after the child's birth, albeit for a brief period of time, also would likely be constitutionally entitled to notice even despite failing to file the claim of parental rights required by the Safe Haven Act.

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[82] § 39-8205(3).
[83] § 39-8206(1). This provision also establishes procedural requirements for the registry and for the filing of claims.
[84] § 39-8306(1).
[85] § 39-8306(2) and (4).
[86] § 39-8206(1).

b. Filing a claim of parental rights

If a claim for parental rights is timely filed, notice of the action to terminate parental rights must be provided to the person claiming parental rights pursuant to Idaho Code section 16-2007 (the TPR statute). In addition, the court must hold the action of involuntary termination of parental rights "in abeyance" for a period of time not to exceed sixty days.[87]

During the sixty day period of abeyance, the court must order genetic tests to establish maternity or paternity at the expense of the person claiming parental rights. In addition, the act directs the Department to conduct an investigation pursuant to Idaho Code section 16-2008.[88]

When indicated, a shelter care hearing must be conducted within 48 hours to determine whether the child should remain in the custody of the Department or should be returned to the parent. Presumably, this shelter care hearing is in addition to the shelter care hearing that was conducted when the child was initially abandoned and hearing must be held within 48 hours of the filing of a claim of parental rights, although the statute does not state how the time requirement should be implemented.[89] In making a determination regarding whether to return the child to the parent, continue a CPA proceeding, or terminate parental rights, the act provides that "a parent shall not be found to have neglected or abandoned a child" solely because the child was left with a safe haven.[90]

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[87] § 39-8206(3).
[88] § 39-8306(3)(a) & (b). The referenced investigation includes a financial analysis regarding unreimbursed public assistance provided on behalf of the child. In addition the section directs that a social study of the circumstances of the child and the case be conducted. § 16-2008.
[89] § 39-8206(3)(c).
[90] § 39-6307(3)(d).

12.5 DEFACTO CUSTODIANS AND CHILD PROTECTIVE ACT PROCEEDINGS

In 2009, the Idaho Legislature enacted the De Facto Custodian Act.[91] This statute provides a procedural mechanism by which a relative of a child may obtain an order of legal or physical custody of the child.

If a *de facto* custodian has been appointed for a child prior to the removal of the child from the home, the custodian is a proper party to the CPA proceeding.[92] Depending on the facts of the case, the custodian may be considered as a possible resource for the child during the CPA proceeding.

However, where a *de facto* custodian has not been appointed by a court prior to the initiation of the CPA proceeding, this statute does not provide a basis for the alleged custodian to participate as a party in the CPA proceeding or to use a CPA placement as a bootstrap for a legal order of custody.

The De Facto Custodian Act, itself, makes clear that that a person cannot qualify as a *de facto* custodian based on a placement made pursuant to the CPA.[93] Thus, placement of the child with a relative as part of a CPA proceeding cannot provide a basis for the relative to seek appointment as a *de facto* custodian.

The CPA provides that the court in the CPA proceeding has exclusive jurisdiction of the matter.[94] The Idaho Rules of Civil Procedure provide that proceedings filed under Title 16 of the Idaho Code (including adoptions, child protective act proceedings, and parental termination actions) are not "child custody proceedings" in which an individual may intervene to seek appointment as a *de facto* custodian.[95]

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[91] IDAHO CODE §§ 32-1701 – 32-1705.
[92] Idaho Code § 16-1602(12) defines the term "custodian" as "a person, other than a parent or legal guardian to whom legal or joint legal custody of the child has been given by a court order." This definition would include a de facto custodian who has been awarded legal custody. A custodian must be identified in the CPA petition with specificity, § 16-1610(2)(d), is to be notified of the CPA proceeding in the Summons, section 16-1611(3), and must receive notice of the shelter care hearing, section 16-1615(2). *See* IDAHO CODE §§ 16-1602(12), 16-1610(2)(d), and 16-1611(3)(2010).
[93] § 32-1703(4)(a).
[94] § 16-1603(1).
[95] IDAHO R. CIV. P. 24(d).

12.6 FINDINGS REQUIRED TO ESTABLISH AND/OR MAINTAIN A CHILD'S ELIGIBILITY FOR IV-E FUNDING

In order for an Idaho child who is placed in foster care to establish and maintain eligibility to receive federal IV-E foster care maintenance payments, the judge hearing the child protection case must make specific findings at specific times in the child protection case. This section is designed to review the specific findings, their language, and the timing of each throughout the child protective process.

A. Contrary to the Welfare

The first order pertaining to the removal of the child from the home must contain a finding that it would be contrary to the welfare of the child to remain in the home. Failure to make this finding will cause an otherwise eligible child to be ineligible for federal foster care maintenance payments as well as adoption assistance funds.

The first order pertaining to the removal of a child from the home could be:

1. Initial Detention Orders in Juvenile Corrections cases;
2. Idaho Juvenile Rule 16 Expansion Orders;[96]
3. Orders of Removal;[97]
4. Orders that continue shelter care hearings to another date;[98]
5. Orders issued at shelter care hearings that place the children in shelter care, based on the stipulation of the parties;[99]
6. Orders issued at shelter care hearings that place the children in shelter care, based upon the evidence presented;[100]
7. Orders issued at adjudicatory hearings that place the children in the custody of the IDHW, based upon the stipulation of the parties;[101]
7. Orders issued at adjudicatory hearings that place the children in the custody of IDHW, based upon the evidence presented at the adjudicatory hearing;[102]
8. Orders issued at a Redisposition Hearing (for example, a child is removed from home after having been placed in the home under protective supervision);[103] or
9. Orders issued at a Review Hearing[104] or a 12-month permanency hearing,[105] if the child is removed from the home at that time.

[96] IDAHO JUV. R. 16.
[97] IDAHO CODE ANN. § 16-1611(4)(2010).
[98] § 16-1615.
[99] *Id.*
[100] *Id*.
[101] § 16-1619.
[102] *Id*.
[103] § 16-1623.
[104] § 16-1622.
[105] § 16-1622(4).

1. *Finding*

The judge hearing a child protection case must make a finding that it would be "contrary to the welfare of the child to remain in the home."[106]

2. *Timing*

Federal law requires this finding to be made in the first order pertaining to the removal of the child from the home.[107] Idaho Code § 16-1615(5) (d) requires that the "contrary to the welfare finding" be made at the shelter care hearing and Idaho Code § 16-1619(6)(a-c) requires that the "contrary to the welfare" finding be made at the adjudicatory hearing.

If the child has been removed from the home, the shelter care hearing is continued, and custody of the child is mentioned in any way, the contrary to the welfare finding must be made at that hearing.[108]

3. *Corrective Action*

If the "contrary to the welfare" determination is not made in the first court order pertaining to the child's removal from the home, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.[109] Additionally, the child will also likely be ineligible for federal adoption assistance payments.

If the "contrary to the welfare" finding was made at the shelter care hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[110]

B. Reasonable Efforts to Prevent Removal

1. *Finding*

A judicial determination must be made as to whether or not the Department made reasonable efforts to prevent the removal of the child from his/her home.[111]

2. *Timing*

Under federal law, the reasonable efforts to prevent removal finding must be made **no later than sixty (60) days from the date the child was removed from home.** Idaho law requires that the "reasonable efforts to prevent removal" finding be made at the shelter care and, if the court vests

[106] 42 U.S.C.§ 672(a)(2)(A)(ii); §§ 16-1615(5) (d), 16-1619(6)(a-c).
[107] 45 C.F.R. § 1356.21(c).
[108] 45 C.F.R. § 1356.21(c).
[109] 45 C.F.R. § 1356.21(c).
[110] 45 C.F.R. § 1356.21(d)(1).
[111] 42 U.S.C. § 671(A)(15)(B)(1).

legal custody in the Department, at the adjudicatory hearing as well.[112] The adjudicatory hearing may not be continued to a date more than 60 days from the date of removal unless the court has a made case specific, written, reasonable efforts to prevent removal finding.[113]

3. *Corrective Action*

Federal Law provides that "[i]f the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, an otherwise eligible child is not eligible under Title IV-E foster care maintenance payments program for the duration of the child's stay in foster care."[114]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

C. Removal from Protective Supervision

1. *Finding and Timing*

When the child is returned home under protective supervision, the Department relinquishes custody of the child and custody of the child is returned to the parent(s). If the child is ultimately returned to care, it is treated as a new removal and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings must be made at the Redisposition Hearing.[115]

2. *Corrective Action*

If the contrary to the welfare finding is not made in the first order of removal, which could be an Order of Removal or the order resulting from the re-disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[116]

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[112] 45 C.F.R. § 1356.21(b)(1)(i) and (ii); §§16-1615(5)(b), 16-1619(6)(a-c).
[113] IDAHO JUV. R. 41(b).
[114] 45 C.F.R. § 1356.21(b) (1) (i) and (ii).
[115] §§16-1623,16-1619; 42 U.S.C. §672(a)(2)(B) and 45 C.F.R. § 1356.21(g)(3).
[116] 45 C.F.R. § 1356.21(c).

If the "contrary to the welfare" finding was made at the re-disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[117]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

D. Extended Home Visit

1. *Finding and Timing*

When a child is returned home on an extended home visit, the Department retains custody of the child, and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings need be made only if the child is returned to care after a home visit that exceeds six (6) months without prior court approval.[118]

2. *Corrective Action*

If the contrary to the welfare finding is not made in the first order of removal, which could be an Order of Removal or the order resulting from the re-disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[119]

If the "contrary to the welfare" finding was made at the re-disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[120]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations

[117] 45 C.F.R. § 1356.21(d)(1).
[118] 45 C.F.R. § 1356.21(e).
[119] 45 C.F.R. § 1356.21(c).
[120] 45 C.F.R. § 1356.21(d)(1).

recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

E. Reasonable Efforts to Finalize the Permanency Plan

1. *Finding*

A judicial determination must be made as to whether the Department did or did not make reasonable efforts to finalize the permanency plan that was in effect. The finding must be a *retrospective review* of the efforts made by the Department to finalize the permanency plan *that is in effect*.[121] Idaho law requires that, after the permanency hearing, the court make "written case-specific findings" as to whether the "[D]epartment made reasonable efforts to finalize a permanency plan for the child."[122]

2. *Timing*

This finding must be made **within twelve (12) months of the date the child is considered to have entered foster care and at least once every twelve (12) months thereafter.** A child is considered to have entered foster care on the earlier of the date of the first judicial finding that the child has been subjected to child abuse or neglect or the date that is sixty (60) calendar days after the date on which the child is removed from the home. A state may use a date earlier than that required by federal regulations.[123]

Idaho law requires that the hearing to review the permanency plan be held ***prior to*** **twelve (12) months** from the date the child is removed from the home or the date of the court's order taking jurisdiction under this chapter, whichever occurs first.[124]

Federal policy regarding the failure to make this finding and the ability to quickly reinstate such funding is as follows: "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section (45 C.F.R. 1356.21), the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible unless such a determination is subsequently made. The eligibility re-commences the first day of the month the finding is eventually made.[125]

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[121] 45 C.F.R. § 1356.21(b)(a)(i) and (ii).
[122] § 16-1622; IDAHO JUV. R. 46(c).
[123] 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i) and (ii).
[124] § 16-1622(4).
[125] 45 C.F.R. § 1356.21(b)(2)(ii).

3. *Corrective Action*

1. Problem: Twelve (12) month permanency plan hearing not held on time.

   Action: Schedule and hold the permanency review hearing at the earliest possible date.

2. Problem: Twelve (12) month permanency plan hearing was held, but no (or incorrect) "reasonable efforts to finalize the permanency plan" finding is made.

   Action: If the "reasonable efforts to finalize the permanency plan" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

   If the "reasonable efforts to finalize the permanency plan" finding was not made, or was incorrectly made, the finding must be made. The "reasonable efforts to finalize the permanency plan" finding can be made by the court upon evidence presented to it by the state without a formal hearing. This finding can be made from the bench or from chambers based on testimony.[126] If the "reasonable efforts to finalize the permanency plan" finding is not made, not made within the mandated time frame, or made but the language of the finding is incorrect, IV-E funding will end on the last day of the month which is 12 months from the date of removal. The IV-E funding will be restored on the first day of the month in which the permanency hearing is held and the "reasonable efforts to finalize the permanency plan" finding is made.

F. Placement and Care Authority

The state IV-E agency must have placement and care authority in order to be eligible for federal IV-E funding. Although placement and care authority is generally associated with legal custody there is no absolute federal requirement that legal custody be vested in the agency in order for the child to be eligible for IV-E funding. Legal custody may be translated to mean placement and care authority.[127]

If the court orders a child into a specific placement setting, facility, home, or institution, this action may be considered to have usurped the IV-E agency's authority for placement and care, thus making the child ineligible for federal IV-E funding.[128] When the court's order merely names the child's placement as an endorsement or approval, or generally references of the agency's choice, eligibility for IV-E funding is not precluded.[129]

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[126] 42 U.S.C. § 672(a)(15)(B).
[127] 42 U.S.C. § 672(a) (2) (B)(1). U.S. Dept. Health & Human Services, Admin. For Children & Families Program Instruction ACYF-CB-PI-08-07 available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0807.htm (12/24/2008)
[128] 45 C.F.R. § 1356.21(g) (3).
[129] 42 U.S.C. § 672(a) (2) (B);45 C.F.R. § 1356.21(g) (3).

Federal IV-E guidelines do not require that the court always concur with the agency's recommendation regarding placement. The IV-E guidelines state: The court may take testimony and after hearing such testimony or recommendations, including that from IV-E representatives and\or others, the court may accept such recommendations and name a specific placement in its order. In all such situations the court should make it clear that the designation of the specific facility is based upon the evidence presented at the hearing and upon a bona fide consideration of the agency's recommendation regarding placement.[130]

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[130] U.S. Dept. Health & Human Services, Admin. For Children & Families Program Instruction ACYF-CB-PM-8.3A.12 available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0807.htm (12/24/2008)

12.7 INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

A. Introduction

The Interstate Compact on the Placement of Children[131] (ICPC) is the best means to ensure protection of and services to children who are placed across state lines for foster care or adoption. The Compact is a both an interstate agreement and a uniform law that has been enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands.[132] It establishes orderly procedures for the interstate placement of children and fixes responsibility for those involved in placing the child. Provisions of the Compact ensure the same protection and services to children as if they had remained in their home state. The compact contains 10 Articles and 10 Regulations. The Association of Administrators of the ICPC promulgates regulations.

Although the ICPC includes private adoptions and placements for residential care, the majority of Idaho ICPC cases involve children in foster care. Each year, Idaho processes between 800-900 total ICPC requests, with the majority being public cases. From those ICPC requests, about 300 placements are made from other states with Idaho families, and roughly 200 placements are made from Idaho public agencies with out-of-state families. [133]

B. Goals of the ICPC

1. *Safety*

The ICPC provides the sending agency[134] the opportunity to obtain home studies in the receiving state prior to placement of the child. The prospective receiving state ensures that the placement is not "contrary to the best interests of the child" and that all applicable laws and policies are followed before it approves the placement.

2. *Permanency and Well-Being*

The ICPC guarantees the child's legal and financial protection once the child moves to the receiving state.[135] The sending agency receives the opportunity to obtain supervision and regular

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[131] Interstate Compact on the Placement of Children, available at http://icpc.aphsa.org/Home/articles.asp. The Compact is codified in Idaho at IDAHO CODE §§ 16-2101 – 16-2107 (2010)

[132] An interstate compact is an agreement between two or more states of the United States of America. Article I, Section 10 of the United States Constitution provides that "no state shall enter into an agreement or compact with another state" without the consent of Congress. Frequently, these agreements create a new governmental agency that is responsible for administering or improving some shared resource such as a seaport or public transportation infrastructure. In some cases, a compact serves simply as a coordination mechanism between independent authorities in the member states. *See* Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS 13, 14 (1994)

[133] Data taken from Idaho's APHSA ICPC database 2005-present.

[134] "Sending agency" is defined in the ICPC as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought, any child to another party state." § 16-2102, Art. III(b).

[135] "Receiving state" is defined in the ICPC as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local authorities or for placement with private agencies or persons." § 16-2102, Art. II(c).

reports on the child's adjustment and progress in the placement and ensures the sending state does not lose jurisdiction over the child.[136]

C. Situations Where the ICPC Applies

The core provision of the ICPC establishes that:

> No sending agency shall send, bring or cause to be sent or brought into any other party state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and wit the applicable laws of the receiving state governing the placement of children therein.[137]

Pursuant to this provision and the definitions in Article II of the Compact, the ICPC applies to the following situations where the child is being placed from one state to another:

- Children who are within the custody of the Department (or in a parallel arrangement in another state) and who are being placed with a parent or relative when a parent or relative is not making the placement;
- Children who are entering foster care or a placement for the purpose of adoption;
- Children who are within the custody of the Department (or in a parallel arrangement in another state) for placement in a group home and/or residential treatment facility;
- Children who are to be placed in a group home and/or residential treatment facility by a legal guardian;
- Children who are placed by a legal guardian with a person outside of the third degree of relationship, *i.e.* child's second cousin; or
- Children who are adjudicated delinquents for placement in a group home and/or residential treatment facility.[138]

The Compact does not apply to placement of children into any institution caring for the mentally ill, mentally defective or epileptic, or any institution primarily educational in character, and/or any hospital or other medical facility.[139]

D. Placement and Maintaining Jurisdiction

Under the compact, the sending state must provide written notice to the appropriate public authorities in the receiving state of "the intention to send, bring, or place the child in the receiving state."[140] The notice must contain: 1) the name, date and place of birth of the child; 2) the identity and address(es) of the parents or legal guardians of the child; 3) the name and address of the person, agency or institution to which the sending agency proposes to send the

[136] § 16-2102, Art. V.
[137] § 16-2102, Art. III(a)
[138] § 16-2102, Art. VI.
[139] § 16-2102, Art. II(d).
[140] § 16-2102, Art. III(b)

child; and 4) a "full statement" of the reasons the child is being sent and the authority pursuant to which the proposed placement is being made.[141]

A child may not be sent to a receiving state until the receiving state notifies the sending state that the placement is in the best interests of the child.[142] In order to make this determination, once notice of the proposed interstate placement is received by the public authorities in the receiving state, the receiving state may request, and is entitled to receive, additional information necessary to carry out the purposes of the compact.[143]

Finally, pursuant to the ICPC, the sending state must maintain jurisdiction until the child is adopted, reaches the age of majority, or the child protection case is closed with concurrence from the receiving state.[144]

E. Timeframes

Under the Safe and Timely Interstate Placement of Foster Children Act of 2006, all states are required to have home studies completed and back to the sending state within 60 calendar days. Failure to do so could result in penalties for the state failing to complete the home study within the timeframes. Permission to place continues to be valid for six months.[145]

F. Special Cases

1. *Regulation 1 – Intact Moves*

Regulation 1[146] of the ICPC applies when a child is placed with a family and the family plans to move to another state.[147] The child may accompany the family to the new state. If the child will be moving to the receiving state for more than 90 days, the receiving state must conduct a home study and approve the child's placement. During the transition, Regulation 1 provides that the receiving state must honor the home study completed in the sending state until it is able to complete its own evaluation.[148]

2. *Regulation 7 – Priority Cases Involving Placement with a Relative Only*

ICPC Regulation 7 provides for expedited handling of interstate placements with a relative under some circumstances. Pursuant to Regulation 7, a request can be made when the proposed

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[141] *Id*.
[142] § 16-2102, Art. III(d).
[143] § 16-2102, Art. III(c).
[144] § 16-2102, Art. V(a).
[145] 42 U.S.C. § 671(a)(25)-(26).
[146] The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) is an interstate agency consisting of representatives from all 50 states that has the authority under the ICPC to "promulgate rules and regulations to carry out more effectively the terms and provisions of the compact." *See* § 16-2102 Art. VII. The regulations adopted by AAICPC are available at: http://icpc.aphsa.org/Home/resources.asp (last visited on February 8, 2010)
[147] INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, Reg. No. 1(3)(2010), available at http://icpc.aphsa.org/Home/resources.asp (last visited on February 8, 2010).
[148] *Id*. at Reg. No. 1(5)-(6)

placement is with a relative AND: the child is under two years OR the child is in an emergency shelter OR the court finds the child has already spent a substantial amount of time in the proposed placement.[149] Regulation 7 requires a court to make the specific finding just described in order to qualify for expedited handling.[150]

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[149] *Id*. at Reg. No. 7(6)(a)
[150] *Id*.

12.8 IDAHO JUVENILE RULE 40: INVOLVING CHILDREN AND FOSTER PARENTS IN COURT

Youth are the most important part of a child protection case, and making decisions based on the child's best interests requires his or her voice to be heard throughout the proceedings. Children are often understandably frustrated when they are excluded from court proceedings in which their family relationships, physical safety, health, education, and where they will live are all at stake.[151] With this fundamental idea in mind, Idaho Juvenile Rule 40 was enacted to give children (and foster parents) the right to notice and the right to be heard at each stage of the proceedings, post adjudication.

IJR 40 requires that a foster parent, pre-adoptive parent, relative placement, and/or a child eight years of age or older, must be provided with notice of, and have a right to be heard in, any post-adjudicatory hearings to be held with respect to the child.[152] This does not give foster parents, pre-adoptive parents, or relative placements the status of a party to the proceedings.[153] The Department has the duty of providing notice to the individuals and must confirm to the court that notice was given.[154] To further the policy of giving children a voice in the courtroom, the guardian *ad litem* appointed to the case has the duty of inquiring of any child capable of expressing his or her wishes and including the child's express wishes in the report to the court.[155]

Many judges and child welfare advocates have decided that children should be present in court to have their voices heard in the proceedings. Many questions arise from both judges and practitioners on how to best involve children in the proceedings and gain insights to aid decision making. One question that often arises concerns ex-parte communications between the youth and judge. In *State of Idaho v. Clouse*[156], the court determined it was permissible for the judge to interview the child in chambers, with no record taken and where parents' counsel was not permitted to cross-examine. The court applied the reasoning used in domestic relations cases. Considering both the *Clouse* decision and the Idaho Code of Judicial Conduct[157], some best practice recommendations include:

- get parties' consent to such an interview on the record;
- always make a record of the interview;
- if possible, have counsel (but not parents) present;
- have an advocate available to accompany the child; and
- if parties and/or counsel will not be present during the interview, offer opportunities to submit questions.

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[151] William G. Jones, *Making Youth a Meaningful Part of the Court Process,* JUV. & FAM. JUSTICE TODAY, 16 (Fall 2006).
[152] IDAHO JUV. R. 40(a),(b).
[153] IDAHO JUV. R. 40(a).
[154] *Id*.
[155] §16-1633(2).
[156] 93 Idaho 893, 477 P.2d 834 (1970).
[157] "A judge may not have *ex parte* communications concerning a pending proceeding with any party on any substantive matter." IDAHO CODE OF JUDICIAL CONDUCT CANNON 3-(B)(7).

Another concern often voiced by judges and child welfare experts is that information discussed in court may be disturbing and upsetting to children who attend the hearings. Judges and attorneys should keep in mind that children are involved in court proceedings because of real-life events they have experienced. They have already been exposed to and survived the harsh realities that will be discussed in court. If certain parts of the proceeding are unusually upsetting, the youth can be excluded for that part of the hearing. Youth participation allows the youth to hear how the parent has progressed in meeting requirements and to have a better ability to come to terms with what the court orders.[158]

Finally, concerns arise over disruptions in the youth's schedule to attend court hearings. The judge can alleviate some of this concern by scheduling hearing times so youth miss the least amount of school possible. Ensure the hearings are scheduled before or after school hours or on school holidays. The judge can also ensure that when youth are present, he or she hears those cases first.

While the child is in court, the role of the judge, attorneys and child welfare workers is twofold: to make the experience a positive one, and to gain as much relevant information about the child and family as possible.[159] The following best practice tips accomplish both tasks:

- Arrange for or allow children to have a support person present if they desire.
- Provide age-appropriate reading material describing the court process to the child and a list of some legal terms and definitions that may be used during the hearing.
- Address the child directly using a supportive voice and making eye contact.
- Explain your role to the child and explain what issues you can address.
- Avoid acronyms or legal jargon that a child would not understand.[160]

Most importantly, take the time to prepare for a child's involvement using proper language, asking good questions, and talking about the right issues.

When children have a voice in court and the opportunity to participate in the critical processes that profoundly impact their lives, the entire system benefits from better-informed decision making. Whether the child attends a hearing, or the social worker, guardian *ad litem*, or child's attorney informs the court of the child's wishes, the youth has the chance to be heard and to make an impact on some of the most important decisions in his/her life.

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[158] ANDREA KHOURY, ESTABLISHING POLICIES FOR YOUTH IN COURT—OVERCOMING COMMON CONCERNS (2008) available at http://www.isc.idaho.gov/childprotection/PDFs/Establishing%20Policies%20for%20Youth%20in%20Court-Common%20Concerns.pdf (last visited Apr. 25, 2011)

[159] Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, A.B.A. CHILD L. PRACTICE, Nov. 2007.

[160] *Id*.

12.9 EDUCATIONAL NEEDS OF CHILDREN

"Our greatest natural resource is the minds of our children." – Walt Disney

A. Overview

When children come into care for abuse, neglect, abandonment, or unstable homes, it is almost certain that their education has been harmed in some way by the action or inaction of their parents. Studies have confirmed this fact.[161]

Research indicates that "[e]ach year, an estimated 400,000–440,000 infants (10–11% of all births) are affected by prenatal alcohol or illicit drug exposure. Prenatal exposure to alcohol, tobacco, and illicit drugs has the potential to cause a wide spectrum of physical, emotional, and developmental problems for these infants. The harm caused to the child can be significant and long-lasting, especially if the exposure is not detected and the effects are not treated as soon as possible."[162] Exposure to maltreatment as a child is especially detrimental in the context of education. Children's " brains are developing at life-altering rates of speed. Maltreatment chemically alters that development and can lead to permanent damage to the brains architecture. Every year 196,476 children from birth to 3 years old come into contact with the child welfare system."[163]

Other issues in the home, such as tobacco use, have also been linked to cognitive problems for children:

> "The effects of prenatal tobacco exposure are particularly concerning because so many expectant mothers smoke---by one estimate, over 10 percent in the United States. In utero exposure to tobacco by products had been linked to cognitive deficits in laboratory animals and human adolescents. Some studies suggest that such exposure can lower general intelligence; for example, one found a 12 point gap in full scale IQ between exposed and unexposed middle-class adolescents. In another study, the odds of having attention deficit hyperactivity disorder (ADHD) were more than three times as great for adolescents whose mothers smoked during pregnancy compared with children of nonsmoking mothers."[164]

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[161] ADVOCATES FOR CHILDREN OF NEW YORK, INC. EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER DARE SYSTEM (2000) available at http://www.eric.ed.gov/PDFS/ED443910.pdf; MARKE. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004); PETER J. PECORA, P., ET. AL. ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY (2003).

[162] NANCY K. YOUNG ET AL., SUBSTANCE EXPOSED INFANTS: STATE RESPONSES TO THE PROBLEM 9 (2009), *available at* http://www.ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf

[163] MATTHEW E. MELMED, A CALL TO ACTION FOR INFANTS AND TODDLERS IN FOSTER CARE (2011) available at ZerotoThree.org, http://main.zerotothree.org/site/DocServer/Melmed_31-3_Jan_2011.pdf?docID=12201.

[164] Thomas J. Gould, *Addiction and Cognition*, NIDA ADDICTION SCIENCE & CLINICAL PRACTICE, Dec. 2010 at 4.

Studies report that up to 47% of children and youth in foster care receive special education services at some time in their schooling.[165]

Medicaid pays for 37% of births nationally and well above that level in several states. The good news is that interventions at birth for substance-exposed infants can remedy much of the harm and have the children ready for success when entering school. The bad news is that few states pay for or provide these expensive comprehensive services and parents in poverty are not always well equipped to access existing services or advocate for their children. The best option is prevention. Healthcare providers that take the time to educate expectant mothers effect significant reductions in prenatal substance abuse. Early intervention for substance-exposed infants can also prevent a lifetime of expensive services and costs to the criminal justice system. [166]

"From the moment of conception to the initial, tentative step into a kindergarten classroom, early childhood development takes place at a rate that exceeds any other stage of life. The capacity to learn and absorb is simply astonishing in these first years of life. What impact does child care have on a child's development? What lasting toll does family stress have on a child? What are the most important known influences on early brain development? Can early interventions alter the course of early development for the better? … The conclusions and recommendations are very specific, derived from a rich and extensive knowledge base firmly grounded in four core themes:

1. All children are born wired for feelings and ready to learn.
2. Early environments matter and nurturing relationships are essential.
3. Society is changing and the needs of young children are not being addressed.
4. Interactions among early childhood science, policy, and practice are problematic and demand rethinking."[167]

B. Legal Framework for Assessing Educational Needs

1. *Federal Law*

In response to the clear data of a failed system in regards to educational needs of foster children, the federal government has responded with legislation designed to motivate local jurisdictions. These include:

1. The Fostering Connections to Success and Increasing Adoptions Act of 2008.[168] (Fostering Connections) This act places the responsibility on local child welfare agencies to collaborate with local school districts for the educational success of foster children. Reimbursement (part of IV-E funding going to the Department)

[165] COURTNEY, *supra* note 129 at 40 tbl. 38.
[166] Young, *supra* note 130, at 4-5
[167] NATIONAL RESEARCH COUNCIL AND INSTITUTE OF MEDICINE, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 4 (Jack P. Shonkoff & Deborah Phillips eds., 2000).
[168] Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, 122 Stat. 3949 (2008), amending portions of 42 U.S.C. § 671 - 675 (2010).

helps pay for transportation to keep foster children in their original school when appropriate.

2. The McKinney Vento Homeless Assistance Act (McKinney Vento).[169] This act forces action by local school districts to support educational efforts of the department with the threat of loss of federal funds for non-action.

Of the two laws, Fostering Connections is far more comprehensive and is carried out by state child welfare agencies. McKinney Vento is directed at local school districts, and the districts are responsible for the cost of implementation. On the issue of who pays the cost of meeting children's special needs – the child welfare agency or the schools – the courts can bring the parties together in a comprehensive manner. The case plan must include "an assurance that the state [or local child welfare agency] has coordinated with appropriate local education agencies … to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement" unless moving is in the child's best interest.[170]

Unique challenges exist in Idaho because of differences in the size and resources available in school districts around the state. For some children, it may be helpful to move the child to a county where needed services are available. If this option is considered, care should be taken to look at the transferability of the any existing or needed "Individual Education Program" (IEP) plans. The latest version of the Individuals with Disabilities Education Act (IDEA 2004) made parents of children with special needs even more crucial members of their child's education team. Parents can now work with educators to develop an IEP. The IEP describes the goals the team sets for a child during the school year, as well as any special support needed to help achieve them. The plan should address who is to act in the roll of parent and interact with the school on educational issues -- the foster parents, the case worker, or a specially assigned educational advocate. The child's case plan must include "assurances that the placement of a child in foster care takes into account the appropriateness of the current educational setting and proximity to the school in which the child is enrolled at the time of placement."[171]

C. Idaho Law

Idaho has responded to the educational needs of children by amending the definition of neglect in the CPA. It now provides:

> (25) "Neglected" means a child:
> . . .
> (d) Who is without proper education because of the failure to comply with section 33-202, Idaho Code [mandatory school attendance].[172]

Idaho statutes relating to education provide guidance on what constitutes a "proper education". For example, the state compulsory school attendance law provides:

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[169] McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11301 – 11432 (2010)
[170] 42 U.S.C.§ 675(1)(G). *See U.S. Department of Education, Building the Legacy: IDEA 2004* for general information about the Individuals with Disabilities Education Act (IDEA) at http://idea.ed.gov/ .
[171] *Id*.
[172] § 16-1602(25)

> The parent or guardian of any child resident in this state who has attained the age of seven (7) years at the time of the commencement of school in his district, but not the age of sixteen (16) years, shall cause the child to be instructed in subjects commonly and usually taught in the public schools of the state of Idaho. To accomplish this, a parent or guardian shall either cause the child to be privately instructed by, or at the direction of, his parent or guardian; or enrolled in a public school or public charter school, including an on-line or virtual charter school or private or parochial school during a period in each year equal to that in which the public schools are in session; there to conform to the attendance policies and regulations established by the board of trustees, or other governing body, operating the school attended.[173]

In addition Idaho Juvenile Rule 44 regarding the case plan hearing requires that the child's educational needs be met by the case plan. Rule 44 requires that the case plan

> "meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, or to ensure the stability of the placement. The plan shall also address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child, and organizations or community activities with who the child has a significant connection."[174]

D. Issues for Social Workers Regarding Education Needs of Children

The child protection system can appear to require social workers to manage a child's situation in inconsistent ways. For example the CPA's concurrent planning requirement means that caseworkers must to seek to reunify the child with the parents and, at the same time, plan for failure by developing a permanency plan if reunification is not timely. Educational mandates described above can raise similar conflicts – should a social worker keep a child in his home school or place the child in a foster placement that will require the child to be in a different school district or even state?

Social workers are trained to evaluate cases by focusing on an escalating ladder of risk assessment, starting at addressing immediate safety issues and escalating through imminent risk, risk of harm, imminent risk of severe harm, immediate physical danger, threat of harm, and finally, threat of imminent harm.[175] It is not always obvious how the child's educational needs fit into this type of assessment. It is not likely that the Department will pursue many CPA cases simply based on educational neglect. Yet, a child whose educational needs are not being met may be facing many future obstacles. Nonetheless, educational issues are more likely to surface through truancy charges in juvenile court or charges against the parents rather than through a CPA case.

Social workers making school stability determinations need to document and justify their actions to the court in review hearings. Best practice is to answer these questions in the Department's reports to the court:

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[173] IDAHO CODE § 33-202 (2010)
[174] IDAHO JUV. R. 44.
[175] *See* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-19 (2009)

1. How was the best interest determination made for the child's school selection?
2. Who made the best interest decision?
3. What role did the parents play in making these decisions?
4. If there were disputes how were they resolved?
5. How did the Department and the school district collaborate?
6. How long is the child's current placement expected to last?
7. How many schools has the child attended this year? The past few years?
8. How strong is the child academically?
9. What is the availability of programs and activities at the different school options?
10. Which school does the student prefer?
11. How deep are the child's ties to the school?
12. How was the timing of a transfer decided? End of year or testing timing?
13. How did changing schools affect the student's ability to earn full credits, participate in sports or extra-curricular activities, or graduate on time?
14. How does the length of the commute to the school of origin impact the child?
15. What school do the child's siblings attend?
16. Are there any safety issues to consider?[176]

E. Suggested Questions for Judges to Assess a Child's Educational Needs

Throughout the planning process, the court should assure that all of the educational needs of the child are being addressed. In protective supervision cases and in cases progressing towards reunification, focus must be placed on the caregivers learning about the importance of education, about how to help their child succeed in school, and about how to advocate for the educational needs of their child.

As a matter of best practice, judges should read the reports provided by the Department and the guardians *ad litem*. The new reports provided to the courts in Idaho have space dedicated to answering many of the educational questions a judge may have.

A team effort between the National Council of Juvenile and Family Court Judges, Casey Family Programs, and Team Child Advocacy for Youth developed a technical assistance brief in 2005 for the use of judges and others entitled "Asking the Right Questions." [177] It provides judicial checklists to ensure that the educational needs of children and youth in foster care are being addressed. As a matter of best practice, judges, practitioners, and social workers are encouraged to use the extensive checklists found in the judicial bench cards which compliment this manual.

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[176] *See* THE LEGAL CENTER FOR FOSTER CARE & THE NATIONAL CENTER FOR HOMELESS EDUCATION, SCHOOL SELECTION FOR STUDENTS IN OUT-OF-HOME CARE *available at* http://center.serve.org/nche/downloads/briefs/school_sel_in_care.pdf

[177] ASKING THE RIGHT QUESTIONS: A JUDICIAL CHECKLIST TO ENSURE THAT THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE ARE BEING ASSESSED (2005) *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/EducationalOutcomes/2005educationchecklistfulldoc2.pdf (a joint publication between NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CASEY FAMILY PROGRAMS, &TEAM CHILD ADVOCACY FOR YOUTH).

12.10 INDEPENDENT LIVING

On any given day, more than 463,000 children and youth are in out-of-home care across the United States.[178] Of these children, an estimated 39% were identified as being 13 years of age or older[179] and more than 29,000 of these youth reach an age at which they must make the transition out of the child welfare system, whether or not they possess the skills and support necessary to live successfully on their own.[180] Youth who have experienced abuse, neglect, and other circumstances resulting in out-of-home placement often need additional resources to reach their full potential after leaving the child welfare system.

Independent Living services are intended to mitigate negative outcomes for former foster youth and enhance their chances for success as adults. The services provided by Idaho's Independent Living Program support older youth in foster care and assist them in developing the skills they need to live as responsible and successful adults.[181] Recognizing the unique challenges of older youth who have lived in foster care, the federal government established the Chafee Foster Care Independence Program and appropriated funds to states to assure a minimum level of preparation for independent living for older youth who have been in foster care.[182]

The goals of Idaho's Independent Living program are to achieve the goals of the Chafee Act:[183]

- Help youth transition to self-sufficiency;
- Help youth receive the education, training, and services necessary to obtain employment;
- Help youth prepare for and enter postsecondary training and education institutions;
- Provide personal and emotional support to youth aging out of foster care through mentors and the promotion of interactions with dedicated adults;
- Provide financial, housing, counseling, employment, education and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition into adulthood;
- Make available vouchers for education and training, including postsecondary education, to youth who have aged out of foster care; and
- Provide services to youth who, after attaining 16 years of age, have left foster care for kinship guardianship or adoption.[184]

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[178] Child Welfare Information Gateway, *Foster Care Statistics*, available at http://www.childwelfare.gov/pubs/factsheets/foster.cfm (last visited April 23, 2011)
[179] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2007.
[180] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2008.
[181] Idaho Department of Health and Welfare, Independent Living Program, http://www.healthandwelfare.idaho.gov/Children/AdoptionFosterCare/IndependentLivingProgram/tabid/158/Default.aspx (last visited April 23, 2011)
[182] 42 U.S.C. §§ 677(b)(2)(A), 677(a)(1)-(7).
[183] *Id.*
[184] 42 U.S.C. § 677(a).

To be eligible for Independent Living Services in Idaho, youth must meet all of the following criteria:

- Must be, or have been, the responsibility of the State or Indian Tribe either through a court order or voluntary placement agreement with the child's family;
- Be between the ages of fifteen and twenty-one years;
- Resided in an eligible placement setting which includes foster care, group care, Indian boarding school, or similar foster care placement and excludes inpatient hospital stays, detention facilities, forestry camps, or other settings primarily designed for services to delinquent youth; and
- Resided in an eligible foster care setting for ninety cumulative days after the 15th birthday.

Every youth, 15 years of age or older and in the custody of IDHW, must have an individualized Independent Living (IL) Plan that includes a permanency plan and independent living skill development and is updated at least annually. For a youth who has attained sixteen (16) years of age, the permanency plan approved by the court must include the services needed to assist the youth to make the transition from foster care to independent living.[185] Idaho law requires that at permanency hearings for youth who are 16 or older, a determination of the services needed to assist the youth to make the transition from foster care to independent living must be identified.[186]

Independent Living planning continues at 17 and 18, but formal transition planning is added at age 17 to assure that youth are prepared to move into independent living at age 18. Transition planning includes assessing the youth's readiness, resources, and skills and providing individualized services to prepare each youth to live as independently as possible after leaving care.

No earlier than 60 days before and no later than 60 days after the youth's 17th birthday, a transition planning meeting must be held. Transition planning participants include the youth for whom the plan is being developed, foster parents, biological parent(s) and family when appropriate, youth mentors, educators, service providers, and others requested by the youth or specific to the youth's needs. The plan should provide for a stable transition and support network for the youth during the transition period and following the exit from care. The Transition Plan is part of the youth's IL Plan and is required at two points, when the youth in care turns 17 and when the youth is within 90 days of aging out of care. [187]

The Fostering Connections to Success and Adoption Assistance Act of 2008 requires a Transition Plan be completed during the 90-day period immediately prior to a youth's 18th birthday or when the youth ages out of care.[188] This plan must be "personalized at the direction of the youth." Within those 90 days, the IL Transition Plan developed must be reviewed and

[185] IDAHO JUV. R. 44(3)(D).
[186] IDAHO JUV. R. 46(c).
[187] THE WORKING WITH OLDER YOUTH STANDARD, IDAHO DEPARTMENT OF HEALTH AND WELFARE, DIVISION OF FAMILY AND COMMUNITY SERVICES, CHILD AND FAMILY SERVICES (2010).
[188] 42 U.S.C. § 677

updated to ensure that the final IL Transition Plan reflects the current status and needs of the youth.

A youth who has a final IL transition plan must be given information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if the youth becomes unable to participate in such decisions and the youth does not have, or does not want, a relative who would otherwise be authorized under State law to make such decisions.[189] The final IL transition plan provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law.

Before youth age out of foster care, they are to be given a Health and Education Passport. The passport should include the following documents:

- Birth Certificate
- Social Security Card
- Immunization Record: Complete and up to date
- Health Records and Medical Card: allergies; hospitalizations; treatments; medications; list of all past medical exams with any diagnoses; childhood diseases
- Information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if he/she is unable to participate in such decisions, specifically as found in Idaho's Living Wills and Idaho's Natural Death Act.
- Education Record: Past and present schools attended, report cards, IEP's, transcripts, letters of achievement
- Independent Living Plan: Most recent Independent Living Transition Plan
- Letter of Verification of Dependency in the State of Idaho: Letter of verification, which establishes eligibility for future IL services and enables the youth to receive IL services from another state if they leave Idaho
- Permanency Pact: Developed before the youth leaves care
- Education and Training Voucher (ETV) information
- State and regional resource guides, as available[190]

When the state fails to connect youth to a permanent legal family, youth struggle to create their own family or support network to meet legal, emotional, psychological, and cultural needs. Youth who age out of the system are less likely than their peers in the general population to achieve academic milestones, and find employment opportunities. They are more likely to experience violence, homelessness, mental illness, and poor health outcomes.[191] Independent living advocacy in the courtroom at each hearing, collaboration between all the child welfare participants, and close monitoring of the youth's independent living needs will ensure that the youths' needs are being met and that youth receive the supports they need for future stability and success.

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[189] *Id*.
[190] THE WORKING WITH OLDER YOUTH STANDARD, IDAHO DEPARTMENT OF HEALTH AND WELFARE, DIVISION OF FAMILY AND COMMUNITY SERVICES, CHILD AND FAMILY SERVICES (2010).
[191] CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE (2008) available at http://www.casey.org/resources/publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_FR.pdf

12.11 GUARDIANSHIPS

The CPA court has exclusive jurisdiction and venue over any guardianship proceeding involving a child who is the subject of a CPA proceeding, unless the court declines jurisdiction.[192] Best practice is for the court to ensure, through careful inquiry, that both the parents and the guardian understand that upon appointment, the guardian will be undertaking a responsibility that is intended to be as close to adoption as possible, subject only to the rights that are reserved to the parents under the guardianship statute or in the order appointing the guardians.

The statute provides that notice of any action regarding a guardianship arising under the CPA must be provided to IDHW, which has the right to appear and be heard in any hearing and which may intervene as a party in the action.[193] Under this provision, the guardian may not consent to adoption of the child without prior notice to the Department.[194] Finally, the guardianship statute limits the situations under which a CPA-connected guardianship may be modified or terminated or under which the guardian may be removed. The person who moves to terminate a guardianship or have a guardian removed in actions arising under the CPA has the burden of proving by clear and convincing evidence that there has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship and that termination of the guardianship would be in the best interests of the minor. [195]

In limited circumstances, guardianship can have some advantages over termination of parental rights and adoption as a long-term permanency option:

- Guardianship does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, or Social Security.
- A guardianship is flexible. The order appointing the guardian can include whatever provisions are appropriate for the child to have continuing contact with either or both parents (to the extent that continuing contact is in the child's best interests) and can readily be modified as circumstances change.
- A guardianship may offer the potential for an agreed-upon solution that has active support of all the parties and avoids contested and time-delaying termination proceedings. A parent might be threatened by the idea of having their parental rights terminated, yet at the same time be unable or unwilling to actually fulfill the role of a parent. If the threat of termination is removed, the parent may be supportive of an alternative arrangement for their child.
- A relative may be committed to providing the child with parental care through guardianship, but may not be willing to become an adoptive parent.
- The potential guardian may be willing to take on the challenge of raising a child but not willing to take the risk of financial responsibility for the child's negligent or criminal actions.
- An older child may object to adoption but may accept the same placement if it is in the form of a guardianship.

[192] IDAHO CODE § 15-5-212A(1).
[193] § 15-5-212A(2) & (3).
[194] § 15-5-212A(4).
[195] § 15-5-212A(5) & (6).

- For children in foster care, guardianship assistance may be available in specific circumstances:
    - *IV-E Guardianship Assistance.* Benefits may be provided to a relative guardian for the support of a child who is fourteen (14) years of age or older, who without guardianship assistance, would remain in the legal custody of IDHW.
    - *State Guardianship Assistance.* Benefits may be provided to a legal guardian for the support of a child if the parental rights have been terminated and there are documented unsuccessful efforts to place the child for adoption.

Guardianship also has significant disadvantages:

- Despite provisions of Idaho law intended to make CPA-connected guardianships long term, such a guardianship may be modified or terminated under some circumstances during the child's minority.[196]
- Guardianships terminate when the children reaches majority.
- Guardianships are subject to ongoing monitoring until the guardianship is terminated by court order or the minor reaches the age of majority. The court may be required to monitor the guardianships, but IDHW will not monitor the guardianship once the CP case has been closed.
- The adoption subsidies that are available to assist adoptive families and special needs children are not usually available in guardianships. In a limited number of cases, a child may qualify for guardianship assistance through the Department. Eligibility is based on the child's identified needs, legal termination of parental rights, and documentation of the unsuccessful efforts to place the child for adoption.[197]
- Many insurance policies that will cover a parent's biological or adoptive child, such as medical or life insurance policies, will not cover a ward.

The guardian is appointed in a proceeding separate from the child protection proceeding, and many of the protections available in CPA cases are not available in guardianship proceedings. The parents do not have the right to court-appointed counsel. The child does not have the right to a court-appointed guardian *ad litem*. The services of the Department and the guardian *ad litem* are not available to monitor the child's welfare while in the care of the guardian or to find a new placement for the child if the guardian resigns, both of which may be necessary in some circumstances. Services may not be available to assist the guardian or the child, except to the extent the guardian or child qualifies under other programs independent of the CPA proceedings. In some cases, such services may be appropriate or necessary to ensure the success of the placement, particularly where the child has special needs and the guardian has limited resources.

If the proposed permanent placement of the child is guardianship, the court should ask, and the participants should answer, the following questions:

[196] *See* § 15-5-212A.
[197] Eligibility for adoption subsidies is discussed in Chapter 10 of this manual.

- Why is a guardianship in the best interests of the child? What are the facts and circumstances showing that guardianship is a better option for the child than termination of parental rights and adoption?
- What are the facts and circumstances demonstrating that the individual or couple with whom the child is to be placed is the most appropriate to serve as a permanent family to the child?
- Is the child living with the proposed guardian? If not, why not?
- Has there been full disclosure to the proposed guardian of the child's circumstances and special needs?
- What is the detailed plan to ensure that this placement will be stable?
- What are the plans to continue any necessary services to the child or the child's guardian, and how will those services be funded after the guardianship is finalized?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members?
- What financial support will be provided by the birth parents?[198]

Because guardianship does not have the same permanency as termination of parental rights and adoption, the plan to ensure the stability of the placement is an important consideration in determining whether the placement is in the child's best interests. Similarly, because there are subsidies available to adoptive parents that are not available to guardians, the plan for post-guardianship services, including funding those services, is an important consideration in determining whether the placement is in the child's best interests.

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[198] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES-IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (Barbara Seibel, Fall, 2000).