

## CHAPTER 4: Shelter Care

### 4.1 PURPOSE AND GOALS OF THE SHELTER CARE HEARING

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

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

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

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*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

<sup>1</sup> THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 2 (2009).

<sup>2</sup> IDAHO CODE ANN. §16-1623 (2011).

## 4.2 PROCEDURAL CONSIDERATIONS AT THE SHELTER CARE HEARING

### A. *Timing*

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

The shelter care hearing must occur within 48 hours of the removal of the child from the home or within 24 hours of the removal of the offender from the home.<sup>6</sup> A re-disposition hearing must be held within 48 hours after the child is removed from protective supervision.<sup>7</sup>

### B. *Evidentiary Considerations*

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

Both the shelter care hearing and the re-disposition hearing must be placed on the record in the CPA proceeding.<sup>12</sup>

### C. *Exclusive Jurisdiction/Ongoing Duty to Disclose*

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

<sup>3</sup> See §§ 16-1608(2)–(3), 16-1615(1); IDAHO JUV. R. 39(b).

<sup>4</sup> IDAHO JUV. R. 32; *see also* §16-1609. *See* Chapter 3 of this manual for a discussion of emergency removal of a child or offender from the home.

<sup>5</sup> § 16-1611(4); IDAHO JUV. R. 31. *See* Chapter 3 of this manual for a discussion of the Order to Remove the Child.

<sup>6</sup> §§ 16-1608(2)–(3).

<sup>7</sup> § 16-1623(3); IDAHO JUV. R. 47.

<sup>8</sup> § 16-1613(1).

<sup>9</sup> IDAHO R. EVID. 101(e)(6); IDAHO JUV. R. 39(e), 51(b) (except as to privilege, jurisdiction, and aggravated circumstances determination).

<sup>10</sup> § 16-1615(5).

<sup>11</sup> IDAHO R. EVID. 101(e)(6); *see also* §16-1613(1).

<sup>12</sup> IDAHO JUV. R. 39(h); *see also* §16-1623.

<sup>13</sup> §16-1603.

the subject of a child protection case. If there are conflicting orders, the CPA order is controlling.<sup>14</sup>

#### ***D. Who Should Be Present at the Shelter Care Hearing***

1. *Judge.* A judge presides over the shelter care hearing and is responsible for making the required decisions. Whenever possible, the judge should regularly preside over child abuse or neglect cases, be familiar with the workings of the child welfare system, and have broad knowledge of and experience with the services and placement options available in the community.
2. *Parents.* The CPA does not define “parent” for purposes of the Act.<sup>15</sup> As a matter of best practice, any person who qualifies as a parent for purposes of the parental termination statute<sup>16</sup> or for the adoption statute<sup>17</sup> should be joined in the CPA proceeding. If reunification is not possible, the rights of these individuals will be implicated in any permanency plan for the child. Their participation in the CPA proceeding will reduce delays in achieving permanency.

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

Questions regarding paternity should be resolved in a timely fashion in order to meet the best interests of the child and further case processing. The court should order paternity testing where appropriate to establish parentage. In addition, the court should determine whether further efforts are needed to identify, locate, and serve missing parents, including putative fathers. If notice has been given and a parent does not appear, the failure to appear should be documented in the file and appropriate findings should be made in the shelter care order.

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

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<sup>14</sup> § 16-1604(2).

<sup>15</sup> Idaho law *requires* notice to each parent and custodian. § 16-1615(2). *See* Chapter 12 for a discussion of Idaho law regarding unwed fathers.

<sup>16</sup> *See* §§ 16-2002(11), (12), (15), (16) (defining parent for purposes of termination of parental rights) and § 16-2007 (providing for required notice in a termination of parental rights case).

<sup>17</sup> *See* § 16-1505 (providing for required notice in an adoption case) and § 16-1504 (defining who must consent to adoption).

<sup>18</sup> § 16-1611(1), (3) (requiring service of the summons and petition on a legal guardian and requiring notice to guardians). A court may appoint a guardian for a minor under Idaho Code §§ 15-5-201 to 213.

<sup>19</sup> § 16-1611(1), (3).

custodian who has been awarded legal custody of a child and who was appointed prior to the initiation of the CPA proceeding.<sup>20</sup>

4. *Assigned Caseworker.* To provide the court with complete, accurate, and up-to-date information for the hearing, the caseworker with primary responsibility for the case should be present. When this is not possible, the worker's supervisor, who has been well briefed on the case, should be present.
5. *Indian Custodian/Child's Tribe and Tribal Attorney.* Efforts must be undertaken to ascertain whether the child is an Indian child and whether further efforts are needed to give notice as required by the Indian Child Welfare Act.<sup>21</sup> An Indian child's tribe has the right to notice and to an opportunity to participate in all hearings involving the child.<sup>22</sup> For Indian children, the tribe often has information regarding the child and the family that is crucial to the court's review of the Department's placement determination regarding the child.
6. *County Prosecutor or Deputy Attorney General.* In child protection cases in Idaho, the state may be represented either by the county prosecutor or a deputy attorney general.<sup>23</sup>
7. *Attorney(s) for Parents.* Because of the critical strategic importance of the shelter care hearing, it is essential that parents have meaningful legal representation at the hearing. Most parents involved in these proceedings cannot afford counsel. Idaho law requires that the notice to the parents inform them of their right to counsel.<sup>24</sup>

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

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

<sup>21</sup> The requirements of ICWA are discussed in detail in Chapter 11 of this manual.

<sup>22</sup> 25 U.S.C. §§ 1912(a), 1911(c) (2011).

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

<sup>24</sup> § 16-1611(3); IDAHO JUV. R. 37(d).

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

8. *Guardian ad litem and Attorney for GAL.* Idaho law requires the appointment of a guardian *ad litem* for the child, to serve at *each stage* of the proceeding.<sup>25</sup> It further provides that the court should also appoint counsel for the guardian *ad litem*.<sup>26</sup> The recommended best practice is for the court to appoint the guardian *ad litem* for the child and the attorney for the guardian *ad litem* upon the filing of the petition.
9. *Child's Attorney.* Idaho law further provides that the court *may* appoint separate counsel for the child and that it *must* appoint separate counsel for the child in cases where no guardian *ad litem* is available for appointment.<sup>27</sup> Federal law strongly suggests that children should have individual legal representation in cases of child abuse and neglect, including at the critical shelter care hearing.<sup>28</sup> Upon filing the petitions, the recommended best practice is for the court to appoint an attorney for the child where required or when deemed appropriate.
10. *Court Reporter or Suitable Technology.* A court reporter or stenographer should be present to accurately record all proceedings at each shelter care hearing. If electronic technology is substituted for a court reporter, the recording equipment must be of appropriately high quality to allow for the efficient, cost-effective, and timely production of a hearing transcript, when needed.
11. *Security Personnel.* Security personnel should be available during all child abuse and neglect hearings. In all courts, security personnel must be immediately available to the court whenever needed. In some counties, security concerns may be serious enough to require guards or bailiffs to be present during all hearings.
12. *Interpreters, if applicable.* If a parent or other essential participant is not fluent in English or has a requirement for language assistance, a certified interpreter must be present. If there is more than one essential participant who needs an interpreter, more than one interpreter may be required. For example, if two parents are represented by one attorney then one interpreter may serve for both parents. However, if parents are represented by different attorneys, then one interpreter will be needed for each parent. If one or more non-English speaking witnesses will be called to testify, then another interpreter will be needed for the witnesses.

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

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<sup>25</sup> § 16-1614(1).

<sup>26</sup> IDAHO JUV. R. 37(a).

<sup>27</sup> § 16-1614(2); IDAHO JUV. R. 37(a)–(c).

<sup>28</sup> The availability of federal grant funding under the Child Abuse Prevention and Treatment/Adoption Reform Act will be based in part on whether states appoint representation for children in child abuse actions. 42 U.S.C. § 5106a.

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

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

If a witness is unavailable to testify in court, the witness can testify by telephone,<sup>29</sup> and well-prepared written reports, such as medical or police reports, can be made available prior to the hearing. The use of reports is a less desirable option, as the preparer of the report is not available for questioning, but the less stringent rules applicable to shelter care hearings make this an option. Finally, the court may adjourn the hearing for brief periods,<sup>30</sup> allowing the currently available witnesses to testify at the originally scheduled shelter care hearing and setting a continued hearing for the next available time the remaining witness(es) can be present. Continuances must be kept as short as possible, and calendars rearranged as necessary, to enable the court to make its decision as soon as possible.

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

1. *Age-Appropriate Children.* Children may be required as witnesses at a shelter care hearing. Whether their testimony is included should depend upon many factors, including the age of the child, the physical and emotional condition of the child, and the potential traumatization from requiring the child to participate in the hearing. If the child's testimony is deemed necessary, alternative means of testifying should be explored.<sup>32</sup> If the child is summoned as a witness, the child may have a friend or person who has a supportive relationship with the child present at the hearing.<sup>33</sup>
2. *Extended Family Members.* The Department has an obligation to contact the child's extended family within thirty (30) days of the child's removal from his or her home.<sup>34</sup> When relatives are either already actively involved with a child or are interested in caring for a child, their testimony can be valuable at a shelter care hearing. Relatives can provide essential information about the situation that can help protect the child in the home (thus allowing the court to return the child home), or, alternatively, they can

<sup>29</sup> IDAHO R. CIV. P. 7(b)(4).

<sup>30</sup> IDAHO JUV. R. 39(f).

<sup>31</sup> §16-1613(1).

<sup>32</sup> The caseworker's testimony as to the child's statements would be hearsay, but such hearsay is admissible at shelter care hearings. IDAHO JUV. R. 51(b) and IDAHO R. EVID. 101(e)(6) provide that the Rules of Evidence, which include the hearsay rules, do not apply at shelter care hearings. See §§ 9-1801, *et seq.* (the Uniform Child Witness Testimony by Alternative Methods Act).

<sup>33</sup> §16-1613(2).

<sup>34</sup> 42 U.S.C. § 671(a)(29).

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

3. *Law Enforcement Officers.* Law enforcement officers who remove children from dangerous situations are often key witnesses. They sometimes need to be present to testify to the circumstances of removal.
4. *Service Providers.* When a family has already been intensively involved with a service provider, such as a public health official, homemaker, or mental health professional, that professional may provide essential information at the shelter care hearing. The professional may, for example, assist the court in identifying a safety plan so that the child may return home.
5. *Adult or Juvenile Probation or Parole Officer.* Family members may either presently or recently have been involved with juvenile or adult probation or parole services. Probation and/or parole officers with past or current knowledge pertinent to the family's circumstances can often provide the court with valuable testimony. Both juvenile and adult probation and parole departments should be contacted and potential witnesses identified and asked to appear at the shelter care hearing.
6. *Department of Juvenile Corrections.* In a Rule 16 expansion case, the Department of Juvenile Corrections has standing as an interested party in the CP action, if the juvenile is in the custody of Juvenile Corrections.<sup>35</sup>
7. *Other Witnesses.* To ensure careful and informed judicial decisions, appropriate witnesses should testify at the shelter care hearing. In addition to law enforcement officers and service providers, such witnesses may include eyewitnesses to the neglect or abuse of the child and medical providers who have examined the child.

### 4.3 KEY FINDINGS AT SHELTER CARE HEARINGS

#### A. *Petition*

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

A recommended best practice is that the petition be verified or that it be accompanied by one or more affidavits from the social worker and/or law enforcement officer involved in the case. The affidavit(s) describe all the circumstances of the removal, the facts that bring the child within the jurisdiction of the CPA, the reasons why removal of the child from the home is in the child's best interests, and the efforts made to prevent the need to remove the child from the home. Whenever possible, the affidavit should include as many of the relevant facts discussed

<sup>35</sup> IDAHO JUV. R. 16(f). See Chapter 12 for more information on Rule 16 expansion cases.

<sup>36</sup> § 16-1615(5)(a).

<sup>37</sup> § 16-1610(2)(a). The preparation of the petition is discussed in detail in Chapter 3 of this manual.

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

### ***B. Jurisdiction***

Idaho law requires that the court find that there is reasonable cause to believe that the child comes within the jurisdiction of the court under the CPA.<sup>38</sup> A child is within the jurisdiction of the court pursuant to the Child Protective Act under the following circumstances:

- the child is abused, neglected, or abandoned;
- the child is homeless;
- the child’s parents or legal custodian fails to provide a stable home environment; or
- the court has taken jurisdiction over another child living or having visitation in the same household, and the child is at risk of being abused, neglected or abandoned.<sup>39</sup>

### ***C. Contrary to the Welfare/Best Interests***

The central concern of the shelter care hearing is whether the child can be safely returned home. Thus as part of the shelter care order, Idaho law requires the court to determine that it is contrary to the welfare of the child to remain in the home and that it is in the best interest of the child to remain in temporary shelter care pending the adjudicatory hearing.<sup>40</sup> Unlike the federal requirement discussed in the following paragraph, state law requires that the contrary to the welfare finding be made at the shelter care hearing, even if the shelter care order is not the first order sanctioning removal.<sup>41</sup>

Federal law requires a parallel finding as a condition of preserving federal IV-E match funds for otherwise eligible children. If the shelter care order is the *first court order* sanctioning removal of the child from the home, federal law requires that the court find that: “It is contrary to the welfare of the child to remain or to be returned home and it is in the child’s best interests to remain in the custody of the Department”.<sup>42</sup> This finding must be *case specific* and it must be *documented* in the court order.<sup>43</sup> If this finding is not made, an otherwise eligible child will not be eligible for federal IV-E foster care reimbursement and/or adoption assistance funds, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the specific circumstances making removal in the child’s best interests. If the court makes the case-specific finding, but fails to document the finding in the order, the omission can only be corrected with a transcript of the hearing that documents the case-specific finding.<sup>44</sup> If the child was taken into custody pursuant to an Order to Remove the Child on the summons, then

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<sup>38</sup> § 16-1615(5)(b).

<sup>39</sup> The grounds for a CPA case are found in § 16-1603. They are discussed in detail in Chapter 3.

<sup>40</sup> § 16-1615(5)(d)–(e).

<sup>41</sup> *Id.*

<sup>42</sup> 42 U.S.C. §§ 672(a)(1), 673(a)(2)(A)(i).

<sup>43</sup> 45 C.F.R. § 1356.21(d) (2011).

<sup>44</sup> 45 C.F.R. § 1356.21(c) (2011).



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

#### ***D. Background Information Relevant to the Child's Safety***<sup>46</sup>

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

1. *What is the nature and extent of the maltreatment of the child?* The social worker should be able to identify the child and the maltreating parent. She or he also should be able to describe the maltreating behavior and the immediate physical or psychological effects on the child. Explaining the nature and extent of the maltreatment should include the type of maltreatment, the severity of the maltreatment, the history of maltreatment, a detailed description of the events constituting the maltreatment, and the emotional and physical symptoms or injuries caused by the maltreatment.
2. *What circumstances accompany the maltreatment?* The social worker should be able to describe what is going on when the maltreatment occurs. This description includes knowledge about how long the maltreatment has been occurring. It also includes information relevant to determining parental intent regarding the maltreatment and whether the parent was impaired by substance use or was otherwise out-of-control when the maltreatment occurred. The social worker also should know how the parent explains the maltreatment and the family conditions and what the parent's attitude toward the maltreatment is (*i.e.*, does the parent acknowledge the maltreatment).
3. *How does the child function day-to-day?* The social worker should know about how all the children in the home function – their behaviors, emotions, temperaments, and physical capacities. This information should be relevant to how the child functions generally and not just at a particular point in time (such as the time of IDHW contact or at the time of maltreatment). The answer to this question should include information about the child compared to other children of the same age. Factors in the answer to this question include capacity for attachment, general mood and temperament, intellectual functioning, communication and social skills, expressions of emotions/feelings, behavior, peer relations, school performance, independence, motor skills, and physical and mental health.
4. *How does the parent discipline the child?* The social worker should learn how the parent approaches discipline and child guidance. The worker should find out about disciplinary methods, the concept and purpose of discipline, the context in which discipline occurs, and cultural practices relevant to discipline.

<sup>45</sup> See Chapter 3 of this manual regarding Orders to Remove the Child.

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

5. *What are overall parenting practices?* Beyond discipline, the social worker should learn more about the general approach of the parents to parenting and to parent-child interactions. She or he should find out the parents' reasons for being a parent, satisfaction in being a parent, knowledge and skill in parenting and child development, decision-making in parenting practices, parenting style, history of parenting behavior, protectiveness and cultural practice regarding parenting.
6. *How does the parent manage his own life?* Finally, a social worker should learn how the parent feels, thinks, and acts daily, not just limited to times and circumstances surrounding the maltreatment. The focus of this inquiry must be on the adult, separate from his or her parenting role or the interaction with the Department. The social worker should discover the parent's abilities in the following areas: communication and social skills, coping and stress management, self-control, problem solving, judgment and decision making, independence, home and financial management, employment, community involvement, rationality, self-care and self-preservation, substance use, abuse or addiction, mental health, physical health and capacity, and functioning within cultural norms.

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

### ***E. Elements of Safety Decision Making: Threats, Child Vulnerability, and Parental Protective Capacity***<sup>47</sup>

#### *1. Threats of Danger*

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

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

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

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<sup>47</sup> LUND & RENNE, *supra* note 1, at 9–18.

## 2. *Child's Vulnerability*

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

## 3. *Parental Protective Capacities*

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

### ***F. Reasonable efforts to eliminate the need for shelter care***

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

Federal law requires a similar finding by the court – that the Department made reasonable efforts to prevent the child's removal from the home.<sup>49</sup> Where the child is removed because of immediate danger and the Department has had a limited opportunity to provide services to prevent removal, the court should examine the circumstances and make a finding that **the Department's efforts to prevent removal were reasonable given that the Department's assessment accurately determined that no preventive services could be safely provided.**<sup>50</sup> A finding of no reasonable efforts in this circumstance will preclude federal funding.

This federal reasonable efforts finding must be made within **60 days** after the child is removed from the home. If this finding is not made within 60 days after removal (or is not made in the manner required by federal law), an otherwise eligible child will lose eligibility for federal foster care match funds, and the omission **cannot be corrected at a later date** to reinstate the child's eligibility.<sup>51</sup>

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

<sup>48</sup> §16-1615(5)(b)(i)(ii). Idaho law requires that the reasonable efforts to prevent removal finding be made at BOTH the shelter care and adjudicatory hearing. § 16-1615(5); § 16-1619(6)(a-c).

<sup>49</sup> 42 U.S.C. §§ 671(a)(15)(B), 672(a)(1) & (2); 45 C.F.R. § 1356.21(b).

<sup>50</sup> The exact language provided in bold should be utilized, as this finding has been sufficient to preserve federal funding when reviewed in federal audits of Idaho procedures.

<sup>51</sup> 45 C.F.R. § 1356.21(b)(1).

adjudicatory hearing, but only if the adjudicatory hearing occurs within 60 days after the child is removed from the home.

Federal law requires that the finding be *case specific* and *documented* in the court's order. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the reasonable efforts that were made and the circumstances that made further efforts unreasonable.<sup>52</sup> If the court makes a case-specific finding on the record at the hearing, but fails to document it in the court's order, the omission can only be corrected with a transcript of the hearing.

The only exception to the federal requirement for a reasonable efforts finding is where the court finds that the parent subjected the child to aggravated circumstances.<sup>53</sup>

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

#### **4.4 PARENT HAVING JOINT LEGAL OR PHYSICAL CUSTODY**

Under Idaho law, the court must determine whether the child can be placed in the temporary sole custody of a parent having joint legal or physical custody.<sup>56</sup> In some cases there is reason to believe that the child has been abused or neglected in one parent's home but that there is another parent with joint physical or legal custody who could provide a safe home for the child pending further proceedings. State law, in effect, establishes the policy that placement in shelter care is not in the child's best interests if the child can be safely placed with another parent having joint custody of the child.

#### **4.5 PROTECTIVE ORDER TO ENSURE SAFE RETURN HOME**

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

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<sup>52</sup> 45 C.F.R. § 1356.21(d).

<sup>53</sup> 45 C.F.R. § 1356.21(b)(3); 42 U.S.C. § 671(15)(D)(i).

<sup>54</sup> See YOUTH LAW CENTER, MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD (1999) available at [http://familyrightsassociation.com/bin/white\\_papers-articles/reasonable\\_efforts/making\\_reasonable\\_effort.pdf](http://familyrightsassociation.com/bin/white_papers-articles/reasonable_efforts/making_reasonable_effort.pdf); DEBORAH RATTERMAN BAKER ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION (1989).

<sup>55</sup> 42 U.S.C. § 671(a)(15)(a) (2011); § 16-1601(a).

<sup>56</sup> § 16-1615(5)(c).

<sup>57</sup> § 16-1615(5)(f).

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

Protective orders are defined in the CPA in Idaho Code §16-1602(28), which references Idaho Code §39-6303. These provisions are particularly applicable in cases where a child has been abused by one parent but not the other parent. In such situations, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order against the other parent that ensures the safety of the child and the non-abusing parent.<sup>59</sup> Such a protective order may include, for example, orders expelling the allegedly-abusive parent from the home or restraining the allegedly-abusive parent from contacting or visiting the child.<sup>60</sup>

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

Where services are available, parents are willing to participate, and IDHW is willing and able to provide the services, IDHW and the parents should enter into a stipulation. The stipulation should set out the reasons why supervision is appropriate and what the specific conditions are for the child to remain in the home pending the adjudicatory hearing.<sup>61</sup>

#### **4.6 OUT-OF-STATE PLACEMENT**

An out-of-state placement may not be made without court order.<sup>62</sup> If the result of the shelter care hearing is that a child is to be placed out of state, the placement must be made in accordance with the Interstate Compact on the Placement of Children (ICPC).<sup>63</sup>

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<sup>58</sup> Safety Plans are discussed in Chapters 2 and 3. The safety principles relevant to this determination are discussed earlier in this chapter.

<sup>59</sup> §§16-1615(5)(f), 16-1602 (28) & 39-6306.

<sup>60</sup> §§16-1615(5)(f) and 16-1602(28) authorize entry of protection orders following the shelter care hearing.

<sup>61</sup> For more information on stipulations, please see page 52.

<sup>62</sup> §§16-1629(8), 16-2102(III)(a); IDAHO JUV. R. 46(c).

<sup>63</sup> The ICPC is discussed in detail in Chapter 12 of this manual.

## 4.7 LEAST RESTRICTIVE SETTING AND PLACEMENT PRIORITIES FOR RELATIVES

Idaho law requires:

At any time the department is considering a placement pursuant to this chapter, the department shall make a reasonable effort to place the child in the least restrictive environment to the child and in so doing shall consider, consistent with the best interest and special needs of the child, placement priority of the child in the following order:

- (a) A fit and willing relative.
- (b) A fit and willing non-relative with a significant relationship with the child.
- (c) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code.<sup>64</sup>

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

Even if relatives or other responsible adults are not available to assume full-time care of a child, they may be available as a resource to supervise visitation when necessary.

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

Finally, the "least restrictive environment" language of this provision means that children should not routinely be placed in group home shelters when the child is capable of functioning in the family-like setting of an individual foster home. If the most appropriate setting for the child is not immediately available on an emergency basis, the court should review that appropriate referrals are made so that the child can be moved to a more appropriate placement when one becomes available.

## 4.8 ADDITIONAL CONSIDERATIONS THAT MAY BE REQUIRED OR APPROPRIATE

### A. *Indian Child Welfare Act (ICWA)*

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

<sup>64</sup> § 16-1629(11).

<sup>65</sup> 42 U.S.C. § 671(a)(19).

<sup>66</sup> 25 U.S.C. § 1901-63.

<sup>67</sup> 25 U.S.C. §§ 1901-1963. ICWA requirements are discussed in detail in Chapter 11.

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

### ***B. Examinations, Evaluations, or Immediate Services***

During some shelter care hearings, the court may order examinations or evaluations, where appropriate. For example, the court may need to authorize a prompt physical or mental examination of the child to assess the child's need for immediate treatment. An expert evaluation of a child is frequently essential for placement and service planning if the child needs to be placed outside of the home. An evaluation can often identify special treatment needs of the child (for example, whether the child will need placement in a residential treatment facility or a therapeutic foster home).

Further examination of the child may be needed to preserve evidence bearing on whether the child has been abused. The need for such examinations and evaluations is often already clear at the shelter care hearing and ordering them at that time can speed the pace of litigation.

### ***C. Parental Visitation***

If a child cannot be returned home after the shelter care hearing, immediate parent-child visitation often can ease the trauma of separation. Early visitation helps to maintain parental involvement and speed progress on the case.<sup>68</sup> A visitation schedule between the child and his/her parent(s) and/or siblings should be identified in the case plan.<sup>69</sup> Judicial oversight of visitation helps to ensure that visitation is begun promptly, that it is permitted frequently, and that unnecessary supervision and restrictions are not imposed.

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

### ***D. Maintaining the Child's Connection to the Community***

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

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<sup>68</sup> See K. Blumenthal & A. Weinberg *Issues Concerning Parental Visiting Of Children In Foster Care*, in *FOSTER CHILDREN IN THE COURTS*, 372, 372–98 (M. Harden ed., 1983).

<sup>69</sup> IDAHO JUV. R. 44(a)(2).

<sup>70</sup> IDAHO JUV. R. 44(a)(1).

<sup>71</sup> Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 122 stat. 3949 (2008).

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

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

### ***E. Child Support***

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

## **4.8 ADDITIONAL ACTIVITIES AT THE SHELTER CARE HEARING**

### ***A. Serving the Parties with a Copy of the Petition***

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

### ***B. Advising Parties of their Rights***

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

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

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

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<sup>72</sup> 42 U.S.C. § 671(a)(30).

<sup>73</sup> § 16-1628(a).

<sup>74</sup> IDAHO JUV. R. 39(g).



### ***C. The Time and Date for the Next Hearing and any Orders Needed to Prepare for the Next Hearing***

In most cases, the next hearing will be the adjudicatory hearing. A number of important considerations make the timing of the adjudicatory hearing very sensitive. Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.<sup>76</sup> Idaho law further requires that a pretrial conference be held three to five days prior to the adjudicatory hearing and provides for both IDHW and the guardian *ad litem* to file written reports prior to the adjudicatory hearing.<sup>77</sup> As discussed previously in this chapter, federal law requires the court to make a documented, case-specific finding as to whether the agency made reasonable efforts to prevent the need for placement of the child in foster care and requires that this finding be made within 60 days from the date the child was removed from the home.

In addition, as a result of agreements by the parties,<sup>78</sup> the adjudicatory hearing and the case plan hearing<sup>79</sup> sometimes are held together. This can happen when the parties enter into a stipulation at the shelter care hearing that the child comes within the jurisdiction of the CPA and that the child should be placed either in the custody of IDHW or in the child's own home under the protective supervision of IDHW. When this happens, the timing of the adjudicatory hearing also may be affected by the time requirements of the case plan hearing. Idaho law requires that a written case plan be filed with the court no later than 60 days from the date the child was removed from the home or 30 days from the date of the adjudicatory hearing, whichever is first. Additionally, the case planning hearing must be held within 5 days after the plan is filed.<sup>80</sup>

The court should set the time and date of the pretrial conference and adjudicatory hearing on the record prior to the conclusion of the shelter care hearing and order the filing of IDHW and GAL reports prior to the pretrial conference. (If the next hearing will be the case plan hearing, the court should set the time and date for the hearing, order the filing of the case plan, and set the deadline for filing of the case plan.) Because there are so many participants in child protection proceedings and so many steps in the process governed by strict deadlines, scheduling can be challenging. These challenges can be minimized by scheduling the next hearing on the record when all the participants are present with their calendars available. Also, if a party fails to appear, scheduling the next proceeding on the record forecloses any potential excuse that the party did not have notice or did not know of the date and time for the hearing. Finally, if the parties have been ordered to appear, sanctions and warrants become available as a means to address a party's failure to appear.

Sometimes, an essential participant, such as a parent, may be in jail or prison or a child may be in detention or in the custody of juvenile corrections. The court should address whether transport orders will be needed to ensure the presence of all essential participants at the next

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<sup>75</sup> IDAHO JUV. R. 39(g).

<sup>76</sup> § 16-1619(1).

<sup>77</sup> §§ 16-1616, 16-1619(1)–(2), 16-1633(2).

<sup>78</sup> Stipulations and agreements are discussed in the next section of this Chapter.

<sup>79</sup> See § 16-1621. This hearing is discussed in detail in Chapter 6 of this manual.

<sup>80</sup> § 16-1621(1).

hearing. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

#### ***D. Agreements by the Parties***

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

The court should ensure that the stipulated facts and agreements address all of the key decisions the court needs to address at the shelter care hearing, and the court should resolve any items that are omitted. Rule 38 provides that orders entered based on stipulations “must include all case-specific findings required” by state or federal law or by the Idaho Juvenile Rules.