

## **CHAPTER 5: The Adjudicatory Hearing**

### **5.1 INTRODUCTION**

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

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

### **5.2 TIMING OF THE ADJUDICATORY HEARING AND PRETRIAL CONFERENCE**

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.<sup>4</sup> In addition, a pretrial conference must be held within three to five days prior to the adjudicatory hearing.<sup>5</sup> The statute provides for the pretrial conference to be held outside the presence of the court, but the recommended best practice is for the judge to be available to accept stipulations or to resolve pretrial issues.

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

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

<sup>3</sup> § 16-1619(9).

<sup>4</sup> § 16-1619(1).

<sup>5</sup> § 16-1619(2).

Timely adjudication has important long-term implications for the child and the family. A speedy adjudication can reduce the length of time a child spends in out-of-home placement. Often it is necessary for the court to make a definitive decision whether a child has been abused or neglected before parents will begin to work with the Department. Additionally, the time in which this adjudication is completed may control the timing of later judicial proceedings.

The timeliness of the adjudicatory hearing will also impact the timeliness of required federal IV-E findings. If the adjudicatory hearing is the first hearing sanctioning the removal the child of the home, the order must include the finding that it is contrary to the welfare of the child to remain in the home.<sup>6</sup> Additionally the court must, in all cases, determine whether the Department made reasonable efforts to prevent the need for placement of the child in foster care. Federal law requires the court to make a documented, case-specific finding of reasonable efforts and requires that this finding be made within 60 days from the date the child was removed from the home.<sup>7</sup> **If this finding is not made within the deadline, the child will lose eligibility for federal foster care match funds.** This omission cannot be corrected at a later date to reinstate the child's eligibility for funding.

IJR 41(b) provides that "The hearing may not be continued more than 60 days from the date the child was removed from the home, unless the court has made case-specific, written findings, as to whether the Department made reasonable efforts to prevent the need to remove the child from the home." Generally, only a genuine personal emergency of a party or counsel warrants a continuance; awaiting the outcome of criminal proceedings, even criminal proceedings related to the child protection case, is generally not a compelling reason to continue an adjudicatory hearing.<sup>8</sup> Best practice is to grant a continuance only for compelling reasons and only for a short period of time.

### 5.3 SUBMISSION OF REPORTS TO THE COURT

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, prepare a written report, and file the report with the court prior to the pretrial conference.<sup>9</sup>

Idaho law further provides for the guardian *ad litem* to conduct an independent investigation of the circumstances of the child, to prepare a written report, and to file the report with the court at least five days prior to the adjudicatory hearing.<sup>10</sup>

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

<sup>6</sup> For additional information on the required Contrary to the Welfare finding, please refer to Chapter 4 on Shelter Care and Chapter 12 on required IV-E findings.

<sup>7</sup> 42 U.S.C. § 671(a)(15)(B)(1); 45 C.F.R. §1356.21(b)(1).

<sup>8</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (1995)

<sup>9</sup> § 16-1616. Although the preparation of such reports is routine, prior to 2005 they were not required by the Child Protective Act. The 2005 amendments to the CPA clarify that the preparation of a report is mandatory.

<sup>10</sup> § 16-1633.

<sup>11</sup> § 16-1616(3).

does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes prior to disposition. The process of report preparation can tighten a caseworker's or GAL's analysis of the case. Also, the reports often serve as the primary discovery mechanism in child protection cases, ensuring that essential information is distributed to all parties prior to the adjudicatory hearing, which works as an alternative to the more time-consuming methods of discovery used in other civil proceedings.<sup>12</sup> The availability of this information prior to the pretrial conference promotes reasoned and informed settlement of cases prior to trial. Finally, when the parties stipulate to admission of all or portions of the reports, the reports can be used as the basis for the court's written findings and conclusions.<sup>13</sup>

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

The reports are a valuable tool in the disposition phase of the case for several reasons. The process of report preparation can tighten a caseworker's or GAL's analysis of the case. The information in the reports can assist the parties and counsel in their analysis and enable them to more effectively contribute to a successful resolution of disposition issues. Additionally, once a child has been determined in the adjudicatory phase to be within the jurisdiction of the CPA, the information can be of invaluable assistance to the court in determining disposition issues when disposition is contested or in determining whether to approve a stipulated disposition.

#### 5.4 AGREEMENTS BY THE PARTIES

Most cases are resolved by agreement of the parties. Therefore, court practices and procedures for uncontested or stipulated cases are particularly important.<sup>14</sup> IJR 38 provides that “the court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interests of the child. Any order entered based on a stipulation must include any case-specific findings as required by the statute or these rules.”

Thus, before accepting a stipulation, the court must conduct sufficient inquiry on the record to ensure that the agreement has been carefully considered by all the parties, especially the parents and the guardian *ad litem*, and that the parties are entering into the agreement knowingly and voluntarily. The court must determine that the parties have thoroughly considered the reports by IDHW and the guardian *ad litem*, that the parties understand the content and consequences of the stipulation, and that the parties have had sufficient opportunity to confer with their attorneys.

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<sup>12</sup> Neither the CPA nor the Idaho Juvenile Rules prohibit the use, in CPA cases, of the formal methods of discovery available in civil cases generally. However, the use of formal discovery by the state against the parents may in some instances raise constitutional issues regarding the parents' rights against self-incrimination. *See* IDAHO. R. CRIM. P. 26–37. To the extent that information can be voluntarily exchanged, delays in the case that can jeopardize permanency and funding for the child are also avoided.

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

<sup>14</sup> IDAHO JUV. R. 38 sets forth minimum standards for court endorsement of stipulations by the parties.

Parties may stipulate to only adjudication, only disposition, or both. The court must ensure that the stipulation is comprehensive and that it addresses all of the key decisions that the court must or should make at the adjudicatory hearing. The court must resolve any issues not addressed by the stipulation. The key decisions that the court must make at the adjudicatory hearing, including both adjudication and disposition issues, are described below.

## 5.5 EVIDENTIARY ISSUES AT THE ADJUDICATORY HEARING

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

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

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

## 5.6 WHO SHOULD BE PRESENT

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

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

<sup>15</sup> IDAHO R. EVID. 101; IDAHO JUV. R. 51.

<sup>16</sup> § 16-1619(4).

<sup>17</sup> IDAHO JUV. RULE. 41(c).

<sup>18</sup> § 16-1616(3).

<sup>19</sup> §§ 16-1619(4), 16-1619(5), 16-1633(2).

<sup>20</sup> § 16-1613(1). Additional information on the roles of the participants below can be found in Chapter 2.

<sup>21</sup> Please see Chapter 12 of this manual for more information on issues surrounding putative fathers.

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

## 5.7 WITNESSES

### A. *In General*

Witnesses may be required if the adjudicatory hearing is contested. The key witnesses at the adjudication phase will be those who have knowledge of the circumstances giving rise to the petition, such as law enforcement officers involved in the removal of the child, doctors who have examined the child's injuries or diagnosed the child's physical or developmental condition, or other witnesses to incidents of abuse, neglect, or abandonment.

The primary issues at disposition are placement and reasonable efforts to avoid placement. Key witnesses may include friends, family members, or service providers who have been or may be called upon to provide resources for the child and/or the parents.

### B. *Child Witnesses*

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

## 5.8 KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATORY HEARING

### A. *Phase 1: Adjudication*

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

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

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<sup>22</sup> Please see Chapter 12 of this manual for a discussion of issues surrounding children and youth in court in non-witness capacities.

<sup>23</sup> §§ 9-1801 to 1808.

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

Some confusion results from the use of the word “jurisdiction” in the Idaho statute. A child is within the *jurisdiction of the court* if the child lives or is found within the state. The child is within the *jurisdiction of the Act* if the court determines that one of the five bases for jurisdiction exists. There are five grounds for a child to be within the jurisdiction of the Act. The Act applies where a child has been abused, neglected, abandoned, lacks a stable home environment, is homeless, or resides in/visits a household where other children are subject to the CPA.<sup>25</sup> These grounds are discussed in detail in Chapter III regarding the initiation of a CPA case.

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

If aggravated circumstances are an issue, they will generally be alleged in the petition and determined at the adjudicatory hearing. The concept of aggravated circumstances was added to the law of child protection to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find and place the child in a new safe and loving home can be initiated promptly.<sup>26</sup>

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing. Aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.<sup>27</sup> However, because a finding of aggravated circumstances will fundamentally alter the process of the case, such allegations should be made at the earliest possible point in the case.

In determining whether the parent has subjected a child to aggravated circumstances, the Act specifically identifies the following: abandonment; torture; chronic abuse; sexual abuse; committed murder; voluntary manslaughter of another child; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter; committed a battery or an injury to a child that results in serious bodily injury to any child; or the parental rights of the parent to a sibling have been terminated involuntarily.<sup>28</sup> The Act further provides that aggravated circumstances “include *but are not limited to*” those specifically listed (emphasis added). In determining whether other circumstances constitute aggravated circumstances, the court should be guided by two factors: whether the circumstances are similar in severity to those listed in the statute and whether the circumstances are such that no effort should be made to reunify the family.

If aggravated circumstances are found, then:

1. IDHW is not required to make reasonable efforts to prevent removal or to reunify the family;<sup>29</sup>

<sup>24</sup> § 16-1619(4).

<sup>25</sup> § 16-1603.

<sup>26</sup> 45 C.F.R. § 1356.21(3)(i).

<sup>27</sup> See §§ 16-1610, 16-1619.

<sup>28</sup> § 16-1619(6)(d).

<sup>29</sup> *Id.* § 16-1620(1); 45 C.F.R § 1356.21(3)(i).

2. the next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent plan and placement for the child;<sup>30</sup> and
3. the Department must file a petition to terminate parental rights, unless the court finds compelling reasons why termination is not in the best interests of the child.<sup>31</sup>

### ***B. Phase 2: Disposition***

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

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

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

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

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

The child's best interests are the court's primary consideration in determining whether to leave the child in the custody of his/her parents under the protective supervision of the Department.<sup>37</sup> Placement of the child at home under the Department's supervision is appropriate if the placement of the child in the home can be made subject to conditions that will ensure the health and safety of the child while in the home. Otherwise, placement of the child in the legal custody of IDHW is necessary to ensure the health and safety of the child while reunification efforts are

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<sup>30</sup> § 16-1620(1).

<sup>31</sup> §§ 16-1619(6)(d), 16-1624.

<sup>32</sup> IDAHO JUV. R. 42.

<sup>33</sup> § 16-1619(5)(a).

<sup>34</sup> THERESE ROE LUND & JENNIFER RENNE, *CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS* 9-10, "Benchcard B" (2009).

<sup>35</sup> LUND & RENNE, *supra* note 30, at 11-13, "Benchcard C" (2009).

<sup>36</sup> LUND & RENNE, *supra* note 30, at 13-18, "Benchcard D" (2009).

<sup>37</sup> § 16-1619(5)-(6).

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

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

The plan may contain conditions such as:

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

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

In addition to the conditions in place with the safety plan, the court should consider whether a protective order would also be appropriate.<sup>42</sup> Protection orders are defined in the CPA in Section §16-1602(28), which references §39-6303. In cases where a child has been abused by only one parent, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order against the other parent that ensures the safety of the child and the non-abusing parent.<sup>43</sup>

## 2. Custody with the Department

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

<sup>38</sup> 45 C.F.R. § 1356.21(3)(i).

<sup>39</sup> LUND & RENNE, *supra* note 29, at 25-32, "Benchcard G" (2009).

<sup>40</sup> § 16-1619(7).

<sup>41</sup> § 16-1604.

<sup>42</sup> § 16-1619(9).

<sup>43</sup> See §§ 16-1619 (9), 16-1602 (28), 39-6306. See earlier discussion.



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

### 3. *Contrary to the Welfare*

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

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

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

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

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

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<sup>44</sup> §16-1619(7).

<sup>45</sup> §16-1629(8).

<sup>46</sup> 45 C.F.R. § 1356.21(c).

<sup>47</sup> For more information, please refer to findings in Chapter 4 of this manual. More information on the required IV-E findings can be found in Chapter 12.

<sup>48</sup> §16-1619(6)(a); 42 U.S.C § 671(a)(15); 45 C.F.R. §1356.21(b)–(d).

<sup>49</sup> 45 C.F.R. §1356.21(d); §16-1619(6).

Federal law requires that the documented, case-specific finding be made within 60 days of the date the child is removed from the home.<sup>50</sup> If the finding is not made within the deadline, the child may lose eligibility for federal funding. The omission cannot be corrected at a later date to reinstate the child's eligibility. If the finding is made on the record, but is not documented in the order, it can be later be corrected by preparation of a transcript.<sup>51</sup>

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

### ***C. Role of the Court in Reviewing the Placement Decision***

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

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

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

If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live. *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-

<sup>50</sup> 45 C.F.R. §1356.21(b)(1)(i) and (ii).

<sup>51</sup> 45 C.F.R. § 11356.21(d)(1).

<sup>52</sup> §16-1629(8).

<sup>53</sup> §16-1629(11).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 134 Idaho 760, 9 P.3d 1226 (2000).

<sup>57</sup> *Id.* at 767, 9 P.3d at 1233.

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

The Court did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. This leaves a major question as to the nature and extent of judicial review of the Department's placement decision at the adjudicatory hearing and leaves the trial courts and the parties facing a serious dilemma in cases where the placement of the child is a major issue that needs to be resolved. Nonetheless, the placement of the child is of such importance to the child's well-being that the existence of these questions should not discourage the court and the parties from careful inquiry as to the Department's proposed placement of the child.

Finally, federal law requires that placement authority be vested in the state agency for the child to be eligible for federal funds.<sup>59</sup> However, the U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."<sup>60</sup> Attorneys who are faced with this issue are encouraged to do significant additional research.

### 1. *Indian Child Welfare Act Considerations*

It is essential that the court actively monitor the case to ensure compliance with the Indian Child Welfare Act, both for the sake of the child and for the progress of the proceedings.<sup>61</sup> At the adjudicatory hearing, the court should make specific findings as to whether the child is an Indian child or whether further efforts are needed to determine if the child is an Indian child. If the child is an Indian child, the court should make specific findings as to whether notice has been given as required by ICWA and whether further efforts are needed to comply with the notice requirements of ICWA. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree. Finally, the substantive standards governing the case (for example, the qualified Indian expert witness) are unique and apply at the adjudicatory hearing. Failure to comply with ICWA can render the court's decision void. Chapter 11 of the manual contains a detailed discussion of the Indian Child Welfare Act.

### 2. *Services Provided by the Department*

By the time of the adjudicatory hearing, information regarding these issues will be available that will enable the parties to move forward with activities necessary for a successful resolution of the case. To the extent this information is known at the adjudicatory hearing, best practice is for the court's disposition decree to specify the services to be provided to the child and the family, and the services in which the family is to be required to participate, pending the next hearing.

<sup>58</sup> *Id.* (referring to pre-2005 numbering of the Child Protective Act).

<sup>59</sup> 45 C.F.R. §1356.71(d)(1).

<sup>60</sup> Responsibility for Placement and Care, Section 8.3A.12 of the Children's Bureau's Child Welfare Policy Manual, Questions and Answers on the Final Rule (65 FR 4020 (1/25/00)).

<sup>61</sup> *See generally* 25 U.S.C. §1901–1922.

The purpose is to keep the case moving forward, as there is often no good reason to wait for the case plan hearing when some information is already available that will enable the parties to start making progress on some of the issues.

For example, it may already be known that a parent has substance abuse issues. Thus, one of the necessary steps will be a drug and alcohol evaluation to determine the nature and extent of the problem and the treatment options available to address the problem. Or, it may already be known that the child has developmental problems or behavioral problems, so one of the necessary steps will be evaluations of the child to determine the nature and extent of the child's special needs and the options available to address those needs. The court's order can require that the evaluations be completed and the options identified prior to the next hearing and that the recommended or agreed upon option be included in the case plan or permanency plan.

Sometimes the determination of these issues by the parties can be the key to reaching an appropriate settlement at the adjudicatory hearing. If the Department has identified services it will provide to assist the family in resolving the problems that resulted in the child protection case, the parents may be willing to agree to adjudication and disposition issues to enable them to quickly access those services and to resolve the problems. If the parents demonstrate a commitment to participating in the services and resolving the problems, then requirements for the parents to participate in the services and to comply with specific behavioral directives may be conditions that would enable the child to safely remain at home under IDHW supervision.

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

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory hearing. The next hearing to be scheduled depends on whether the court found aggravated circumstances. If aggravated circumstances are not found and the child is placed in the custody of IDHW or home with a parent on protective supervision, then IDHW must prepare a written case plan. The case plan must be filed with the court no later than 60 days from the date the child was removed from the home, or thirty days after the adjudicatory hearing, whichever occurs first. The case plan hearing must be set for a date within five days of the filing of the case plan.<sup>62</sup>

When the court schedules the next hearing, it should also enter any orders needed for the next hearing. This should include an order requiring the filing of the Department's plan and the GAL's report and the deadlines for filing them. Transport orders may also be needed if a parent is in jail or prison or the child is in detention or in the custody of juvenile corrections. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

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

The court must make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the

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<sup>62</sup> § 16-1621. See Chapter 7 of this manual for a full discussion of the Case Plan hearing.

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

- If any necessary parties were not present, a finding that proper notice was given.<sup>63</sup>
- If the decree/orders are entered based on the stipulation of the parties, findings that the stipulation is reasonable and appropriate and that the parties entered into it knowingly and voluntarily.<sup>64</sup>
- If the child is found to be within the jurisdiction of the Act, adjudication findings that accurately reflect the reasons for state intervention.<sup>65</sup>
- If aggravated circumstances are found, adjudication findings that accurately reflect the nature of the aggravated circumstances.<sup>66</sup>
- Findings as to the child's ICWA status. If the child is an Indian child, the court should make a finding that the Indian child's tribe and Indian custodian have received notice of the case. If the court has jurisdiction over the case, and if the case will not be transferred to tribal court, the court should make findings as to the facts that led to this result.<sup>67</sup>
- If the order is the first sanctioning removal of the child from the home, the court should make case-specific findings that removal is in the child's best interests and that it is contrary to the welfare of the child to remain in the home. It may incorporate by reference an affidavit that describes the specific circumstances.<sup>68</sup>
- Within 60 days of the child's removal, the court must make case-specific findings that IDHW made reasonable efforts to prevent removal of the child from the home.<sup>69</sup> This finding is not necessary if the parent subjected the child to aggravated circumstances. It may incorporate by reference an affidavit that describes the specific circumstances.
- Decree placing child in the custody of IDHW or in the child's own home under Department supervision, until the child's eighteenth birthday (or until otherwise ordered by the court prior to the child's eighteenth birthday).<sup>70</sup>
- If the child is to be placed in the child's own home under IDHW supervision, the safety plan necessary to eliminate threats to the child's safety and welfare in the home, and a protective order, where appropriate.<sup>71</sup>
- Services the Department is to provide to the child, the child's parents, and the foster parents, and services in which the parent(s) will be required to participate.
- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

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

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<sup>63</sup> § 16-1619.

<sup>64</sup> IDAHO JUV. R. 38.

<sup>65</sup> § 16-1603.

<sup>66</sup> § 16-1620.

<sup>67</sup> For a detailed discussion on the guidelines related to an ICWA case, please see Chapter 11.

<sup>68</sup> § 16-1619(6); IDAHO JUV. R. 41(f).

<sup>69</sup> § 16-1619(6)(a-c); IDAHO JUV. R. 41(e).

<sup>70</sup> § 16-1619(7).

<sup>71</sup> § 16-1619(9).