

# PERMANENCY HEARING

(AGGRAVATED CIRCUMSTANCES)

## Bench Card

*This Bench Card has been created by the Administrative Office of the Court as a resource for judges. Bench Cards do not represent statements of law by the Idaho Supreme Court and do not constitute legal advice.*

### PURPOSE

1. Review, approve, reject, or modify the permanency goal/plan of termination of parental rights, adoption, placement with a legal guardian, or another planned permanent living arrangement (APPLA).<sup>1</sup>
2. If this is the second or later permanency hearing, a review of the Department's past efforts to finalize the permanency plan in effect.<sup>2</sup>

### WHEN

1. Within 30 days of the determination that the parent(s) subjected the child to aggravated circumstances.<sup>3</sup>
2. Every 12 months thereafter as long as the court has jurisdiction.<sup>4</sup>
  - a. To ensure the child's continuing eligibility for federal IV-E funding, the first annual permanency hearing should be scheduled for a date within 12 months from the date the child was removed or the date of the court's order finding jurisdiction, whichever comes first.<sup>5</sup>
  - b. If not timely held, an otherwise eligible child will lose federal IV-E match funds on the last day of the month in which the finding of "reasonable efforts to finalize permanency" should have been made.

IV-E funding will resume on the first day of the month in which the required "reasonable efforts to finalize permanency" finding is made.<sup>6</sup>

3. For a youth in the custody of the Department, within 90 days prior to the youth's 18<sup>th</sup> birthday.<sup>7</sup>
4. The permanency hearing may be combined with a review hearing.<sup>8</sup> (Note: Clerks must "result" both hearings.)
5. The Department must file and serve the permanency plan at least 5 days prior to the hearing.<sup>9</sup>

### WHO MAY BE PRESENT

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>10</sup>
2. The Department must provide notice of the permanency hearing to:
  - a. the foster parents;
  - b. pre-adoptive parents;
  - c. a relative who is providing care to a child who is in the custody of the Department; and
  - d. children age 8 and older.

The Department must confirm to the court that this notice was given.<sup>11</sup>

3. The child may be excluded from hearings at any time at the discretion of the court.<sup>12</sup>
4. Youth age 12 and older are required to attend permanency hearings in person or remotely, unless the youth declines in writing prior to the hearing, declines through counsel, or the court finds good cause to excuse the youth from attending the hearing.<sup>13</sup>

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## EVIDENCE

1. The Rules of Evidence do not apply.<sup>14</sup>
2. The foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department, each have the right to be heard at the permanency hearing.<sup>15</sup>
3. A child age 8 or older has the right to be heard, either in person or in writing.<sup>16</sup> If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>17</sup>
4. Privileges in effect at the permanency hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>18</sup>

## STIPULATIONS<sup>19</sup>

Must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is knowing and voluntary, has a reasonable basis in fact, and is in the best interests of the child.

## CONTENTS OF THE PERMANENCY PLAN

The permanency plan must include:

*ICWA (See the ICWA Bench Card)*

If there is reason to believe the child is an Indian child, and there has been no final determination of the child's status as an Indian child:<sup>20</sup>

1. The efforts made to determine whether the child is an Indian child; and
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.

*Placement*

1. The current foster care placement for the child.<sup>21</sup>
2. The prospective, adoptive parents, if known.<sup>22</sup> (NOTE: In an adoption proceeding, if the person proposing to adopt the child is not the proposed adoptive parent named in the permanency plan, then the adoption judge must stay the adoption until the permanency plan is amended by the court in the child protection case.<sup>23</sup>)
3. If a group of siblings was removed from the home but was not placed together, the Department must document:<sup>24</sup>
  - a. the efforts to place the siblings together;
  - b. the reasons the siblings were not placed together; and
  - c. the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the well-being of one or more siblings.

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## *Services to the Child*

1. Services to identify and meet any educational, emotional, physical, or developmental needs the child may have, and to assist the child in adjusting to the placement or to ensure the stability of the placement.<sup>25</sup>
2. Options for maintaining the child's connection to the community. This includes people, schools, organizations, or activities with which the child has a significant connection.<sup>26</sup>
3. The plan to ensure educational stability for the child, including efforts to keep the child in the same school or reasons why keeping the child in the same school is not in the child's best interests.<sup>27</sup>
4. For youth age 14 and older, the case plan must include the information described in the *Transition to Successful Adulthood Bench Card*.<sup>28</sup>

## *Permanency Goal and Plan*

1. The plan must include a permanency goal, which must be one of the following:<sup>29</sup>
  - a. Termination of parental rights and adoption.
  - b. Guardianship.
  - c. For youth age 16 and older only, "another planned permanent living arrangement" (APPLA).
2. Best Practice: The plan should include both a primary goal and a concurrent goal.<sup>30</sup>

## *The plan must also include the following:*

1. All options for permanent placement of the child, including in-state and out-of-state placement options.<sup>31</sup>
2. The advantages and disadvantages of each option, and a recommendation as to which option is in the child's best interests.<sup>32</sup>
3. The actions necessary to implement the recommended option.<sup>33</sup>
4. A schedule for accomplishing the actions necessary to implement the permanency goal within the time frames in the Idaho Juvenile Rules:
  - a. If the permanency goal is termination of parental rights and adoption, a schedule that has the objective of finalizing termination within 6 months from approval of the permanency plan and finalizing the adoption within 12 months from the date the child was removed.<sup>34</sup>
  - b. If the permanency goal is guardianship, a schedule that has the objective of finalizing the guardianship within 5 months from the date of the determination of aggravated circumstances.<sup>35</sup>
5. If the permanency goal is termination of parental rights and adoption, identify the names of the prospective adoptive parents, when known.<sup>36</sup>
6. If the permanency goal is APPLA, the plan must document:<sup>37</sup>
  - a. intensive, ongoing, and unsuccessful efforts the Department has made to place the youth with a parent, in an adoptive placement, in a guardianship, or in the custody of the Department in a placement with a fit and willing relative, including an adult sibling.
  - b. reasons why APPLA is the best permanency goal for the youth and compelling reasons why one of the other placements is not in the youth's best interests.

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- c. steps taken by the Department to ensure that the youth's foster parents or childcare institution are following the reasonable and prudent parent standard when making decisions about the youth's participation in extracurricular, enrichment, cultural, and social activities.
- d. opportunities provided to the youth to regularly engage in age or developmentally appropriate activities.

## QUESTIONS THE COURT MUST ASK AND FINDINGS THE COURT MUST MAKE

### *Reasonable efforts to finalize permanency*

At the annual permanency hearings, the court must make written, case-specific findings that the Department has made reasonable efforts to finalize the primary permanency goal for the child.<sup>38</sup>

### *ICWA (See the ICWA Bench Card)*

1. The court must ask:<sup>39</sup>
  - a. Is there reason to believe that the child is an Indian child?
  - b. What efforts have been made since the last hearing to determine whether the child is an Indian child?
  - c. What efforts have been made by the Department to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership?
2. The court must determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership.
3. If the court has reason to know the child is an Indian child, but the court does not have enough evidence to determine that the child is not an Indian child, the court must treat the child as an Indian child.<sup>40</sup>

### *Placement*

1. If a group of siblings was removed from the home but was not placed together, the court must ask about:<sup>41</sup>
  - a. the efforts to place the siblings together;
  - b. the reasons the siblings were not placed together; and
  - c. the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.
2. The hearing must include a review of the Department's consideration for in-state and out-of-state placement of the child. In the case of a child in an out-of-state placement, the court shall determine if the out-of-state placement continues to be in the best interests of the child.<sup>42</sup>

### *Educational Stability*<sup>43</sup>

The Department must document and the court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interests.

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## *Psychotropic Medication* <sup>44</sup>

If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.

## *Youth Age 12 and Older* <sup>45</sup>

For youth age 12 and older, the Department must provide additional information and the court must ask additional questions and make additional findings regarding the permanency plan, including the plan for the youth's transition to successful adulthood. (See *Transition to Successful Adulthood Bench Card*)

## *Youth Age 14 and Older* <sup>46</sup>

For youth age 14 and older, the hearing shall include a determination of the services needed to assist the youth to make the transition from foster care to successful adulthood. (See *Transition to Successful Adulthood Bench Card*)

## *Youth Age 16 and Older* <sup>47</sup>

For youth with a proposed or current permanency goal of APPLA, the court shall make written case specific findings as of the date of the permanency hearing:

1. APPLA is the best permanency plan for the youth; and
2. There are compelling reasons why it is not in the youth's best interests to be placed with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department in a placement with a fit and willing relative, including an adult sibling.

## **YOUTH AGING OUT OF CARE**<sup>48</sup>

When a youth in the Department's custody is within 90 days of the youth's 18<sup>th</sup> birthday:

1. The Department shall file a report with the court that includes the Department's transition plan for the youth.
2. The court will schedule a review or a permanency hearing at which the court will review and discuss the permanency plan with the youth and ensure that the plan provides the services necessary to allow the youth to transition to a successful adulthood.

## **EXTENDED FOSTER CARE**<sup>49</sup>

If a youth wishes to remain in extended foster care beyond the age of 18, and meets eligibility criteria, refer to I.J.R. 59 and the *Extended Foster Care Bench Card* for guidance.

When the court orders extended foster care, the court shall continue to hold review and permanency hearings in accordance with I.C. § 16-1622. The court shall also determine whether the child continues to meet the eligibility requirements. If at any time the child no longer meets the requirements, the court shall terminate extended foster care.

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## ORDER

1. The order must adopt, modify or reject the plan.<sup>50</sup>
2. The permanency plan as approved by the court must be entered into the record as an order of the court.<sup>51</sup>
3. At annual permanency hearings, the court may approve a plan with a primary permanency goal and a concurrent permanency goal.<sup>52</sup>
4. If the permanency plan approved by the court has a permanency goal of termination of parental rights and adoption, the Department must file a petition to terminate parental rights within 30 days of the approval of the plan.<sup>53</sup>
5. The court should schedule the next hearing.

## RECOMMENDED QUESTIONS

1. If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (See *the ICWA Bench Card*)
2. Is the Department fully exploring placement options with a fit and willing relative:<sup>54</sup>
  - a. Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?
  - b. Who has been contacted?
  - c. Are they placement options?
3. Does the child have a concurrent plan? If so, what is it?
4. Has the child been moved since the last hearing? If so:
  - a. Why?
  - b. What further efforts are needed to ensure the child's placement stability?
  - c. Does the new placement support the child's cultural identity?
5. Department and guardian *ad litem*:
  - a. Do you understand what is required of the Department and/or guardian *ad litem* prior to the next hearing?
  - b. Do you have any questions for the court?

## ENDNOTES

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<sup>1</sup> I.C. § 16-1620(1).

<sup>2</sup> I.C. § 16-1622(2)(c).

<sup>3</sup> I.C. § 16-1619(6)(d), § 16-1620(1).

<sup>4</sup> I.C. § 16-1620(1).

<sup>5</sup> I.C. § 16-1622(2)(b).

<sup>6</sup> 45 C.F.R. § 1356.21(b)(2)(ii).

<sup>7</sup> I.C. § 16-1622(3).

<sup>8</sup> I.C. § 16-1622(2)(b).

<sup>9</sup> I.C. § 16-1620(1), § 16-1629(9); I.J.R. 45(c).

<sup>10</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>11</sup> I.C. § 16-1620(5); I.J.R. 40(a) and (b).

<sup>12</sup> I.C. § 16-1613(1).

<sup>13</sup> I.J.R. 40(c).

<sup>14</sup> I.R.E. 101(e)(6); I.J.R. 51(b).

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- 15 I.J.R. 40(a).
- 16 I.J.R. 40(b).
- 17 I.C. § 16-1613(2).
- 18 I.R.E. 502, I.R.E. 505. *See also* I.R.E. 503(d)(4), I.R.E. 504(d)(1), I.R.E. 516(d)(3), I.R.E. 517(d)(3), I.R.E. 518(d)(5).
- 19 I.J.R. 38.
- 20 I.C. § 16-1620(3)(j).
- 21 I.J.R. 43(2).
- 22 I.C. § 16-1620(3)(k), § 16-1622(2)(a).
- 23 I.C. § 16-1506(2).
- 24 I.C. § 16-1620(3)(g), § 16-1622(2)(h)(ii).
- 25 I.C. § 16-1620(3)(a), § 16-1622(2)(a), cross-referencing § 16-1621(3)(a).
- 26 I.C. § 16-1620(3)(f), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).
- 27 *Id.*
- 28 I.C. § 16-1620(3)(h), § 16-1622(2)(e).
- 29 I.C. § 16-1620(2), § 16-1622(2)(a).
- 30 I.C. § 16-1622(2)(a).
- 31 I.C. § 16-1620(3)(b), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).
- 32 I.C. § 16-1620(3)(c), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).
- 33 I.C. § 16-1620(3)(d), § 16-1622(2)(a), cross-referencing § 16-1621(3)(a).
- 34 I.J.R. 44(b)(2).
- 35 I.J.R. 44(b)(1).
- 36 I.C. § 16-1620(3)(k), § 16-1622(2)(a).
- 37 I.C. § 16-1620(3)(i) and (7), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d), § 16-1622(f).
- 38 I.C. § 16-1622(2)(c).
- 39 I.C. § 16-1620(4)(b). Idaho Code provides that if there is reason to *believe* that a child is an Indian child, the court must inquire about efforts made to determine the child's status and make a determination that the Department is making active efforts to verify whether the child is an Indian child. The U.S. Bureau of Indian Affairs regulations, however, provide that where the court has reason to *know* the child is an Indian child, the court must inquire about efforts made to make the determination. 25 C.F.R. § 23.107(b).
- 40 25 C.F.R. § 23.107(b).
- 41 I.C. § 16-1622(2)(h)(ii). The court is required to inquire at annual permanency hearings, but recommended best practice is to also inquire at the 30-day permanency hearing.
- 42 I.C. § 16-1622(2)(d).
- 43 I.C. § 16-1620(3)(f), § 16-1622(2)(h)(i). The court is required to inquire at annual permanency hearings, but recommended best practice is to also inquire at the 30-day permanency hearing.
- 44 I.C. § 16-1620(4)(c), § 16-1622(2)(j).
- 45 I.C. § 16-1620(4)(a).
- 46 I.C. § 16-1622(2)(e).
- 47 I.C. § 16-1620(7).
- 48 I.C. § 16-1622(3).
- 49 I.J.R. 59.
- 50 I.C. § 16-1620(4), § 16-1622(2)(b).
- 51 I.C. § 16-1620(6).
- 52 I.C. § 16-1622(2)(a).
- 53 I.C. § 16-1620(1); I.J.R. 44(b)(3).
- 54 I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).