

## CHAPTER 3: Initiating a Child Protective Act Case

### 3.1 INITIATING A CHILD PROTECTION CASE

#### A. Introduction

A child protection case can be initiated in five different ways:

1. Law enforcement officers can declare a child to be in imminent danger and remove the child or the alleged offender from the home.<sup>1</sup>
2. The county prosecutor or a deputy attorney general (DAG) can file a petition with the court pursuant to the Child Protective Act (CPA) asking the court for either an order to remove the child from the home, which is included in the summons,<sup>2</sup> or for a protective order removing the alleged offender from the home.<sup>3</sup>
3. The county prosecutor can file a petition with a court pursuant to the CPA without asking for emergency removal of the child pending the adjudicatory hearing on the petition.<sup>4</sup>
4. A court can expand a proceeding under the Juvenile Corrections Act (JCA)<sup>5</sup> into a child protection proceeding.<sup>6</sup>
5. A CPA proceeding can be initiated under the provisions of the Idaho Safe Haven Act.<sup>7</sup>

No matter how a CPA proceeding begins, the prosecutor must work closely with law enforcement and the Idaho Department of Health and Welfare (IDHW) to fully develop and understand the facts and circumstances of each case. While the prosecutor is responsible for determining whether the facts of the case support the filing of the petition, the Department is

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*Note re Terminology:* In this manual, “prosecutor” refers to both a county prosecutor and/or a deputy attorney general; “Indian child” refers to all native children as defined by the Indian Child Welfare Act (ICWA); and “IDHW” and “the Department” are used interchangeably to refer to the Idaho Department of Health and Welfare.

<sup>1</sup> I.C. § 16-1608(1)(a) (2009); I.J.R. 31. (The process for removal pursuant to a declaration of imminent danger is discussed in detail later in this chapter).

<sup>2</sup> I.C. § 16-1611(4); I.J.R. 34(c).

<sup>3</sup> I.C. § 16-1611(5). *See* I.C. § 16-1602(34) (Supp. 2017) (defining “protective order” under the CPA provisions of the Idaho Code). The use of protective orders in a CPA proceeding is discussed later in this chapter.

<sup>4</sup> I.C. § 16-1611(1) (2009) (provides for issuance of a summons without the emergency removal of a child); I.C. § 16-1611(5); I.J.R. 34 provide for issuance of a summons with an order for removal of a child) *See also* I.C. § 16-1610 (Supp. 2017), which generally governs the petition in a CPA case. CPA petitions are discussed later in this chapter.

<sup>5</sup> I.C. §§ 20-501 - 549 (2009).

<sup>6</sup> I.J.R. 16. This procedure is discussed briefly later in this chapter and is discussed in detail in Chapter 12 of this manual.

<sup>7</sup> I.C. §§ 39-8203 through 8205 (2011). The Safe Haven Act is discussed briefly in this chapter and in detail in Chapter 12 of this manual.

responsible for the primary investigation into the safety of the child.<sup>8</sup> In many cases, IDHW social workers have had extensive prior contact with the family, and their knowledge is often crucial to supporting the initial allegations in the case. Even in cases in which IDHW has not previously been involved with the family, social workers are required to undertake the initial investigation of the case and are responsible for the assessment of the child's situation and the delivery of direct services to the child and the child's family. As a result of this central role, the Department should be consulted at all phases of the case. In addition, the Department keeps a detailed database of every family with which it comes in contact; this database often contains information about the child's parents and the child's possible Indian heritage, which is crucial in the initial preparation of the case.

Law enforcement can also provide valuable information regarding the family, particularly regarding prior law enforcement contact with the family. Law enforcement officials may also have had contact with school officials and other persons who can shed light on the facts relevant to the family's situation.

### ***B. Removal***

#### **1. Declaration of Imminent Danger**

The first and most common way in which a CPA proceeding is initiated occurs when a law enforcement officer takes a child into shelter care pursuant to Idaho Code section 16-1608(1)(a). "...where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child or where the child is an abandoned child . . ."<sup>9</sup> This process is commonly described as a "declaration of imminent danger" although that phrase is not used in the CPA statutes.

Generally, a declaration of imminent danger should be made only if the child would be endangered if removal were delayed until a CPA petition can be filed. If the child is not endangered in his surroundings and prompt removal is not necessary to prevent serious physical or mental injury, a petition should be filed and an Order to Remove the Child should be obtained from a court. The declaration of imminent danger is an emergency procedure used at the discretion of law enforcement, while the order of removal is issued by the court in response to a request by the prosecutor.

Law enforcement officers have two options after declaring that a child is in imminent danger. First, the child may be removed from the home and taken into shelter care. Second, law enforcement may remove an alleged offender from the home. In the case of a child's removal, Idaho law provides that a shelter care hearing must be held within

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<sup>8</sup> I.C. § 16-1629 (Supp. 2017) (provides that "[t]he department . . . shall have the primary responsibility to implement the purpose" of the CPA). *See also* I.C. § 16-1631(1) (2009) (authorizes the Department to act any time it receives information that a child may be abused, neglected, or abandoned).

<sup>9</sup> I.C. § 16-1608(1)(a).

forty-eight hours of removal.<sup>10</sup> In the case of the offender's removal, a shelter care hearing must be held within twenty-four hours of removal.<sup>11</sup>

Law enforcement officials must prepare a "Notice of Emergency Removal" when a child is declared in imminent danger. The form of this notice is prescribed in the Idaho Juvenile Rules.<sup>12</sup> It includes information about the shelter care hearing and the right to counsel. The notice must be personally served on the child's parent(s), guardian, or custodian if the child is removed. Notice must be served on the alleged offender, if the alleged offender is removed. Service must be made at least twenty-four hours prior to the shelter care hearing. Personal service is not required for persons who cannot be located or who are out of state.

## 2. Order to Remove the Child

The second method of initiating a CPA proceeding begins when the prosecutor files a CPA petition and requests that the court issue either an order to remove the child or a protective order against the offending parent.<sup>13</sup> An order to remove the child directs law enforcement or Department personnel to take the child "to a place of shelter care." The form of the order is set forth in the Idaho Juvenile Rules.<sup>14</sup> A shelter care hearing must be held within forty-eight hours of the removal. The court typically issues the order to remove the child based on a verified petition or affidavit, although a hearing may be held. Typically, the best practice is for the county prosecutor or the DAG to file with the court an affidavit(s) accompanying the petition and the motion requesting the order to remove.

The information provided to the court in the petition and/or the affidavit should support all the findings the court must make under Idaho law to remove a child from the home:

- The child is within the jurisdiction of the CPA (the grounds for jurisdiction, such as abuse, neglect, etc., are discussed later in this chapter).
- "[T]he child should be removed from his present condition and surroundings because continuation in such condition or surroundings would be contrary to the welfare of the child and vesting legal custody with the department . . . would be in the child's best interests."<sup>15</sup>

**It is of critical importance that the court makes the finding that remaining in the home is contrary to the child's welfare and that vesting custody of the child in the Department is in the child's best interests.** Federal law requires this finding to be made in the first order sanctioning removal of the child from the home. This finding is required to preserve the child's eligibility for federal IV-E match funds that are applied to

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<sup>10</sup> I.C. § 16-1608(2).

<sup>11</sup> I.C. § 16-1608(3) (More information about the petition and service of process is contained later in this chapter, and more information about the shelter care hearing can be found in Chapter 4 of this manual).

<sup>12</sup> I.J.R. 32 (sets forth the prescribed form of this notice).

<sup>13</sup> I.C. § 16-1611(4)–(5); I.J.R. 34(a).

<sup>14</sup> I.J.R. 34(c).

<sup>15</sup> I.C. § 16-1611(4).

the costs of shelter care.<sup>16</sup> The finding must be case-specific and documented in the court's order. If this finding is not made, an otherwise eligible child will not be eligible for IV-E match funds, nor for adoption assistance. The omission cannot be corrected at a later date. 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 supporting the finding. If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific best interests/contrary to the welfare findings.

In addition to the contrary to the welfare/best interests finding, the court should also begin reviewing the efforts made by the Department to prevent the removal of the child from the home. The court must make a finding at the shelter care hearing regarding the efforts made by the Department to eliminate the need for shelter care. The court may find that the Department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful. The court may also find that the Department made reasonable efforts to eliminate the need for shelter care, but was not able to safely provide preventative services. The latter finding is intended to address situations in which the child was removed for imminent danger and the Department had a limited opportunity to provide services to eliminate the need for shelter care.<sup>17</sup> Federal law requires that this finding be made within the first 60 days after the child is removed from the home.<sup>18</sup> Idaho Code requires this finding to be made at both the shelter care hearing and at the adjudicatory hearing.<sup>19</sup> Failure to make a case-specific finding regarding the reasonable efforts of the Department to avoid removal within the first 60 days after removal will result in loss of IV-E match funds for an otherwise eligible child. The failure to make this finding cannot be corrected at a later date.

### 3. Protective Order

As an alternative to removing the child from the home, the CPA provides for the entry of a protective order that provides for the exclusion of the alleged offender from the home.<sup>20</sup> Exclusion of an abusive parent may be a viable alternative to removing the child, if it enables the child to remain safely at home with a non-abusive, protective parent. If the parents have joint custody of the child, the CPA requires that the protective order state with specificity the rights and responsibilities of each parent.<sup>21</sup>

The CPA defines “protective order” as an order issued by the court in a child protection case, prior to the adjudicatory hearing, to enable the child to remain in the home pursuant

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<sup>16</sup> 42 U.S.C. §§ 672(a)(1)-(2) (2011); 45 C.F.R. § 1356.21(c)-(d) (2011). The federal IV-E requirements are discussed in detail in Chapter 12 of this manual.

<sup>17</sup> I.C. 16-1615(5)(b)(i)-(ii) (Supp. 2016).

<sup>18</sup> 45 C.F.R. § 1356.21(b)(1)(i)-(ii) (2011).

<sup>19</sup> I.C. §§ 16-1615(5) (2009); 16-1619(6) (Supp. 2014). *See also* I.C. § 39-6309 (relating to the issuance of protection orders).

<sup>20</sup> I.C. §§ 16-1611(5) (2009); 39-6306(1)(c) (2011).

<sup>21</sup> I.C. § 16-1611(5) (2009).

to Idaho Code section 16-1615(8).<sup>22</sup> The statute was amended in 2013 to provide that the order shall have the “same form and effect” as a domestic violence order issued pursuant to chapter 63, title 39, Idaho Code. The revision was intended to clarify that protection orders in CPA cases are not limited to domestic violence situations. The cross reference to the domestic violence statute is simply meant to describe the form of the order and to clarify that once granted, a protective order in a CPA case is to be enforced in the same manner as a domestic violence protection order. The definition further provides that such a protective order “shall be for a period not to exceed three months unless otherwise stated herein.”

If a protection order under the CPA is used to exclude the alleged offending parent from the home, the conditions of such exclusion should be included in the shelter care order and as part of a protective order.

After the protective order providing for the exclusion of the alleged offender is issued, and the prosecutor has served notice, the court must hold a shelter care hearing within twenty-four hours of the alleged offender’s removal, not including weekends and holidays.<sup>23</sup>

#### 4. Petition Without Emergency Removal

CPA cases are usually initiated as a result of the need for removal of the child or the alleged offender from the home. A CPA case can, however, be initiated without removal of the child or an alleged offender. Generally, this procedure is used for cases of neglect or unstable home environment where it is clear that improvements are necessary for the health and well-being of the child, but where immediate removal of the child is not necessary for the child’s safety. The court’s involvement is sought to ensure that a safety plan is in place to control threats of danger to the child, to ensure the parents’ participation in remedial services, and to ensure ongoing review of the case to confirm improvement in the care of the child and the home environment.

Generally, when a CPA petition is filed without seeking prior removal of the child, the state is requesting protective supervision.<sup>24</sup> Even though the child has not been removed from the home in these cases, a petition must be filed, process served, and an adjudicatory hearing must be held. A shelter care hearing is not needed because neither the child nor the alleged offender was removed from the home.<sup>25</sup>

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<sup>22</sup> I.C. § 16-1602(34) (Supp. 2017). (A protective order can enable the child to remain in the home through provisions other than the removal of the alleged offender. Other uses of a protective order are discussed in Chapter 4: Shelter Care Hearings).

<sup>23</sup> I.C. § 16-1608(3) (2009). (In this scenario, there is no request to place the child in shelter care, but the statute requires a shelter care hearing to ensure due process to the excluded parent).

<sup>24</sup> I.C. § 16-1619(5)(a) (Supp. 2017) (provides for the placement of the child in her or his own home under the protective supervision of the Department).

<sup>25</sup> More information about the petition and service of process is contained later in this chapter, and information about the adjudicatory hearing is contained in Chapter 5 of this manual.

If, after filing the petition but prior to the adjudicatory hearing, removal of the child becomes necessary because the child is unsafe, a declaration of imminent danger must be made by law enforcement officials or the court must issue an order to remove the child. In either case, a shelter care hearing must be held within 48 hours of the child's removal.<sup>26</sup>

5. Expansion of Juvenile Corrections Cases

In Idaho, offenses committed by juveniles are governed by the Juvenile Corrections Act (“JCA”)<sup>27</sup> and the Idaho Juvenile Rules.<sup>28</sup> In some cases, a juvenile subject to the JCA may also be abandoned, abused, neglected, or otherwise fall within the jurisdiction of the CPA.<sup>29</sup> Rule 16 of the Idaho Juvenile Rules provides that the court may order a JCA proceeding expanded into a CPA proceeding whenever the court has reasonable cause to believe that a juvenile living or found within the state comes within the jurisdiction of the CPA. Practitioners commonly refer to such cases as “Rule 16 Expansions.” Rule 16 Expansions are discussed in detail in Chapter 12 of this manual.

6. Safe Haven Act Proceedings

If a child is abandoned pursuant to the Idaho Safe Haven Act, a safe haven may take temporary custody of a child.<sup>30</sup> The safe haven must immediately notify either law enforcement officials or the individual designated by the court in that county to receive such notifications. Once temporary custody of the child has been assumed by the safe haven, a CPA proceeding must be initiated by IDHW.<sup>31</sup> The Safe Haven Act is discussed in detail in Chapter 12 of this manual.

### 3.2 EVALUATING A POSSIBLE CPA CASE

The prosecutor is responsible for evaluating the facts provided by social workers and/or law enforcement to determine first, whether the filing of a petition is appropriate, and second, whether the facts support an earlier declaration of imminent danger or an immediate request for an order to remove the child. The evaluation must be based on the law as it applies to the facts of each case. This evaluation should focus on whether the child is safe or unsafe and must be based on information gathered from credible sources.

In each case, the amount of information available to the prosecutor will vary with the circumstances and with how the child first came to the attention of authorities. The prosecutor should be aware of the highly structured process used by social workers to conduct the investigation and safety assessment. The social worker in each case should focus on principles

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<sup>26</sup> I.C. §§ 16-1615(1) (2009); 16-1623(3) (2009) (“[Child Protective Act cases] may be expanded or altered to include full or partial consideration of the cause under the Juvenile Corrections Act”).

<sup>27</sup> I.C. §§ 20-501 to 549.

<sup>28</sup> I.J.R. 1–30.

<sup>29</sup> Grounds for jurisdiction under the CPA are discussed later in this chapter.

<sup>30</sup> I.C. §§ 39-8201 to 8207 (Idaho Safe Haven Act) (2011).

<sup>31</sup> I.C. §§ 39-8202 to 8205

below in guiding her or his decision-making process.<sup>32</sup> The social worker may not have answers to all of the questions in every case. This is particularly true when the child was removed from the home through a declaration of imminent danger and the Department has not had previous involvement with the family. However, the questions below may provide an outline to guide the prosecutor's expectations of IDHW's investigation.

1. *What is the nature and extent of the maltreatment?* The social worker can be expected to identify the child and the parent and to describe the:
  - a. Type of maltreatment
  - b. Severity, results, and injuries
  - c. History of maltreatment or prior similar incidents
  - d. Events surrounding the maltreatment
  - e. Emotional and physical symptoms of maltreatment
  
2. *What circumstances accompany the maltreatment?* The social worker can be expected to know or evaluate:
  - a. How long the maltreatment has been occurring
  - b. The parental intent concerning the maltreatment
  - c. Whether the parent was impaired by substances or otherwise out of control when the maltreatment occurred
  - d. The parent's attitude and whether the parent acknowledges the maltreatment
  - e. Whether other issues such as mental illness may have contributed to the maltreatment or to the parent's ability to ensure the child's safety
  
3. *How does the child function day-to-day?* The worker can be expected to know about all of the children in the home, including their general behaviors, emotions, temperaments, and physical capacities. The social worker should be able to provide information about the child in comparison to other children of the same age related to the child's:
  - a. Capacity to form close emotional relationships with parents and siblings as well as the child's expressions of emotions and feelings
  - b. General mood and temperament
  - c. Intellectual functioning
  - d. Communication and social skills

The social worker also should have information relating to the child's behavior, peer relations, school performance, independence, motor skills, and physical and mental health.

4. *How does the parent discipline the child?* The social worker may also have information about the parent's approach to guiding and disciplining the child. This information is important in evaluating the child's socialization and the family context. The social worker should know about disciplinary methods, the concept and purpose of discipline in the child's household, the context in which discipline has occurred (e.g. is the parent

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<sup>32</sup> See generally THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 3–5 (2009).

impaired by drugs and alcohol when disciplining the child), and relevant cultural practices regarding discipline.

5. *What are overall parenting practices?* In addition to discipline, the social worker can be expected to have information regarding the overall parent-child relationship. The social worker should have information regarding the following topics regarding the parent's:
  - a. Reason for being a parent
  - b. Satisfaction in being a parent
  - c. Knowledge of and skill in parenting and child development
  - d. Expectations of and empathy for the child
  - e. Decision-making practices
  - f. Parenting style
  - g. Protectiveness
  - h. Relevant cultural context for parenting
  
6. *How does the parent manage his or her own life?* The investigation should yield information about how the parent feels, thinks, and acts on a daily basis, independent of the alleged maltreatment. Thus, a social worker should have discovered the following information regarding a parent's:
  - a. Employment
  - b. Substance use, abuse, or addiction
  - c. Mental health
  - d. Physical health and abilities
  - e. Communication and social skills
  - f. Coping and stress management skills
  - g. Self-control
  - h. Problem-solving abilities
  - i. Judgment and decision-making abilities
  - j. Independence
  - k. Home and financial management skills
  - l. Community involvement
  - m. Rationality
  - n. Self-care and self-preservation abilities.

The prosecutor is responsible for evaluating this information and determining whether the law and the information provided support the filing of a CPA petition.

### **3.3 FILING A CHILD PROTECTION CASE**

To file a child protection case, the prosecutor should prepare the petition, summons, and supporting affidavit(s), if a child was declared in imminent danger or if removal of the child or the alleged offender is sought prior to the adjudicatory hearing.

#### **A. Petition**

The contents of the petition are specified by statute.<sup>33</sup> Careful attention to the preparation of the petition will help avoid defects in the petition, which can result in a great deal of time spent on motions to dismiss, motions to clarify, and motions to amend. Pursuant to Idaho Code section 16-1610, the petition must be entitled “In the Matter of \_\_\_\_\_, a child (children) under the age of eighteen years.” It must be signed by the county prosecutor or deputy attorney general and verified. The petition may be based on information and belief rather than on the personal knowledge of the person(s) signing the petition, but the petition must state the basis for the information and belief.<sup>34</sup> Care should be taken that the affidavits and/or verification of a petition are signed by the individual(s) with personal knowledge of the facts being attested to.

The petition must include the following:

- The facts that bring the child within the jurisdiction of the CPA, including a description of the actions of each parent.
- The name, birthdate, sex, and residence address of the child.
- The name, birthdate, sex, and residence address of all other children living at or having custodial visitation at the same home as the child named in the title of the petition.
- The names and residence addresses of mother and father, guardian, and/or other custodian. If none of these persons reside or can be found within the state, the name of any known adult relative residing within the state should be included.
- The names and residence addresses of each person having sole or joint legal custody of any of the children named in the petition.
- Whether there is a legal document controlling the custodial status of any of the children.
- Whether the child is in shelter care, and, if so, the type and nature of the shelter care, the circumstances justifying the shelter care, and the date and time the child was placed in shelter care.
- If the child has been or will be removed from the home, the petition must allege that:
  1. It is contrary to the welfare of the child to remain in the home and it is in the best interests of the child to be placed in the custody of IDHW or another authorized agency, and
  2. Reasonable efforts were made to prevent the removal of the child<sup>35</sup>, or reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.<sup>36</sup>
- Whether the parent(s) with joint legal custody or a non-custodial parent has been notified of the placement.
- Whether a court has adjudicated the custodial rights of the parents of the child named in the title of the petition, and, if so, the custodial status of the child.<sup>37</sup>

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<sup>33</sup> I.C. § 16-1610(2) (Supp. 2017).

<sup>34</sup> *Id.* at (h).

<sup>35</sup> The information regarding efforts to prevent removal is necessary for a required finding at the shelter care hearing, either that the department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful, or the department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services. *Id.* at § 16-1615(5). This issue is further discussed in Chapter 4 of this manual.

<sup>36</sup> I.C. §§ 16-1602(6); 16-1619(6)(d). Aggravated circumstances are discussed later in this chapter.

The petition should also include the following in applicable cases:

- An allegation or statement of the grounds and the facts that bring the parent's actions within the definition of aggravated circumstances.<sup>38</sup>
- If there is reason to believe that the child is an Indian child, the petition should include additional substantive allegations required by the Indian Child Welfare Act (ICWA).<sup>39</sup>

### ***B. Summons***

The summons is a notice of the filing of a petition pursuant to the CPA, which must be served on the child's parents, guardian, and/or custodian, along with a copy of the petition.<sup>40</sup> A summons may be issued for and served on any other person whose presence is required by the child or any other person whose presence, in the opinion of the court, is necessary.<sup>41</sup> A separate summons must be prepared for each person to be served. The form of the summons is set forth in the Idaho Juvenile Rules.<sup>42</sup> The summons should be prepared by the attorney filing the petition and signed by the court clerk. The summons provides essential information to the parents:

- The date and time of the shelter care hearing [or the adjudicatory hearing, if removal of the child or alleged offender has not been made and is not requested].
- The right to counsel, including appointed counsel for parents who cannot pay for an attorney, and directions for requesting appointed counsel.
- Notice that if the parent fails to appear, the court may proceed in the parent's absence, and the missing parent may be subject to proceedings for contempt of court.

The form for the summons as set forth in Idaho Juvenile Rule 33 does not include language for the order to remove the child. If the prosecutor is seeking an order to remove the child, the language for such an order is governed by Idaho Juvenile Rule 34 and must be included on the summons.<sup>43</sup>

### ***C. Supporting Affidavit(s)***

Recommended best practice in all cases is to prepare supporting affidavits from the investigating authorities (usually IDHW caseworkers, sometimes law enforcement officers, sometimes medical or school personnel) that include all the supporting information for all the facts that must or should be alleged in the petition. This practice serves several important functions. First, it assists in preparation of the petition. Second, it can tighten the analysis of the evidence and the case. Third, the availability of an affidavit that thoroughly documents the current information and promotes the potential for informed settlement and appropriate stipulations.

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<sup>37</sup> I.C. § 16-1610(2).

<sup>38</sup> I.J.R. 41(a) (provides that the court will determine at the adjudicatory hearing whether aggravated circumstances exist if they were raised in the petition or by motion prior to the adjudicatory hearing).

<sup>39</sup> 25 U.S.C. §§ 1911–1923 (2011). These additional elements may be pled conditionally. See Chapter 11 of this manual for more information on cases under ICWA.

<sup>40</sup> I.C. § 16-1611(1)–(3) (2009).

<sup>41</sup> I.C. § 16-1611(1).

<sup>42</sup> I.J.R. 33(b).

<sup>43</sup> I.J.R. 34; *See also* I.C. § 16-1611(4).

The affidavit should contain all the information necessary to support the findings and conclusions the court is required to make.<sup>44</sup> Before issuing a shelter care order, the court must make the following findings and conclusions:

- A CPA petition has been filed.
- There is reasonable cause to believe that the child comes within the jurisdiction of the CPA.<sup>45</sup>
- IDHW made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful, or IDHW made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services.<sup>46</sup>
- The child cannot be placed in the temporary sole custody of a parent having joint custody of the child.
- It is contrary to the welfare of the child to remain in the home, and it is in the child's best interests to be placed in shelter care pending the adjudicatory hearing.<sup>47</sup>

Recommended best practice is to include this information in an affidavit that is filed along with the petition, to ensure compliance with state and federal laws and to safeguard the child's eligibility for federal IV-E match funds. The supporting affidavits should be attached to the petition to ensure service of process of the affidavits along with the petition and summons.

### 3.4 NOTICE AND SERVICE OF PROCESS

#### A. Manner of Service

Service of process must be made by personal delivery of an attested copy of the summons, with the petition and accompanying affidavits attached. Service of process must be completed at least forty-eight hours prior to the time set in the summons for the hearing.<sup>48</sup> Service of process must be made by the sheriff or another person appointed by the court.<sup>49</sup> The summons includes a return of service, which must be completed and filed with the court to show that service has been made.<sup>50</sup>

Where personal service is impracticable, the prosecutor must file a motion seeking court approval of service by registered mail and publication.<sup>51</sup> The motion should be filed and heard

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<sup>44</sup> The required factual allegations for the petition are set forth above. The Shelter Care Hearing is discussed in detail in Chapter 4 of this manual.

<sup>45</sup> I.C. § 16-1603 (setting forth the grounds for jurisdiction such as abuse, neglect, etc.; discussed later in this chapter).

<sup>46</sup> I.C. § 16-1615(5). Where the child is removed because of imminent danger and the Department had limited opportunity to provide services to prevent removal, the court examines the circumstances and may make the second finding, that the Department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services. This issue is further discussed in Chapter 4 of this manual

<sup>47</sup> I.C. § 16-1615(5).

<sup>48</sup> I.C. § 16-1612(1) (2009). It should be noted that only 24 hours' notice is needed for a shelter care hearing where the alleged offending parent has been removed from the home.

<sup>49</sup> I.C. § 16-1612(3).

<sup>50</sup> *Id.*

<sup>51</sup> I.C. §§ 16-1612(1)-(2).

as soon as possible, so that service can be completed prior to the adjudicatory hearing. The motion should either be verified or accompanied by a supporting affidavit and include the following information:

- A description of the efforts made to identify, locate, and serve the missing party.
- A statement of the address where service by registered mail is most likely to achieve actual notice.
- A description of why that address is most likely to achieve actual notice.
- A statement of the newspaper of general circulation most likely to achieve actual notice.
- A description of why that newspaper is most likely to achieve actual notice.

The motion should also be accompanied by a proposed order. The proposed order should include findings that personal service is impracticable and that service by registered mail at the specified address and by publication in the specified newspaper are most likely to achieve actual notice. The proposed order should require filing of an affidavit of service and an affidavit of publication to show completion of service in accordance with the order.

### ***B. Persons to be Served***

Service of process must be made to each of the child's parents,<sup>52</sup> legal guardian(s), or custodian(s). This includes non-custodial parents and adoptive parents but does not include a parent whose parental rights have been terminated.<sup>53</sup> Early identification and participation of all parents is essential for several reasons. First, it is essential to the protection of substantial individual rights that these persons have notice and an opportunity to participate. Second, the sudden appearance of a missing party later in the process can cause significant disruption, both to judicial proceedings and to timely permanency for the child. Finally, the participation of these parties may prove essential to achieving the ultimate goal – a safe home and loving family for the child. To the extent that there are issues of paternity, the best practice is to identify the child's father, establish paternity, and confer party status as early as possible in the proceedings.

### ***C. Notice to the Child's Tribe, Parents, or Indian Custodian(s)***

The Indian Child Welfare Act<sup>54</sup> establishes special notice requirements for child protection cases involving an Indian child. If the child is an Indian child, the parent or Indian custodian and the child's Indian tribe have the right to notice. Notice of the pending proceedings and the tribe's right to intervene must be given by registered mail, return receipt requested, to the parent or Indian custodian and to the Indian child's tribe. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior, who then has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe.<sup>55</sup>

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<sup>52</sup> I.C. § 16-1612(6). The CPA does not include a definition of "parent." See Chapter 12 of this manual regarding the circumstances under which unmarried fathers should be included in a CPA case.

<sup>53</sup> I.C. § 16-1611(1) (provides that the summons may be served on the "person or persons who have custody of the child" and must be served on "[e]ach parent or guardian").

<sup>54</sup> 25 U.S.C. §§ 1901 to 1963 (2011). A detailed discussion of ICWA can be found in Chapter 11 of this manual.

<sup>55</sup> 25 U.S.C. § 1912, 25 C.F.R. § 23.11(c).

Identification of Indian children and notice of the child's Indian tribe is not only required by federal law but will also aid in the fastest and most appropriate placement for the child. ICWA protects the unique and substantial interest of the tribe and the Indian child. In addition, the tribe often has information regarding the child and the family that is critical in assisting the court in making good decisions regarding the child. The sudden appearance of a tribal claim at a later point in the process can cause major disruption to the judicial proceedings and, more importantly, to timely permanency for the child. Such disruption can be avoided by early and diligent efforts to determine whether the child is an Indian child and by providing notice to the child's tribe as soon as possible.

### 3.5 FACTS SUPPORTING THE FILING OF A CPA CASE

#### A. Jurisdiction

A child is within the jurisdiction of the CPA if the child lives or is found within the state and is:

1. Abused
  2. Abandoned
  3. Neglected
  4. Homeless
  5. Lacks a stable home, or
  6. Lives or has custodial visitation in a household where another child is subject to the jurisdiction of the CPA<sup>56</sup>
1. *Abused.* Idaho law defines "abused" as any case in which a child has been the victim of:
    - a. Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of accidental occurrence; or
    - b. Sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.<sup>57</sup>
  2. *Abandoned.* Idaho law defines abandonment as "the failure of a parent to maintain a normal parental relationship with his child including, but not limited to, reasonable support or regular personal contact."<sup>58</sup> The statute further provides that failure to maintain this relationship for one year is prima facie evidence of abandonment.
  3. *Neglected.* Idaho law defines "neglected" as a child:

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<sup>56</sup> I.C. § 16-1603 (2009).

<sup>57</sup> I.C. § 16-1602(1).

<sup>58</sup> I.C. § 16-1602(2) (Supp. 2017).

- a. Who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian(s), or other custodian(s) or their neglect or refusal to provide them; or
- b. Whose parents, guardian, or other custodian are unable to discharge their responsibilities to the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or
- c. Who has been placed for care or adoption in violation of law.
- d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code<sup>59</sup>

Idaho law specifically provides that a child will not be deemed neglected solely because a child's parent or guardian chooses spiritual treatment for a child instead of medical treatment.<sup>60</sup> There is statutory authority, however, for the court to order emergency medical treatment for a child, whether or not the child is within the jurisdiction of the Act.<sup>61</sup>

4. *Homeless.* Idaho law defines homeless as a child who is "...without adequate shelter or other living facilities, and the lack of such shelter or living facilities poses a threat to the health, safety or well-being of the child."<sup>62</sup>

There are two common scenarios that illustrate homelessness for children. The first is where a child has come into contact with authorities and is apparently homeless, as no parent or other custodial adult can be located, and the child needs a home while authorities investigate the situation. Typically, the child is a runaway or a juvenile whose parents refuse to allow the child home, sometimes after the juvenile's release from detention.

The second is where a family is homeless and therefore the children are homeless. The purpose of including homelessness in the CPA is not to impose further displacement on an already displaced family. The purpose is to establish a statutory basis to provide services and shelter to the children when the parents are unable or unwilling to do so. In such cases, the reasonable efforts of the Department to provide housing or employment assistance, and the parent's ability and willingness to participate in those services, become an issue in the adjudication phase. If the parents are not able to provide the child with a home despite the Department's assistance, or if they are unwilling to accept assistance that would enable them to provide the child a home, then such evidence supports a determination that the child comes within the jurisdiction of the CPA.

5. *Lacks Stable Home Environment.* The CPA does not define "lack of a stable home environment." This provision should not be interpreted to provide a basis for state intervention simply because the parent's lifestyle is outside the norm.

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<sup>59</sup> I.C. § 16-1602(31).

<sup>60</sup> I.C. § 16-1602(31)(a).

<sup>61</sup> I.C. § 16-1627 (2009).

<sup>62</sup> I.C. § 16-1602(26) (Supp. 2017).

Often, the situations that fall into this category also fall into the category of neglect. There are at least two situations that fall into this category, but which might not fit into the category of neglect. One is the “drug house” (where an occupant of the home is a manufacturer or distributor of illegal drugs) and the nature of the substances and people frequenting the house endanger the safety of the child or children in the home.

Another situation that might fall within this category is a violent home where the child is not directly abused, but he or she regularly witnesses domestic violence. As with homelessness (discussed above), the purpose of this provision is not to punish the adult victim of domestic violence by taking the children away, but rather the purpose is to establish a statutory basis to provide services and shelter to the child when the parent is unable to do so.

As with homelessness, the reasonable efforts of the Department to provide assistance to the adult victim, and the adult victim’s ability and willingness to participate in those services, become issues in the adjudication phase. If the parent who is the adult victim of domestic violence is not able to provide the child with a safe home despite Department assistance or is unwilling to accept assistance that would enable the parent to provide the child a safe home, then such evidence supports a determination that the child comes within the jurisdiction of the CPA. (The court can enter protective orders that expel the abusive parent from the home or that limit contact between the abusive parent and the non-abusive parent and/or the child.)<sup>63</sup>

It is common practice, in some jurisdictions, to stipulate to lack of a stable home environment as the basis of jurisdiction under the CPA. Care should be taken when entering such stipulations because the jurisdictional basis for the case is relevant in determining the scope of the case plan and possibly the grounds alleged in a petition to terminate parental rights. Also, the jurisdictional basis for the CPA case may be relevant if termination of parental rights is eventually required. Attorneys should consider how stipulating to lack of a stable home environment may influence the case plan or any future termination of parental rights case.

6. *Other Children in the Home.* An issue that frequently arises in child protection cases is what to do about other children in the home when some, but not all, of the children are abused, neglected, or abandoned. If one child is abused, neglected, or abandoned, it cannot simply be presumed that the others are as well. Conversely, it cannot be assumed that the other children are safe. Idaho law provides that if a court has taken jurisdiction of a child, it may take jurisdiction over another child if the other child lives or has custodial visitation in the same household, and if the other child has been exposed to or is at risk of being a victim of abuse, abandonment, or neglect. All of the children must be named in the Petition or the Amended Petition, and notice must be provided to that child’s parent(s) and/or guardian(s).<sup>64</sup>

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<sup>63</sup> I.C. § 16-1602(34).

<sup>64</sup> I.C. § 16-1603(2) (2009).

### **B. Aggravated Circumstances**

The purpose of the aggravated circumstances provision is to identify those cases in which, as a result of serious maltreatment, no effort will be made at reunification.<sup>65</sup> Aggravated circumstances is a concept that can be used to facilitate earlier permanency for the child. By suspending efforts focused on reunification, attention can be promptly focused on efforts to find the child a safe home, loving family, and permanent placement.<sup>66</sup>

The CPA provides:

‘Aggravated circumstances’ include, but are not limited to:

- (a) Circumstances in which the parent has engaged in any of the following:
  - (i) Abandonment, chronic abuse, or chronic neglect of the child. Chronic neglect or chronic abuse of a child shall consist of abuse or neglect that is so extreme or repetitious as to indicate that return of the child to the home would result in unacceptable risk to the health and welfare of the child.
  - (ii) Sexual abuse against a child of the parent. Sexual abuse, for the purposes of this section, includes any conduct described in sections 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6608 or 18-8602, of Idaho Code.
  - (iii) Torture of a child; a sexual offense as set forth in section 18-8303(1), Idaho Code; battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter, or attempting or conspiring to commit such voluntary manslaughter;
- (b) The parent has committed murder, aided or abetted a murder, solicited a murder, or attempted or conspired to commit murder; or
- (c) The parental rights of the parent to another child have been terminated involuntarily.<sup>67</sup>

In evaluating whether circumstances not specifically listed in the statute constitute aggravated circumstances, prosecutors should consider 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.

Aggravated circumstances may be raised at any time.<sup>68</sup> The court may determine whether aggravated circumstances exist at the adjudicatory hearing if aggravated circumstances were alleged in the petition or raised by written motion with notice to the parent(s) prior to the adjudicatory hearing. After the adjudicatory hearing, aggravated circumstances may be raised by written motion with notice to the parents prior to the hearing.<sup>69</sup>

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<sup>65</sup> I.C. § 16-1602(6) (Supp. 2017); 16-1619(6)(d). (If the case is governed by ICWA, a finding of aggravated circumstances does not relieve the Department of its responsibility to make active efforts to reunify the Indian family). *See, e.g., In Re Interest of Jamyia M.* 791 N.W. 2d 343 (Neb. 2010); *In the Matter of CR*, 646 N.W. 2d 506 (Mich. App. 2001).

<sup>66</sup> Permanency planning, reunification plans, and alternative permanent placement plans are further discussed in Chapters 6 and 7 of this manual.

<sup>67</sup> I.C. § 16-1602(6).

<sup>68</sup> I.J.R. 41(a).

<sup>69</sup> *Id.*

### 3.6 ICWA CONSIDERATIONS

It is critical that the court ensure compliance with ICWA.<sup>70</sup> Compliance with ICWA is essential to preserve the unique interests of the Indian child and the child's tribe and to avoid disruption and delay in both placements and court proceedings. The removal of a child prior to the shelter care hearing constitutes an emergency removal of the child under ICWA. ICWA and regulations adopted pursuant to ICWA impose specific standards and procedures for the emergency removal of an Indian child and impose preliminary responsibilities on the parties for ascertaining the child's status and notifying the child's tribe. Chapter 11 of the manual contains a detailed discussion of ICWA.

### CONCLUSION

Initiating a child protection case requires cooperation between the prosecutor, law enforcement, the Department, and any other individual or entity that may have relevant information regarding the child. Ensuring the safety and well-being of the child is paramount when evaluating a CPA case.

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<sup>70</sup> See generally 25 U.S.C. § 1901–1922 (2012).