

CHAPTER 4: Shelter Care

4.1 PURPOSE AND GOALS OF THE SHELTER CARE HEARING

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

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

The court's determination must also take into consideration the trauma to the child. The NCJFCJ has pointed out in the *Enhanced Resource Guidelines* that “[r]emoving a child from home, even when there is an imminent safety threat, is a life-altering experience for all those involved...”² Judges charged with determining whether to place the child in shelter care “are in a powerful and challenging position as removing a child from her or his parents will likely result in removing the child from their siblings, extended family, friends, activities, belongings, and community. Once removed children may be placed with adults and other children whom they do not know, who may not look like them, speak their language, or follow their family’s customs. They may be separated from school, community activities and adults they trust.”³

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.

¹ THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 2 (2009). Chapter 2 of this Manual contains a discussion on the process for evaluating child safety.

² NCJFCJ, Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 107 (2016) (<https://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%202005-2016.pdf>).

³ *Id.*

4.2 PROCEDURAL CONSIDERATIONS AT THE SHELTER CARE HEARING

A. *Timing*

The shelter care hearing must occur within 48 hours of the removal of the child from the home or within 24 hours of the removal of the offender from the home (excluding Saturdays, Sundays, and holidays).⁴

The shelter care hearing is usually the first court hearing in a CPA case, if: 1) the child has been removed from his or her home by a law enforcement officer; 2) the alleged offender is removed from the home by a law enforcement officer; 3) the petitioner in a CPA case moves the court for removal of a child or an alleged offender from the home; or 4) the child protection case was initiated by the expansion of a Juvenile Corrections Act case, pursuant to Idaho Juvenile Rule 16(b).⁵

The court's order resulting from the shelter care hearing is often the first order sanctioning the removal of the child from the home. Lack of necessary IV-E findings in the first order sanctioning the removal of the child from the home can result in the child's ineligibility for federal IV-E funds. The necessary findings are discussed below under section 4.3 – Key Findings at Shelter Care Hearings.

B. *Evidentiary Considerations*

The shelter care hearing is an informal hearing that is closed to the general public.⁶ The Idaho Rules of Evidence do not apply in shelter care hearings.⁷ Rather, the court may consider “[a]ny evidence . . . which is of the type which reasonable people may rely upon.”⁸ The shelter care hearing must be placed on the record in the CPA proceeding.⁹

C. *Exclusive Jurisdiction/Ongoing Duty to Disclose*

The court initiating the CP proceeding has exclusive, original jurisdiction over all proceedings arising under the Act.¹⁰ Furthermore, parties have an ongoing duty to inquire, and to inform the court as soon as possible, about any pending actions or current orders involving the child who is the subject of a child protection case. If there are conflicting orders, the CPA order is controlling.¹¹

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

⁴ I.C. §§ 16-1608(2)-(3) (2009).

⁵ *Id.*; § 16-1615(1) (Supp. 2016); I.J.R. 39(b).

⁶ I.C. § 16-1613(1).

⁷ I.R.E. 101(e)(6); I.J.R. 39(e), 51(b) (except as to privilege, jurisdiction, and aggravated circumstances determination).

⁸ I.C. § 16-1615(5)(e) (Supp. 2016).

⁹ I.J.R. 39(h); *see also* I.C. §16-1613 (Supp. 2014).

¹⁰ I.C. § 16-1603.

¹¹ I.C. § 16-1604(2).

1. *Judge.* A judge presides over the shelter care hearing and is responsible for ensuring fairness, due process and making the required decisions. Whenever possible, the judge should regularly preside over child abuse or neglect cases, be familiar with the workings of the child welfare system, and have broad knowledge of and experience with the services and placement options available in the community.
2. *Parents.* The CPA does not define “parent” for purposes of the Act.¹² As a matter of best practice, any person who qualifies as a parent for purposes of the termination of parental rights statute¹³ or for the adoption statute¹⁴ should be joined in the CPA proceeding. If reunification is not possible, the rights of these individuals will be involved in any permanency plan for the child. Their participation in the CPA proceeding will reduce delays in achieving permanency.

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

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

3. *Child’s Guardian or Legal Custodian.* If the child has a court-appointed guardian of the person, the guardian must be joined in the CPA proceeding.¹⁵ An individual who has legal custody of a minor pursuant to a court order must also be joined in the CPA proceeding.¹⁶ This could include a de facto custodian who has been awarded legal custody of a child and who was appointed prior to the initiation of the CPA proceeding.¹⁷

¹² I.C. § 16-1615(2) (Supp. 2016) (requiring notice to each parent and custodian). See Chapter 12 for a discussion of Idaho law regarding unwed fathers.

¹³ I.C. §§ 16-2002(11), (12), (15), (16) (defining parent for purposes of termination of parental rights); I.C. § 16-2007 (2009) (providing for required notice in a termination of parental rights case).

¹⁴ I.C. § 16-1505 (providing for required notice in an adoption case); I.C. § 16-1504 (Supp. 2016) (defining who must consent to adoption).

¹⁵ I.C. §§ 16-1611(1), (3) (2009) (requiring service of the summons and petition on a legal guardian and requiring notice to guardians). I.C. §§ 15-5-201 to 213 (regarding appointment of a guardian for a minor).

¹⁶ I.C. §§ 16-1610(2) (Supp. 2016) and 16-1611(3) (2009).

¹⁷ Pursuant to the CPA, only legal custodians are parties to a CPA proceeding. I.C. § 16-1611(3). Pursuant to the *De Facto* Custodian Act, a court can award legal and/or physical custody to a *de facto* custodian. §§ 32-1701 to -1705 (Supp. 2016). A petition for appointment as a *de facto* custodian may **not** be initiated through intervention in a CPA proceeding. I.R.C.P. 24(d). In addition, a foster parent may not petition to be deemed a *de facto* custodian. § 32-1703(4)(a).

4. *Department of Juvenile Corrections.* In a Rule 16 expansion case, the Department of Juvenile Corrections has standing as an interested party in the CP action, if the juvenile is in the custody of Juvenile Corrections.¹⁸
5. *Assigned Caseworker.* To provide the court with complete, accurate, and up-to-date information for the hearing, the caseworker with primary responsibility for the case should be present. When this is not possible, the worker's supervisor, who has been well briefed on the case, should be present.
6. *Indian Custodian/Child's Tribe and Tribal Attorney.* Immediate and ongoing efforts must be undertaken to ascertain whether the child is an Indian child and whether further efforts are needed to give notice as required by the Indian Child Welfare Act (ICWA).¹⁹ An Indian child's tribe has the right to notice and to an opportunity to participate in all hearings involving the child.²⁰ For Indian children, the tribe often has information regarding the child and the family that is crucial to the court's review of the Department's placement determination regarding the child.
7. *County Prosecutor or Deputy Attorney General.* In child protection cases in Idaho, the state may be represented either by the county prosecutor or a deputy attorney general.²¹
8. *Attorney(s) for Parents.* Because of the critical strategic importance of the shelter care hearing, it is essential that parents have meaningful legal representation at the hearing. Most parents involved in these proceedings cannot afford counsel. Idaho law requires that the notice to the parents inform them of their right to counsel.²²

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

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

9. *Attorney for Child, Guardian ad Litem (GAL) and/or Attorney for GAL.* Idaho law requires the appointment of either an attorney for the child or a guardian *ad litem* for the

¹⁸ I.J.R. 16(f). See Chapter 12 for more information on Rule 16 expansion cases.

¹⁹ Chapter 11 discusses the requirements of the ICWA in detail.

²⁰ 25 U.S.C. §§ 1912(a), 1911(c) (2012).

²¹ I.C. § 16-1610(1)(a) (Supp. 2016).

²² I.C. § 16-1611(3) (2009); I.J.R. 37(d).

child and counsel for the guardian *ad litem*, or both, to serve at each stage of the proceeding. The recommended best practice is for the court to make these appointments at the time the petition is filed.

Children under Twelve. For children under the age of twelve, Idaho Code section 16-1614(1) provides that the court shall appoint a guardian *ad litem* for the child and shall appoint counsel to represent the GAL. If no GAL is available, the court must appoint counsel for the child. In appropriate cases, the court may appoint a GAL and an attorney for the GAL as well as counsel to represent the child.

Youth Twelve and older. Idaho Code section 16-1614(2) provides that the court shall appoint counsel to represent the child and may in addition, appoint a GAL. When appointment of counsel is not practicable or not appropriate, the court may appoint a GAL for the child and shall appoint counsel to represent the GAL.²³ Federal law strongly suggests that children should have individual legal representation in cases of child abuse and neglect, including at the critical shelter care hearing.²⁴

10. ***Court Clerk and Suitable Technology.*** The clerk should have specialized training in case processing of child protection cases. Recording equipment must be of appropriately high quality to allow for the efficient, cost-effective, and timely production of a hearing transcript, when needed.
11. ***Security Personnel.*** Security personnel should be available during all child abuse and neglect hearings. In all courts, security personnel must be immediately available to the court whenever needed. In some cases, security concerns may be serious enough to require guards or bailiffs to be present during all hearings.
12. ***Interpreters, if applicable.*** If a parent or other essential participant is not fluent in English or has a requirement for language assistance, a certified interpreter must be present. If there is more than one essential participant who needs an interpreter, more than one interpreter may be required. For example, if two parents are represented by one attorney then one interpreter may serve for both parents. However, if parents are represented by different attorneys, then one interpreter will be needed for each parent. If one or more non-English speaking witnesses will be called to testify, then another interpreter will be needed for the witnesses.

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

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

²³ I.C. § 16-1614(2) (Supp. 2016).

²⁴ See 42 U.S.C. § 5106a (2012) (The availability of federal grant funding under the Child Abuse Prevention and Treatment/Adoption Reform Act will be based in part on whether states appoint representation for children in child abuse actions).

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

If a witness is unavailable to testify in court, the witness can testify by telephone,²⁵ and well-prepared written reports, such as medical or police reports, can be made available prior to the hearing. The use of reports is a less desirable option, as the preparer of the report is not available for questioning, but the less stringent rules applicable to shelter care hearings make this an option. Finally, the court may adjourn the hearing for brief periods,²⁶ allowing the currently available witnesses to testify at the originally scheduled shelter care hearing and setting a continued hearing for the next available time the remaining witness(es) can be present. Continuances must be kept as short as possible, and calendars rearranged as necessary, to enable the court to make its decision as soon as possible.

Because shelter care hearings are not open to the public²⁷, persons not on the list of those whose attendance is required at shelter care hearings should not be present. Nonetheless, a number of additional persons may be required as witnesses and should be available to testify, if needed:

1. *Age-Appropriate Children.* Children may be required as witnesses at a shelter care hearing. Whether their testimony is included should depend upon many factors, including the age of the child, the physical and emotional condition of the child, and the potential trauma that might occur from requiring the child to participate in the hearing. If the child's testimony is deemed necessary, alternative means of testifying should be explored.²⁸ If the child is summoned as a witness, the child may have a friend or person who has a supportive relationship with the child present at the hearing.²⁹
2. *Extended Family Members.* The Department has an obligation to contact the child's extended family within 30 days of the child's removal from his or her home.³⁰ Extended family includes adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling, and other adult relatives of the child (including any other adult relatives suggested by the parents).³¹ When relatives are either already actively involved with a child or are interested in caring for a child, their testimony can be valuable at a shelter care hearing. Relatives can provide essential information about

²⁵ I.R.C.P. 7.2; I.J.R. 29.

²⁶ I.J.R. 39(f).

²⁷ I.C. § 16-1613(1) (2009).

²⁸ I.J.R. 51(b) and I.R.E. 101(e)(6) provide that the Rules of Evidence do not apply at shelter care hearings. The caseworker's testimony as to the child's statements would generally be hearsay, but such hearsay is admissible at shelter care hearings. *See also* I.C. §§ 9-1801, *et seq.* (2010) (the Uniform Child Witness Testimony by Alternative Methods Act).

²⁹ I.C. § 16-1613(2) (2009).

³⁰ 42 U.S.C. § 671(a)(29) (from the Sex Trafficking and Strengthening Families Act of 2014, Pub.L.No. 133-183).

³¹ *Id.*

the situation that can help protect the child in the home (thus allowing the court to return the child home), or, alternatively, they can become the caretaker of the child. It is helpful for the court to observe the child's relatives and to be able to speak to them directly at the hearing.

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

4.3 KEY FINDINGS AT SHELTER CARE HEARINGS

A. *Petition*

Idaho law requires that the court find that a petition has been filed under the Child Protective Act.³² The petition must describe the facts that bring the child within the jurisdiction of the CPA, and it must be verified.³³

A recommended best practice is that the petition be accompanied by one or more affidavit(s) in support from the social worker, law enforcement officer, or others involved in the case. The affidavit(s) should describe all the circumstances of the removal, the facts that bring the child within the jurisdiction of the CPA, the reasons why it is contrary to the welfare of the child to remain in the home, the reasons why it is in the best interests of the child to be placed in temporary shelter care pending the conclusion of the adjudicatory hearing and the efforts made to prevent the need to remove the child from the home. The affidavit(s) should include as many of the relevant facts discussed above as possible and a thorough evaluation of the child's safety at the time of shelter care. Detailed affidavit(s) will apprise parties and participants of relevant evidence and improve decision making in the case.

³² I.C. § 16-1615(5)(a).

³³ I.C. § 16-1610(2)(a) (Supp. 2016). Chapter 3 of this manual discusses the preparation of the petition.

B. Jurisdiction

Idaho law requires that the court find that there is reasonable cause to believe that the child comes within the jurisdiction of the court under the CPA.³⁴ A child is within the jurisdiction of the court pursuant to the Child Protective Act when the child is living or found in Idaho and any one of the following circumstances is present:

- The child is abused, neglected, or abandoned.
- The child is homeless.
- The child's parents or legal custodians fail to provide a stable home environment, or
- The court has taken jurisdiction over another child living or having visitation in the same household, and the child is at risk of being abused, neglected or abandoned.³⁵

C. Contrary to the Welfare/Best Interests

1. Required Finding

The central concern of the shelter care hearing is whether the child can be safely returned home. Thus as part of the shelter care order, Idaho law requires the court to determine whether it is contrary to the welfare of the child to remain in the home and whether it is in the best interest of the child to remain in temporary shelter care pending the adjudicatory hearing.³⁶ Unlike the federal requirement discussed in the following paragraph, state law requires that the contrary to the welfare finding be made at both the shelter care hearing and adjudicatory hearing, even if the shelter care order is not the first order sanctioning removal.³⁷

Federal law requires a parallel finding as a condition to preserving federal IV-E match funds for otherwise eligible children. If the shelter care order is the *first court order* sanctioning removal of the child from the home, federal law requires that the court find that: “Continuation in the home from which removed would be contrary to the welfare of the child.”³⁸ This finding must be *case specific* and it must be *documented* in the court order.³⁹ If this finding is not timely made, an otherwise eligible child will not be eligible for federal IV-E foster care reimbursement and/or adoption assistance funds, and the omission cannot be corrected at a later date to make the child eligible.⁴⁰ The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the specific circumstances making removal in the child’s best interests. If the court makes the case-specific finding, but fails to document the finding in the order, the omission can only be corrected with a transcript of the hearing that documents the case-specific finding.⁴¹ If the child was taken into custody pursuant to an order to

³⁴ I.C. § 16-1615(5)(b). If the court does not find reasonable cause, then the court must dismiss the petition. I.C. § 16-1615(10) (Supp. 2016).

³⁵ I.C. § 16-1603 (2009) (grounds for a CPA case). Chapter 3 discusses these grounds in detail.

³⁶ I.C. §§ 16-1615(5)(d)-(e) (Supp. 2016).

³⁷ *Id.*, I.C. § 16-1619(6).

³⁸ 42 U.S.C. §§ 672(a)(1), (a)(2)(A)(ii) (2012).

³⁹ 45 C.F.R. § 1356.21(d) (2012).

⁴⁰ 45 C.F.R. §§ 1356.21(b)(1), (c).

⁴¹ 45 C.F.R. § 1356.21(d).

remove the child on the summons, then that order is the first order sanctioning removal. The documented, case-specific best interests finding must be made in that order.⁴²

2. Background Information Relevant to the Child's Safety

The *ABA Child Safety Guidelines for Judges and Attorneys*⁴³ offers a framework for gathering information relevant to determining whether the child can be safely returned home. The evaluation of the child's safety must be based on information observed or gathered from credible sources. Six background questions should be asked to guide the analysis of the child's safety in each case.

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

⁴² See Chapter 3 of this manual regarding orders to remove the child.

⁴³ LUND & RENNE, *supra* note 1, pp. 3-5.

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

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

3. Framework for Safety Decision Making: Threats, Child Vulnerability, and Parental Protective Capacity

The ABA *Child Safety Guidelines for Judges and Attorneys* also offers a framework for analyzing whether the child can be safely returned home.

a. *Threats of Danger*

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

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

When considering threats of danger, the focus should be on the child's own home and also should be on the individuals who function as the child's parents (e.g.: biological parents, live-in boyfriend, grandmother).⁴⁴

b. *Child's Vulnerability*

Threats of danger can jeopardize a child's safety when a child is vulnerable. Considering a child's vulnerability involves both knowing about the child's ability to protect him or herself from threats and knowing how the child is able to care for him or herself. Factors relevant to this determination include the child's age, physical ability, cognitive ability, developmental status, emotional security, and family loyalty.⁴⁵

c. *Parental Protective Capacities*

The parents' protective capacities must be weighed against the existing threats of danger. The key question on this factor is whether the parent(s) demonstrate sufficient capacity to control and manage the threats. Protective capacities are cognitive, behavioral, and emotional qualities supporting vigilant protectiveness of children. They are fundamental strengths preparing and empowering a person to protect. All adults in the home should be assessed for protective capacities.⁴⁶

D. Reasonable Efforts to Eliminate the Need for Shelter Care

Under Idaho law, the court may order a child placed in shelter care at the shelter care hearing only if the court finds that: 1) the Department "made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful;" OR 2) the Department "made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventive services."⁴⁷

Federal law requires a similar finding by the court – that the Department made reasonable efforts to prevent the unnecessary removal of the child from his or her home.⁴⁸ Where the child is removed because of immediate danger and the Department has had a limited opportunity to provide services to prevent removal, the court should examine the circumstances and consider making the following finding from Idaho Code § 16-1619(6) (b): the Department made reasonable efforts to prevent removal but was not able to safely provide preventive services. A finding that the Department did not make reasonable efforts, or that reasonable efforts were not required, will preclude federal funding.

This federal reasonable efforts finding must be made within **60 days** after the child is removed from the home. If this finding is not made within 60 days after removal (or is not made

⁴⁴ LUND & RENNE, *supra* note 1, pp. 9-10.

⁴⁵ *Id.* at 11-12.

⁴⁶ *Id.* at 13-16.

⁴⁷ I.C. § 16-1615(5)(b) (Supp. 2016). Idaho law requires that the reasonable efforts to prevent removal finding be made at BOTH the shelter care and adjudicatory hearing; I.C. §§ 16-1615(5)(b), 16-1619(6).

⁴⁸ 42 U.S.C. §§ 671(a)(15)(B), 42 U.S.C. §§ 672(a)(1) to (2) (2012); 45 C.F.R. § 1356.21(b) (2012).

in the manner required by federal law), an otherwise eligible child will lose eligibility for federal foster care match funds, and the omission **cannot be corrected at a later date** to reinstate the child's eligibility.⁴⁹

To ensure compliance with the federal requirement, the recommended best practice is to make the reasonable efforts finding at the shelter care hearing, if possible. The federal finding may also be made at the adjudicatory hearing, but is timely only if the adjudicatory hearing occurs within 60 days after the child is removed from the home.

Federal law requires that the finding be **case specific and documented** in the court's order. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the reasonable efforts that were made and the circumstances that made further efforts unreasonable.⁵⁰ If the court makes a case-specific finding on the record at the hearing, but fails to document it in the court's order, the omission can only be corrected with a transcript of the hearing.

The only exception to the federal requirement for a reasonable efforts finding is where the court finds that the parent subjected the child to aggravated circumstances.⁵¹ Generally, a finding of aggravated circumstances would be made at a shelter care hearing only upon the stipulation of the parties.

What constitutes reasonable efforts depends on the time available in which such efforts could be made.⁵² In many cases, IDHW's first contact with the family occurs as part of the incident giving rise to the petition. Efforts of third parties, including law enforcement, may constitute reasonable efforts. In other cases, the Department has had prior contact with the family. By taking a careful look at the Department's efforts, the court can better evaluate both the danger to the child and the ability of the family to respond to help. In any determination of reasonable efforts, the child's health and safety are the paramount concerns.⁵³

4.4 PARENT HAVING JOINT LEGAL OR PHYSICAL CUSTODY

Under Idaho law, the court must determine whether the child can be placed in the temporary sole custody of a parent having joint legal or physical custody.⁵⁴ In some cases there is reason to believe that the child has been abused or neglected in one parent's home but that there is another parent with joint physical or legal custody who could provide a safe home for the child pending further proceedings. The CPA provides for the court to determine that the child "could not" be placed in the temporary sole custody of a parent having joint legal or physical custody before placing a child in shelter care. To determine if a child "can" be placed in the temporary sole

⁴⁹ 45 C.F.R. § 1356.21(b)(1).

⁵⁰ 45 C.F.R. § 1356.21(d).

⁵¹ 45 C.F.R. § 1356.21(b)(3); 42 U.S.C. § 671(15)(D)(i); § 16-1619(6)(d) (Supp. 2016).

⁵² YOUTH LAW CENTER, MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD (2000) available at http://familyrightsassociation.com/bin/white_papers-articles/reasonable_efforts/making_reasonable_effort.pdf (last visited Mar. 2, 2015); DEBORAH RATTERMAN BAKER ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION (1989).

⁵³ 42 U.S.C. § 671(a)(15)(A) (2012); I.C. § 16-1601 (2009).

⁵⁴ I.C. § 16-1615(5)(c) (Supp. 2016).

custody of a parent, the court must consider the child's safety and whether the placement is in the child's best interest.

4.5 PROTECTIVE ORDER

The court may issue a protective order that permits the child to return home safely.⁵⁵ Where the court finds that the child is within the jurisdiction of the court, it also may find that "a reasonable effort to prevent placement outside the home could be affected by a protective order safeguarding the child's welfare...."⁵⁶ The determination of whether such a protective order would be appropriate should focus on whether a safety plan can be put in place to control threats of danger to the child.⁵⁷

"Protective order" is defined in the CPA in Idaho Code section 16-1602(4) as an order issued by the court prior to the adjudicatory hearing to enable the child to remain in the home pursuant to Idaho Code § 16-1615(8). Protective orders are particularly applicable in cases where a child has been abused by one parent but not the other parent. In such situations, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order against the other parent that ensures the safety of the child and the non-abusing parent.⁵⁸ Such a protective order may include, for example, orders removing the allegedly-abusive parent from the home or restraining the allegedly-abusive parent from contacting or visiting the child.

IJR 39(j) clarifies that the court may enter a protective order instead of placing the child in shelter care, but the court may also enter a protective order in addition to placing the child in shelter care. For example, the court may enter an order placing the child in shelter care, and the temporary foster placement is with a family member. A protection order may be needed to restrain the allegedly-abusive parent from contacting or visiting the child, or contacting the foster parent.

4.6 PLACEMENT CONSIDERATIONS

If the court determines that there is reasonable cause to believe that the child comes within the jurisdiction of the CPA, then the court has two – and **only** two – options with respect to placement of the child.⁵⁹ The first option is placement of the child in the Department's temporary custody. The other is to return the child home (with or without a **protective order**). Returning a child home under the **protective supervision** of the Department is **not** an option at the shelter care hearing. This is an option only after the adjudicatory hearing.⁶⁰ In addition to the fact that the CPA does not authorize returning the child home under the protective supervision of the Department at the shelter care hearing, returning the child under protective

⁵⁵ I.C. § 16-1615(8).

⁵⁶ *Id.*

⁵⁷ Safety Plans are discussed in Chapters 2 and 3. The safety principles relevant to this determination are discussed earlier in this chapter.

⁵⁸ I.C. §§ 16-1615(8), 16-1602(4), 39-6306 (2011).

⁵⁹ I.C. §§ 16-1615(5), (8) or (9) (Supp. 2016).

⁶⁰ I.C. § 16-1619(5).

supervision also compromises the child's eligibility for IV-E match funds, should the child later be removed from the home.

Where services are available that would enable the child to safely return home pending the adjudicatory hearing, the parents are willing to participate, and IDHW is willing and able to provide the services, IDHW and the parents may enter into a stipulation for entry of a **protective order**. The stipulation/protective order should specifically state the services in which the parent is to participate, the services that IDHW is to provide, and the specific conditions for the child to remain in the home pending the adjudicatory hearing.⁶¹ For example, where the child is drug-endangered, the parties might stipulate and the court might order, that the parents submit to drug testing and the child remain in the home only if the parents have no failed tests.

Idaho law requires:

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

- (a) A fit and willing relative.
- (b) A fit and willing non-relative with a significant relationship with the child.
- (c) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code, with a significant relationship with the child.
- (d) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code.⁶²

Federal law also requires that the Department place children with a relative so long as the relative meets the Department's "child protection standards."⁶³ Even if relatives or other responsible adults are not available to assume full-time care of a child, they may be available as a resource to supervise visitation when necessary.

Idaho law requires court approval of an out-of-state placement.⁶⁴ Often out-of-state placement is considered to accomplish the above placement priorities. When considering an out-of-state placement option, thought should be given to the impact on the reunification of the family and the opportunity for meaningful visitation between the parents and their children and between siblings. If the court approves the Department's request for out-of-state placement, immediate attention must be paid to the requirements of the Interstate Compact on the Placement of Children (ICPC). If the child will be placed out of state, the placement must be made in accordance with the ICPC.⁶⁵

The "least restrictive environment" language of this provision of the statute means that children should not routinely be placed in group home shelters when the child is capable of

⁶¹ For more information on stipulations, see page 51.

⁶² I.C. § 16-1629(11).

⁶³ 42 U.S.C. § 671(a)(19) (2012).

⁶⁴ I.C. §§ 16-1629(8) (Supp. 20146), 16-2102(Art.III)(a) (2009), I.J.R. 43(6) .

⁶⁵ I.C. §§ 16-2101 to -2107. The ICPC is discussed in Chapter 12 of this manual.

functioning in the family-like setting of an individual foster home.⁶⁶ A best practice recommendation is that when the most appropriate setting for the child is not immediately available, the court should inquire when a more family-like setting will become available or what services the child needs so that the child can be successful in a more family-like setting.

When the court places a child in shelter care, the authority to determine the child's placement is vested in the Department.⁶⁷ The statute further provides that the agency's determination as to where the child will live is subject to judicial review by the court, and subject to judicial approval when contested by any party. Issues as to placement and judicial review of agency placement decisions are further addressed in Chapter 5.

4.7 INDIAN CHILD WELFARE ACT (ICWA)

If the child is an Indian child, the proceeding will be subject to the Indian Child Welfare Act, and it is critical that the court ensure compliance with the ICWA.⁶⁸ Compliance with the 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 first and most critical issue is to determine if the child is an Indian child as defined by the ICWA, and therefore, whether ICWA applies. At the shelter care hearing, the court is required to inquire of the participants whether they know or have reason to know that the child is an Indian child.⁶⁹ U.S. Bureau of Indian Affairs regulations provide that where the court has reason to know the child is an Indian child, but does not have sufficient evidence to determine that the child is not an Indian child, the court must proceed as if the child is an Indian child. The regulations also define the term "reason to know."⁷⁰

If the child is an Indian child, the ICWA has procedural and substantive requirements that apply in a CP proceeding, and in particular to the shelter care hearing. This includes provisions for notice to the Indian custodian and the child's tribe, tribal participation, standards for removal of an Indian child from a parent or Indian custodian, and placement preferences, among other issues. Chapter 11 of this manual contains a detailed discussion of the Indian Child Welfare Act.

If further efforts are needed to determine if the child is an Indian child, to give notice as required by the ICWA, or to otherwise comply with the requirements of the act, the court should enter appropriate orders. It is very important to timely permanency for the child that efforts be made as early as possible to determine if the child is an Indian child.

⁶⁶ I.C. § 16-1629(11) (Supp. 2016).

⁶⁷ I.C. § 16-1629(8).

⁶⁸ 25 C.F.R. §23-107(a). Idaho Code §16-1615(6)(Supp. 2016) has not been revised since the federal regulations were adopted. At the time the Idaho statute was adopted federal guidelines required that the judge must inquire whether any person has "reason to believe" that the child is an Indian child. The standards for determining the child's status as an Indian child changed to the "know or reason to know" standard in the regulations. These regulations now provide the minimum requirement for the application of ICWA. 25 C.F.R. §23.101.

⁶⁹ I.C. § 16-1615(6) (Supp. 2016).

⁷⁰ 25 C.F.R. 23.107.

4.8 ADDITIONAL CONSIDERATIONS

A. Examinations, Evaluations, or Immediate Services

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

B. Parental Visitation

If a child cannot be returned home after the shelter care hearing, immediate parent-child visitation is essential for promoting reunification.⁷¹ Judicial oversight of visitation helps to ensure that visitation starts promptly, it is scheduled frequently, and that unnecessary supervision and restrictions are not imposed. Protective orders can include provisions for visitation with supervision or other conditions to ensure the safety of the child. When issuing a no-contact order, the court should consider the impact the order may have on visitation and reunification, and whether conditions can be included that will ensure the safety of the child while allowing visitation.

C. Maintaining the Child's Connections to the Community, Sibling Relationships-and Educational Stability

The shelter care placement for the child has important ramifications for the child's long-term success. Considerations to maintain the child's connections should be taken into account when making the placement decision.

In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) imposed a number of requirements on state agencies to improve outcomes for foster children by emphasizing their connections.⁷²

Regarding sibling placement, Fostering Connections requires that reasonable efforts be made to place siblings together in the same foster home, or other placement, unless such a joint placement would be contrary to the safety or well-being of any of the siblings. If siblings are not placed together, the state must provide for frequent visitation or other ongoing interaction between the siblings, unless doing so would be contrary to the safety or well-being of any of the siblings.⁷³ Maintaining sibling bonds is also a policy of Idaho law.⁷⁴ Upon entry of an order of

⁷¹ P. Hess & K. Proch, *Visiting: The Heart of Reunification*, in B. PINE, R. WALSH, A MALUCCIO, EDS., TOGETHER AGAIN: FAMILY REUNIFICATION IN FOSTER CARE, 119-140 (Child Welfare League of America, 1993); M. White, et al., *Factors in Length of Foster Care: Worker Activities and Parent child Visitation*, 23 J. OF SOCIOLOGY & SOC. WEL., 75 (1996); C. Mallon & B. Leashore, CHILD WELFARE, 95-99 (2002).

⁷² Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 122 Stat. 3949 (2008).

⁷³ 42 U.S.C. § 671(a)(31) (2012).

shelter care, state law requires the court to inquire “about the department’s efforts to place the siblings together, or if the department has not placed or will not be placing the siblings together, about a plan to ensure frequent visitation or ongoing interaction among the siblings, unless visitation or ongoing interaction would be contrary to the safety or well-being of one (1) or more of the siblings.”⁷⁵

Fostering Connections also requires that the Department ensure that the child remains in his or her school of origin or, if such enrollment is not in the child’s best interest, to provide immediate and appropriate enrollment in a new school. The Act also requires the Department to monitor the child’s school attendance.⁷⁶ State law requires that upon entry of the shelter care order, the court ask about the department’s efforts to keep school aged children in the school which the child is currently attending.⁷⁷ For example, it may be possible to transport the child to the school of origin and there may be assistance available for this purpose.

Additional best practice recommendation is for the court to inquire about the Department’s efforts to maintain the child’s other connections, and where appropriate, to initiate a discussion about options for maintaining those connections.

D. *Child Support*

Idaho law authorizes a court to order a parent or other legally obligated person to provide child support for a child in the Department’s custody. Such support must be a “reasonable sum that will cover in whole or in part the support and treatment of the child.”⁷⁸

4.9 ADDITIONAL ACTIVITIES AT THE SHELTER CARE HEARING

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

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

B. *Advising Parties of their Rights*

The court is required to advise the parties of their rights. This specifically includes the right to court-appointed counsel, where applicable.⁷⁹ Even when the parties are represented at the hearing, the court should explain the nature of the hearing and the proceedings that will follow.

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

- The purpose and scope of the hearing.

⁷⁴ I.C. § 16-1601(5) (Supp. 2018)

⁷⁵ I.C. § 16-1615 (7)(b).

⁷⁶ 42 U.S.C. § 671(a)(30) (2012).

⁷⁷ I.C. § 16-1615 (7)(a)(2016)

⁷⁸ I.C. § 16-1628 (1).

⁷⁹ I.J.R. 39(g).

- The possible consequences of the proceeding, including the possibility that a petition to terminate parental rights may be filed if the child has been in the temporary or legal custody of the department for fifteen of the most recent twenty-two months.
- The right of parties to present evidence and cross-examine witnesses.
- That failure to appear at future hearings could result in a finding that the petition has been proved, and the issuance of orders temporarily or permanently transferring legal custody of the child.⁸⁰

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

In most cases, the next hearing will be the adjudicatory hearing. A number of important considerations make the timing of the adjudicatory hearing very sensitive. Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.⁸¹ Idaho law further requires that a pretrial conference be held three to five days prior to the adjudicatory hearing and provides for both IDHW and the guardian *ad litem* to file written reports prior to the adjudicatory hearing.⁸² As discussed previously in this chapter, federal law requires the court to make a documented, case-specific finding as to whether the agency made reasonable efforts to prevent the need for placement of the child in foster care and requires that this finding be made within 60 days from the date the child was removed from the home.

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

Sometimes, an essential participant, such as a parent, may be in jail or prison or a child may be in detention or in the custody of juvenile corrections. The court should address whether transport orders will be needed to ensure the presence of all essential participants at the next hearing. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

D. *Agreements by the Parties*

Parties are sometimes willing and able to enter into stipulations prior to or at the shelter care hearing. Such stipulations may expedite the litigation and simplify the early stages of the

⁸⁰ I.J.R. 39(g).

⁸¹ I.C. § 16-1619(1) (Supp. 2016).

⁸² I.C. §§ 16-1616 (2009), 16-1619 (2) (Supp. 2016), §16-1633(2) (Supp. 2016).

proceedings. Idaho Juvenile Rule 38 governs such stipulations. It provides that stipulations shall be made part of the record and are subject to court approval. It is a best practice recommendation that parents appear before the court to place the stipulation on the record. Rule 38 further provides that “[t]he court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interest of the child.”

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

ICWA imposes procedural requirements before the parent of an Indian child can consent to the placement of an Indian child in foster care. These requirements limit the ability of parents to consent once a child protection proceeding has been initiated. Chapter 11 of this manual contains a detailed discussion of the specific additional requirements for voluntary placements in foster care.