IDAHO CHILD PROTECTION MANUAL

A practical guide for judges and attorneys

Fifth Edition

The Supreme Court of the State of Idaho
Administrative Office of the Court
2018

ACKNOWLEDGEMENTS

The 2018 Fifth Edition of the Idaho Supreme Court Child Protection Committee's "Idaho Child Protection Manual" began as a response to new state and federal child welfare laws passed over the last three years. It turned into a broader opportunity to further strengthen and enhance this valuable resource for judges and attorneys.

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CHAPTER 1: Introduction

1.1 PURPOSE OF THIS MANUAL

This manual is published by the Idaho Supreme Court Child Protection Committee (Committee). The Committee was convened to study ways to strengthen and enhance Idaho court processes in the area of child protection and to work with judges, the Idaho Department of Health and Welfare (IDHW), guardians *ad litem*, the Idaho Department of Juvenile Corrections, the Idaho Attorney General's Office, prosecutors, and public defenders to improve outcomes for children in the child protection system in Idaho. The committee's membership is both professionally and geographically diverse.[1]

1.2 KEY PRINCIPLES GUIDING CHILD PROTECTION CASES IN IDAHO

The work of the Committee has been guided by state and federal law governing child protection cases and is informed by the following principles:

1. *Ensure the Safety, Permanency and Well-Being of the Child.* The policy of the State of Idaho is that "[a]t all times the health and safety of the child shall be the primary concern" in Child Protective Act (CPA) cases.[2] Judges, attorneys, social workers, guardians *ad litem* and others working in the child protection system are responsible for ensuring the physical, mental and emotional health, and educational success of all children under the supervision of the court.

2. *Keep Families Together*. Consistent with the Idaho Child Protective Act, "[t]he state of Idaho shall . . . seek to preserve, protect, enhance and reunite the family relationship."[3] It is also the policy of the state of Idaho to "maintain sibling bonds by placing siblings in the same home when possible…unless such contact is not in the best interest of one (1) or more of the children."[4] The child's family - barring insurmountable safety issues - is the first choice for permanency. When return to a parent is inappropriate, placement with kin or a responsible person with a significant relationship with the child is the first priority. The court system and other stakeholders should use their authority to ensure that social and protective services are immediately available to families whose children may be abused or neglected so that parents have a fair opportunity to become competent and safe

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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.

[1] Information on Child Protection Committee, Idaho Supreme Court, http://isc.idaho.gov (last visited on March 30, 2018).

[2] I.C. § 16-1601 (2009).

[3] I.C. § 16-1601 (2009).

[4] I.C. § 16-1601(5) (Supp. 2018),.

caretakers. The services should be easily accessible, adequate, appropriate, and delivered in a culturally competent framework. No child should exit foster care without a life-long connection to a caring and responsible adult.

3. *Provide Judicial Oversight.* The best practice is that one judge presides over the entire child protection case from the shelter care hearing through permanency. Following a case from start to finish offers the judge an opportunity to monitor the impact of decisions on the child, creates the best possibility of ensuring that case plans are family-centered, and helps ensure that the needs of the child and family are met in a timely way. Judges have a responsibility to provide individual case oversight as well as system oversight and leadership. The judge must hold all stakeholders, including the court, responsible to ensure safe, timely permanency and well-being for children and families. Judges must provide fair, equal, effective and timely justice for children and families throughout the life of the case. The court is the focal point for ensuring that all participants in the proceedings, including IDHW and other agencies, are accountable for providing reasonable and necessary services to children and families.

4. *Ensure Competent Representation.* In child protection proceedings, attorneys for the state, the parents, the guardian *ad litem*, and the children should be well trained and culturally competent.[5] Representation should be available to parents, the child's guardian *ad litem*, and to the child at the earliest opportunity (preferably upon filing of the petition but no later than the first hearing). The magistrate judge in a CPA case should take active steps to ensure that the parties have access to competent representation. Attorneys and other advocates identify key legal issues and determine, to a large extent, what information is presented to a judge. Attorneys must provide competent and diligent representation in order for juvenile and family courts to function effectively.

5. *Ensure Access to Justice*. Judges must ensure that the courtroom is a place where all who appear are treated with respect, patience, dignity, courtesy, and as part of the problem-solving process. Courts must be child and family centered. Children and parents must have the opportunity to be present in court and meaningfully participate in their case planning and court process. It is the responsibility of judges to see that all children and each parent are afforded their constitutional rights to due process.

6. *Cultivate Cultural Responsiveness*. Courts must be welcoming and respectful to people of all races, legal, ethnic, and socio-economic statuses, honoring family in all its forms. All members of the court system must recognize, respect, and seek to preserve the ethnic and cultural traditions, mores, and strengths of those who appear before the court. Judges must become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect decision-making.

7. *Avoid Delay*. The court should ensure timely decision making at all stages of the child

[5] The Idaho State Bar provides an opportunity for attorneys to obtain a Child Welfare Law Specialist certification through the National Association of Counsel for Children (NACC). Additional information on this certification can be found at their website, Child Welfare Law Specialist Certification, National Association of Counsel for Children, https://www.naccchildlaw.org/ (last visited on February 5, 2019).

protection case, from shelter care through the reunification or implementation of another permanency plan. Placement in foster care often has long-term negative consequences for children. Methods to reduce unnecessary delays in achieving permanency include:

- *Avoiding Continuances.* The court should avoid granting continuances, ensuring efficient management of the case and timely decision making on behalf of the child.
- *Ensuring Early Identification of Family Members.* Early identification of parents and extended family members helps to ensure timely permanency for children. Failure to timely engage parents can delay the court process. In addition, such family members may provide the most appropriate placement for the child.
- *Monitoring Concurrent Planning.* Idaho law requires IDHW to engage in concurrent planning.[6] Such planning is crucial to reduce delays in achieving permanency for a child should reunification efforts fail. It is the responsibility of the court to ensure that IDHW is actively pursuing concurrent planning throughout the life of the case.

8. *Front Load Services.* For children, the prolonged uncertainty of not knowing whether they will be removed from home, whether and when they will return home, when they might be moved to another foster home, or whether and when they may be placed in a new permanent home is frightening. This uncertainty can seriously and permanently damage a child's mental health and emotional development. All stakeholders in the child protection system should be attentive to the statutory time deadlines in child protection cases and should move cases forward as expeditiously as possible. To achieve better outcomes in cases, the services should be "front-loaded." This means that all stakeholders must move quickly to assess the facts of the case, identify the appropriate parties, and provide the appropriate services for the family at the earliest possible stage. Effective practice includes early identification and involvement of parents and other relatives, early engagement of parents in the court process, as well as early voluntary involvement of the family in remedial services. Other important court practices include establishing firm court dates and times with tight control over continuances and rapid distribution of the court's orders to all parties.

9. *Recognize Permanency Priorities.* Reunification is usually the primary goal in a child protection case. If a child cannot be safely reunified with his/her parents, the options which provide the most permanency for children, in descending order, are:
    a. Termination of parental rights and adoption
    b. Long-term guardianship
    c. Another permanent planned living arrangement (APPLA)

10. *Identify Indian Children as Quickly as Possible to Ensure Compliance with the Indian Child Welfare Act.* Permanency delays for children can often be caused because the child is not identified as an Indian child early in the case. When an Indian child is not identified, the Indian Child Welfare Act requirements are not complied with and

[6] I.C. § 16-1621(3)(d) (Supp. 2014). Concurrent planning is defined as "a planning model that prepares for and implements different outcomes at the same time." § 16-1602(14) (Supp. 2014).

permanency for the child is at risk. Throughout this manual, ICWA requirements are discussed. Chapter 11 provides a thorough overview of ICWA.

11. *Ensure the Availability of IV-E Federal Match Funds.* From the outset of the case, judges should make timely, accurate, and complete IV-E findings to ensure the availability of federal IV-E funding for each eligible child. Chapter 12 discusses Federal IV-E finding requirements in detail.

12. *Ensure Frequent Review after Termination of Parental Rights to Achieve Timely Permanency.* When parental rights have been terminated, the court should continue to frequently review the case until permanency for the child has been achieved.

13. *Understand the Need for Post-Adoptive Subsidies and Services.* Separating from family and finding permanency with a new family are difficult processes for children. As a result, children and adoptive families often have unique needs. The availability of post-adoptive subsidies and services can be the determining factor in the long-term success of many adoptions. To support adoptive families, participants in the child protection case should be aware of the availability of post-adoptive resources.

14. *Expedite Appeals.* An expedited appeals process for cases involving termination of parental rights and adoption is crucial to permanency. Idaho Appellate Rules 11.1, 12.1 and 12.2 provide a framework for expedited appeals directly to the Supreme Court in Child Protective Act cases and in related matters involving children. Attorneys and judges should strive to process appeals within the expedited timeframes established by these rules and to avoid continuances or extensions of time whenever possible.

15. *Demonstrate Leadership and Foster Collaboration.* The court should encourage and promote collaboration, cross-training, and mutual respect among key stakeholders in the child welfare system, including IDHW, other social service agencies, attorneys, guardians *ad litem*, tribal representatives and staff, community members, court staff, foster parents, and any other relevant participants. Judges and other professionals in the system should help the larger community to understand that child protection is a community responsibility.

16. *Gather, Analyze, and Use Data to Improve Court and Child Welfare Processes.* Decisions regarding processes in the Idaho child protection system should be based on accurate information and thorough study and research. Information gathered from the Idaho courts' case management system and from the Idaho Department of Health and Welfare should be analyzed to assist the child welfare system in strengthening and enhancing outcomes for children. These systems must be continually monitored and enhanced to ensure compliance with statutory time limits, track compliance with goals, analyze trends, and evaluate the effectiveness of programs and policies.

1.3 ORGANIZATION OF THIS MANUAL

The manual follows a child protection action through each step in the statutory process and provides substantive information on important issues that may arise in child protection cases. The flowchart at the conclusion of this chapter illustrates the major steps in a typical child protection case. Corresponding chapters are noted on the chart.

Chapters 2 through 10 correspond with the normal process of a child protection case:

- Chapter 2: Referral and Investigation
- Chapter 3: Initiating a Child Protective Act Case
- Chapter 4: Shelter Care
- Chapter 5: The Adjudicatory Hearing
- Chapter 6: The Case Plan and Case Plan Hearing
- Chapter 7: The Permanency Plan and Permanency Hearing
- Chapter 8: Review Hearings
- Chapter 9: Termination of Parental Rights
- Chapter 10: Adoption

Chapter 11 provides information on the specific requirements of the Indian Child Welfare Act that can arise at any step of the proceeding.

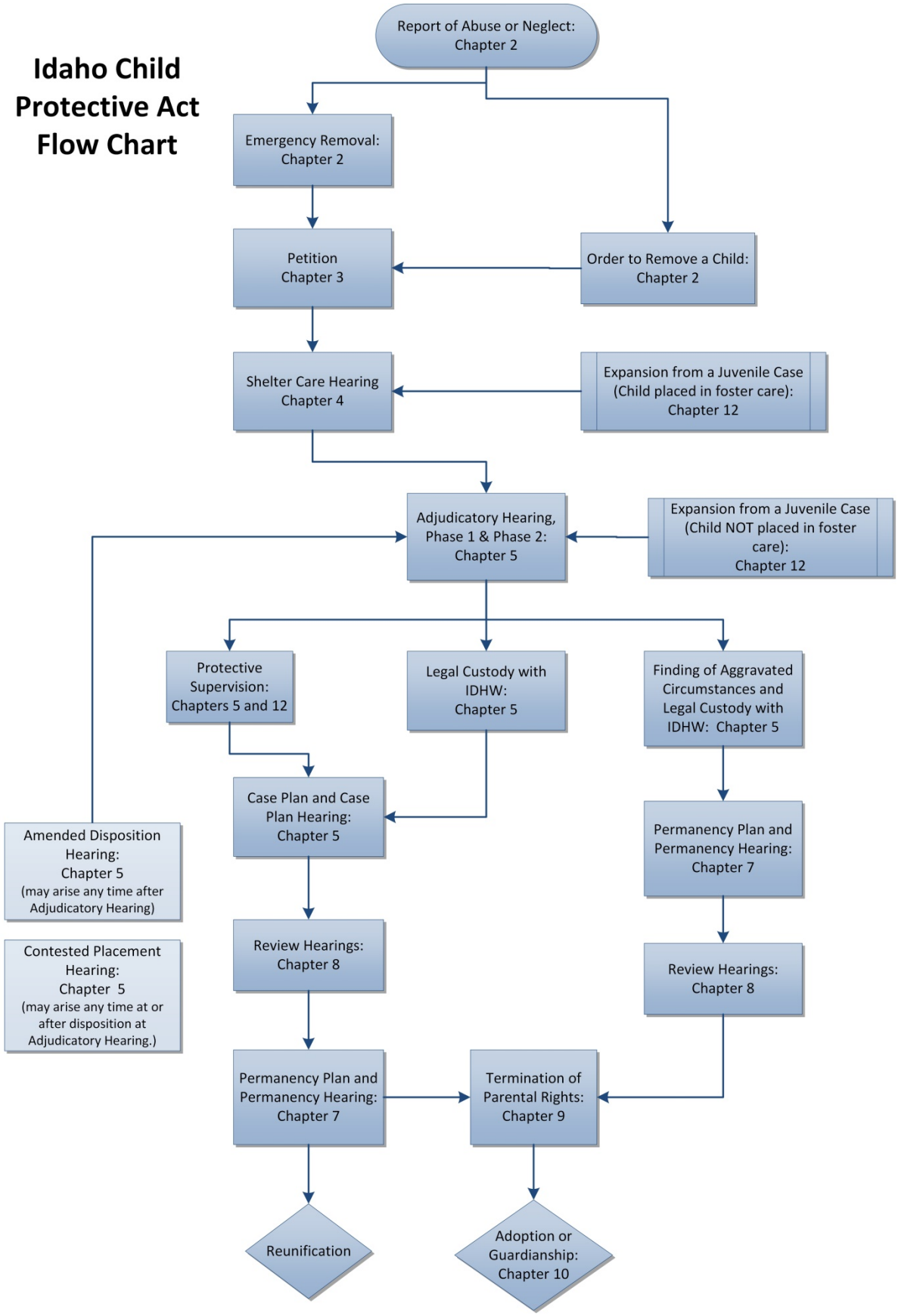
Chapter 12 focuses on specific substantive issues that may arise in CPA cases:

- Timeline for Relevant Federal Statutes
- Idaho Juvenile Rule Expansions
- Notifying and Including Unwed Fathers in Child Protective Act Proceedings
- The Idaho Safe Haven Statute
- *De Facto* Custodians and Child Protective Act Proceedings
- Findings Required to Establish and/or Maintain a Child's Eligibility for IV-E Funding
- Interstate Compact on the Placement of Children
- Idaho Juvenile Rule 40: Involving Children and Foster Parents in Court
- Educational Needs of Children
- Transition to Successful Adulthood
- Guardianships

The Idaho Child Protection Manual, the Idaho Child Protection Bench Cards, and the Idaho Child Protection Court Forms are updated as statutes and best practices change. The most up-to-date versions of these materials are available in the Child Protection section of the Idaho State Judiciary website at:

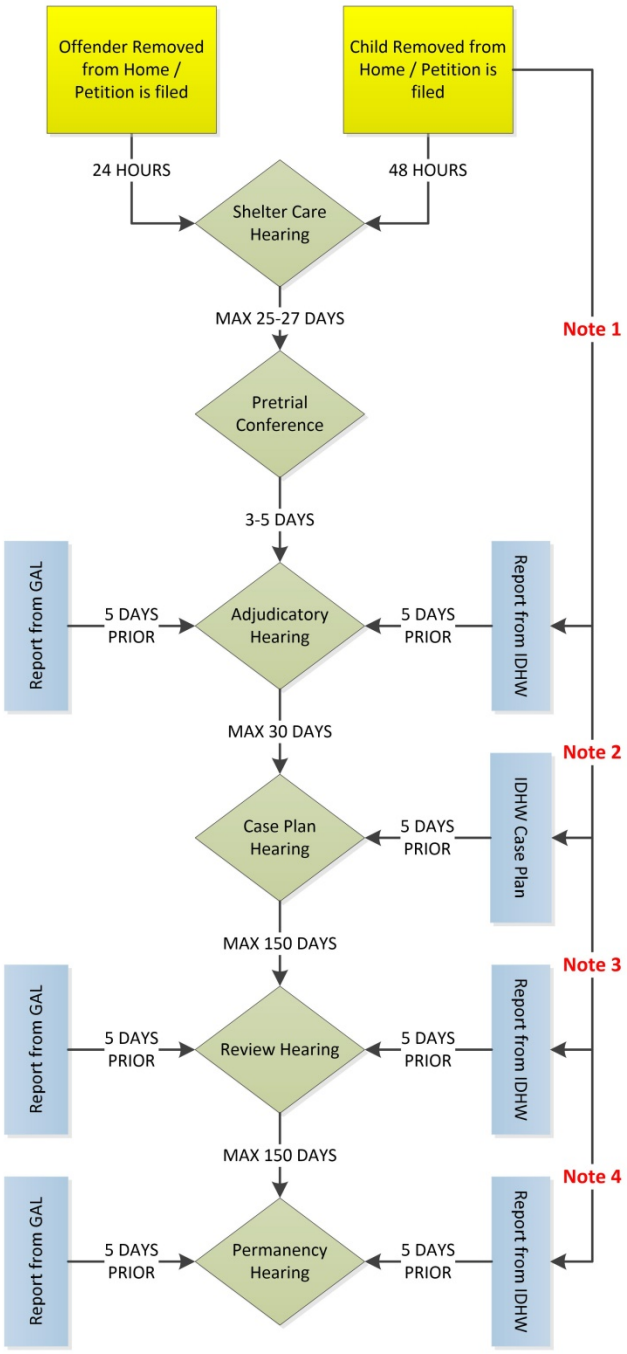
isc.idaho.gov/child-protection/resource

1.4 IDAHO CHILD PROTECTIVE ACT FLOW CHART AND TIMELINES



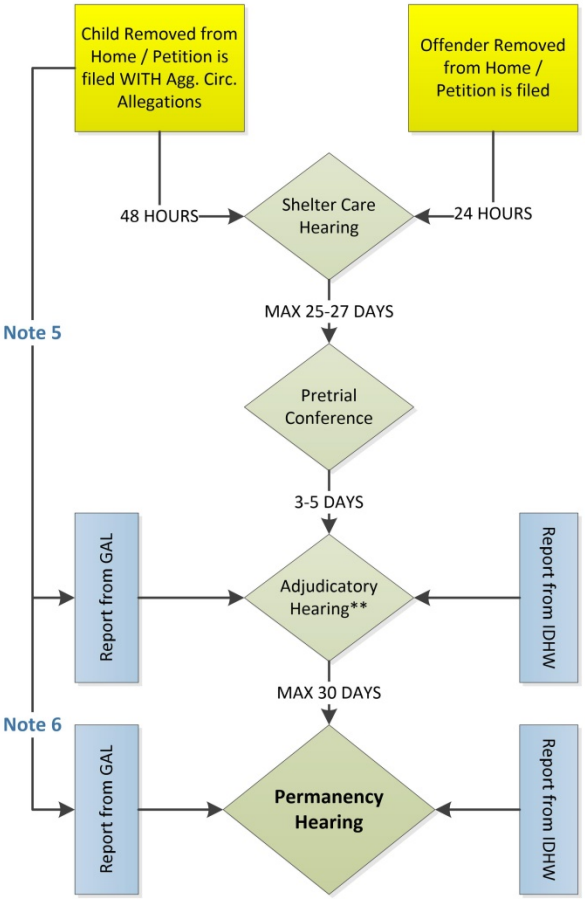
Child Protective Act Case Timelines

without Aggravated Circumstances



Note 1: No more than 30 DAYS after filing of the petition. (Idaho Code section 16-1619(1)).
Note 2: No more than 30 DAYS after the Adjudicatory hearing (16-1621(1)) or 60 DAYS from date of petition filed.
Note 3: No more than 6 MONTHS after entry of the court's order taking jurisdiction and every 6 months thereafter. (16-1622(1)) Best practice is every 60-90 DAYS.
Note 4: No more than 12 MONTHS from removal and every 12 Months thereafter.

w/Aggravated Circumstances



*** This example assumes the judicial determination of Aggravated Circumstances is made at the Adjudicatory hearing. An aggravated circumstances determination can happen at any time during the case. Once the judicial determination is made, the next hearing is a permanency hearing.*

Note 5: No more than 30 DAYS after filing of the petition. (Idaho Code section 16-1619(1)).
Note 6: No more than 30 DAYS after the judicial determination of Aggravated Circumstances is made. (16-1620(1))

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CHAPTER 2: Referral and Assessment

2.1 REFERRALS OF CHILD MALTREATMENT

A. Mandatory Reporting

The Idaho Child Protective Act (CPA) provides for mandatory reporting of suspected child abuse and neglect.[1] The Act specifically mandates reporting by physicians, residents on a hospital staff, interns, nurses, coroners, school teachers, day care personnel, and social workers. In addition, it requires reporting by every person who: 1) has reason to believe that a child is being abused, neglected, or abandoned; or 2) who observes a child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment, or neglect. Reports of suspected child abuse and neglect must be made within 24 hours to either law enforcement or the Department of Health and Welfare (IDHW).[2] Failure to report as required by the Act is a misdemeanor.[3]

Any person making a report of child maltreatment in good faith and without malice is immune from civil or criminal liability in making the report.[4] However, any person who knowingly makes a false report or allegation of child abuse, abandonment, or neglect is liable to the party against whom the report was made for the amount of actual damages or up to $2,500, whichever is greater, plus attorney's fees and costs of the suit.[5]

The duty to report does not apply "…to a duly ordained minister of religion, with regard to any confession or confidential communication made to him in his ecclesiastical capacity in the course of discipline enjoined by the church to which he belongs if:

1. The church qualifies as tax-exempt under 26 U.S.C. § 501(c)(3); and
2. The confession or confidential communication was made directly to the duly ordained minister of religion; and
3. The confession or confidential communication was made in the manner and context which places the duly ordained minister of religion specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine. A

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 Indian Child Welfare Act (ICWA); and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] I.C. § 16-1605(1).

[2] *Id*. (Where a physician, resident, intern, nurse, day care worker, or social worker who obtains information regarding abuse or neglect does so as a member of the staff of a hospital or similar institution, the report can be made to a designated institutional delegate who then makes the necessary reports to law enforcement or IDHW).

[3] I.C. § 16-1605(4).

[4] I.C. § 16-1606.

[5] I.C. § 16-1607. (If the court finds that the individual acted with "malice or oppression", the court may award treble actual damages or treble statutory damages, whichever is greater).

confession or confidential communication made under any other circumstances does not fall under this exemption."[6]

The CPA was amended in 2018 to require IDHW to investigate when IDHW knows or has reason to know that an adult in the home has been convicted of lewd and lascivious conduct or felony injury to child, or that the child has been removed from the home for circumstances that resulted in a conviction for lewd and lascivious conduct or felony injury to child.[7] This amendment takes effect July 1, 2018, and as of the writing of this manual, the Department is in the process of incorporating this requirement in the response protocols that are described below.

B. Other Sources of Child Protective Reports

Regardless of how the initial report is made, IDHW is designated by Idaho law as the official child protection agency of state government and has the duty to intervene in reported situations of child abuse and neglect.[8] The division of IDHW that has primary responsibility in the area of child protection is Family and Community Services (FACS). IDHW is staffed 24 hours a day, 7 days a week to respond to reports of child abuse, neglect, and abandonment.

All child abuse and neglect reports and calls go through a centralized intake unit that collects the information, assigns the report one of three priority responses, and forwards the information to local field offices for local assessment and appropriate action. The central intake unit is located in Boise and takes calls and reports for the entire state. The Department staffs the unit 24 hours a day, 7 days a week by licensed child welfare social workers who have received specialized training. On average, the unit receives approximately 3,750 calls, emails, and faxes per month. School personnel, parents, private agencies, relatives, and law enforcement are the source of the majority of the reports made to the intake unit.

Reports and requests for investigations come from a number of sources, including:

- *Courts.* Judges may order an IDHW investigation as a part of an Idaho Juvenile Rule 16 expansion or in other court proceedings (such as child custody hearings) when the court suspects that abuse or neglect has occurred or is occurring.
- *Safe Havens.* A report is generated by a safe haven which accepts an abandoned infant.[9]
- *Law Enforcement Officers.* In the course of their regular duties, law enforcement officers often encounter children who they have reason to believe have been abused, neglected, or abandoned.

C. Response to Referrals

When IDHW receives a referral of child maltreatment that appears to fall within the CPA's definitions of child abuse, neglect, or abandonment[10], the referral is assigned one of three

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[6] I.C. § 16-1605(3).
[7] I.C. § 16-1605(1) (Supp. 2018).
[8] IDAHO ADMIN. CODE r. 16.06.01.550 (2015) (The Idaho Administrative Code is also known as "IDAPA."); *See also* I.C. § 16-1629 (Supp. 2014). ("The Department, working in conjunction with the court and other public and private agencies and persons, shall have the primary responsibility to implement the purpose of this chapter").
[9] I.C. § 39-8203 (2009) (Idaho Safe Haven Act).

priority responses. Priority is determined by the Priority Response Guidelines, which classify, report, and organize responses based on the level of threat to the child's safety and well-being.[11] Before responding, IDHW social workers search agency records to determine whether other relevant reports regarding the family have been received and the status of those reports. A pattern of referrals indicates a cumulative risk; therefore, a referral of child abuse or neglect should be assigned for safety assessment when the history of referrals indicates potential risk to the child even when that referral would not, in and of itself, meet the standard of assignment.

If the information contained in the referral does not fall within the definitions in the Child Protective Act, the report will be entered into IDHW's data system for information. Every referral of child maltreatment is reviewed by a supervisor to ensure it is correctly screened and prioritized.

The IDHW's *Priority I Guidelines*:

- If a child is in immediate danger involving a life threatening and/or emergency situation, IDHW shall respond immediately.
- Law enforcement must be notified and requested to either respond to or accompany the social worker.
- IDHW will coordinate the assessment with law enforcement.
- The child must be seen by a social worker immediately and by medical personnel when deemed appropriate by law enforcement and/or the social worker. [12]

Examples of threats to a child or children that fall within *Priority I Guidelines* include:

- Death of a child
- Life-threatening physical abuse or physical or medical neglect
- Physical abuse of a child who is under seven years of age
- Sexual abuse if the alleged offender has immediate access to the child
- Infant and/or mother testing positive for drugs at birth
- Preservation of information if there is a risk that the family is leaving the area

The IDHW *Priority II Guidelines*:

- A child is not in immediate danger but allegations of abuse or serious physical or medical neglect are clearly defined in the referral.
- The child must be seen by the social worker within 48 hours of IDHW's receipt of the referral.
- Law enforcement must be notified within 24 hours of receipt of all Priority II referrals that involve issues of abuse, neglect, or abandonment.

Examples of threats within the *Priority II Guidelines* include:

- Non-life threatening physical abuse and/or physical or medical neglect
- Sexual abuse when the alleged offender does not have immediate access to the child

[10] I.C. §§ 16-1602(1), (2), and (31) (Supp. 2014).
[11] IDAPA r. 16.06.01.554.
[12] IDAPA r. 16.06.01.554.01.

Idaho law requires this notification because the assessment must be coordinated with law enforcement's investigation.[13]

The IDHW *Priority III Guidelines*:

- A child is in a vulnerable situation or without parental care necessary for safety, health, and well-being.
- The social worker must respond within three days, and the child must be seen by social worker within 120 hours (5 days) of IDHW's receipt of the referral.[14]

Examples of threats within the *Priority III Guidelines* include:

- Inadequate supervision
- Home health and safety hazards
- Moderate medical neglect
- Educational neglect

D. Multi-Disciplinary Teams

The CPA provides for the formation and involvement of Multi-Disciplinary Teams (MDTs) in each county to assist in coordinating work in child maltreatment cases.[15] This provision, in part, recognizes that child abuse and neglect are community problems requiring a cooperative response by law enforcement and IDHW's child protection social workers. Although their perspectives and roles are different, both agencies share the same basic goal: the protection of endangered children. Depending on the situation, either agency may benefit from the assistance of the other.

Section 16-1617(1) of Idaho Code requires the prosecuting attorney in each county to be responsible for the development of the county MDT. The statute further provides that, at a minimum, an MDT should consist of a representative from the prosecuting attorney's office, law enforcement personnel, and IDHW child protection risk assessment staff. Members may also include a representative from the guardian *ad litem* program, medical personnel, school officials, and any other persons deemed beneficial because of their role in cases concerning child abuse and neglect.

MDTs are charged by statute with the responsibility to develop a written protocol for investigating child abuse cases and for interviewing alleged victims of abuse or neglect. Teams are trained in risk assessment, dynamics of child abuse, interviewing, and investigation. They also are required to assess and review a representative selection of cases referred to either the Department or to law enforcement for investigation.[16]

Although social workers, law enforcement, and prosecutors bring different perspectives in investigating child abuse and neglect, working together can ensure a cooperative and coordinated action. Each must recognize the interrelationship among the legal, health, social service, and educational responses that occur in cases of child abuse and neglect.

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[13] IDAPA r. 16.06.01.554.02.
[14] IDAPA r. 16.06.01.554.03.
[15] I.C. § 16-1617. (The benefits and methods of approaching multidisciplinary teams in child welfare cases are described in A. P. Giardino & S. Ludwig, *Interdisciplinary Approaches to Child Maltreatment: Accessing Community Resources, in* MEDICAL EVALUATION OF CHILD SEXUAL ABUSE: A PRACTICAL GUIDE 215 (2d ed. Martin A. Finkel & Angelo P. Giardino eds., 2001).
[16] I.C. §§ 16-1617(2)–(5).

The roles of core MDT members are determined by each county's protocol. Consistent with the statutory mandate, best practice recommendations[17] concerning the roles of key MDT members include:

1. Prosecutor:
    a. Provide consultation during child abuse investigations
    b. Initiate civil and criminal legal proceedings
    c. Determine what specific charges to file
    d. Make decisions regarding plea agreements
    e. Work closely with the victim/witness coordinator

2. Law Enforcement:
    a. Gather evidence to support criminal prosecution of crimes against children
    b. Investigate allegations of child abuse, abandonment, or neglect
    c. Enforce laws
    d. Remove perpetrator from the family home in child protection cases, if needed
    e. Take custody of a child where a child is endangered and prompt removal from her or his surroundings is necessary to prevent serious physical or mental injury to the child
    f. Interview alleged perpetrator
    g. Interview child victim, when appropriate

3. Social Worker:
    a. Make reasonable efforts to prevent the removal of a child when safe to do so
    b. Conduct a comprehensive safety assessment of the family
    c. Consult with the prosecutor regarding an order of removal
    d. Make child placement decisions
    e. Explore kinship placements
    f. Link family with resources
    g. Develop case plan with family
    h. Interview child victims, if appropriate
    i. Monitor family's progress and report to the court

The advantages of MDTs are substantial. Appropriate use of an MDT can increase success in civil and criminal courts, reduce contamination of evidence, and provide more complete and accurate data. In addition, MDTs allow for improved assessment, shared decision making, support, and responsibility, reduced role confusion among disciplines, decreased likelihood of conflicts among agencies, and effective management of difficult cases. Finally, MDTs help ensure increased safety in volatile situations.

MDTs are also advantageous for the child and her or his family. MDTs help provide increased safety for children through improved evaluation of cases. Also, coordination often

[17] Throughout this Manual "best practice recommendations" are included. These recommendations are not required by Idaho law but represent instead generally accepted guidelines for judges, lawyers and social workers. These recommendations are often based on national, research based recommendations, or on practices that appear to be employed in a majority of jurisdictions.

means that the family is required to participate in fewer interviews. Finally, MDTs help to ensure more comprehensive identification of and access to services for the family.

2.2 ASSESSMENT

A. Risk and Safety

When a referral of child abuse, neglect, or abandonment is received, IDHW and law enforcement work together to determine whether or not a child is safe. A child's safety depends on the presence or absence of threats of danger and a family's protective capacities to manage or control threats of danger.

The terms *risk* and *safety* are often used interchangeably. However, within the child protection context, these terms have significantly different meanings. *Safety* refers to specific threats to a vulnerable child which can be described or seen, that are either occurring presently or that are likely to occur in the immediate future, that will result in severe harm or injury to the child, and that are due to an out of control family situation or condition that no adult can prevent from happening. 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 or not occur at all.[18]

According to both the federal Child Abuse Prevention Treatment Act[19] and the Idaho CPA,[20] upon the first contact with the family, the social worker must explain the purpose and nature of the assessment, including the allegations or concerns that have been made regarding the child/family. The explanation should include the general nature of the referral rather than specific details that could supply information to the alleged offender and impede any potential criminal investigation. If a criminal investigation is pending, disclosure of any details should be coordinated with law enforcement.

B. Assessment of Child Safety

When a social worker responds to a CPA referral, the focus is on assessing for present and/or emerging danger. Present danger is a significant and clearly observable threat that exists at the time of the assessment, requiring immediate IDHW and/or law enforcement response. Some examples of present danger are:

- Serious bodily injury
- Life-threatening living arrangements
- Unexplained injuries
- Child needing immediate medical attention
- Parent/caregiver is currently unable to perform parental responsibilities
- Parent/caregiver's behavior is currently out of control

[18] *See generally* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9 (2009). (providing a detailed discussion of the concepts of safety and risk in a context relevant to judges).
[19] 42 U.S C § 5106a(b)(2)(B)(xviii) (2011); 42 U.S.C. § 5116(a)–(f) (2011).
[20] I.C. § 16-1629(7)(b) (Supp. 2014).

- Domestic violence and child maltreatment are currently occurring

Emerging danger (sometimes referred to as "impending danger") refers to a family circumstance where a child is living in a state of danger. Danger may not exist at a particular moment or be an immediate concern (like in present danger), but a state of danger exists. Emerging danger can be identified and understood upon more fully evaluating individual and family conditions and functioning through assessment.

To guide and document decision making related to child safety, IDHW uses a standardized comprehensive safety assessment that is to be completed no later than 45 calendar days from the earliest start date on any report associated with the assessment. It contains information collected from the assessment tools used by the Department, discussed below.

1. The Six Domains of Information Collection[21]

Child safety is assessed by gathering information about the family through interviews with the child, the parents or caregivers, and collateral contacts. The social worker also visits the family home to determine if the environment poses a threat of harm to the child(ren). In gathering information about the family, social workers focus on six domains of information collection to assist in understanding the family conditions and identifying safety threats:

1. Extent of Maltreatment: Includes straightforward information concerned with the facts, and evidence, summarizes the allegations, and documents the worker's determination as to whether or not maltreatment occurred.
2. Nature of Maltreatment and History: What is occurring in the family that impacts, influences, or causes maltreatment? Includes a summary of past child protection history and how it may impact or influence the current safety threat.
3. Adult Functioning: How do the caregivers in the home function on a daily basis?
4. Parenting Practices: What is the caregiver's overall parenting style?
5. Disciplinary Practices: How do the caregivers in the home discipline the child?
6. Child Functioning: How does the child function on a daily basis?

2. Safety Threshold[22]

When assessing child safety, social workers utilize standardized criteria to differentiate between safe and unsafe children. The safety threshold is the point at which a risk factor becomes a safety threat to a child and a child is determined to be unsafe. The safety threshold is crossed when the following five criteria apply:

1. Severity: Harm that results in significant pain, serious injury, disablement, grave or debilitating physical health or physical conditions, acute or grievous suffering, terror, impairment, or death.
2. Immediate to Near Future: Threats to child safety that are likely to become active without delay, likely to occur within the immediate to near future, and that could have severe effects.

[21] IDAHO DEPARTMENT OF HEALTH AND WELFARE, CHILDREN AND FAMILY SERVICES STANDARD FOR COMPREHENSIVE SAFETY, ONGOING, AND RE-ASSESSMENT (2014).
[22] *Id*.

3. Out-of-Control: Family conditions that can affect a child, are unrestrained, unmanaged, without limits, not monitored, not subject to influence, manipulation or internal power, and/or are out of the family's control. No responsible adult in the home can prevent the emerging danger from happening.
4. Observable/Describable: The threat or harm to the child is real, can be seen or understood, can be reported, and is evidenced in explicit, unambiguous ways.
5. A Vulnerable Child: A child who is dependent on others for protection.

3. Safety Factors[23]

A safety factor is a specific family situation or behavior, emotion, motive, perception, or capacity of a family member that may impact a child's safety status. There are 14 safety factors that are nationally recognized and accepted by child welfare programs as best practice in assessing child safety. By applying the safety threshold analysis to one or more of the 14 safety factors, a social worker evaluates a child's safety. When a safety factor crosses the safety threshold, the factor becomes a safety threat and a child is considered unsafe. These factors include:

1. Caregivers cannot, will not, or do not, explain a child's injuries or threatening family conditions.
2. A child has serious physical injuries or serious physical symptoms/conditions from maltreatment.
3. One or more caregivers intended to seriously hurt the child.
4. The living environment seriously endangers the child's physical health.
5. The child demonstrates serious emotional symptoms, self-destructive behavior and/or lacks behavioral control that results in provoking dangerous reactions in caregivers.
6. A child has exceptional needs that affect his/her safety that caregivers are not meeting, cannot meet, or will not meet.
7. A child is fearful of the home situation or people within the home.
8. One or more caregivers lack parenting knowledge, skills or motivation necessary to assure a child's safety.
9. One or more caregivers are threatening to severely harm a child or are fearful they will maltreat the child and/or request placement.
10. No adult in the home is routinely performing parenting duties and responsibilities (food, clothing, age appropriate supervision, and nurturance) that assure child safety.
11. A child is perceived in extremely negative terms by one or more caregivers.
12. Caregivers do not have or use resources necessary to assure a child's safety.
13. One or more caregivers will not/cannot control their behavior, and/or are acting violently and/or dangerously.
14. Caregivers refuse intervention, refuse access to a child, and/or there is some indication that caregivers will flee.

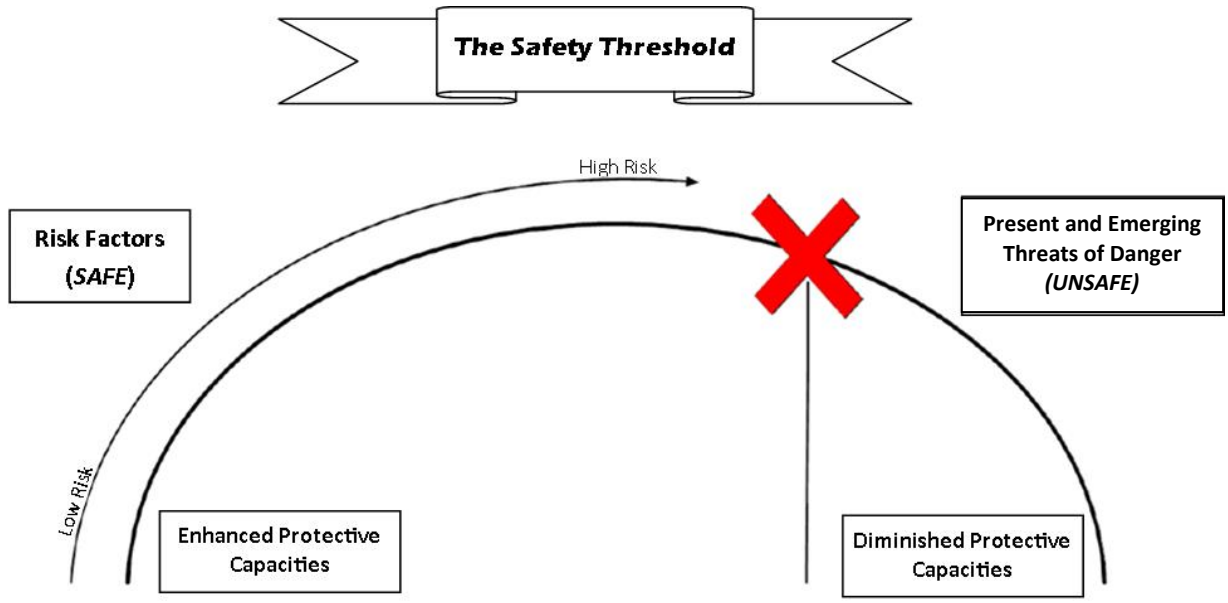
4. Caregiver Protective Capacities

Protective capacities of the parent/caregiver are family strengths or resources that reduce, control, and/or prevent threats of danger from occurring or from having a negative impact on a child. Protective capacities are strengths that are specifically relevant to child safety. They can

[23] *Id.*

include a parent's knowledge, understanding, and perceptions that contribute to how well a parent carries out his/her parental responsibilities.[24] Protective capacities also refer to observable behaviors of a parent that prevent threats of danger from occurring, as well as the parents' feelings, attitudes, and motivation to protect the child.[25]

The safety threshold, in relationship to risk, safety threats, and caregiver protective capacities is shown in the following illustration:



5. Safety Decision

A child is unsafe when a present or emerging threat of danger exists and caregivers are unable or unwilling to provide protection. When a safety threat has been identified through the application of the safety threshold analysis, a child is considered to be unsafe. A child is considered to be safe when there are no present or emerging threats of danger or the caregiver's protective capacities can control existing threats.

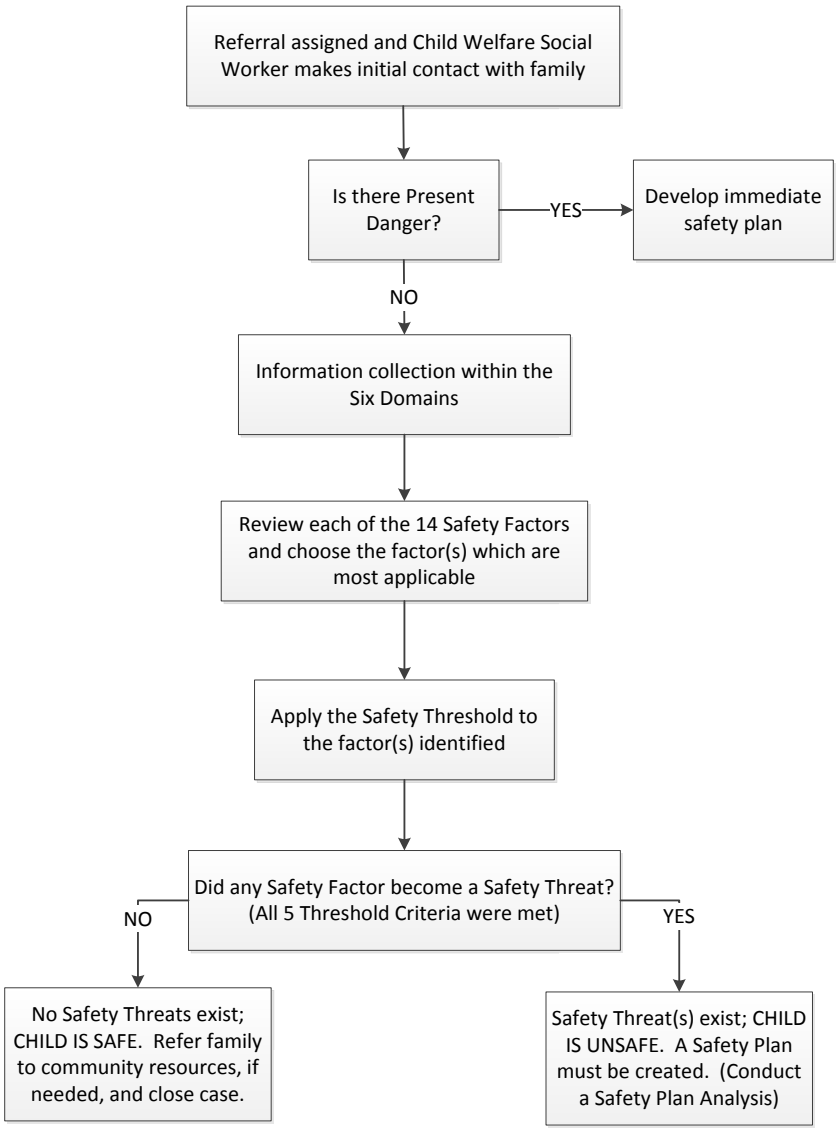
Decisions related to child safety are not made alone. Pursuant to IDHW practice, a supervisor reviews all cases assigned for assessment. The supervisor considers the following:

- Was the assessment completed in a timely manner?
- Does the assessment provide a thorough description of the family's situation so that it can be used to support decision making in the case?
- Were IDHW standards, policies, and rules adhered to in the assessment process?
- Was the assessment documented in IDHW's data system, using best practice documentation standards? [26]

[24] LUND & RENNE, *supra* note 17, at "Benchcard D."
[25] *Id*.
[26] LUND & RENNE, *supra* note 17 at page 19.

The following chart illustrates the Comprehensive Safety Assessment process:

Comprehensive Safety Assessment Flow Chart



6. Safety Plan

When a child is found to be unsafe a safety plan is required. Safety plans prescribe actions intended to control present or emerging danger rather than changing the conditions that cause it. These prescriptive provisions of the safety plan must have an immediate effect, be immediately accessible, and available. The safety plan must focus only on safety services and actions, not on services designed to effectuate long-term change. The safety plan must be sufficient to ensure the child's safety. The plan may be implemented in the home or may include an out-of-home plan when child safety can only be assured through temporary placement with relatives or in substitute care.

C. Safety Plan Analysis: In-Home versus Out-of-Home Safety Plan

Under federal and state law, children should remain in their own home with their family whenever safely possible.[27] "If an in-home safety plan would be sufficient, and the agency fails to consider or implement one, then the agency has failed to provide reasonable efforts to prevent removal."[28]

Social workers conduct an analysis to determine whether an in-home safety plan can be implemented or whether an out-of-home safety plan is warranted. An out-of-home safety plan may include a voluntary or involuntary placement of the child.

The following chart illustrates the decision points made during a safety plan analysis:

[27] 42 U.S.C. § 621 (2011); I.C. § 16-1601 (2009).
[28] LUND & RENNE, *supra* note 17, at 25.

It is important to use the strengths and resources of the family in developing safety plans and implementing in-home services for families. Family Group Decision Making Meetings (FGDM) can assist families in developing and implementing plans that keep children safe. Often the family's greatest resource is extended family, kin, and community supports. Extended family and kin know a great deal about the family situation, often have resources not available to agencies, can create family-specific solutions, and are invested in the solutions that they create.

Family and kin can:

- Serve as mentors
- Care for children until parental capacities have been strengthened
- Assist in monitoring child safety

In addition to involving relatives and kin, children can also be maintained safely in their own homes by:

- Law enforcement removing the alleged offender as provided in Idaho Code § 16-1608(1)(b)
- Removal of an offender through a Domestic Violence Protection Order – Idaho Code §§ 16-1602(31) and 16-1611(5)

In situations where a family refuses to work with IDHW on a voluntary basis and the threats of danger are not imminent, IDHW can contact the local county prosecutor and request that she file a petition seeking protective supervision of the child by the Department.[29]

CONCLUSION

IDHW has a tremendous responsibility for evaluating referrals and reports of child maltreatment and taking further action where warranted. Further action includes working with a family voluntarily to resolve the threats to the child's safety. In situations where the threats to the child's safety cannot be resolved on a voluntary basis, IDHW works with the county prosecutor or deputy attorney general to initiate a child protection case.[30]

[29] I.C. § 16-1619(5)(a) (Supp. 2014); I.J.R. 41(h).
[30] I.C. § 16-1610.

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.[1]
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,[2] or for a protective order removing the alleged offender from the home.[3]
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.[4]
4. A court can expand a proceeding under the Juvenile Corrections Act (JCA)[5] into a child protection proceeding.[6]
5. A CPA proceeding can be initiated under the provisions of the Idaho Safe Haven Act.[7]

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.

[1] 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).

[2] I.C. § 16-1611(4); I.J.R. 34(c).

[3] 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.

[4] 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.

[5] I.C. §§ 20-501 - 549 (2009).

[6] I.J.R. 16. This procedure is discussed briefly later in this chapter and is discussed in detail in Chapter 12 of this manual.

[7] 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.[8] 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 § 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 . . ."[9] 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

[8] 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).
[9] I.C. § 16-1608(1)(a).

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

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.[12] 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.[13] 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.[14] 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."[15]

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

[10] I.C. § 16-1608(2).
[11] 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).
[12] I.J.R. 32 (sets forth the prescribed form of this notice).
[13] I.C. § 16-1611(4)–(5); I.J.R. 34(a).
[14] I.J.R. 34(c).
[15] I.C. § 16-1611(4).

the costs of shelter care.[16] 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.[17] Federal law requires that this finding be made within the first 60 days after the child is removed from the home.[18] Idaho Code requires this finding to be made at both the shelter care hearing and at the adjudicatory hearing.[19] 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.[20] 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.[21]

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

[16] 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.
[17] I.C. 16-1615(5)(b)(i)-(ii) (Supp. 2016).
[18] 45 C.F.R. § 1356.21(b)(1)(i)-(ii) (2011).
[19] I.C. §§ 16-1615(5) (2009); 16-1619(6) (Supp. 2014). *See also* I.C. § 39-6309 (relating to the issuance of protection orders).
[20] I.C. §§ 16-1611(5) (2009); 39-6306(1)(c) (2011).
[21] I.C. § 16-1611(5) (2009).

to Idaho Code § 16-1615(8).[22] 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.[23]

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.[24] 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.[25]

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[22] 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).

[23] 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).

[24] 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).

[25] 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.[26]

5. Expansion of Juvenile Corrections Cases

In Idaho, offenses committed by juveniles are governed by the Juvenile Corrections Act ("JCA") [27] and the Idaho Juvenile Rules.[28] In some cases, a juvenile subject to the JCA may also be abandoned, abused, neglected, or otherwise fall within the jurisdiction of the CPA.[29] 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.[30] 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.[31] 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

[26] 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").
[27] I.C. §§ 20-501 to 549.
[28] I.J.R. 1–30.
[29] Grounds for jurisdiction under the CPA are discussed later in this chapter.
[30] I.C. §§ 39-8201 to 8207 (Idaho Safe Haven Act) (2011).
[31] I.C. §§ 39-8202 to 8205

below in guiding her or his decision-making process.[32] 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

[32] *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.[33] 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 § 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.[34] 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[35], or reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.[36]
- 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. [37]

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[33] I.C. § 16-1610(2) (Supp. 2017).
[34] *Id*. at (h).
[35] 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.
[36] 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.[38]
- If there is reason to know that the child is an Indian child, the petition should include additional substantive allegations required by the Indian Child Welfare Act (ICWA.)[39]

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.[40] 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.[41] 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.[42] 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.[43]

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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[37] I.C. § 16-1610(2).
[38] 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).
[39] 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.
[40] I.C. § 16-1611(1)–(3) (2009).
[41] I.C. § 16-1611(1).
[42] I.J.R. 33(b).
[43] 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.[44] 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.[45]
- 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.[46]
- 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.[47]

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.[48] Service of process must be made by the sheriff or another person appointed by the court.[49] The summons includes a return of service, which must be completed and filed with the court to show that service has been made.[50]

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

[44] 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.
[45] I.C. § 16-1603 (setting forth the grounds for jurisdiction such as abuse, neglect, etc.; discussed later in this chapter).
[46] 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
[47] I.C. § 16-1615(5).
[48] 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.
[49] I.C. § 16-1612(3).
[50] *Id.*
[51] 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,[52] 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.[53] 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[54] 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.[55]

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[52] 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.
[53] 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").
[54] 25 U.S.C. §§ 1901 to 1963 (2011). A detailed discussion of ICWA can be found in Chapter 11 of this manual.
[55] 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.[56]

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. [57]

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."[58] 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:

[56] I.C. § 16-1603 (2009).
[57] I.C. § 16-1602(1).
[58] 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 [59]

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.[60] 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.[61]

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." [62]

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.

[59] I.C. § 16-1602(31).
[60] I.C. § 16-1602(31)(a).
[61] I.C. § 16-1627 (2009).
[62] 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.)[63]

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).[64]

[63] I.C. § 16-1602(34).
[64] 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.[65] 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.[66]

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 Idaho Code §§ 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6608 or 18-8602.
>
> (iii) Torture of a child; a sexual offense as set forth in Idaho Code § 18-8303(1); 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.[67]

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.[68] 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.[69]

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[65] 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).

[66] Permanency planning, reunification plans, and alternative permanent placement plans are further discussed in Chapters 6 and 7 of this manual.

[67] I.C. § 16-1602(6).

[68] I.J.R. 41(a).

[69] *Id.*

3.6 ICWA CONSIDERATIONS

It is critical that the court ensure compliance with ICWA.[70] 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.

[70] *See generally* 25 U.S.C. § 1901–1922 (2012).

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CHAPTER 4: Shelter Care

4.1 PURPOSE AND GOALS OF THE SHELTER CARE HEARING

The shelter care hearing is governed by Idaho Code § 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%2005-2016.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

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[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 statute[13] or for the adoption statute[14] 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]

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[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 and/or Attorney for Guardian ad Litem.* Idaho law requires the appointment of either an attorney for the child or a guardian *ad litem* for

[18] I.J.R. 16(f). See Chapter 12 for more information on Rule 16 expansion cases.
[19] Chapter 11 discusses the requirements of 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).

the 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 § 16-1614(1) provides that the court shall appoint a guardian *ad litem* for the child and shall appoint counsel to represent the guardian *ad litem*. If no guardian *ad litem* is available, the court must appoint counsel for the child. In appropriate cases, the court may appoint a guardian *ad litem* and an attorney for the guardian *ad litem*, as well as counsel to represent the child.

Youth Twelve and older. Idaho Code § 16-1614(2) provides that the court shall appoint counsel to represent the child and may in addition, appoint a guardian *ad litem*. When appointment of counsel is not practicable or not appropriate, the court may appoint a guardian *ad litem* for the child and shall appoint counsel to represent the guardian *ad litem*.[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 public[27], 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

[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.*

be valuable at a shelter care hearing. Relatives can provide essential information about the situation that can help protect the child in the home (thus allowing the court to return the child home), or, alternatively, they can 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

[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.

the time of shelter care. Detailed affidavit(s) will apprise parties and participants of relevant evidence and improve decision making in the case.

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

[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).

documents the case-specific finding.[41] If the child was taken into custody pursuant to an order to 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.

[41] 45 C.F.R. § 1356.21(d).
[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.

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[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).

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

[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).

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 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 safe-guarding 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 § 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

[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).

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 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

[60] I.C. § 16-1619(5).
[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) .

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 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 ICWA.[68] 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 first and most critical issue is to determine if the child is an Indian child as defined by 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, 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.

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

If further efforts are needed to determine if the child is an Indian child, to give notice as required by 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.

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]

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[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).

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 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

[73] 42 U.S.C. § 671(a)(31) (2012).
[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).

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.
- 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 guardian *ad litem* 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

[79] I.J.R. 39(g).
[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).

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 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.

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CHAPTER 5: The Adjudicatory Hearing

5.1 INTRODUCTION

The adjudicatory hearing is a two-phase process. The first is the adjudication phase, in which the court determines whether the child falls within the jurisdiction of the court pursuant to the Child Protective Act ("CPA") due to being abandoned, abused, neglected, homeless, lacking a stable home environment, or living/visiting in the same household as another child who is within the jurisdiction of the CPA.[1] Adjudication provides the basis for on-going state intervention with a family. In addition, if the petition alleges aggravated circumstances,[2] the court at the adjudicatory hearing must determine whether the parent(s) subjected the child to aggravated circumstances.

Disposition is the second phase of the adjudicatory hearing. At the time of the adjudicatory hearing, the child is usually in the temporary custody of the Department as a result of the court's order after a shelter care hearing. The child may instead be at home, and there may be a protective order in place.[3] Disposition is the process by which the court determines whether to place the child in the legal custody of IDHW or to place the child in the child's own home under the protective supervision of the Department.[4] The court may initiate or extend a protection order "to preserve the unity of the family and to ensure the best interest of the child".[5]

5.2 TIMING OF THE ADJUDICATORY HEARING AND PRETRIAL CONFERENCE

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.[6] In addition, a pretrial conference must be held within three to five days prior to the adjudicatory hearing.[7] The statute provides for the pretrial conference to be held outside the presence of the court, but the recommended best practice is for the judge to be available to accept stipulations or to resolve pretrial issues.

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 Indian Child Welfare Act (ICWA); and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] I.C. §§ 16-1619(4) (Supp. 2016); 16-1603 (2009); I.J.R. 41(a).

[2] I.C. § 16-1602(6) (Supp. 2016).

[3] I.C. § 16-1615(8); *see also* Chapter 4 regarding shelter care and protective orders.

[4] I.C. § 16-1619(5); I.J.R. 41(a). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed later in this chapter.

[5] I.C. § 16-1619(10).

[6] I.C. § 16-1619(1).

[7] I.C. § 16-1619(2).

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

The timeliness of the adjudicatory hearing will also impact the timeliness of required federal IV-E findings. If the adjudicatory hearing is the first hearing sanctioning the removal of the child from the home, the order must include the finding that it is contrary to the welfare of the child to remain in the home.[8] Additionally the court must, in all cases in which the child was removed, determine whether the Department made reasonable efforts to prevent the need for placement of the child in foster care.[9] Federal law requires the court to make a documented, case-specific finding of reasonable efforts and requires that this finding be made within 60 days from the date the child was removed from the home.[10] This omission cannot be corrected at a later date to reinstate the child's eligibility for funding. **If these findings are not timely made, an otherwise eligible child will lose eligibility for federal foster care match funds for the entire removal episode.**

Idaho Juvenile Rule 41(b) provides that "The hearing may not be continued more than 60 days from the date the child was removed from the home, unless the court has made case-specific, written findings, as to whether the Department made reasonable efforts to prevent the need to remove the child from the home." Best practice is to grant a continuance only for compelling reasons and only for a short period of time. Generally, only a genuine personal emergency of a party or counsel warrants a continuance. Awaiting the outcome of criminal proceedings, even criminal proceedings related to the child protection case, is not a compelling reason to continue an adjudicatory hearing.[11]

5.3 SUBMISSION OF REPORTS TO THE COURT

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, must prepare a written report, and file the report with the court prior to the pretrial conference.[12] Idaho law further requires the guardian *ad litem* to conduct an independent investigation of the circumstances of the child, to prepare a written report, and to file the report with the court at least five days prior to the adjudicatory hearing.[13] The purpose of these reports is to provide information and recommendations to the court regarding disposition. These reports also facilitate the exchange of essential information between the parties.

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[8] For additional information on the required Contrary to the Welfare finding, please refer to Chapter 4 on Shelter Care and Chapter 12 on required IV-E findings.
[9] I.C. § 16-1619 (6).
[10] 42 U.S.C. § 671(a)(15)(B)(1) (2012); 45 C.F.R. § 1356.21(b)(1) (2011).
[11] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (1995).
[12] I.C. § 16-1616(1)-(2) (2009).
[13] I.C. § 16-1633(1)-(2) (Supp. 2016).

Neither report is admissible for purposes of determining issues during the adjudication phase[14] because they typically contain hearsay information or other information that does not comply with the Idaho Rules of Evidence. They can nonetheless be extremely useful for other purposes prior to disposition. The reports often serve as the primary discovery mechanism in child protection cases, ensuring that essential information is distributed to all parties prior to the adjudicatory hearing.[15] The availability of this information prior to the pretrial conference promotes reasoned and informed settlement of cases prior to trial. The reports can also be used as the basis for the court's written findings of fact and conclusions of law.

5.4 AGREEMENTS BY THE PARTIES

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

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

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

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.

[14] I.C. §§ 16-1616(3) (2009), 16-1633(2) (Supp. 2016).

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

5.5 EVIDENTIARY ISSUES AT THE ADJUDICATORY HEARING

The Idaho Rules of Evidence apply to the adjudication phase of the hearing.[16] The standard of proof at the adjudicatory hearing is preponderance of the evidence.[17] The Idaho Rules of Evidence also apply at a hearing on aggravated circumstances.[18]

The reports of IDHW and the guardian *ad litem,* may not be considered during the adjudication phase, as they may contain hearsay.[19] Attempts to present hearsay evidence during the adjudication phase can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, caseworkers or law enforcement officers may rely on a doctor's written report of a medical diagnosis in concluding that a child is abused or neglected. Accordingly, a doctor's testimony will be necessary at the adjudicatory hearing. Since the Idaho Rules of Evidence apply, the caseworker cannot testify as to a doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit a doctor's written report. Regular communication and active cooperation between the prosecutor, caseworkers, and law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

The Idaho Rules of Evidence do not apply to the disposition phase of the adjudicatory hearing. In the disposition phase, the court may consider any information relevant to its decision regarding the child's disposition, including the reports of IDHW and the guardian *ad litem*.[20]

5.6 INDIAN CHILD WELFARE ACT CONSIDERATIONS

It is critical that the court ensure early and ongoing compliance with the Indian Child Welfare Act.[21] 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 first issue is to determine if the child is an Indian child as defined by ICWA, and therefore, whether ICWA applies. At the adjudicatory hearing, the court is required to inquire of the participants whether there is any reason to know that the child is an Indian child, the efforts the Department has made since the last hearing to determine whether the child is an Indian child, and the Department's efforts to work with all tribes of which the child may be a member to verify whether the child is a member or is eligible for membership.[22] U.S. Bureau of Indian Affairs regulations provide that where the court has reason to know the child is an Indian child,

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[16] I.R.E. 101; I.J.R. 41(c), 51(b).
[17] I.C. § 16-1619(4) (Supp. 2016).
[18] I.J.R. 41(c) and 51(b).
[19] I.C. §§ 16-1616(3) (2009), 16-1633(2) (Supp. 2016).
[20] I.C. §§ 16-1619(5) (Supp. 2016), 16-1616(3) (2009), 16-1633(2) (Supp. 2016).
[21] *See generally* 25 U.S.C. § 1901–1922 (2012).
[22] I.C. § 16-1619(7)(a) (Supp. 2016); 25 C.F.R. § 23-107(a). Section 16-1619(7)(a) not been revised since the federal regulations were adopted. At the time that section 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 a child's status as an Indian child changed to the "reason to know" standard in the regulations. These regulations now provide the minimum requirements for the application of ICWA. 25 C.F.R. § 23-101.

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."[23]

If the child is an Indian child, ICWA has procedural and substantive requirements that apply in a CP proceeding, and in particular to the adjudicatory 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, testimony of a qualified expert witness 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 ICWA, or to otherwise comply with the requirements of the act, the court should include appropriate orders in its decree.

5.7 WHO SHOULD BE PRESENT

The CPA provides that hearings under the Act are not open to the general public and that only persons who are "found by the court to have a direct interest in the case" may be present.[24] Thus relatives, family friends, and others are generally not permitted to be present at the hearing. Generally, the presence of the following persons is required:

- Judge
- County Prosecutor and/or Deputy Attorney General
- Mother, father, guardian, and/or other custodian whose rights have not been terminated[25]
- Attorney for parents (separate attorneys if conflict warrants)
- Indian Custodian, the child's tribe, and attorney, if applicable
- Child, in appropriate circumstances
- Attorney for the child[26]
- Guardian *ad litem* and attorney for guardian *ad litem*[27]
- IDHW personnel with knowledge of the facts and authority to enter into agreements
- A representative of the Department of Juvenile Corrections, if the child is placed in its custody, and
- Court reporter, security personnel, and interpreter(s), as needed.

5.8 WITNESSES

A. In General

[23] 25 C.F.R. § 23.107.
[24] I.C. § 16-1613(1) (2009). Additional information on the roles of the participants below can be found in Chapter 2.
[25] I.C. § 16-1611(1), (3). *See* Chapter 12 of this manual for more information on issues surrounding putative fathers.
[26] *See* I.C. § 16-1614 (Supp. 2016) (regarding appointment of counsel for children).
[27] *See* I.C. § 16-1614 (regarding appointment of guardian *ad litem* and counsel for guardian *ad litem*).

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

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

B. Child Witnesses

In the adjudication phase of a contested adjudicatory hearing, the proceeding is formal and the key issue is whether the child is abused, neglected, or otherwise comes within the jurisdiction of the CPA. The disposition phase is less formal, and the key issues are placement and reasonable efforts to avoid placement. Any time a child is considered a witness, the court and attorneys should pay close attention to the potential trauma to the child resulting from attending the hearing and testifying.[28] Every effort should be made to make the child's testimony unnecessary. If the child's testimony is required, alternatives to in-court testimony should be pursued to minimize the trauma to the child.[29] The CPA specifically provides for a person having a supportive relationship with the child to remain in the courtroom at the witness stand during the child's testimony.[30]

5.9 KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATORY HEARING

A. Phase 1: Adjudication

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

The first issue the court must determine is whether the child is within the jurisdiction of the CPA. The finding of jurisdiction is the core finding of the CPA proceeding. There are six grounds for a child to be within the jurisdiction of the Act:

1. Abuse
2. Neglect
3. Abandonment
4. Lack of a stable home environment
5. Homelessness
6. The child resides in or visits a household where another child is within the jurisdiction of the CPA[31]

[28] See Chapter 12 of this manual for a discussion of issues surrounding children and youth in court in non-witness capacities.
[29] I.C. §§ 9-1801 to 1808 (2010).
[30] I.C. § 16-1613(2) (2009).
[31] I.C. § 16-1603.

Detailed information on each of these grounds for jurisdiction can be found in Chapter 3 of this manual.

The burden of proof is on the state, and the standard of proof is by a preponderance of the evidence. Idaho law requires the court to make a finding on the record regarding the facts and conclusions of law that bring the child within the jurisdiction of the CPA.[32]

Some confusion results from the use of the word "jurisdiction" in the Idaho statute. A child is within the *jurisdiction of the court* if the child lives or is found within the state. The child is within the *jurisdiction of the CPA* if the court determines that one of the six bases for jurisdiction exists.

A decree finding the child within the jurisdiction of the CPA continues until the child turns eighteen or until the court orders otherwise.[33] Prior to the child's eighteenth birthday, the case remains under the continuing jurisdiction of the court until the safety threats to the child are permanently eliminated and the child may safely return to or remain in the home without continuing Departmental supervision.[34] At that point in time, the case may be dismissed by court order.

[32] I.C. § 16-1619(4) (Supp. 2016).
[33] I.C. § 16-1619(8).
[34] I.C. § 16-1604 (2009).

The decisions made by judges, caseworkers, and others have tremendous impact on the lives of the families in child protection proceedings. Those decisions are impacted by the implicit biases that affect human-decision making. Everyone has cultural biases, by which we make assumptions in interpreting and judging our social environment based on our own culture and background. That includes assumptions we make about others based on age, race, gender, sexual preference, race, ethnicity, language, religion, political affiliation, socio-economic status, or any factor by which we categorize ourselves and others. Overcoming cultural bias requires diligent efforts, to develop an awareness of our own assumptions, to develop an understanding of cultural differences that affect how we communicate with and understand each other, and to ensure we are making decisions based on knowledge of facts rather than assumptions or beliefs.

Reflections on the decision-making process to prevent bias:*

What assumptions have I made about the cultural identity, genders, and background of this family?

What is my understanding of this family's unique culture and circumstances?

How is my decision specific to this child and this family?

How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?

What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?

Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?

Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?

Have I placed the child in foster care as a last resort?

Have I integrated the parents, children and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?

Is this family receiving the same level and tailoring of services as other families?

Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?

If this were my child, would I be making the same decision? If not, why not?

*From *Enhanced Resource Guidelines, Improving Court Practice in Child Abuse and Neglect Cases*, published by the National Council of Juvenile and Family Court Judges (2016), at page 204. The complete guidelines are available on-line at www.ncjfc.org.

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

If aggravated circumstances are an issue, allegations regarding the circumstances may be included in the petition and determined at the adjudicatory hearing. The concept of aggravated circumstances was added to child protection law to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find and place the child in a new safe and loving home can be initiated promptly.[35]

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing. Aggravated circumstances could be asserted later, by written motion with notice and opportunity for hearing.[36] However, because a finding of aggravated circumstances will fundamentally alter the process of the case, such allegations should be made at the earliest possible point in the case.

Idaho Code § 16-1602(6) defines aggravated circumstances:

> (a) Aggravated circumstances include, but are not limited to, 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 of Idaho Code §§ 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108, or 18-6608.
>
> (iii) Torture of a child; a sexual offense as set forth in Idaho Code § 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."[37]

The statute provides that the list of aggravated circumstances is **not** exclusive. In determining whether other acts not part of the statutory list constitute aggravated circumstances, the court should be guided by two factors: whether the circumstances are similar in severity to those listed in the statute and whether the circumstances are such that no effort should be made to reunify the family.

If aggravated circumstances are found, then:

1. IDHW is not required to make reasonable efforts to prevent removal or to reunify the family.[38]

[35] 45 C.F.R. § 1356.21(b)(3)(i) (2012).
[36] I.C. § 16-1610 (Supp. 2016); I.J.R. 41(a).
[37] I.C. § 16-1602(6) (Supp. 2016).

2. The next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent plan and placement for the child.[39]
3. The Department must file a petition to terminate parental rights, unless the court finds compelling reasons why termination is not in the best interests of the child.[40]

B. Phase 2: Disposition

The Idaho Child Protective Act sets forth two alternatives for disposition of the child.[41] The court must determine who has *custody* of the child: the parents or the Department. If the court determines that the child cannot safely return home, the court must place the child in the custody of the Department. In the alternative, the child may remain in the legal custody of her/his parents, under the protective supervision of the Department.[42]

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

1. *Threats of Danger to the Child*. A specific family situation or behavior, emotion, motive, perception, or capacity of a family member which are specific and observable, immediate, out-of-control, and have severe consequences.[43]
2. *Vulnerability of the Child*. A child is vulnerable when she/he lacks the capacity to protect her/himself. Age is only one of many factors which may impact a child's vulnerability.[44]
3. *Protective Capacities of the Parents and Family*. The knowledge, understanding, perceptions, observable behaviors, feelings, attitudes, and motivations that contribute to the parent's ability and willingness to protect the child.[45]

1. Custody with Parents and Protective Supervision by the Department

The court must determine whether it is in the child's best interest to place the child in the custody of her or his parents under the supervision of the Department.[46] At all times, the health and safety of the child is the primary concern.[47] Placement of the child at home under the Department's supervision is appropriate if the placement of the child in the home can be made subject to conditions that will ensure the health and safety of the child while in the home. Otherwise, placement of the child in the legal custody of IDHW is necessary to ensure the health and safety of the child while reunification efforts are made. Where aggravated circumstances have been found, no effort is to be made at reunification, and the child must be placed in the custody of the Department.[48]

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[38] I.C. §§ 16-1619(6)(d); 16-1620(1), (8); 45 C.F.R § 1356.21(b)(3)(i) (2012).
[39] I.C. § 16-1620 (Supp. 2016).
[40] I.C. §§ 16-1620, 16-1624(3).
[41] I.C. § 16-1619(5).
[42] I.C. § 16-1619(5)(a).
[43] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-10, "Benchcard B" (2009).
[44] *Id.* at 11-13, "Benchcard C."
[45] *Id.* at 13-16, "Benchcard D." These criteria are discussed in more detail in Chapter 2, pages 13-17.
[46] I.C. § 16-1619(5)–(6).
[47] I.C. § 16-1601 (2009).
[48] 45 C.F.R. § 1356.21(b)(3)(i) (2012).

If the parents demonstrate a commitment to participating in the services and resolving the problems, then requirements for the parents to participate in the services and to comply with specific behavioral directives may be conditions that would enable the child to remain safely at home under IDHW supervision.

When determining whether the child may be placed in her or his own home, the court should evaluate whether a plan to ensure the child's safety is sufficient, feasible, and sustainable. The safety plan must control or significantly reduce the safety issues identified in the investigation. If the family's protective capacities are insufficient, the safety plan should determine what will protect the child by examining how and when threats emerge. It should also specify what actions or services are required to control those threats.[49]

A plan for ensuring the child's safety may contain conditions such as:

- Engaging the support or assistance of extended family,
- Controlling who can be present or reside in the home,
- Allowing inspection of the home,
- Requiring drug testing and no failed tests,
- Identifying what services will be provided to strengthen the parents' protective capacities,
- Requiring the home to meet the basic needs of the child (i.e. water, power, heat, etc.), or
- Eliminating unsafe conditions in the home.

The court should include these terms and conditions in the order for protective supervision.[50] In cases where a child has been abused by only one parent, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order restricting contact with the other parent.[51]

If the safety threats to the child cannot be controlled or eliminated, removal from protective supervision will be required and a new disposition decision will be necessary. Redisposition is further discussed below.

2. Custody with the Department

When it is not possible to control or eliminate the threats of danger, the child must be placed in the custody of IDHW. The court should carefully review why a safety plan is insufficient, unfeasible, or unsustainable and should begin the discussion of the conditions for return home (which will be addressed in the case plan). A decree placing the child in the custody of the Department continues until the child turns eighteen or until the court orders otherwise.[52] The Department may not place a child in the home from which the court ordered the child removed without first obtaining the approval of the court.[53]

3. Contrary to the Welfare

[49] LUND & RENNE, *supra* note 40, at 25-32, "Bench card G" (2009).
[50] I.C. § 16-1619(10) (Supp. 2016).
[51] I.C. § 16-1619(10), §16-1602 (31). Chapter 4 discusses protection orders in detail.
[52] I.C. § 16-1619(9).
[53] I.C. § 16-1629(8).

Idaho law requires the court to find that it is contrary to the welfare of the child to remain in the home in every case in which the child is placed in the custody of the Department. Idaho law requires this finding at both the shelter care hearing and the adjudicatory hearing.[54]

Federal law requires a case-specific finding that it is contrary to the welfare of the child to remain in the home in the first court order sanctioning removal of the child from the home.[55] Generally, this finding has been made prior to the adjudicatory hearing (either at the shelter care hearing or in the order for removal in the summons).[56] There are specific requirements for this finding that are necessary to ensure an otherwise eligible child's access to federal IV-E match funds and adoption assistance.[57] Failure to timely make the contrary to the welfare finding cannot be corrected at a later date. These requirements are discussed in detail in Chapters 4 and 12 of this Manual.

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

The court is required to make a finding regarding the Department's efforts to prevent the need for removal under state and federal law. Under federal law, the finding must be made no later than 60 days after the child has been removed from the home.[58] If the finding is not made within the deadline, an otherwise eligible child will lose eligibility for federal IV-E match funds and the omission **cannot be corrected** at a later date to reinstate the funding.

The finding must be explicitly documented and made on a case-by-case basis.[59] This requirement can be met by incorporating by reference affidavits or reports from the Department or others describing the efforts made and why those efforts were reasonable under the circumstances. If the finding is made on the record, but is not documented in the order, it can only be corrected by preparation of a transcript that verifies that the required determinations have been made.[60]

Idaho law also requires a finding of reasonable efforts to prevent removal, in every case where a child is removed from the home and placed in the custody of the Department. This includes a child who was placed under the protective supervision of the Department and is later removed from the home. To ensure the finding is timely made, this requirement is found in both the shelter care provision and the adjudicatory provision, as well as the redisposition provision.[61] Any of the following findings satisfy the reasonable efforts requirement:

1. Reasonable efforts were made but were not successful in eliminating the need for foster care placement of the child;

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[54] I.C. §§ 1619(6), 16-1615(d)(e).
[55] 45 C.F.R. § 1356.21(c) (2012).
[56] Chapter 3 of this Manual contains further information about orders for removal; Chapter 4 contains further information on Shelter Care hearings.
[57] 45 C.F.R. § 1356.60.
[58] 45 C.F.R. § 1356.21(b)(1)(i) - (ii) (2012).
[59] 45 C.F.R. § 1356.21(d).
[60] *Id.*
[61] I.C. §§ 16-1615(5), 161619(6), 16-1623(4) (Supp. 2016.).

2. The Department made reasonable efforts to prevent removal but was not able to safely provide preventive services;
3. Reasonable efforts to temporarily place the child with related persons were made but were not successful; or
4. Reasonable efforts were not required as the parent had subjected the child to aggravated circumstances as determined by the court.[62]

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 Section 16-1619(6)(b): the Department made reasonable efforts to prevent removal but was not able to safely provide preventive services.

The court may find that the Department failed to make reasonable efforts to prevent removal of the child from the home. If a finding of "no reasonable efforts" is made, an otherwise eligible child's eligibility for IV-E match funds will be lost. If the court is considering a "no reasonable efforts" finding, to preserve federal IV-E funding for the child, recommended best practice is for the court to hold a continued hearing within the 60-day deadline to hear additional evidence as to the Department's efforts to prevent the need for removal.

5. Amended Disposition: Removal of the Child from Protective Supervision

When the child is under the protective supervision of the Department, there may be circumstances when a subsequent removal is necessary for the safety of the child. The CPA provides a procedure and standards for amending the child's disposition.[63]

A peace officer may remove the child where the child is endangered in her or his surroundings and prompt removal is necessary to prevent serious physical or mental injury. In addition, the court may order, based upon facts presented to the court, that the child should be removed because continuation would be contrary to the welfare of the child and vesting legal custody of the child in the Department is in the best interest of the child (similar to an order for removal).[64]

Upon removal from protective supervision, the child must be taken to a place of shelter care and the court must hold a hearing to amend the current disposition for the child within 48 hours of the child's removal from the home. Parents must be given notice of the hearing.[65]

The amended disposition hearing is not a shelter care hearing, because there has been an adjudicatory hearing at which the child was determined to be within the jurisdiction of the CPA. At the amended disposition hearing, the court determines the amended disposition for the child in the same manner and upon the same basis as at the disposition phase of the adjudicatory

[62] I.C. § 16-1619(6).
[63] I.C. § 16-1623.
[64] I.C. § 16-1623(1).
[65] I.C. § 16-1623(2), (3), and (6).

hearing.[66] The court may consider any information relevant to amending the current disposition for the child. The court's determinations must include the same written, case-specific findings regarding contrary to the welfare/best interest of the child and the reasonableness of the Department's efforts to prevent removal as at the disposition phase of the adjudicatory hearing. Both are further discussed above.[67]

If the court has made a finding of aggravated circumstances, the Department may request that the court find that reasonable efforts to prevent removal or to reunify the family were not required.[68]

5.10 OTHER CONSIDERATIONS

A. Role of the Court in Reviewing the Placement Decision

When a child is placed in the custody of IDHW, Idaho law vests authority in the Department to determine the child's placement, subject to review by the court.[69] Idaho law requires the Department to make a reasonable effort to place the child in the least restrictive environment, and to consider, along with the best interest and special needs of the child, priorities for the child's placement.[70] The first priority is for placement with a "fit and willing relative." The second priority is for placement with a "fit and willing non-relative with a significant relationship with the child." The third priority is placement with foster parents and other licensed persons "with a significant relationship with the child. Finally, the fourth priority is for placement with foster parents and other licensed persons.

Because the placement is critical to the child's well-being, the court should make careful inquiry as to the Department's proposed placement for the child at the disposition phase of the adjudicatory hearing, and encourage the full and open consideration of all options for the child's placement by all participants. As to the issue of judicial review of agency placement decisions, however, Idaho judges and practitioners must become familiar with the following specific provisions of Idaho and federal law and the Idaho Supreme Court decision in *Roe v. State* (*"Roe 2000"*). [71]

In *Roe 2000*, a grandmother who had established a strong relationship with her granddaughter sought to intervene in a child protection case to seek permanent custody of her granddaughter. The Idaho Supreme Court affirmed the trial court's decision denying intervention by the grandmother.[72] The Court further stated:

> If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a

[66] I.C. § 16-1623(4).
[67] *Id.*
[68] I.C. §§16-1623(4), 16-1619(6); 45 C.F.R. § 1356.21(b)(3) (2012).
[69] I.C. § 16-1629(8) (Supp. 2016).
[70] I.C. § 16-1629(11).
[71] *In Re Doe*,134 Idaho 760, 9 P.3d 1226 (2000).
[72] *Id*. at 767, 9 P.3d at 1233.

> forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live. *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-1629(8), the CPA provides the court only limited authority to review the Department's placement decisions.[73]

The Court did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. This left a major question as to the nature and extent of judicial review of the Department's placement decision and left the trial courts and the parties facing a serious dilemma in cases where the placement of the child is a major issue that needs to be resolved.

Federal law requires that placement authority be vested in the state agency for the child to be eligible for federal funds.[74] The U.S. Department of Health and Human Services ("USDHHS") has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[75]

Recent developments in the law have further addressed the issue of judicial review. In 2016, the CPA was amended to provide that "determinations relating to where and with whom the child shall live shall be subject to judicial review by the court, and, when contested by any party, judicial approval," but no provision addressed how such review and approval was to be done.[76] In 2017, the Idaho Supreme Court adopted Idaho Juvenile Rule 43, which addressed when and how such contests are raised and resolved, and in 2018, Idaho Code § 16-1619 was amended to add subsection 12, which further addresses how such contests are raised and resolved. The rule and the statute address who can address the issue, when the issue can be raised, and the procedure for raising and resolving the issue. Most notably, both the statute and the rule provide that where the court disapproves the agency placement, the court does not order a different placement. Rather, the court orders the agency to identify and implement an alternate placement in accordance with applicable law.

The CPA specifically provides that the Department may not place a child outside the state without prior court approval.[77] It is important to consider all options for the child's placement,

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[73] *Id*.
[74] 45 C.F.R. §1356.71(d)(1)(iii) (2012).
[75] Responsibility for Placement and Care, Section 8.3A.12 of the Children's Bureau's Child Welfare Policy Manual, Questions and Answers on the Final Rule, 65 Fed. Reg. 4020 (January 25, 2000)) https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31 (last visited: May 3, 2018).
[76] I.C. § 16-1629(8) (Supp.2016). *See also* § 16-1619(5) (Supp. 2016), which provides that upon entering its decree, the court shall consider any information relevant to the disposition of the child, and in any event shall place the child under the protective supervision of the Department, or vest legal custody in the Department, "subject to full judicial review by the court and, when contested by any party, judicial review of all matters relating to the custody of the child" by the Department.
[77] I.C. § 16-1629(8).

including out-of-state placements, but out-of-state placements can impede visitation and can present inter-jurisdictional difficulties. If the Department proposes to place a child out-of-state, the Department must file a written motion with the court for approval of the placement, and the placement must comply with the Interstate Compact on Placement of Children.[78] Out-of-state placement issues are further addressed in Chapter 12.

The CPA also specifically provides that, when the court has vested custody of the child in the Department, the Department may not return the child home without the prior approval of the court.[79] The child may have supervised or unsupervised visits in the home pursuant to agency rules, but an unsupervised visit that exceeds 48 hours is an "extended home visit" that requires prior court approval.[80] The return of a child home under the supervision of the Department is a modification of disposition that also requires prior court approval.[81]

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

In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act (the Fostering Connections Act) imposed a number of requirements on state agencies to improve outcomes for foster children by emphasizing their connections, and by doing so earlier in the CPA case.[82] When a child is removed from the home, the removal from the parents is a traumatic and disruptive event that can be accompanied by other disruptive traumas, such as separation from siblings, changes in schools, or separation from other significant people or activities. Minimizing these accompanying disruptions is important to promote the child's resilience to the trauma and to protect the child from further trauma.

Idaho has adopted two requirements to address the disruptions that can accompany removal, that are consistent with the Fostering Connections Act, and that apply at the adjudicatory hearing. If the court vests legal custody of the child in the Department, and if the child is school-aged, the court must ask about the Department's efforts to keep the child in the same school.[83] If the court vests legal custody of siblings in the Department, the court must also ask about the Department's efforts to maintain the connection among the siblings. The court must ask about the Department's efforts to place the siblings together. If the siblings are not placed together, the court must ask about the Department's plan to ensure frequent contact among the siblings, unless the contact would be contrary to the safety or well-being of one or more of the siblings.[84]

A best practice recommendation is for the court to inquire about the Department's efforts to maintain the child's other significant connections and to initiate a discussion about options for maintaining those connections.

C. Psychotropic Medications

[78] I.J.R. 43(6); I.C. §§ 16-2101 to 16-2107 (2009).
[79] I.C. § 16-1629(8) (Supp. 2016).
[80] I.J.R. 42.
[81] I.C. § 16-1622(1)(c) (Supp. 2016).
[82] Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-352, 122 Stat. 3949 (2008).
[83] I.C. § 16-1619(7)(b)(i) (Supp. 2016).
[84] I.C. § 16-1619(7)(b)(ii).

The use of psychotropic medications in children and youth, particularly children and youth in foster care, is an issue of tremendous concern and increasing attention.[85] This is reflected in recent amendments to the CPA, which require the court to ask and the Department to report about the use of psychotropic medications for children and youth in child protection cases.

At the adjudicatory hearing, if a child is placed in the custody of the Department, the court is required to ask if the child is being treated with psychotropic medications. If so, the Department is required to report the medications and dosages prescribed for the child, and the medical professional who prescribed the medications. The court may make any further inquiry relevant to the use of psychotropic medications.[86]

The purpose of this provision is to promote informed decision-making on behalf of the child, and to ensure that the child is receiving the diagnostic and treatment services necessary for the child's well-being. The court might inquire, for example: whether the child needs further assessment by a different medical service provider; whether the child is receiving appropriate counseling in conjunction with the medication; whether and to what extent the medication appears to be helping the child; whether and to what extent the medication is causing harmful side effects; whether and to what extent other treatment options exist, etc.

D. Services Provided by the Department

By the time of the adjudicatory hearing, information regarding the reasons the child came into care should be available and enable the parties to move forward with services necessary for a successful resolution of the case. To the extent this information is known at the adjudicatory hearing, best practice is for the court's disposition decree to specify the services to be provided to the child and the family, and the services in which the family is to be required to participate, pending the next hearing. The purpose is to keep the case moving forward, as there is often no good reason to wait for the case plan hearing when information is already available that will enable the parties to start making progress towards reunification.

For example, a parent may have a known substance abuse issue. One of the necessary steps will be a drug and alcohol evaluation to determine the nature and extent of the problem and the treatment options available to address the problem. The child may have known developmental or behavioral problems. Ordering an evaluation of the child to determine the nature and extent of the child's special needs and the options available to address those needs is necessary. The court's order can require that the Department complete evaluations and identify service options prior to the next hearing and that the recommended or agreed upon option(s) be included in the case plan or permanency plan.

The key to reaching an appropriate settlement at the adjudicatory hearing can be determining the issues that brought the child into care and the services that can help the family resolve those issues. If the Department has identified services it will provide to assist the family in addressing

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[85] *See* UNDERSTANDING PSYCHOTROPIC MEDICATIONS, Child Welfare Information Gateway, U.S Department of Health and Human Services Administration for Children and Families, Children's Bureau, at www.childwelfare.gov.
[86] I.C. § 16-1619(7)(c) (Supp. 2016).

the problems that created the child protection case, the parents may be willing to agree to adjudication and disposition, enabling them to access those services more quickly and to resolve the problems.

E. Timing of the Case Plan or Permanency Hearing

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory hearing. The next hearing to be scheduled depends on whether the court found aggravated circumstances. If aggravated circumstances are not found and the child is placed in the custody of IDHW or with a parent under protective supervision, then IDHW must prepare a written case plan and the court must have a case plan hearing. If aggravated circumstances are found, then the Department must prepare a written permanency plan and the court must hold a permanency hearing. The case plan or permanency hearing must be scheduled for a date within 30 days of the adjudicatory hearing and the case or permanency plan must be filed with the court no later than five days prior to the hearing.[87]

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

5.11 THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE ADJUDICATORY HEARING

The court must make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can be greatly reduced by incorporating well-prepared reports submitted by IDHW and/or the guardian *ad litem*. The written findings, conclusions, order, and decree should include the following:

- If any necessary parties were not present, a finding that proper notice was given (or if a necessary party has not been served, a finding and order that further efforts to identify, locate, and serve a necessary party are required).[88]
- If the decree/orders are entered based on the stipulation of the parties, findings that the stipulation is reasonable and appropriate and that the parties entered into it knowingly and voluntarily.[89]

[87] I.C. §§ 16-1620, 16-1621. See Chapter 6 of this manual for a full discussion of the case plan hearing, and Chapter 7 regarding permanency hearing.

[88] This finding is not specifically required by I.C. § 16-1619. However, sections 16-1610(d) and (e) make clear that the parents and those having legal custody of the child are to be named in the petition. Section 16-1611 provides for service of summons on the parents and those having legal custody. In view of the requirements of the petition and the summons, the finding of whether necessary parties are present at the adjudication is a recommended best practice.

- If the child is found to be within the jurisdiction of the CPA, findings that specifically set forth the reasons for state intervention.[90]
- If aggravated circumstances are found, findings that specifically set forth the nature of the aggravated circumstances.[91]
- Findings as to the child's ICWA status. This includes findings as to whether the child is an Indian child and if so, whether the Indian child's tribe and Indian custodian have been provided proper notice under the Act. The court should enter an appropriate order if further efforts are needed to determine whether the child is an Indian child or to provide notice as required by ICWA. If the case is subject to ICWA, additional substantive findings must also be made by the court.[92]
- If the order is the first order sanctioning removal of the child from the home, the court must make case-specific findings that removal is in the child's best interests and that it is contrary to the welfare of the child to remain in the home. It may incorporate by reference an affidavit that describes the specific circumstances.[93]
- Within 60 days of the child's removal, the court must make case-specific findings as to the reasonableness of the Department's efforts to prevent the need for removal of the child from the home.[94] Reasonable efforts to prevent a child's removal from the home are not required if the IV-E agency obtains a judicial determination that such efforts are not required because a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances.[95]
- Decree placing child in the custody of IDHW or in the custody of a parent under the Department's supervision, until the child's 18th birthday (or until otherwise ordered by the court prior to the child's 18th birthday).[96]
- If the child is to be placed in the child's own home under Department supervision, the safety plan necessary to eliminate threats to the child's safety and welfare in the home.
- A protective order, where appropriate.[97]
- Services the Department is to provide to the child, the child's parents, and the foster parents, and services in which the parent(s) will be required to participate.
- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

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

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[89] I.J.R. 38 provides for entry of decrees and orders based on a stipulation only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interest of the child.
[90] I.C. §§ 16-1603 (2009), 16-1619(4) (Supp. 2016).
[91] I.C. §§ 16-1620, 16-1602(6).
[92] For a detailed discussion of the requirements in an ICWA case, please see Chapter 11.
[93] I.C. § 16-1619(6); I.J.R. 41(f).
[94] I.C. § 16-1619(6); I.J.R. 41(e).
[95] 45 C.F.R. § 1356.21(b)(3).
[96] I.C. § 16-1619(9) (Supp. 2016).
[97] I.C. § 16-1619(10).

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CHAPTER 6: The Case Plan and the Case Plan Hearing

6.1 THE CASE PLAN

The case plan is the roadmap for achieving permanency for the child. It identifies the issues that are preventing the child from safely returning home. It includes tasks that must be completed to resolve each of those issues and achieve reunification or another permanent placement for the child. The goal of a child protection case is to achieve permanency for the child, taking into consideration the significance of time in a child's life. For that reason, the case plan is required to include timelines for achieving permanency.[1] The case plan is the benchmark for determining if the Department is making reasonable efforts to finalize the permanency plan for the child.[2] Failure to comply with the case plan is the basis for terminating parental rights.[3] The case plan is essential to the progress of the case and in achieving permanency for the child. The court, the Department, and all parties must pay careful attention to the specificity and thoroughness of the case plan.[4]

In cases where there has been no finding of aggravated circumstances, the next step after the adjudicatory hearing is preparation of the case plan and the case plan hearing.[5] This includes both cases in which the court places the child in the custody of the Department, and cases where the court places the child under the protective supervision of the Department. The statute specifically includes cases in which the parent is incarcerated.[6]

In cases where there has been a finding of aggravated circumstances, the next step is the preparation of a permanency plan and a permanency hearing. The permanency plan and permanency hearing are discussed in Chapter 7 of this manual.

A. Contents of the Case Plan

In cases where there has been no finding of aggravated circumstances, the primary permanency goal for the child is reunification, and the case plan must include a reunification plan.[7] Where the child is placed in the custody of the Department, the case plan must also include an alternate permanency plan (or concurrent plan).[8] In cases where the child is placed under the protective

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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.

[1] I.J.R. 44.
[2] I.C. § 16-1621(4).
[3] I.C. §§ 16-2005(1)(b) (Supp. 2016), 16-2002(3)(b).
[4] Department staff often refer to the case plan as a "service plan."
[5] I.C. § 16-1621(1).
[6] I.C. § 16-1621(1).
[7] I.C. § 16-1621(3)(c).
[8] I.C. § 16-1621(3)(d).

supervision of the Department, the case plan must include the relevant portions of the reunification plan, but an alternative permanency plan is not required.[9]

1. Child in Department Custody

Idaho Code § 16-1621(3) requires that the case plan include a "reunification plan." The primary purpose of the reunification plan is to identify what needs to be done to achieve the goal of reunification. The contents of the reunification plan have expanded over time to include provisions to promote successful outcomes for children, particularly youth, while in state custody. The statute requires that the case plan must:

- Set forth reasonable efforts that will be made to make it possible for the child to return home.[10]
- Include a goal of reunification and a plan for achieving that goal.
- Identify all issues that need to be addressed before the child can safely be returned home (also known as "Conditions for Return Home")[11], without Department supervision.
- Specifically identify the tasks to be completed by the Department, each parent, or others to address each issue, including services to be made available by the Department to the parents and in which the parents are required to participate.
- Set deadlines for the completion of each task.
- Specifically state the role of the Department toward each parent.
- Identify the services to be provided to the child, including services to identify and meet any educational, emotional, physical, or developmental needs the child may have.
- Identify the services to be provided to the child to assist the child in adjusting to the placement or to ensure the stability of the placement.
- Address options for maintaining the child's connection to the community:
    - Include connections to individuals with a significant relationship to the child, and organizations or community activities to which the child has a significant connection,
    - Ensure educational stability for the child, including the efforts to keep the child in the same school or reasons why remaining in that school is not in the best interest of the child,

[9] I.C. § 16-1621(4).

[10] The court must hold annual permanency hearings, and must determine whether the Department has made reasonable efforts to finalize a permanency plan for the child, which includes reasonable efforts to reunify. If the Department has not made reasonable efforts to finalize a permanency plan for the child, **or the court fails to make the finding that the Department has made reasonable efforts to finalize the permanency plan,** an otherwise eligible child may be ineligible for federal IV-E match funds. Eligibility will be reinstated once the finding is made. The case plan provides the bench mark for determining whether the Department has made reasonable efforts. I.C. §§ 16-1622(2)(c), 45 C.F.R. § 1356.21(b)(2)(ii) (2012). Annual permanency hearings are discussed in Chapter 7 of this manual.

[11] The Department's reports to the court and *The ABA Child Safety Guidelines for Attorneys and Judges* use the term "Conditions for Return Home" to describe this section of the case plan relevant to the state requirement. *See* THERESE ROE LUND & JENNIFER RENNE, A.B.A., CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 34-38 (2009).

  - Include a visitation plan and identify the need for supervision of visitation and child support, and
  - Document that siblings were placed together, or the efforts that were made to place the siblings together, why the siblings were not placed together, and the plan for ensuring frequent contact among the siblings, unless that contact would be contrary to the safety or well-being of one or more of the siblings.
- For youth 14 and older:
  - Identify the services needed to assist the youth in making the transition to successful adulthood, and
  - Document that the youth was provided with a written copy of the youth's rights in regard to education, health, visitation, court participation, and receipt of an annual credit report, and that the rights were explained to the youth in a developmentally appropriate manner.
- If there is reason to know that the child is an Indian child, and there has been no final determination of the child's Indian status, document:
  - Efforts made to determine whether the child is an Indian child, and
  - The Department's efforts to work with all tribes of which the child may be a member to verify whether the child is a member or is eligible for membership.[12]
- The child's current foster care placement, whether there has been a change in placement since the last hearing and if so, the reasons for the change.[13]

The reunification plan should address the distinctive needs of each parent. The Department will sometimes prepare separate case plans for each parent. Judges and lawyers need to be aware of the different needs and obligations of each parent under the case plan.

In **all** cases in which the child is placed in the legal custody of the Department, Idaho Code § 16-1621(3)(d) requires that the case plan include a concurrent permanency goal and a plan for achieving that goal. The concurrent permanency goal may be one of the following: termination of parental rights and adoption, guardianship, or for youth 16 and older, another planned permanent living arrangement.[14]

[12] 25 C.F.R § 23-107(a). I.C. § 16-1621(1)(b) has not been revised since the federal regulations were adopted. At the time that section 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.
[13] I.J.R. 43(2).
[14] I.C. § 16-1621(3)(d) (Supp. 2016).

Concurrent planning[15] is a critical element in the initial case plan if a child is to achieve permanency in a timely manner. The purpose of the concurrent plan is to have a "backup" plan for the permanent placement of the child in the event reunification fails, to ensure that it is the backup plan that best serves the child's interests, to have that backup plan in place as early as possible, and to have the child in a placement consistent with that plan as early as possible. The plan for the concurrent permanency goal should be developed in earnest from the outset, and with as much specificity as the plan for the primary permanency goal. A "wait and see" approach, waiting to see how reunification efforts progress, or waiting to see if reunification will fail, before seeking alternative permanency options, will not achieve permanency for the child in a timely manner. Delays in concurrent planning can substantially impair the child's stability and success while in state care and increase the emotional toll on the child, impairing the child's future stability and success long after the child has left state care. Delays in concurrent planning do the greatest harm to the children who are the most at risk - those for whom reunification efforts fail.

In order to achieve the timely permanency required by ASFA, it is necessary to develop, communicate, and work simultaneously on two types of placements in the event that reunification is not possible. Concurrent planning is the process of working toward reunification while at the same time establishing and working toward an alternate or contingency permanent plan. Concurrent case planning is a family-centered practice, bringing together the caregiver and biological family to improve the child's safety and well-being. Caregivers can offer support and parenting assistance while the biological family works through the case plan tasks with needed services. As a team, parents and caregivers can focus on the best interests of the child. The court should inquire about the concurrent plan in each case and ensure that concurrent planning efforts are underway to support the safety and well-being of children and families while promoting early permanency decisions for children.
*From *Enhanced Resource Guidelines, Improving Court Practice in Child Abuse and Neglect Cases*, published by the National Council of Juvenile and Family Court Judges (2016), at page 220. The complete guidelines are available on-line at www.ncjfc.org

Idaho Code § 16-1621(3)(d) provides that the concurrent plan must:

- Address all options for permanent placement of the child, including consideration of options for in-state and out-of-state placement of the child.
- Address the advantages and disadvantages of each option in light of the child's best interest and include recommendations as to which option is in the child's best interest.
- Specifically identify the actions necessary to implement the recommended option.
- Specifically set forth a schedule for accomplishing the actions necessary to implement the concurrent permanency goal.
- Address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with which the child has a significant connection.

[15] "Concurrent planning" is defined in the CPA as a "planning model that prepares for and implements different outcomes at the same time." I.C. § 16-1602(14). One of the primary purposes of the CPA is to "coordinate efforts by state and local public agencies, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to: (3) Take such actions as may be necessary to provide the child with permanency including concurrent planning…" I.C. § 16-1601(3) (2009).

- Specify further investigation necessary to identify and/or address other options for permanency placement, to identify actions necessary to implement the recommended placement, or to identify options for maintaining the child's significant connections.
- If the concurrent permanency goal is termination of parental rights and adoption, include the names of the adoptive parents once the proposed adoptive parents are identified.
- For youth 14 and older, specifically identify the services needed to assist the child to make the transition to successful adulthood.
- For youth with a proposed permanency goal of another permanent planned living arrangement (APPLA), document:
    - The intensive and so far unsuccessful efforts made to place the child with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative.
    - Why APPLA is the best permanency plan for the youth, and compelling reasons why, so far, it would not be in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative.
    - The steps the Department has taken to ensure that the youth's foster parents or child care institution are following the reasonable and prudent parent standard when determining whether to allow the youth to participate in extracurricular, enrichment, cultural and social activities.
    - The opportunities provided to the youth to engage in age or developmentally appropriate activities.

Concurrent permanency planning has many important aspects, and permanency planning is discussed in more detail in Chapter 7 of this manual.

2. Child under Department Supervision

A case plan must also be prepared in cases where the child is home under the Department's protective supervision.[16] The plan must:

- Identify all issues that need to be addressed before the child can safely live at home without the Department's supervision.
- Specifically identify the tasks to be completed by the Department, each parent, or others to address each issue, including services to be made available by the Department to the parents and in which the parents are required to participate.
- Set deadlines for the completion of each task.
- Specifically state the role of the Department toward each parent.
- Identify the services to be provided to the child, including services to meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement or to ensure the stability of the placement.
- For youth 14 and older:

[16] I.C. § 16-1621(4) (Supp. 2016).

  - Identify the services needed to assist the youth in making the transition to successful adulthood, and
- Document that the youth was provided with a written copy of the youth's rights in regard to education, health, visitation, court participation, and receipt of an annual credit report, and that the rights were explained to the youth in a developmentally appropriate manner. Address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with which the child has a significant connection.

B. The Alternate Care Plan

In Idaho, the Department submits two documents to meet the state and federal requirements regarding the contents of the case plan – the alternate care plan and the case plan, known by the Department as the service plan.[17]

The alternate care plan is a rich source of information and detail regarding safeguards for the children and the development of the goals and tasks outlined in the case plan. Some of the information that is included in the alternate care plan is also required by the Idaho statute governing case plans. The alternate care plan must be included with the case plan in all cases.[18]

Federal law defines "case plan" as a document that includes the following minimum provisions: "A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan."[19] The Department refers to this portion of the planning process as the alternate care plan.

Pursuant to this federal definition, the case plan (alternate care plan) must describe specifics of a child's care while in placement, including, at a minimum, the following:

- A description of the type of home or institution in which the child is to be placed.
- A plan for ensuring that the child receives safe and proper care and that appropriate services are provided to the parents, child, and foster parents:
  - To improve the conditions in the parents' home.
  - To facilitate the child's return to her or his own safe home or the alternative permanent placement of the child.
  - To address the child's needs while in foster care.
- To the extent available, the child's health and education records.
- Where appropriate, for a child age 14 years or older, [20] a description of programs and services that will help the child transition to successful adulthood; and/or

[17] Department staff often refer to the case plan as a "service plan."
[18] I.C. § 16-1621(3), (4).
[19] Preventing Sex Trafficking and Strengthening Families Act, 42 U.S.C. § 675(1)(B) (2015).
[20] *See* Preventing Sex Trafficking and Strengthening Families Act, 42 U.S.C. § 675(1)(B), (5)(C)(iv) (2015).

- If the permanency goal for the child is adoption, documentation of the steps being taken to find an adoptive family.[21]

For youth age 14 and older, the case plan must be developed in consultation with the youth and, at the option of the youth, up to two members of the case planning team who are not the case worker or foster parent.[22] The case plan must specify the child's rights with respect to education, health, visitation, and court participation, the right to be provided with certain documents[23], and the right to stay safe and avoid exploitation.[24] At the case plan and permanency hearings, The Department must identify the services that will be provided to help the youth transition to a successful adulthood. [25]

6.2 GOALS AND ELEMENTS OF EFFECTIVE CASE PLANNING FROM A SOCIAL WORK PERSPECTIVE

A. The Case Planning Process

Case planning, often called "service planning" by social workers, is the process of establishing desired results, goals, and tasks to address the needs of the entire family so that they can live safely without Department involvement. Case planning is the bridge or link between the safety assessment and the service or intervention required to meet the child's need for safety, permanency, and well-being. Therefore, the connection between the safety assessment and the case plan is essential and purposeful. The case plan must address the identified safety threats to the child and provide services to the parent or caregiver to address their assessed diminished protective capacities. The case plan also should contain timelines for the accomplishment of all tasks.

The purpose of the case planning process is to achieve the following goals:

- Identify services and tasks that will reduce safety threats to the child, enhance the protective capacity of parents or caregivers, and/or mitigate the child's vulnerability.
- Create an individualized, outcome-oriented case plan that addresses the needs of all family members.
- Establish a concurrent plan in the event the family cannot be reunited permanently and safely.
- Demonstrate parental commitment and follow through to completing the case plan.

The plan must be specific, measurable, achievable, realistic, and time-limited. The planning process should engage the family in an effective method of problem solving that might be useful as the family encounters other challenges. It should communicate the belief that change is both

[21] 42 U.S.C. § 675(1)(E); I.C. § 16-1621(3)(vi) (Supp.2016).
[22] 42 U.S.C. § 675(1)(B), (5)(C) (2015).
[23] 42 U.S.C. § 675a(b), 675(5)(I) (2015). Youth aging out of foster care must be provided with a copy of their birth certificate, social security card, health insurance information, copy of their medical record, and a driver's license or a state-equivalent identification card.
[24] 42 U.S.C. § 675a(b)(1)
[25] 42 U.S.C. § 675(5)(C) and 42 U.S.C. § 671(a)(16), respectively (2015).

expected and desired. It should also send an optimistic, hopeful message that change is possible. Effective planning is dependent upon ongoing assessment. Assessment guides the plan by identifying the issues that pose continued threats of danger to the children.

During case planning the focus should be on the family unit. Services should be offered to strengthen the family and to allow parents to function effectively while adequately protecting and providing for their children. The role of the social worker is to ensure that families have reasonable access to a flexible, culturally-responsive, individualized array of services and resources.

B. Family Participation in Case Planning

Ideally, effective case planning requires participation of a "family team." A family team can include parents, age-appropriate children, other family members, other family supports, resource families/adoptive parents, therapists, mentors, case aides, or others who are significant in the family's life.

IDHW currently uses a process called Family Group Decision making (FGDM)[26] to encourage participation of families in case planning and to assist families in identifying issues and needs. FGDM recognizes that families have the most information about themselves and have the ability to make well-informed decisions. Family members become active participants in decision-making for the family.

FGDM embraces the following values: the process of planning should be family focused, strength based, community based, and culturally appropriate. Generally, all family members who wish to be present at the family meeting are invited. The family can identify other non-family supportive individuals who are also invited to participate. The family meeting is usually facilitated by an independent coordinator – the social worker is present but does not lead the meeting.

At the meeting, information is shared by all present, usually starting with the social worker who presents the facts that led to the filing of the CPA proceeding. The family can ask questions of the social worker and others to make sure that they have a full understanding of the issues in the case.

Once information is exchanged, the professionals generally leave the room so that the family can discuss their planning in private. The family's job is to create a plan to ensure that the child is cared for and protected from threats of violence. The family then presents their plan to the professionals who provide input. The goal of the process is to reach consensus, although the professionals may veto portions of the plan.

The process of FGDM not only can assist in achieving timely reunification of the child with her or his family, but also may assist the family to understand when reunification is not possible. In the latter situation, FGDM can help to identify an alternate permanent placement for the child.

[26] FGDM is also known as family decision-making, family group conferencing, or family unity meetings.

6.3 THE CASE PLAN HEARING

A. Purpose of the Case Plan Hearing

At the case plan hearing, the court must decide whether to adopt, modify, or reject the case plan filed by the Department.[27]

If the court approves the plan as submitted or as modified, the plan must be incorporated in an order by the court, directing the Department and the parents to comply with the plan.[28] Other parties, in appropriate circumstances, also may be required to comply with the plan. If the child is placed in the custody of the Department (rather than under the Department's supervision), "the court's order shall provide that reasonable efforts shall be made to reunify the family in a timely manner in accordance with the case plan."[29] The court's order also shall "require the Department to simultaneously take steps to accomplish the goal of reunification and the concurrent permanency goal."[30]

B. Timing of the Hearing

The court shall schedule a case plan hearing to be held within thirty (30) days after the adjudicatory hearing.[31] It is particularly important to approve the case plan in a timely fashion as the plan provides the "road map" for permanency for the child. As in all CPA proceedings, the court should strongly discourage continuances.

C. Submission of the Case Plan to the Court

The written case plan must be filed no later than five (5) days prior to the case plan hearing.[32] The case plan must be delivered to the parents, legal guardians, the prosecuting attorney or deputy attorney general, the guardian *ad litem*, and the attorney for the child.

D. Notice

1. Foster Parents

Idaho law requires that notice of the case plan hearing be provided to the "parents and other legal guardians, the prosecuting attorney or deputy attorney general, the guardian *ad litem*, attorney for the child, the Department, and foster parents."[33] In addition, I.J.R. 40 provides that "[a]fter the adjudicatory hearing, any person who is designated by the Department of Health and Welfare as the foster parent, as a pre-adoptive parent, or as a relative providing care for a child who is in the custody of the Department, shall be provided with notice of, and have a right to be heard in, any further hearings to be held with respect to the child." This notice must be given by the

[27] I.C. § 16-1621(1)(a) (Supp. 2016).
[28] I.C. § 16-1621(5).
[29] I.C. § 16-1621(5).
[30] *Id.*
[31] I.C. § 16-1621(1).
[32] I.C. § 16-1621(1).
[33] I.C. § 16-1621(2).

Department and the Department must confirm to the court that the required notice was provided. The rule also makes clear that the right to notice and to be heard does not make foster parents parties to the CPA proceeding.[34]

2. Children Eight and Older

Idaho Juvenile Rule 40 requires that "[a]fter the adjudicatory hearing, a child eight years of age or older, shall be provided with notice of, and have a right to be heard, either in person or in writing, in any further hearings to be held with respect to the child."[35] As with notice to foster parents, notice must be given by the Department, and the Department must confirm that notice was provided. The rule also makes clear that the court may but is not required to continue the hearing when the notice is not given or when the child does not appear. [36]

Idaho Juvenile Rule 40 also provides that children 12 and older are required to attend their six-month review hearings and permanency hearings in person or by telephone, unless the youth declines in writing, declines through counsel, or the court finds good cause to excuse the youth from attending.[37] The purpose of this provision is to promote more positive outcomes for youth by encouraging them to be more engaged in both the permanency planning process and the planning for the transition to independent living, and to encourage the court to engage more directly with the youth. [38]

3. Agreements by the Parties

The parties may stipulate to a case plan. Pursuant to Idaho Juvenile Rule 38, such a stipulation must be made part of the court record and is subject to court approval. The court must make reasonable inquiry to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that it is in the best interests of the child. [39] The court should ensure that the case plan has been thoroughly considered by all participants, especially both parents, if involved. The court should specifically ask the parents, on the record, whether they are willing and able to comply, and whether there are additional or different services they need or want that will enable them to address the issues that need to be resolved before the child can be safely returned home.

Even when the parties stipulate to the plan, the court must ensure that it is comprehensive and it contains all the essential elements of a case plan (as discussed above). If the case plan is not comprehensive, the court should address any omitted elements.

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[34] I.J.R. 40(a). *See also Roe v. Dep't. of Health & Welfare (In Interest of Doe),* 134 Idaho 760, 9 P.3d 1226 (2000) (holding that foster parents did not have standing to intervene and object to the Department's permanency plan in a CPA proceeding).
[35] I.J.R. 40(b).
[36] I.J.R. 40(b).
[37] I.J.R. 40(c).
[38] See Chapter 12 of this manual for more information about involving children and foster parents in court.
[39] I.J.R. 38.

6.4 KEY DECISIONS THE COURT SHOULD MAKE AT THE CASE PLAN HEARING

A. Approval of the Case Plan

When evaluating the case plan, judges should consider the following questions.

- Is the case plan **complete**? The plan should include all the information required by the statute and the rules.

- Is the case plan **focused on safety**? The plan should focus on the safety issues that brought the child into care and what needs to change so the child can safely return home, with emphasis on reducing risks to the child and increasing the protective capacities of the parents.[40]
    - Does the plan include goals or tasks addressing changes in behaviors, commitments, and attitudes that will mitigate the threat of danger to the child? (If the plan merely lists the services participants must attend and/or generically directs the participants to "follow a treatment recommendation," then the plan only provides a basis for measuring the participants' attendance, but does not provide a basis for measuring changes in their behavior.)
    - Does the case plan follow logically from the threats of danger to the child and gaps in parents' protective capacities? The plan should contain precise detail regarding the strategy and actions necessary to change the situation and to allow the child to return home.

- Is the case plan **comprehensive**? The case plan should fully identify and address the needs of both the parents and the children.

- Is the case plan **individualized**? The plan should address the needs of each parent and each child, and not be a list of standard provisions.

- Is the case plan **specific**? Specificity is essential, so that each participant knows what is expected, to avoid delays from lack of clarity, to provide a benchmark if the case proceeds to termination of parental rights based on failure to comply with the case plan,[41] and to provide a benchmark to determine if the Department is making reasonable efforts to finalize permanency for the child.[42]

- Is the case plan **behavior-oriented**? The ultimate objective is to change behavior. The tasks are the means to achieve that objective. For example, if lack of parenting skills is an issue, the case plan should not simply require the parent to attend a parenting class, but should also require that the parent demonstrate the skills learned

[40] I.C. § 16-1601.
[41] I.C. §§ 16-2005(1)(b), 16-2001(3)(b) (Supp. 2016).
[42] I.C. § 16- 1622(2)(c).

through appropriate interaction, supervision, and discipline of the child during supervised visitation.

- Is the case plan **realistic and achievable**? Are there obstacles to the completion of case plan tasks, and if so, what are the options for overcoming those obstacles? Transportation and language barriers are common examples. Initiating a discussion of the options for mitigating the obstacles can improve the potential for success, and can eliminate excuses for a parent's failure to comply with the case plan. Incarceration can limit but does not necessarily preclude a parent's ability to work a case plan. An incarcerated parent may be able to complete programming that is relevant to a case plan, may have options for visitation or other contact with the child, and at minimum should be required to comply with the rules of the facility to ensure the earliest possible release date. Ensuring that the case plan is realistic and achievable is also important because the Idaho Supreme Court has recognized impossibility as a defense to failure to comply with the case plan.[43] The case plan therefore provides a benchmark for termination of parental rights based on failure to comply with the case plan, but it does not provide an effective benchmark for that purpose if the plan is not one with which the parents can reasonably comply.

- Does the case plan include appropriate **deadlines**? The ultimate goal is to achieve permanency for the child, AND to do so within a reasonable time.

- What is the **parents' reaction** to the case plan? If the parents identify barriers to compliance, the court should initiate a discussion regarding the options for mitigating those barriers. The parents may be more likely to succeed when the court and other participants take an open problem-solving approach.

B. ICWA

It is critical that the court ensure compliance with the Indian Child Welfare Act.[44] 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 first and most critical issue is to determine if the child is an Indian child as defined by ICWA, and therefore, whether ICWA applies. The child's Indian status should be resolved as soon as possible in the case but there is an ongoing duty to inquire whether ICWA may apply.

At the case plan hearing, if there is reason to know that the child is an Indian child, and there has not been a final determination regarding the child's status as an Indian child, then the Department is required to include information in the case plan about its efforts to determine the child's status as an Indian child, as noted above. In addition, state law places two specific requirements upon the court. First, the court is required to inquire about the efforts that have been made since the last hearing to determine whether the child is an Indian child. Second, the

[43] *Dept. of Health and Welfare v. Doe (Doe 2016-14)*, 161 Idaho 596, 389 P.3d 141 (2016). Termination of parental rights is discussed in Chapter 9 of this Manual.
[44] *See generally* 25 U.S.C. § 1901–1922 (2012).

court is required to determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or is eligible for membership.[45] 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."[46]

If the child is an Indian child, ICWA has procedural and substantive requirements that apply in a CP proceeding, and in particular to the case plan 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 ICWA, or to otherwise comply with the requirements of the act, the court should include appropriate orders in the order approving, modifying, or rejecting the case plan.

Finally, because new information about a child's heritage can become available at any time, the best practice recommendation is for the court to inquire at each hearing whether new information has become available that would give reason to know that the child is an Indian child.

C. Deadlines

As noted above, the case plan is required to include deadlines for completion of the tasks in the reunification plan,[47] and a schedule for accomplishing the concurrent permanency goal. [48] Idaho Juvenile Rules 44 and 46 set deadlines for accomplishing the permanency goals.
Idaho Juvenile Rule 44(a) provides that the reunification plan must include a schedule for finalization of reunification within 12 months from the date of removal, but the court may approve an amendment to the case plan extending the time to finalize reunification up to three months.

Idaho Juvenile Rule 44(b) provides that if the concurrent permanency plan has a permanency goal of guardianship, the concurrent plan must include a schedule to finalize the guardianship within 13 months from the date the child was removed from the home, and any amendment to the case plan to extend the deadline must be approved by the court.
Idaho Juvenile Rule 44 does not provide a deadline if the concurrent permanency plan has a permanency goal of termination of parental rights and adoption. If the case proceeds to the

[45] I.C. § 16-1621(1)(b) (Supp. 2016); 25 C.F.R § 23-107(a). Section 16-1621(1)(b) has not been revised since the federal regulations were adopted. At the time that section 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.
[46] 25 C.F.R. § 23.107.
[47] I.C. § 16-1621(3)(c).
[48] I.C. § 16-1621(3)(d)(iv).

annual permanency hearing, however, Idaho Juvenile Rule 46 provides that, if the permanency plan has a permanency goal of termination of parental rights and adoption, the permanency plan must include a schedule that has the objective of finalizing the termination within 18 months and finalizing the adoption within 24 months of the date the child was removed from the home. That subsection further provides that any amendment to the case plan to extend the deadline must be approved by the court. The court should be aware of these deadlines when reviewing the timeliness of actions and schedules prior to the annual permanency hearing. The permanency hearing is discussed in further detail in Chapter 7 of this Manual.

D. Other Important Considerations

1. Psychotropic Medications

The use of psychotropic medications in children and youth, particularly children and youth in foster care, is an issue of tremendous concern and increasing attention.[49] This is reflected in recent amendments to the CPA, which require the court to ask and the Department to report about the use of psychotropic medications for children and youth in child protection cases.

At the case plan hearing, if the child is being treated with psychotropic medications, the court is required to ask about the use of psychotropic medications, and may make any inquiry relevant to the use of psychotropic medications. This requirement applies both to children in the custody of the Department and children under the supervision of the Department.[50]

The purpose of this provision is to promote informed decision-making on behalf of the child, and to ensure that the child is receiving the diagnostic and treatment services necessary for the child's well-being. The court might inquire, for example: whether the child needs further assessment by a different medical service provider; whether the child is receiving appropriate counseling in conjunction with the medication; whether and to what extent the medication appears to be helping the child; whether and to what extent the medication is causing harmful side effects; whether and to what extent other treatment options exist; etc.

2. Visitation

In cases where a child is in the custody of the Department, the frequency and quality of visitation between the child and the parent(s) is often the best indicator of progress toward successful reunification (or lack thereof). The case plan is required to include a plan for visitation.[51] A best practice recommendation is for the court to inquire about the frequency and quality of visitation, and to initiate discussion about options for increasing the frequency and quality of visitation, and reducing barriers to more frequent visitation, while ensuring the safety and well-being of the child.

E. Further Orders

[49] *See* UNDERSTANDNG PSYCHOTROPIC MEDICATIONS, Child Welfare Information Gateway, U.S Department of Health and Human Services Administration for Children and Families, Children's Bureau, at childwelfare.gov.
[50] I.C. § 16-1621(1)(c) (Supp. 2016).
[51] I.C. § 16-1621(3)(b)(iii) (Supp. 2016).

The court should set the date and time for the next hearing on the record prior to the conclusion of the case plan hearing (a review or status hearing, discussed in Chapter 8 of this manual). The court should also enter any orders necessary to ensure that all participants are prepared for the next hearing. For example, transport orders or orders allowing a parent to appear by phone may be necessary a parent is incarcerated, or orders allowing participants to appear by telephone may be appropriate where the participant resides out-of-state. Additional orders may be appropriate or necessary when further efforts are needed to identify, locate and serve absent parents or to comply with ICWA, as discussed below.

6.5 BEST PRACTICES TO REDUCE DELAYS AND TO ACHIEVE TIMELY PERMANENCY FOR CHILDREN AT AND BEFORE THE CASE PLAN HEARING

A. Early Identification and Involvement of Absent Parents

The status of absent biological parents must be resolved as early as possible to avoid delays in achieving permanency. In all cases, absent parents should be identified as soon as possible so a determination can be made regarding whether they must be joined to the action and/or whether they or their families might provide resources in support of the child's permanency.

Timely resolution of paternity issues is both in the best interest of the child and essential to avoiding delays at subsequent points in the court process. Where the parents are not married at the time the child was born or where an unmarried father has not been adjudicated as a parent, paternity tests should be conducted early in the case as a matter of best practice. This will ensure that a man thought to be the father of the child actually is the father of the child and is properly part of the CPA proceeding.[52]

B. Early Identification and Involvement of Relatives

Both Idaho and federal law impose a priority in favor of placing children with relatives. Idaho law provides:

> "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:
>
> (e) A fit and willing relative.
> (f) A fit and willing non-relative with a significant relationship with the child.
> (g) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code, with a significant relationship with the child.

[52] *See, e.g., Doe v. Dept. of Health and Welfare*, 134 Idaho 760, 9 P.3d 1226 (2000) (achieving permanency for child was delayed where putative father was not contacted until child protection case had been pending for two years, and the delay led to conflict between grandparent/foster parent and birth father).

(h) Foster parents and other persons licensed in accordance with chapter 12, title 39, Idaho Code."[53]

Federal law requires that the Department place children with relatives so long as the relative meets the Department's "child protection standards."[54]

The Department must identify all relatives of the mother, father, and putative father(s) of the child and thoroughly investigate the appropriateness of these relatives as potential caretakers for the child. Additionally, the Department must identify the parents of the child's siblings and notify them of the child protection case. The term "sibling" is defined by state law and includes individuals who would be a sibling under state law were it not for a disruption in parental rights.[55] Identification and investigation of all potential caretakers is essential to ensure that the placement selected is the one that best meets the needs of the child and ensures the child's safety.[56]

When a child is placed in the custody of the Department, Idaho law vests authority in the Department to determine the child's placement, subject to review by the court.[57] The role of the court in reviewing agency placement decisions is discussed in Chapter 5 of this manual,

C. Compliance with the Interstate Compact on the Placement of Children (ICPC)

A child may not be placed out of state without a court order and without compliance with the ICPC. Interstate placement is a time consuming process and the Department should initiate the ICPC process as soon as possible. [58]

CONCLUSION

The case plan is the roadmap for achieving permanency for the child. The case plan hearing is an important opportunity for the judge to engage with all participants, to promote a collaborative, problem-solving process, and to ensure that the plan is thorough and suited to the needs of the family and the children. As with any journey, circumstances change, necessitating changes in the plan. The next step in a CPA proceeding is to schedule regular review hearings, at which the court will review progress on the plan and determine whether changes need to be made to the plan. Review hearings are discussed in Chapter 8 of this manual.

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[53] I.C. § 16-1629(11) (Supp. 2016).
[54] 42 U.S.C. § 671(a)(19) (2015).
[55] 42 U.S.C.A. § 671(a)(29) (2015).
[56] If the child is an Indian child, the Indian Child Welfare Act establishes a clear placement preference with members of the child's extended or tribal family. 25 U.S.C. § 1915 (2012). ICWA is discussed in detail in Chapter 11 of this manual.
[57] I.C. § 16-1629(8)(Supp. 2016)
[58] I.C. §§ 16-1629(8), 16-2102(Art. III). The ICPC is discussed in detail in Chapter 12 of this manual.

CHAPTER 7: The Permanency Plan and Permanency Hearing

7.1 INTRODUCTION

There are three types of permanency hearings.

1. *First Annual Permanency Hearing after Adoption of Case Plan:*
   Within one year after the child's removal, the court must hold a permanency hearing. If the court has not found that the parent subjected the child to aggravated circumstances, then reasonable efforts to reunify were required, and the case plan should have included both a reunification plan and a concurrent (alternate) permanency plan for the child. At the first permanency hearing, the court must approve, modify or reject the permanency goal and the permanency plan recommended by the Department.[1] The permanency goal must be one of the following: (1) continued efforts toward reunification for a period up to three months; (2) termination of parental rights and adoption; (3) guardianship; or (4) another planned permanent living arrangement for youth aged 16 and older.[2] When the court determines that the parents have made substantial progress in satisfying the requirements of the case plan and reunification is imminent, then the case continues toward reunification. When the court determines that the parents have not made substantial progress and reunification is not imminent, then the direction of the case changes to finalizing the alternative permanency goal.

2. *Permanency Hearing after Aggravated Circumstances are Found:*
   If the court found that the parent subjected the child to aggravated circumstances, then reasonable efforts to reunify were not required and the case proceeds immediately to a 30-day permanency hearing. At the 30-day permanency hearing, the court approves, modifies, or rejects the permanency goal for the child and the plan for achieving that goal. The options for the permanency goal do not include reunification.[3]

3. *Subsequent Annual Permanency Hearings:*
   In every case, the court must continue to hold annual permanency hearings so long as the child remains under the jurisdiction of the court. The permanency plan becomes

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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.

[1] I.C. § 16-1622(2)(b)

[2] I.C. § 16-1622(2)(a), (b) (Supp. 2016); I.J.R. 44(a)(1), 46.

[3] I.C. § 16-1620(1), (2)(Supp. 2016).

the benchmark for determining whether the Department has made reasonable efforts to finalize permanency for the child.[4]

At every permanency hearing, the court must review and either approve, modify, or reject the permanency plan proposed by the Department.[5] The goal of a child protection proceeding is to achieve timely permanency for the child, achieve permanency within state and federal timelines, and ensure that the Department has made reasonable efforts to finalize the permanency goal in effect for the child.

A permanency hearing may be held simultaneously with a review hearing.[6] The functions of a review hearing and a permanency hearing may overlap. When a review hearing and a permanency hearing are combined, the court must make the findings required for each hearing.

7.2 THE PERMANENCY PLAN

The permanency plan provides the road map for providing the child with a permanent placement in a timely manner. The plan identifies the court-approved permanency goal(s) for the child as well as steps for achieving the goal(s).

A. Goals

The options for the child's permanency goal fall into four general categories, in order of preference: [7]

1. Continued efforts to reunify (in the absence of a judicial determination of aggravated circumstances),
2. Termination of parental rights and adoption,
3. Guardianship, or
4. For children age sixteen (16) years or older, "another planned permanent living arrangement" (APPLA).

1. Continued Efforts to Reunify

The preferred option for permanency is the safe, permanent, and timely reunification of the child with his/her parents. The preference for reunification embodied in Idaho law is that the state must seek, to the fullest extent possible, to reunite the family.[8] The Department must make reasonable efforts to reunify the child with the family, unless the court finds that the parent(s) subjected the child to aggravated circumstances.[9]

[4] I.C. §§ 16-1622(2)(a), (c); 16-1620(1).
[5] I.C. § 16-1622(2)(b).
[6] I.C. § 16-1622(2)(b).
[7] I.C. §§ 16-1622(2)(a), 16-1620(2).
[8] I.C. §16-1601(2009).
[9] 42 U.S.C. § 671(a)(15)(D) (2012); I.C. §§ 16-1619(6)(d), 16-1620(2) (Supp. 2016). The determination of aggravated circumstances would normally be made at the adjudicatory hearing.

The statute provides that the court must approve the permanency goal, which may be continued efforts at reunification.[10] Idaho Juvenile Rule 44(a) provides that the case plan shall provide that reunification must be finalized within 12 months from the date the child is removed from the home, and if in the child's best interest, the court may approve an amendment to the case plan extending the time to finalize reunification for up to three months. In addition, the statute provides that if the child has been in the temporary or legal custody of the Department more than fifteen of the last 22 months, the Department shall file a petition to terminate parental rights prior to the last day of the 15th month, unless the court finds that the child is placed permanently with a relative, or there are compelling reasons why termination of parental rights is not in the best interests of the child, or the Department has failed to provide reasonable efforts to reunify the child with the family.[11]

The purpose of these provisions is to set a deadline for achieving reunification. At the first annual permanency hearing, there will have been a case plan with a goal of reunification, and a concurrent plan with a permanency goal of termination of parental rights, guardianship, or another planned permanency living arrangement. At the first annual permanency hearing, the court has a number of options, depending on the progress the parents have made toward reunification.

- In the best case, the child will have been safely reunified with the parent(s), and the court may vacate the case.
- If the parents have made substantial progress, and successful reunification can be reasonably expected, the court may approve a permanency goal of continued efforts at reunification, but with a concurrent (alternate) permanency goal in case reunification fails. The court will need to set a status or six-month review hearing[12] within three months, so that if reunification has not been achieved, the court can determine whether there are compelling reasons not to proceed with termination of parental rights, before the 15-month deadline.
- If the parents have made substantial progress, and successful reunification is expected, the court may approve a permanency goal of continued efforts at reunification, but with a concurrent permanency goal in case reunification fails, AND make the case-specific, written findings that there are compelling reasons not to proceed with termination of parental rights.
- If the parents have made some progress, the court may approve a primary permanency goal other than reunification, such as termination of parental rights, but also approve a concurrent plan with a goal of continued efforts at reunification. In such cases, the Department would proceed with filing the petition to terminate parental rights, but reunification efforts would continue while the termination proceeding is pending. This is sometimes effective in impressing upon parents the need to increase their efforts, and allows the parents more time to achieve reunification, without delaying implementation of another permanency option in the meantime.

[10] I.C. § 16-1622(2)(a).
[11] I.C. § 16-1622(2)(g).
[12] Review hearings are discussed in Chapter 8 of this manual.

- If the parents have made little progress, the court may approve a primary permanency goal other than reunification, such as termination of parental rights and adoption, and authorize the Department to cease reasonable efforts to reunify. [13]

2. Termination of Parental Rights and Adoption

A permanent placement provides the child with a family relationship that will last throughout the child's life, with full and permanent responsibility to the parents that is legally secure from modification and without ongoing state intervention and/or monitoring. If reunification is not a viable option, the permanency preference is termination of parental rights and adoption.[14] Adoption meets all the goals of permanency. Adoption subsidy benefits are available to assist the adoptive parents in meeting the child's needs in most situations.[15]

3. Guardianship

The third, and less preferred, permanency goal is long-term guardianship. Idaho has adopted provisions to secure the stability of CPA-connected guardianships.[16] Nonetheless, guardianship is a less-preferred option because a guardianship is not permanent – it is subject to review and modification, and terminates when a child turns 18 years of age.[17] Guardianship subsidy benefits are available in limited situations.[18]

4. Another Planned Permanent Living Arrangement

Another Planned Permanent Living Arrangement (APPLA) is not considered a permanent placement for a child. The situations in which APPLA is an appropriate permanency goal are **extremely** limited and should be considered only when a permanent placement is unavailable. APPLA may be used only for youth age 16 and older.[19] It may include placement with a foster family, a group home, or a residential facility. Federal regulations require that IDHW, internally, document the compelling reasons for approving APPLA as the permanency goal for the child.[20]

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[13] I.C. § 16-1622(2)(k).
[14] I.J.R. 46(a). Where the parent subjected the child to aggravated circumstances or where the child is an abandoned infant, the state is required to file a petition to terminate parental rights unless there are compelling reasons why it would not be in the child's best interest. I.C. § 16-1624. In addition, where a child has been in the custody of the agency for 15 of the last 22 months, the state is required to file a petition to terminate parental rights, unless the court finds that it is not in the best interests of the child, that reasonable efforts have not been provided to reunite the child with its parents, or the child is placed permanently with a relative. I.C. 16-1629; 42 U.S.C. § 675(5)(E).
[15] Adoption is discussed in detail in Chapter 10 of this manual.
[16] *See* I.C. § 15-5-212A (2009).
[17] *See* Chapter 12: Special Topics.
[18] IDAHO DEPARTMENT OF HEALTH AND WELFARE, STANDARD FOR GUARDIANSHIP ASSISTANCE (2011), *available at* http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/GuardianshipAssistance.pdf (last visited April 29, 2015).
[19] I.C. §§ 16-1622(2)(a), 16-1620(2). See also Preventing Sex Trafficking and Strengthening Families Act, 42 U.S.C. § 675(5)(C)(i).
[20] 45 C.F.R. § 1356.21(h)(3) (2012).

The Idaho Child Protective Act provides that a court may approve a permanency goal of APPLA only upon written, case-specific findings that APPLA is the best permanency goal for the child, and there are compelling reasons why a more permanent goal is not in the best interest of the child. [21]

If the youth cannot currently function in a family setting, ongoing diligent efforts by the Department may result in a family that is willing and able to provide care to the youth in the future. If APPLA is the approved permanency goal for the youth, the recommended best practice is to schedule frequent review hearings to ensure that the Department provides appropriate services to the youth and to determine if circumstances have changed sufficiently to allow the youth to function in a family setting.

B. Required Contents of Permanency Plans

1. The plan for achieving the permanency goal

Identifying the goal and the plan for achieving that goal requires a systematic analysis of the child's needs and the options for best meeting those needs. Every plan must document that analysis in the following manner: [22]

- Address all options for the permanent placement of the child, including consideration of options for in-state and out-of-state placement.
- Address the advantages and disadvantages of each option.
- Include a recommendation as to which option is in the child's best interest.
- Specifically identify the actions necessary to implement the recommended option.
- Specifically set forth a schedule for accomplishing the actions necessary to implement the permanency goal.
- Identify further investigation necessary to identify or assess other options for permanent placement, to identify actions necessary to implement the recommended placement, or to identify options for maintaining the child's significant connections.

2. Other Required Information

In addition to identifying the permanency goal, each permanency plan must include a considerable amount of additional information. The contents of the permanency plan have expanded over time to include provisions to promote successful outcomes for children, particularly youth, while in state custody. The plan must also:

- Identify the services to be provided to the child, including services to identify and meet any special educational, emotional, physical or developmental needs the child may have, to assist the child in adjusting to the placement or to ensure the stability of the placement.[23]

[21] I.C. §§ 16-1622(2)(f), 16-1620(7) (Supp. 2016).
[22] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(d)], 16-1620(3).
[23] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(a)], 16-1620(3)(a).

- Provide information about the child's placement, whether there has been a change in placement since the last hearing, and if so, the reasons for the change and the selection of the new placement.[24]
- For youth 14 and older:
    - Identify the services needed to assist the youth in making the transition to successful adulthood.
    - Document that the youth was provided with a written copy of the youth's rights in regard to education, health, visitation, court participation, and receipt of an annual credit report, and that the rights were explained to the youth in a developmentally appropriate way.[25]
- Address the options for maintaining the child's connection to the community.[26]
    - Include connections to individuals with a significant relationship to the child, and organizations or community activities to which the child has a significant connection.[27]
    - Ensure educational stability for the child, including the efforts to keep the child in the same school or reasons why remaining in the same school is not in the child's best interest. [28]
    - Document either that siblings were placed together or the efforts that were made to place the siblings together, why the siblings were not placed together, and the plan for ensuring frequent contact among the siblings unless that contact would be contrary to the safety or well-being of one or more of the siblings.[29]
- If there is reason to know the child is an Indian child,[30] but there has been no final determination of the child's Indian status, document:
    - Efforts made to determine whether the child is an Indian child, and
    - The Department's efforts to work with all tribes of which the child may be a member to verify whether the child is a member or is eligible for membership.[31]
- If the permanency goal is termination of parental rights and adoption, identify the prospective adoptive parents, when known.[32]
- If the child is being treated with psychotropic medication, the medication and dosage prescribed and the medical professional who prescribed the medication.[33]

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[24] I.J.R. 43(2).
[25] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(a)], 16-1620(3)(h).
[26] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(d)], 16-1620(3)(f).
[27] *Id.*
[28] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(a)], 16-1620(3)(f).
[29] I.C. §§ 16-1622(2)(a) [cross-referencing § 16-1621(3)(a)], 16-1620(3)(g).
[30] 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.
[31] I.C. §§ 16-1622(2)(i), 16-1620(3)(j).
[32] I.C. §§ 16-1622(2)(a), 16-1620(k).
[33] I.C. §§ 16-1622(2)(j), 16-1620(4)(c).

3. Plans with a Concurrent Permanency Goal

If there has been no finding of aggravated circumstances, the statute expressly provides that the court may approve, modify, or reject a permanency plan with both a primary and a concurrent permanency goal.[34] When the primary goal is continued efforts at reunification, it is important that the permanency plan also include a concurrent permanency goal.[35] Where the permanency plan includes a concurrent permanency goal, it should include a plan for achieving the concurrent goal with the same specificity that is required for the plan for the primary goal. If there has been a finding of aggravated circumstances, the statute does not expressly provide for concurrent permanency goals, but neither does the statute prohibit a court from approving a plan with concurrent goals.[36]

4. Permanency Plans with a Permanency Goal of Continued Efforts at Reunification

When the primary permanency goal is continued efforts at reunification, the permanency plan must include a plan for achieving that goal, with the same elements that are required for the reunification component of a case plan. The plan must:

- Identify all issues that need to be addressed before the child can safely be returned home without Department supervision.
- Specifically identify the tasks to be completed by the Department, each parent, or others to address each issue.
- Specifically identify the services to be made available by the Department to the parents and in which the parents are required to participate.
- Specifically state the role of the Department toward each parent.
- Set deadlines for completion of each task.
- Where appropriate, set terms of visitation, supervision of visitation, and child support.[37]

The permanency plan must also include a period of protective supervision or trial home visit of no less than 90 days prior to the court vacating the case when any of the following circumstances are present:

- The circumstances that caused the child to be placed in protective custody resulted in a conviction for lewd and lascivious conduct or felony injury to a child;
- The child has been in protective custody for more the six (6) months; or
- There is a high risk of repeat maltreatment or reentry into foster care exists.[38]

The statute provides that the court must approve a permanency goal, which may be continued efforts at reunification.[39] Idaho Juvenile Rule 44(a) provides that the case plan shall provide that reunification must be finalized within 12 months from the date the child is removed from the home, and if in the child's best interest, the court may approve an amendment to the case plan

[34] I.C. §§ 16-1622(2)(a), 16-1621(3)(d).
[35] *Id.*; I.J.R. 44(a)(1).
[36] *See* I.C. § 16-1620.
[37] I.C. §§ 16-1622(a), 16-1621(3)(c).
[38] I.C. § 16-1622(2)(a) (Supp. 2018)
[39] I.C. § 16-1622(2)(a).

extending the time to finalize reunification for up to three months. In addition, the statute provides that if the child has been in the temporary or legal custody of the Department 15 of the last 22 months, the Department shall file a petition to terminate parental rights prior to the last day of the 15th month, unless the court finds that the child is placed permanently with a relative, or there are compelling reasons why termination of parental rights is not in the best interests of the child, or the Department has failed to provide reasonable efforts to reunify the child with the family.[40] The purpose of these provisions is to set a deadline for achieving reunification.

5. Permanency Plans with a Permanency Goal of APPLA

If the permanency plan for a youth age 16 and older includes a permanency goal of another planned permanent living arrangement, the permanency plan must document the following:

- The intensive and, so far, unsuccessful efforts made to place the child with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative.
- Why APPLA is the best permanency plan for the youth, and compelling reasons why, so far, it would not be in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative.
- The steps the Department has taken to ensure that the youth's foster parents or child care institution are following the reasonable and prudent parent standard when determining whether to allow the youth to participate in extracurricular, enrichment, cultural and social activities.
- The opportunities provided to the youth to engage in age or developmentally appropriate activities. [41]

These requirements are the result of increasing attention upon youth who are difficult to place, who "age-out of the system," and often go on to face dire outcomes, including incarceration, victimization, and even death. The purpose of the first two requirements is to ensure that diligent and ongoing efforts are being made to find a permanency option that includes a supportive family or family-like relationship that will continue into their adulthood. The purpose of the second two requirements is to ensure that the youth has the opportunity to do the things other kids do, so that they can have both a more "normal" adolescent experience and the opportunities to prepare for adulthood that responsible parents would normally provide.

6. Implementation Schedule

As noted above, the permanency plan is required to include a plan for implementing the permanency goal that includes the tasks needed to accomplish the goal and deadlines for completing those tasks. There are also overall deadlines for achieving permanency for a child.

a. *No Finding of Aggravated Circumstances*
If the permanency plan has a goal of termination of parental rights and adoption, the permanency plan shall include a schedule which has the

[40] I.C. § 16-1622(2)(g).
[41] I.C. §§ 16-1622(a) [cross-referencing §16-1621(3)(d)], 6-1620(3)(i).

objective of finalizing the termination of parental rights within 18 months from the date the child was removed from home and finalizing the adoption within 24 months from the date the child was removed from the home. Amendments to extend these timelines must be approved by the court.[42]

If the permanency plan has a goal of guardianship, the plan shall include a schedule to finalize the guardianship within 13 months from the date the child was removed from the home.

b. *Aggravated Circumstances Found*
If the permanency plan has a goal of termination of parental rights and adoption, the permanency plan shall include a schedule to finalize the termination of parental rights within six months from the approval of the permanency plan and finalizing the adoption within 12 months from the approval of the permanency plan. [43]

If the permanency plan includes a permanency goal of guardianship, the permanency plan must also include a schedule to finalize the guardianship within five months from the date of the judicial determination of aggravated circumstances. Amendments to extend the time to finalize the guardianship must be approved by the court.[44]

c. *All cases*
Amendments to the permanency plan to extend the time to finalize the permanency goal must be approved by the court.[45]

7.3 THE PERMANENCY HEARING

A. Timing of the Hearing

Idaho law requires that a permanency hearing be held no later than 12 months from the date the child is removed from the home or the date of the court's order taking jurisdiction under the CPA, whichever occurs first, and at least every 12 months thereafter.[46] In cases where aggravated circumstances are found (usually, but not necessarily, at the adjudicatory hearing), the court is required to hold a permanency hearing within 30 days of the determination that

Attention should also be given to the child's well-being in the broadest sense. The inquiry must go beyond the basic questions of personal safety and physical health. If reunification is not possible, the child welfare system stands in loco parentis to the child and is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for transition to life as an adult.
*From Enhanced Resource Guidelines, Improving Court Practice in Child Abuse and Neglect Cases, published by the National Council of Juvenile and Family Court Judges (2016), at page 272. The complete guidelines are available on-line at www.ncjfc.org.

[42] I.J.R. 46(a).
[43] I.J.R. 44(b)(2).
[44] I.J.R. 44(b)(1).
[45] I.J.R. 44 and 46.
[46] I.C. § 16-1622(2)(b) (Supp. 2016).

aggravated circumstances exist, and every 12 months thereafter.[47]

Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter.[48] The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first.[49] If the permanency hearing is not timely held, or if the court fails to use the correct language in determining that the Department made reasonable efforts to finalize the permanency plan, an otherwise eligible child may be ineligible for federal IV-E match funds.[50] Eligibility will be reinstated on the first day of the month in which the permanency hearing is held and/or the court makes a finding that the Department made reasonable efforts to finalize the permanency plan in effect.[51]

The state and federal timelines should be seen as the latest date upon which the permanency hearing should be held. A permanency hearing could always be scheduled earlier. For example, where neither parent has made discernable progress in spite of reasonable efforts by IDHW to implement the case plan, an early permanency hearing may be appropriate.

B. Submission of the Permanency Plan and Guardian ad Litem Reports to the Court

IDHW is required to file a permanency plan with the court at least five days prior to the permanency hearing.[52] Similarly, the guardian *ad litem* is required to file a report with the court at least five days prior to the permanency hearing.[53] All guardian *ad litem* reports submitted after the adjudicatory hearing must include the child's wishes regarding permanency. For children in state custody over the age of 14, the report must also include the child's wishes regarding the plan for the child's transition to successful adulthood.[54]

C. Notice

4. Foster Parents

Idaho Juvenile Rule 40 provides that "[a]fter the adjudicatory hearing, any person who is designated by the Department of Health and Welfare as the foster parent, as a pre-adoptive parent, or as a relative providing care for a child who is in the custody of the Department, shall be provided with notice of, and have a right to be heard in, any further hearings to be held with respect to the child." This notice must be given by the Department and the Department must confirm to the court that the required notice

[47] I.C. §§ 16-1619(6)(d),16-1620(1).
[48] 42 U.S.C. § 675(5)(C) (2012); 45 C.F.R. § 1356.21(b)(2)(i).
[49] 42 U.S.C. § 675(F).
[50] 45 C.F.R. § 1356.21(b)(2)(ii).
[51] *Id.* The finding regarding reasonable efforts to finalize permanency is further discussed below.
[52] I.C. §§ 16-1620(1), 16-1629(9) (Supp. 2016).
[53] I.C. § 16-1633(2).
[54] I.C. § 16-1633(2).

was provided. The rule makes clear that the right to notice and to be heard does not make foster parents parties to the CPA proceeding.[55]

5. Children Eight and Older

Idaho Juvenile Rule 40 requires that "[a]fter the adjudicatory hearing, a child eight years of age or older, shall be provided with notice of, and have a right to be heard, either in person or in writing, in any further hearings to be held with respect to the child."[56] As with notice to foster parents, notice must be given by the Department, and the Department must confirm that notice was provided. The rule also makes clear that the court may but is not required to continue the hearing when the notice is not given or when the child does not appear.[57]

Idaho Juvenile Rule 40 also requires that children 12 and older are required to attend their six-month review hearings and permanency hearings in person or by telephone, unless the youth declines in writing, declines through counsel, or the court finds good cause to excuse the youth from attending.[58] The purpose of this provision is to promote more positive outcomes for youth by encouraging them to be more engaged in both the permanency planning process and the planning for the transition to independent living, and to encourage the court to engage more directly with the youth.[59]

D. Agreement by the Parties

The parties may stipulate to the permanency plan at the permanency hearing. Pursuant to IJR 38, such a stipulation must be made part of the court record and is subject to court approval. The court must make reasonable inquiry to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that it is in the best interests of the child.[60] The court should ensure that the permanency plan has been thoroughly considered by all participants, especially both parents, if involved.

The court should ensure that the permanency plan contains all the essential elements of a permanency plan as discussed above. If the permanency plan is not complete, the court should address any omitted requirements.

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

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[55] I.J.R. 40(a). *See also Roe v. Dep't. of Health & Welfare (In Interest of Doe)*, 134 Idaho 760, 9 P.3d 1226 (2000) (holding that foster parents did not have standing to intervene and object to the Department's permanency plan in a CPA proceeding). In cases where there has been a finding of aggravated circumstances, the CPA requires that notice of the permanency hearing be provided to the "parents and other legal guardians, the prosecuting attorney or deputy attorney general, the guardian *ad litem*, attorney for the child, the Department, and foster parents. I.C. § 16-1620(5).
[56] I.J.R. 40(b).
[57] I.J.R. 40(b).
[58] I.J.R. 40(c).
[59] *See* Chapter 12 for more information about involving children and foster parents in court hearings.
[60] I.J.R. 38.

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.

7.4 REASONABLE EFFORTS TO FINALIZE PERMANENCY

The court must make a case-specific finding that the Department made reasonable efforts to finalize the primary permanency goal in effect for the child, and the finding must be documented in the court records.[61] If the finding is not timely made, an otherwise eligible child may lose eligibility for federal IV-E foster care payments. Eligibility will be lost on the last day of the month in which the finding was required. Eligibility is reinstated on the first day of the month in which the required finding is made.[62]

At the first annual permanency hearing, the "primary permanency goal in effect" is generally the permanent plan identified by the Department in the case plan approved by the court.[63] However, the Department may identify a different permanency goal prior to the permanency hearing and might make efforts towards the new goal without court approval.[64] If the Department proceeds with a permanency goal other than the goal identified in the case plan, the reasonable efforts to finalize permanency finding is a retrospective analysis of whether the Department made reasonable efforts to finalize the most current permanency goal(s).[65] Typically, this means that the permanent plan for the first twelve (12) months of a CPA proceeding, prior to the first permanency hearing, is reunification with the parents. The recommended best practice is for the Department to file a motion with the court to amend the case or permanency plan as soon as possible, if the Department is going to proceed with a permanency goal other than the goal identified in the case plan.

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[61] 42 U.S.C. § 675(5)(C)(i) (2012); 45 C.F.R. § 1356.21(b)(2); I.C. § 16-1622(2)(c) (Supp. 2014).
[62] 45 C.F.R. § 1356.21(b)(2)(ii).
[63] I.C. § 16-1622(2)(c) (Supp. 2016).
[64] The U.S. Department of Health and Human Services, Administration for Children and Families has a Child Welfare Policy Manual with questions and answers about ASFA, in which the USDHHS states that "The State is not required to reconcile the permanency plan in effect at the time the judicial determination is due with the reasonable efforts determination itself. In order to sustain a child's ongoing title IV-E foster care eligibility, the court must make a judicial determination of reasonable efforts to finalize a permanency plan within 12 months from the date the child is considered to have entered foster care and at least once every 12 months thereafter while the child remains in foster care. We have indicated that we will not instruct courts on the criteria they are to use to make the judicial determination. At the same time, however, we recognize the significance of the provision as it relates to moving a child toward permanency. The courts, therefore, may rule on the plan that is in effect at the time of the finding, a plan that has been in effect for a brief period of time, or the activities related to achieving permanency that took place over the prior 12 months, even if the plan had been abandoned during that 12-month period. In any event, the judicial determination should reflect the court's judgment as to whether the agency activities that were performed during the previous 12 months were meaningful in bringing about permanency for the child." ADMIN. FOR CHILDREN & FAM., U.S. DEP'T HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL (2011) *available at* http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=142 (last visited April 29, 2015).
[65] *Id.*

There may be instances where the court identifies further efforts to be made by the Department to finalize the permanency plan, such as further investigation to identify or assess potential adoptive families or potential guardians. The fact that the court requires further efforts does not necessarily mean that IDHW has failed to make reasonable efforts. For example, the need for further efforts may be the result of new information that was not previously available to the Department or changed circumstances that the Department could not reasonably anticipate and thus not the result of lack of effort.

7.5 OTHER KEY FINDINGS AT THE PERMANENCY HEARING

A. Approval of the Permanency Plan

At the permanency hearing, the court must decide whether to approve, modify, or reject the permanency plan. The CPA specifically requires that the permanency plan submitted after a finding of aggravated circumstances must be incorporated in an order by the court.[66] The recommended best practice is that all permanency plans be incorporated in an order by the court, directing the Department to comply with the plan, and directing the parents to comply with the plan if reunification continues to be a permanency goal.[67]

In evaluating the permanency plan, the court should consider whether the plan is complete, whether it systematically analyzes the needs of the child and the options for addressing those needs, whether it is specific as to the tasks to be completed and the services to be provided, whether it includes appropriate deadlines, and whether the plan best meets the needs of the child.

If the permanency plan is termination and adoption, the permanency order should include the names of the proposed adoptive parent(s).[68]

B. ICWA

It is critical that the court ensure compliance with the Indian Child Welfare Act.[69] 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 first and most critical issue is to determine if the child is an Indian child as defined by ICWA, and therefore, whether ICWA applies. The child's Indian status should be resolved as soon as possible in the case but there is an ongoing duty to inquire whether ICWA may apply.

At the permanency hearing, if there is reason to know that the child is an Indian child, and there has not been a final determination regarding the child's status as an Indian child, then the Department is required to include information in the permanency plan about its efforts to determine the child's status as an Indian child, as noted above. In addition, state law places two specific requirements upon the court. First, the court is required to inquire about the efforts that

[66] I.C. § 16-1620(6) (Supp. 2016).
[67] *See* I.C. § 16-1620(6)
[68] I.C. §§ 16-1506(2); 16-1622(2)(a), (b).
[69] *See generally* 25 U.S.C. § 1901–1922 (2012).

have been made since the last hearing to determine whether the child is an Indian child. Second, the court is required to determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or is eligible for membership.[70] 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."[71]

If the child is an Indian child, ICWA has procedural and substantive requirements that apply in a CP proceeding, and in particular to the permanency hearing. This includes provisions for notice to the Indian custodian and the child's tribe, standards for removal of an Indian child from a parent or Indian custodian, tribal participation in planning and decision-making, placement preferences, heightened standard of proof for termination of parental rights, and procedural requirements for voluntary consent to termination, 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 ICWA, or to otherwise comply with the requirements of the act, the court should include appropriate orders in the order approving, modifying, or rejecting the case plan.

Because new information about a child's heritage can become available at any time, the best practice recommendation is for the court to inquire at each hearing whether new information has become available that would give reason to know that the child is an Indian child.

C. APPLA

As noted above, a permanency plan with a proposed primary permanency goal of "another planned permanent living arrangement" must include detailed supporting information.

APPLA can be a permanency goal only for youth 16 and older. In addition, the court may approve APPLA as a primary permanency goal only upon written, case-specific findings that, as of the date of the hearing:

- APPLA is the best permanency goal for the youth
- There are compelling reasons why it is not in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative, including an adult sibling.[72]

7.6 OTHER CONSIDERATIONS AT THE PERMANENCY HEARING

A. Sibling Placement

[70] I.C. § 16-1622(2)(i)(ii), § 16-1620(4)(b) (Supp. 2016).
[71] 25 C.F.R. § 23.107.
[72] I.C. §§ 16-1622(2)(f), 16-1620(7).

For some children, sibling relationships are the longest and closest relationships they will experience. A child removed from her or his parents should not also suffer the separation loss from brothers and sisters.

In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act imposed a number of requirements on state child protection agencies.[73] Fostering Connections requires reasonable efforts to place siblings together in the same foster home, adoptive home, guardianship home, or other placement unless such a joint placement would be contrary to the safety or well-being of any of the siblings.[74] If siblings are not placed together, the state agency must provide for frequent visitation or other ongoing interaction between the siblings, unless doing so would be contrary to the safety or wellbeing of any of the siblings.[75]

It is the policy of the state of Idaho to maintain sibling bonds in the same home, unless it is not in the best interest of one (1) or more of the children.[76] As noted above, Idaho law requires the Department to document its efforts to maintain sibling relationships in the permanency plan. In addition, at annual permanency hearings, the court is required to inquire whether siblings were placed together, or if not, the reasons why not, and a plan for ensuring frequent and ongoing contact among the siblings, unless this contact would be contrary to the safety or well-being of one or more of the siblings. [77]

B. Educational Stability

Fostering Connections requires the Department to have a plan that takes into account the appropriateness of the child's current educational setting, to ensure that the child remains in the 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.[78]

As noted above, Idaho law requires the Department to document its efforts to maintain a child's educational stability in the permanency plan. In addition, at annual permanency hearings, the court is required to inquire about efforts to maintain educational stability for the child, including the efforts made to keep the child in the same school or the reasons why remaining in the same school were not in the child's best interest.[79]

C. Placement

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[73] ADMIN. FOR CHILDREN & FAM., U.S. DEP'T HEALTH & HUMAN SERVS., GUIDANCE ON FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, ACYF-CB-PI-10-11 (2010), *available at* http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf (last visited April 29, 2015).
[74] 42 U.S.C. § 671(a)(31)(A), (B) (2015).
[75] *Id.*
[76] I.C. § 16-1601(5) (Supp. 2018)
[77] I.C. §16-1622(2)(h)(ii) (Supp. 2016).
[78] 42 U.S.C. § 675(1)(c). *See also* ADMIN. FOR CHILDREN & FAM., U.S. DEP'T HEALTH & HUMAN SERVS., GUIDANCE ON FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, ACYF-CB-PI-10-11 (2010), *available at* http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf (last visited April 29, 2015).
[79] I.C. §16-1622(2)(h)(i) (Supp. 2016).

Fostering Connections requires the Department to notify adult relatives of a child's removal from parents within 30 days of that removal. Notification enables relatives to provide support to the family and be considered as a foster, adoptive and/or guardianship placement for the child. If relatives are identified after 30 days, notification should occur as soon as possible. Parents should be encouraged to assist the assigned social worker in the identification of relatives to prevent their late notification.[80] The Preventing Sex Trafficking and Strengthening Families Act of 2014 expanded required notification to the parents of the child's siblings. This includes the parents of any siblings who were previously adopted.[81]

Idaho law provides that, where the permanency goal is not reunification, the annual permanency hearing will include a review of the Department's consideration of options for in-state and out-of-state placement of the child.[82] The CPA further provides that where a child has been placed out-of-state, the court will determine whether the out-of-state placement continues to be in the best interest of the child.[83] Out-of-state placement of a child requires the approval of the court, and must comply with the Interstate Compact on the Placement of Children (ICPC).[84] The ICPC is discussed in Chapter 12 of this manual.

When a child is placed in the custody of the Department, Idaho law vests authority in the Department to determine the child's placement, subject to review by the court.[85] The role of the court in reviewing agency placement decisions is discussed in Chapter 5 of this manual.

D. Engagement of Youth

Both state and federal law are focusing increased attention on the needs of foster youth. As noted above, for youth 14 and older, the permanency plan must include a plan for the youth's transition to successful adulthood. Fostering Connections requires the Department to provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, including options for housing, health insurance, education, mentoring, workforce supports, and employment services.[86] A plan for a transition to successful adulthood is required for ALL foster youth, beginning at age 14.[87] Planning for the transition to adulthood is required for all foster youth because all adolescents are transitioning to adulthood, and foster youth have special needs if their transition to adulthood is to be successful.

Idaho law requires the court to ask each youth age 12 and older about their desired permanency outcome and to discuss the permanency plan with the youth.[88] For youth age 14 and older, this should include not only the permanency goal, but also the plan for transition to

[80] 42 U.S.C. § 671(a)(29)(2015).
[81] 42 U.S.C. § 671(a)(29)(2015).
[82] I.C. § 16-1622(2)(d) (Supp. 2016).
[83] *Id. and Idaho Department of Health and Welfare v Doe 1 (2018-39)*
[84] I.C. §§ 16-1629(8), 16-2102(Art.III).
[85] I.C. § 16-1629(8).
[86] 42 U.S.C. §675(1)(B), (1)(D), (5)(c)(iv).
[87] Historically, "independent living services" were provided for youth 16 and older who were in long-term foster care (the antecedent to APPLA).
[88] I.C. §§ 16-1622(2)(e), 16-1620(4)(a).

successful adulthood.[89] The judge can play a vital role by actively engaging with youth throughout a child protection proceeding, and the engagement of children and youth in child protection proceedings is discussed further in Chapter 8 of this manual, regarding review hearings, and in Chapter 12, regarding special topics.

If the youth is within 90 days of reaching age 18, the Department must file a report with the court that includes the transition plan for the youth. The court must hold a review or permanency hearing at which the court reviews the plan and discusses the plan with the youth. [90] The purpose of the 90-day hearing is to take one last opportunity to promote a successful future for a youth who is about to turn 18.

E. Psychotropic Medication

The use of psychotropic medication in child and youth, particularly children in foster care, is an issue of tremendous concern and increasing attention.[91] This is reflected in recent amendments to the CPA, which require the court to ask and the Department to report about the use of psychotropic medications for child and youth in child protection cases.

At the permanency hearing, if the child is being treated with psychotropic medication, the court is required to ask about the use of psychotropic medications, and may make any inquiry relevant to the use of psychotropic medication. [92]

The purpose of this provision is to promote informed decision-making on behalf of the child, and to ensure that the child is receiving the diagnostic and treatment services necessary for the child's well-being. The court might inquire, for example: whether the child needs further assessment by a different medical service provider; whether the child is receiving appropriate counseling in conjunction with the medication; whether and to what extent the medication appears to be helping the child; whether and to what extent the medication is causing harmful side effects; whether and to what extent other treatment options exist; etc.

F. Visitation

The frequency and quality of visitation between the child and the parent(s) is often the best indicator of progress toward successful reunification, or lack thereof. Where reunification remains a permanency goal, best practice recommendations include that: (a) the court inquire about the frequency and quality of visitation, (b) the court initiate a discussion about options for increasing the frequency and quality of visitation, and reducing barriers to more frequent visitation, while ensuring the safety and well-being of the child.

G. Suspending Reasonable Efforts to Reunify

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[89] I.C. §§ 16-1622(2)(e), 16-1620(3)(h).
[90] I.C. § 16-1622(3)
[91] *See* UNDERSTANDING PSYCHOTROPIC MEDICATIONS, Child Welfare Information Gateway, U.S Department of Health and Human Services Administration for Children and Families, Children's Bureau, at childwelfare.gov.
[92] I.C. §§ 16-1622(2)(j); 16-1620(4)(c).

The Department's efforts to reunify the child with the parent(s) will continue until the court orders otherwise. The court may order the Department to suspend further efforts to reunify when a petition or other motion is filed seeking a determination of aggravated circumstances.[93] The court may order the Department to suspend further efforts to reunify when a permanency plan is approved by the court that does not include a permanency goal of reunification.[94]

H. Department's Duty to Seek Termination of Parental Rights

If a child has been in the temporary or legal custody of the Department for 15 of the last 22 months, the Department is required to file a petition to terminate parental rights prior to the last day of the fifteenth month. The Department is not required to file the petition if the court makes one of the following findings:

- The child is placed permanently with a relative.
- There are compelling reasons why termination of parental rights is not in the best interest of the child.
- The Department has failed to make reasonable efforts to reunify.[95]

This issue may be raised at a permanency hearing or at a review hearing. (Review hearings are discussed in Chapter 8.) Generally, it will be the Department seeking the finding, to relieve the Department of its duty to file a petition to terminate. A parent may also assert lack of reasonable efforts to reunify as a basis for an order approving a permanency plan with a permanency goal of continued efforts at reunification.[96]

I. Time and Date for the Next Hearing; Orders Needed

The court should set the date and time for the next review hearing on the record prior to the conclusion of the permanency hearing. The court should also enter any orders necessary to ensure that all participants are prepared for the next hearing. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or in county jail or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

J. Subsequent Permanency Hearings

There is a continuing obligation to hold a permanency hearing once every twelve (12) months until the case is closed.[97] State law requires the court to make written, case-specific findings that the Department has made reasonable efforts to finalize the permanency plan in effect for the child.[98] Permanency hearings may be combined with review hearings, however if the hearings are combined, care must be taken to make the necessary findings for both the review and permanency hearings.[99]

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[93] I.C. § 16-1620(8).
[94] I.C. § 16-1622(2)(k).
[95] I.C. § 16-1622(2)(g).
[96] I.C. § 16-1622(2)(c).
[97] I.C. § 16-1622(2)(a), (b), 16-1620(1).
[98] I.C. § 16-1622(2)(c).
[99] I.C. § 16-1622(2)(b).

CONCLUSION

The permanency plan and timely permanency hearing are keys to achieving permanency for the child. Effective permanency planning promotes the systematic investigation and assessment of the child's options for permanent placement, in light of the child's best interests. The permanency plan identifies the actions necessary to implement the placement and to set deadlines for those actions. The plan, incorporated in the court's order, also sets the benchmark against which future progress will be measured and provides the primary mechanism for holding the participants accountable for implementing the plan.

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CHAPTER 8: Review Hearings

8.1 INTRODUCTION

Review hearings are court proceedings that take place after approval of the case plan and continue until permanency for the child is attained and the child protection case is closed. Idaho Code § 16-1622(1) and Idaho Juvenile Rule 45 govern these hearings. The purpose of the review hearing is to review "compliance with the case plan and/or the permanency plan (whichever is in place at the time of the hearing) and the progress of the Department in achieving permanency for the child."[1]

Idaho Code § 16-1622(1)(a) requires that a comprehensive "review hearing" be held no later than six months after entry of the court's order taking jurisdiction and every six months thereafter. At a review hearing, the Department and guardian *ad litem* are required to file written reports and the court is required to make certain specific findings. Idaho Code § 16-1622(1)(b) authorizes a second type hearing, called a "status hearing." At status hearings, written reports are not required unless ordered by the court, there are no statutorily required findings, and the matters reviewed can be as limited or as comprehensive as the court determines to be appropriate. [2]

When the court schedules the hearing, it is important for the court to specify whether it is scheduling a six-month review hearing or a status hearing. Accurately specifying the type of hearing informs the Department and the guardian *ad litem* of the need to file a report prior to the hearing, and enables the clerk to enter the correct hearing type in the court's case management system.

The purpose of a six-month review hearing is to:

- Determine the safety of the child;
- Determine the continuing necessity for and appropriateness of the placement;
- Determine the extent of compliance with the case plan;
- Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care;
- Determine whether the child is an Indian child;
- Inquire regarding the child's educational stability;
- Inquire regarding sibling placement;

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] I.J.R. 45(a). See also I.C. § 16-1622.

[2] In this chapter, the term "review hearing" includes both six-month review hearings and status hearings. Otherwise, we will refer specifically to six-month review hearings or status hearings.

- Inquire regarding permanency;[3]
- Document efforts by the Department related to the reasonable and prudent parent standard;[4]
- Document efforts made to find a permanent placement other than another planned permanent living arrangement;
- Make necessary findings regarding a permanency goal of another planned permanent living arrangement
- Document and inquire regarding the use of psychotropic medication by the child;
- To project, when reasonable, a likely date by which the child may safely be returned and maintained in the home or placed in in another permanent placement; [5]

At a review hearing, the court may:

- Modify the case plan or permanency plan.
- Modify disposition.
- Determine whether the Department has made reasonable efforts to finalize a permanency plan. Best practice is to make the reasonable efforts finding at every review hearing for the period between the last hearing and the current hearing.[6]
- If the child will not be reunified with a parent(s), review the Department's consideration of options for in-state and out-of-state placement.
- Enter further orders as necessary or appropriate to ensure the progress of the case toward achieving permanency for the child;[7]
- If the next review hearing is an annual permanency hearing, order the Department to prepare and file a written permanency plan.[8]

Review hearings are critical to completion of case plans and permanency plans. Review hearings facilitate timely permanent placement of the child. They aid in the timely recognition of those families for whom reunification will be achieved and those families for whom reunification is not a viable option.

Review hearings are informal, the rules of evidence do not apply, and the general public is not permitted to be present.[9] Children age eight and older are entitled to notice of review hearings and have a right to be heard, in person or in writing.[10] Children 12 and older are required to attend their six-month review hearings and permanency hearings in person or by telephone, unless the youth declines in writing, declines through counsel, or the court finds good cause to excuse the youth from attending.[11] Foster parents (including relatives providing care for

[3] I.C. § 16-1622(1)(a).
[4] I.C. § 16-1622(1)(a)(vi).
[5] 45 U.S.C § 675(5)(B); I.C. § 16-1622(1)(a).
[6] NCJFCJ Enhanced Resource Guidelines - Improving Court Practice in Child Abuse and Neglect Cases, http://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf, Pg. 257, Last accessed April 29, 2018.
[7] I.J.R. 45(a).
[8] I.J.R. 45(c) and 46.
[9] I.C. § 16-1613(1) (2009); I.J.R. 51.
[10] I.J.R. 40(b); Chapter 12: Special Topics.
[11] I.J.R. 40(c).

a child) and pre-adoptive parents are also entitled to notice and have a right be heard at review hearings.[12]

Review of the case status is vital for each child within the court's jurisdiction, whether the child is placed in the custody of IDHW or under the supervision of IDHW in the child's own home. In either situation, child safety and timely permanency will be aided by a regular, thorough review of the case. If progress is not being made, review hearings provide an opportunity for early identification and resolution of barriers to progress.

Continuation of a child in foster care for an extended time has a negative effect on the child and the family. A child in foster care forms new relationships that may weaken his or her emotional ties to biological family members. When a child is moved between foster homes, the child may lose the ability to form strong emotional bonds with a permanent family.[13] Thoughtful decisions concerning the child's present and future needs are necessary from the outset and throughout the life of the case. Review hearings can help ensure that decisions concerning a child's future are made at regular intervals and implemented expeditiously.

Review hearings should examine the long-term permanency goal(s) for the child and change or revise goal(s) that are no longer appropriate. Just as review hearings should hasten family reunification when possible, they should also help identify cases in which reunification should be discarded as a goal because a child cannot safely be returned home in a timely fashion. If reunification is not a viable option, review hearings can lead to timely implementation of the concurrent permanency goal.

Review hearings can also help avoid delays in providing necessary services to the child and family. For example, incomplete case plans can prolong foster care placement by failing to clearly specify what each party must do to facilitate family reunification. Unresolved disputes may block case plan progress. Each party may be proceeding unilaterally without confronting a disputed issue, although the dispute may constitute a roadblock to family reunification.

Judicial review facilitates case progress by monitoring compliance with the case or permanency plan, making appropriate changes in the terms of the plan, requiring that participants take specific action(s), and making decisions necessary to move the case forward.[14] Review hearings provide a forum for the parents and children, helping to assure that their viewpoint is considered in case planning and implementation. Through careful scrutiny of the case plan by the attorneys and the court, case content and planning problems can be identified. Terms of the plan can be specified so that all parties understand their obligations and the court can assess progress and hold participants accountable. Regular and thorough review hearings may also create incentives for IDHW to make decisions and take action concerning the permanent

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[12] I.J.R. 40(a); Chapter 12: Special Topics.

[13] The research on children's attachments is extensive. The primary work took place during the 1970's. Examples of this initial research on children's attachment can be found in the following sources: MICHAEL RUTTER, MATERNAL DEPRIVATION REASSESSED (Penguin Books 1981); JOHN BOWLBY, ATTACHMENT AND LOSS (Basic Books 3d ed. 1973); JOSEPH GOLDSTEIN, ANNA FREUD AND ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (Free Press 2d ed. 1979).

[14] *See* I.J.R. 44 and 46.

placement of a child. When the review hearing is challenging and demanding, greater consideration is given to the examination of all placement options.

Review hearings also create a valuable record of the actions of the parents and the Department. Current information is put on the record and is more likely to be freely exchanged in the informal atmosphere of a review hearing.

8.2 TIMING OF SIX-MONTH REVIEW HEARINGS

The timing of six-month review hearings is governed by both federal and state law. Federal law requires that cases involving children in out-of-home care be reviewed within six months of the date the child entered foster care and every six months thereafter.[15]

Idaho law also requires that the court hold a six-month review hearing no later than six months after entry of the court's decree finding the child within the jurisdiction of the Child Protective Act and every six months thereafter, so long as the child is in the custody of the Department.[16] Courts have the discretion and are encouraged to conduct review hearings more frequently. Recommended best practice is to conduct review hearings at least once every 60 to 90 days, unless there is good reason in a particular case to schedule hearings more or less frequently.[17] When scheduling the review hearing, the court should consider the scope of the review and the need for written reports from the Department and the guardian *ad litem* to determine whether the hearing should be a six-month review or a status hearing.

In Idaho courts, review hearings are commonly conducted on a more frequent schedule depending on the needs of the case. For example, more frequent hearings may be appropriate:

- At the beginning of a case when families are making substantial early progress on the case plan.
- When the family is in crisis and needs more frequent monitoring and supportive services.
- When there is a disruption in the child's placement.
- When a child has special developmental, health, or educational needs.
- When the parents or child(ren) have a history of trauma.
- When compliance with substance abuse or mental health treatment plans are an issue.

As in all child protective proceedings, the court should diligently avoid granting continuances except in emergencies. If a continuance is necessary, it should be for a short period of time, and the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date. The court may continue a review hearing to give the parties time to

[15] 42 U.S.C. § 675(5)(B) (2012).
[16] I.C. § 16-1622(1)(a) (Supp. 2016).
[17] NCJFCJ Enhanced Resource Guidelines - Improving Court Practice in Child Abuse and Neglect Cases, http://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf, Pg. 11, Last accessed April 29, 2018.

respond to substantive issues raised for the first time at a review hearing, and the court may enter temporary orders as appropriate pending the continued hearing.[18]

8.3 SUBMISSION OF REPORTS TO THE COURT

The Idaho Child Protective Act (CPA) requires IDHW and guardians *ad litem* to file a written report to the court at least five days prior to a six-month review hearing.[19] The responsibility to report coincides with the courts' responsibility to review cases under its jurisdiction.

Timely submission of reports will assist the parties in analyzing the case, help the judge reach a decision, and help document the facts and history of the case. Reports should be distributed to the parties well in advance of the review hearing (a minimum of five days or as ordered by the court) to allow time for attorneys to discuss the contents of the report with their clients, the parties to consider the information and to prepare for the hearing.

All guardian *ad litem* reports submitted after the adjudicatory hearing must include the child's wishes regarding permanency and the plan for the child's transition to successful adulthood.[20] Recommended best practice is for the court to include an order requiring submission of reports in compliance with the statute and the order scheduling the hearing and that the reports be verified.

8.4 KEY DECISIONS AT THE SIX-MONTH REVIEW HEARING

A. Can the Child be Safely Returned Home Today?

Idaho Code § 16-1622(1)(a)(i) provides that one purpose of the review hearing is to determine:

- The safety of the child;
- The continuing necessity for and appropriateness of the placement;
- The extent of compliance with the case plan; and
- The extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care.

When the permanency goal is reunification, the most important question by the court at each review and/or permanency hearing is: "Can the child(ren) be safely returned home today?" If the answer to that question is no, the follow up question should be: "What is standing in the way of the child(ren) safely returning home today?" The answer to that question should, at least in part, inform the focus of the review hearing.[21]

As progress is made in resolving the causes necessitating the child's placement in foster care, progress should also be made in reunifying the family. The case might proceed from supervised

[18] I.J.R. 45(b).
[19] I.C. § 16-1629(9) (Supp. 2014); § 16-1633(2).
[20] I.C. § 16-1633(2) and § 16-1622(1)(a)(v).
[21] I.C. § 16-1622(1)(a)(i). *See generally* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 43-46 (2009).

visitation to unsupervised visitation, to overnight visitation, to extended home visits, to placing the child at home under the protective supervision of the Department, and ultimately, to closing the case.

An extended home visit is an effective transition step in reunification. An extended home visit is a period of unsupervised visitation in excess of 48 hours, and requires the prior written approval of the court.[22] An order approving an extended home visit can include conditions to ensure the safety and welfare of the child, and it is subject to termination by the Department when necessary to ensure the safety and welfare of the child. If the Department terminates an extended home visit, the Department must prepare a written statement that states when and why the visit was terminated. The Department must file the statement with the court within 48 hours of termination of the visit (excluding weekends and holidays), and serve copies on the parties.[23] Because extended home visits are a transition step in reunification, they should be for a limited and specified period of time (typically until the next hearing), and should generally be for less than six months.[24]

Often, the determination that intervention may be stepped down, or that reunification has been successfully achieved and the case may be vacated, happens at a review or status hearing. The CPA provides that the Department may move the court to vacate an order placing a child in its custody or under its protective supervision at any time.[25] In addition, any party may file a motion asking the court to revoke or modify an order placing a child in state custody or under protective supervision, except that the parents may not file such a motion within three months of a previous hearing.[26]

B. Is the Child an Indian Child?

It is critical that the court ensures compliance with the Indian Child Welfare Act. 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 first and most critical issue is to determine if the child is an Indian child as defined by ICWA, and therefore, whether ICWA applies. At a review or status 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, the efforts the Department has made since the last hearing to determine whether the child is an Indian child, and the Department's efforts to work with all tribes of which the child

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[22] I.J.R. 42.
[23] I.J.R. 42.
[24] If a child is returned to foster care after an extended home visit that exceeds six months without prior court approval, this constitutes a removal under federal law. Judicial findings of "best interest/contrary to the welfare" and "reasonable efforts to prevent removal" are required, or an otherwise eligible child could lose eligibility for federal funding. *See* Chapter 12 for further discussion of these findings.
[25] I.C. § 16-1622(1)(e). *But see* I.C. §16-1622(2)(a) (Supp. 2018).
[26] I.C. § 16-1622(1)(c). That section further provides that if the motion asserts that the child's best interests are no longer served by the prior disposition order, or that the Department has failed to provide adequate care for the child, the court must hold a hearing on the motion. I.C. § 16-1622(1)(d).
[26] I.C. § 16-1622(1)(e).

may be a member to verify whether the child is a member or is eligible for membership.[27] If there has not been a final determination regarding the child's Indian status, the CPA places two specific obligations upon both the Department and the court.

First, the Department must document, and the court must inquire, about the efforts that have been made since the last hearing to determine whether the child is an Indian child. Second, the Department must document, and the court must determine, that the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership. 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."[28]

If the child is an Indian child, ICWA has procedural and substantive requirements that apply in a CP proceeding, and in particular to review and status hearings. This includes provisions for notice to the parents or Indian custodian and the child's tribe, standards for removal of an Indian child from a parent or Indian custodian, tribal participation in planning and decision-making, and placement preferences, among other issues.

If further efforts are needed to determine if the child is an Indian child, to give notice as required by ICWA, or to otherwise comply with the requirements of the act, the court should include appropriate orders in its review or status hearing order.

Because new information about a child's heritage can arise at any time, the court should inquire at each hearing whether information has become available to give reason to know that the child is an Indian child. Chapter 11 of this manual contains a detailed discussion of the Indian Child Welfare Act.

C. Is the Child in an Appropriate Foster Care Placement that Bests Meets Her or His Needs?

The choice of a child's foster care placement is critical to a child's well-being. Idaho law requires the Department to make a reasonable effort to place the child in the least restrictive environment, and establishes placement priorities that must be considered when making a placement decision for the child.[29] Federal law requires the child welfare agency to exercise due diligence starting at the time the child is removed to notify the child's extended family members, who may be potential foster and/or permanent placements for a child.[30]

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[27] 25 CFR § 23-107(a). The Idaho Code, I.C. § 16-1622(1)(a)(ii), 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 CFR § 23.101.
[28] 25 CFR § 23-107(c).
[29] I.C. § 16-1629(11).
[30] 42 U.S.C. § 671(a)(29) (2012).

One purpose of review hearings is to review the appropriateness of the child's placement.[31] Because the choice of a child's foster care placement is critical to a child's well-being, the court should make careful inquiry as to the Department's placement decision, encourage full and open consideration of all options for the child's placement, and engage in a thorough consideration of which option will best meet the child's physical, emotional, educational, and developmental needs.

As part of that inquiry, the court is required to review the Department's consideration of options for in-state and out-of-state placement of the child.[32] In addition, the Department is required to document, and the court is required to inquire about sibling placement. The court's inquiry should include questions about whether siblings were placed together, and if not, the reasons why not, and the plan ensuring frequent and ongoing contact between the siblings, unless ongoing contact would be contrary to the safety or welfare of one or more of the siblings.[33]

Federal law requires that placement authority be vested in the Department in order for the child to be eligible for federal IV E funds.[34] When the court places a child in the custody of IDHW, state law vests authority for the placement decision with the Department. This authority is subject to review by the court.[35] The role of the court in reviewing agency placement decisions is discussed in Chapter 5 of this manual. Out-of-state placement of a child requires the approval of the court, and must comply with the Interstate Compact on the Placement of Children (ICPC).[36] The ICPC is discussed in Chapter 12 of this manual.

D. Another Planned Permanent Living Arrangement (APPLA)

Special consideration is required when the primary permanency goal for the child is APPLA. APPLA may be a primary permanency goal in very limited circumstances and only for youth age 16 and older.[37]

When the primary permanency goal for a youth is APPLA the Department must document:[38]

- That the youth's foster parents or child care institution is following the reasonable and prudent parent standard when deciding when the child may participate in extracurricular, enrichment, cultural, and social activities.
- The regular, ongoing opportunities to engage in age or developmentally appropriate activities that have been provided to the youth.
- The intensive, ongoing, and as of the date of the hearing, unsuccessful effort made to place the youth with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative, including an adult sibling.

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[31] I.C. § 16-1622(1)(a)(i)(2).
[32] I.J.R. 45(a)(3).
[33] I.C. § 16-1622(1)(a)(iv) (Supp. 2016); see *also* § 16-1601(5) (Supp. 2018).
[34] *See* 45 C.F.R. § 1356.71(d)(1) (2012).
[35] I.C. § 16-1629(8), I.J.R. 43; see *also Dep't of Health & Welfare, et al v. Does I*, No. 45020, at 1 (Idaho Apr. 24, 2018), https://isc.idaho.gov/opinions/45020.pdf.
[36] I.C. §§ 16-1629(8), 16-2102(Art.III).
[37] *Id.*
[38] I.C. § 16-1622(1)(a)(vi)-(vii).

- Why APPLA is the best permanency plan for the youth and a compelling reason why, as of the date of the hearing, it would not be in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative, including an adult sibling.

These requirements are the result of increasing attention upon youth who "age out of the system," and often go on to face dire outcomes, including incarceration, victimization, and even death. The purpose of the first two requirements is to ensure that the youth has the opportunity to do the things other kids do, so that they can have both a more "normal" adolescent experience and the opportunities to prepare for adulthood that responsible parents would normally provide. The purpose of the second two requirements is to ensure that diligent and ongoing efforts are being made to find a permanency option that includes a supportive family or family-like relationship that will continue into their adulthood.

When the primary permanency goal for a youth is APPLA, at the six-month review hearing the court must make written, case-specific findings that:[39]

- There are compelling reasons why APPLA is the best permanency plan for the youth
- There are compelling reasons why, as of the date of the hearing, it would not be in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department with a fit and willing relative, including an adult sibling.

In some cases, the primary permanency goal for the child may be something other than APPLA, but the difficulty in achieving that goal is such that the child remains in a long-term foster placement. For example, the permanency goal for the child may be termination of parental rights and adoption, but the child has special needs, maladaptive behaviors, and/or delinquent behaviors that make a stable family placement for the child particularly difficult to achieve. In such cases, the practical reality is that the child is in APPLA even though APPLA is not the goal. In such cases, the best practice is to make the same review, and require the same efforts, as if APPLA were the permanency goal.

E. What Services are Being Provided to Meet the Child's Needs?

1. General

The CPA requires case plans and permanency plans to identify the services to be provided to the child, including services needed to meet any educational, emotional, physical, or developmental needs the child may have, and to assist the child in adjusting to the placement or to ensure the stability of the placement.[40] This review should include whether the child is participating in counseling and treatment services contemplated by the case plan. The court should consider whether those services are meeting their objectives or whether they need to be reconsidered.

2. Educational Needs

[39] I.C. § 16-1622(10(a)(viii).
[40] I.C. § 16-1621(3)(a), § 16-1620(3)(a) (Supp. 2014).

One purpose of review hearings is for the court to inquire about the child's educational stability. The Department is required to report, and the court is required to inquire, as to the efforts made to ensure educational stability for the child, including efforts to keep the child in the same school or the reasons why remaining in the same school is not in the child's best interest.[41] The court should further inquire generally as to the child's educational needs and how those needs are being met. There is further information about the educational needs of children in foster care in Chapter 12 of this manual.

3. Transition to Successful Adulthood

For each youth 14 and older, case plans and permanency plans must include a plan for the youth's transition to successful adulthood.[42] The CPA requires the court to review the plan at each six-month review hearing.[43] Idaho law requires the court to ask each youth age 12 and older about their desired permanency outcome, and to discuss the permanency plan with the youth.[44] For youth 14 and older, this should include not only the permanency goal, but also the plan for transition to successful adulthood. If the youth is within 90 days of reaching age 18, the Department must file a report with the court that includes the transition plan for the youth. The court must hold a review or permanency hearing at which the court reviews the plan and discusses the plan with the youth.[45] The purpose of the 90-day hearing is to take one last opportunity to promote a successful future for a youth that is about to turn 18, and upon turning 18, will no longer be under the jurisdiction of the court in the CPA case. Additional information about transition plans and transition planning is located in Chapter 12 of this manual.

4. Medical, Vision, Dental, Mental Health Needs, and Psychotropic Medication

The Department, in order to qualify for IV-E foster care maintenance payments (in consultation with pediatricians and other experts in health care), must develop a plan for ongoing oversight and coordination of health care needs of children in foster care, including mental and dental health care needs and oversight of prescription medicines.[46] At review hearings, the court should ensure that health care needs, including mental and dental needs, are being met and that oversight of prescription medicines is being provided.

Idaho law has specific requirements when a child is being treated with psychotropic medication.[47] The Department must report the medication and dosage prescribed, and the medical professional who prescribed the medication. The court is required to inquire as to the use of psychotropic medication, and may make any additional inquiry relevant to the use of psychotropic medication. The purpose of this requirement is to promote informed decision-making on behalf of the child, and to ensure that the child is receiving the diagnostic and treatment services necessary for the child's well-being.

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[41] I.C. § 16-1622(1)(a)(iii).
[42] I.C. §§ 16-1621(3)(a)(i), 16-1620(3)(h)(i), 16-1622(2)(a)(v).
[43] I.C. § 16-1622(1)(a)(v).
[44] I.C. § 16-1622(1)(a)(v).
[45] I.C. § 16-1622(3).
[46] 42 U.S.C. § 675(1)(C) (2015).
[47] I.C. § 16-1622(1)(a)(ix) (Supp. 2016).

5. Family Contact

The court should examine the child's need for contact with family, especially siblings. Specifically, the court should monitor whether the Department is meeting its mandate to make reasonable efforts to place *siblings in the same placement, and if not, whether the Department is facilitating frequent, ongoing contact between siblings*.[48]

The court should also review visitation to determine whether the terms and conditions of visitation should be modified. Where reunification is a goal, the parents successfully engage in services, the safety issues have been ameliorated, or the parents' protective capacities have increased, it may be appropriate to provide less restrictive, more extensive visitation.[49]

F. Is Child Support Appropriate?

The court should review whether parents are complying with child support obligations, and whether those child support obligations are reasonable. The CPA provides that child support obligations can be established or modified in a CPA proceeding.[50] However, setting or modifying child support obligations in the CPA proceeding can be problematic, in part because the child protection case file is sealed. One approach is for child support to be established or modified in a child support proceeding pursuant to Idaho Code title 32, chapter 7.

The court should take care to avoid financial burdens that interfere with family reunification. Delays in setting support followed by retroactive lump sum support can be particularly disruptive. The financial disruption can interfere with the parents' ability to obtain or maintain housing, transportation, and other needs that are essential to comply with the case plan and enable the children to return to a safe and stable home. At the same time, parents have the duty to provide for the financial support of their children, and the failure to provide financial support for a child can be evidence in support of grounds for termination.[51] Where a parent is not supporting their child, failure to establish a child support obligation can impact the proof needed to establish the grounds for termination of parental rights.

G. Are Children Engaged in their Proceedings?

Across the nation, children in out-of-home care have expressed a desire to participate in child protection hearings in which their future is decided.[52] The best practice recommendation is to

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[48] I.C. § 16-1601(5) (Supp. 2018). Federal law requires, as a condition of continued funding, that IDHW make "reasonable efforts . . . to place siblings removed from their home in the same . . . placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings." Furthermore, federal law requires that where a joint placement is not made, the state must "provide for frequent visitation or other ongoing interaction between the siblings, unless the state documents that frequent visitation or other ongoing interaction would be contrary to the well-being of any of the siblings." *Id.* § 671(a)(31).
[49] I.C. § 16-1621(3)(c) (Supp. 2014). See also §16-1622(2)(a) (Supp. 2018).
[50] I.C. § 16-1628 (2009).
[51] Failure to pay child support is an element of abandonment; if the case plan provides for payment of child support and the parent does not comply, the failure to comply with the case plan is grounds for termination, and failure to pay child support can be evidence of neglect for failing to provide care necessary for a child's well-being. *See* I.C. §§ 16-2005 (grounds for termination of parental rights); 16-2001(5) (definition of abandonment), 16-2001(3) (definition of neglect).
[52] Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, ABA CHILD L. PRAC. (2006) 145.

include all children, of all ages, in all proceedings.[53] There are many benefits to having children in the courtroom, even when they are very young:

- Often, the parties and their counsel behave better when children are present.
- The presence of the children focuses the participants on what is at stake.
- Children hear firsthand what occurs at hearings.
- It makes visible the passage of time in achieving permanency for the child.
- The judge is able to observe the interaction between the parents and their children.
- The judge is able to observe the interaction between the child and the foster parents.
- The judge can communicate directly with the child.
- For older youth, engagement in the process provides a sense of control.
- The judge can evaluate the child's representation.
- A child's presence facilitates her/his engagement in the process.[54]

> "Children are the first to remind stakeholders that they have lived through and are well aware of the issues that brought them into foster care. As long as they are appropriately prepared for the hearing, discussions in court will not likely cause them additional trauma or harm. Moreover, excluding children from court can be equally (if not more) upsetting, because it strips children of the opportunity to come to terms with their past and move on and precludes children from having a sense of involvement in and control over planning their future." -*Seen, Heard, and Engaged: Children in Dependency Court Hearings*, NCJFCJ Technical Bulletin, 2012.

One traditional objection to the presence of children in the courtroom is that children can be disruptive. The experience of judges who have implemented this practice is that maintaining courtroom order and control is no more difficult when children are present. A second objection is that by attending court hearings, children may be further traumatized by what they experience in the courtroom. An awareness of the child's trauma is important. In consultation with the participants, the court can manage the courtroom environment to appropriately protect the child.[55]

In Idaho, children age eight and older have the right to notice and to be heard, in person or in writing, at all post-adjudicatory hearings.[56] Children under age 12 must be appointed a guardian *ad litem* to advocate for their best interest, and counsel must be appointed for the guardian.[57]

Youth age 12 and over are entitled to the appointment of an attorney to represent their express wishes. If appointment of counsel is not practical or appropriate, the court must appoint a guardian *ad litem* for the child and the guardian must be represented by an attorney.[58] Children 12 and older are required to attend their six-month review and permanency hearings in person or

[53] NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, SEEN, HEARD, AND ENGAGED: CHILDREN IN DEPENDENCY COURT HEARINGS 8 (2012).
[54] Khoury, *supra* note 52, at 150.
[55] NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *supra* note 53, at 8-9.
[56] I.J.R. 40(b).
[57] I.C. § 16-1614(1) (Supp. 2014).
[58] I.C. § 16-1614(2).

by telephone, unless the child declines in writing, declines through counsel, or the court finds good cause to excuse the youth.[59]

At each review hearing, the court should confirm that a child age eight and over has been provided notice of the hearing by IDHW.[60] At each six-month review hearing, the court is required to ask youth 12 and older about the youth's desired permanency outcome, and to discuss the permanency plan with the youth.[61] For youth 14 and older, this should include the plan for transition to successful adulthood. In addition, the guardian *ad item* is required ask any child capable of expressing her or his wishes regarding permanency, the transition to successful adulthood, and to include the child's express wishes in the guardian *ad litem's* report to the court.[62]

For more information on how the court and practitioners can provide a meaningful opportunity for children to participate in the process, see Chapter 12.8.

H. Are the Foster Parents Engaged in the Proceedings?

Foster parents, pre-adoptive parents, and relatives who are providing care for a child in an out-of-home placement are entitled to notice of and have a right to be heard at all post-adjudicatory hearings.[63] One approach to increasing foster parent engagement is to schedule review hearings at times when foster parents can attend and that require a minimum loss of work time.

At each review hearing, the court should:

- Confirm that IDHW provided notice of the hearing as required by IJR 40(a).
- Engage foster parents regarding the child's well-being and progress.
- Engage foster parents regarding the services and support that could be provided to the foster family to strengthen their ability to care for and nurture the child.

I. Have the Parents Complied with the Case Plan?

Review hearings are an important opportunity for the court to assess the continuing effectiveness of the case plan, to motivate the participants, to actively engage the participants in problem-solving, and to hold the participants accountable.

The court should review information on the extent to which the parents have complied with the case plan.[64] Reviewing the parents' progress on the case plan should be a two-step inquiry. For example, a parent may be required to participate in anger management classes. The first part of the inquiry is whether the parent completed the class. The second part of the inquiry is whether the parent gained the skills for which the class was taken and if so, whether the parent is using the skills learned in the class to decrease threats or increase his/her protective capacity.

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[59] I.J.R. 40(c)
[60] I.J.R. 40(b).
[61] I.C. § 16-1622(1)(v) (Supp. 2016).
[62] I.C. § 16-1633(2).
[63] I.J.R. 40(a).
[64] I.C. § 16-1622(1)(a)(iii).

Monitoring compliance with the case plan should not be reduced to a simple checklist of services provided and services attended.

If the parents have not complied with the case plan, the court should review information on why the parents have not complied. If the reasons for non-compliance indicate a lack of motivation and/or effort on the part of the parents, it may be appropriate to remind parents that compliance is required by court order and to reiterate that continued non-compliance may result in termination of their parental rights. If non-compliance indicates an obstacle to complete the task, the obstacle and options for overcoming the obstacle should be identified. For example, the parent may have failed to attend counseling due to a lack of transportation. The parent may need information or assistance with transportation such as Department-provided gas vouchers or bus passes.

Non-compliance, or a case plan that lacks a measurable outcome for a task, may indicate a need to modify or clarify the case plan. At the review hearing, the court can correct any misunderstood expectations as to what is required by either the parents or the Department. Before making the decision on whether and how to revise the case plan, the court should specifically ask the parents – on the record – whether they are willing and able to comply, and whether there are any services, support, or changes to the case plan that will enable them to address the safety issues that need to be resolved before the child can be returned home.

In some cases, non-compliance may indicate a need to modify the permanency goals. Permanency goals and permanency planning are discussed in more detail in Chapter 7.

J. Is the Department Making Reasonable Efforts?

At the permanency hearing, the court is required to make written, case-specific findings as to whether the Department made reasonable efforts to finalize the permanency plan in effect for the child.[65] At review hearings prior to the permanency hearing, the court should determine whether IDHW has made reasonable efforts to attain reunification and on progress with the concurrent permanency plan so that permanency is not delayed if reunification efforts fail.[66] Should reunification efforts fail, the concurrent plan must fully be in place and ready for implementation at the annual permanency hearing.

If reunification is the primary permanency goal for the child, the review includes an assessment of the reasonableness of the Department's efforts to reunify. There may be reasonable efforts the Department is not making that could be made and that would assist the parent in achieving reunification. That issue should be raised by counsel for parents at a review hearing. A finding that the Department is not making reasonable efforts to reunify is one mechanism for holding the agency accountable for its statutory duties. If the court finds that the Department is not making reasonable efforts, an otherwise eligible child may lose eligibility for federal IV-E funding.[67] Before making a finding that the Department is not making reasonable efforts, the court should enter an order specifying the further efforts the Department must make

[65] I.C. § 16-1622(2)(c).
[66] I.J.R. 45(a)(3).
[67] 42 U.S.C. § 675(5)(C)(i) (2010); 45 C.F.R. § 1356.21(b)(2).

and allow the Department an opportunity to comply. If the court finds that the Department is not making reasonable efforts, then once the Department has made the required efforts, written, case-specific reasonable efforts findings can be made and funding can be reinstated.

If reunification is the primary permanency goal for the child, then the case plan must also include a concurrent permanency goal and a plan for achieving that goal.[68] Review and status hearings should include a review of the concurrent plan, the reasonableness of the Department's efforts in developing and implementing the plan, and the progress in finalizing the plan. The concurrent plan must be fully in place and ready for implementation so that permanency for the child is not delayed if reunification efforts fail. Ideally, the best option for the child's temporary and permanent placement will be identified early, and the child will be in the placement while the parents are working the reunification plan.

8.5 POST-PERMANENCY REVIEW

The court must hold a hearing to review the child's case or permanency plan no later than six months after the court's order taking jurisdiction and no later than every six months until the case is closed.[69]

8.6 ADDITIONAL MATTERS THE COURT SHOULD CONSIDER

A. Are Any Additional Court Orders Necessary to Move the Case Toward Successful Completion?

Additional orders may be needed to finalize the permanency plan for the child. Sometimes, the successful completion of the case requires the coordination of efforts with other courts, sometimes in other states. For example, if one parent has successfully completed services but the other has not, it may be possible to return the child to the parent who has completed the case plan, subject to a condition in the plan limiting contact with the other parent.[70] The permanency goal for the child may be adoption or guardianship and the adoptive parent(s) or guardian may reside in another state.[71] In such cases, proceedings in another court are needed to finalize the permanency plan for the child but the court in the CPA case has exclusive jurisdiction over the child.[72] In these instances, the court should enter an order relinquishing its exclusive jurisdiction to the other court, so that both cases can proceed under the concurrent jurisdiction of each court. Idaho Child Protection Forms found in the Child Protection section of the Idaho Supreme Court website include a template form for relinquishing jurisdiction.

[68] I.C. § 16-1621(3)(d) (Supp. 2016),
[69] I.C. § 16-1622(1)(a); I.J.R. 45(a).
[70] I.J.R. 45(a)(4).
[71] See also Chapter 12.7 of this manual for additional information on the Interstate Compact on the Placement of Children,
[72] I.C. § 16-1603(1) (2009).

B. Has the Time and Date for the Next Hearing Been Set; Are Any Orders Needed to Prepare for the Next Hearing?

The court should set the time and date for the next hearing and enter any orders necessary to prepare for it. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or county jail, or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

8.7 AGREEMENTS BY THE PARTIES

Whenever issues at a review are presented through a stipulation of the parties, the court must take the time to thoroughly review the agreement with the participants. IJR 38 requires that all stipulations be part of the court record and that the court approve the agreements and confirms that all stipulations have been entered into knowingly and voluntarily, have a reasonable basis in fact, and are in the best interest of the child.[73] If the parties' agreement is not comprehensive, the court may need to hear evidence to resolve the disputes.

If the court conducts frequent review hearings, any stipulated statement of facts should convey the recent history of the case. The history should include an agreed upon statement concerning services provided to the child and family since the last hearing, actions taken by the parents in accord with the case plan, and progress made toward ending state intervention. This provides a definitive record of what has occurred since the previous hearing. This record will be invaluable later in the case when it is necessary to decide whether to reunite the family or terminate parental rights.

If the parties have reached agreement as to future steps in the case, the court should make sure that the agreement is comprehensive and resolves any issues not considered or inadvertently omitted. A comprehensive agreement might include such issues as placement, services to the child, services to the family, visitation (where applicable), Department oversight of the family, location of missing parents, determination of paternity, etc.

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.

8.8 THE COURT'S WRITTEN FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AT THE REVIEW HEARING

The court must make written findings of fact and conclusions of law. Best practice is for those findings to be detailed enough to document the progress of the participants on the case plan or permanency plan and to support the court's actions. As in other stages of the proceedings, the

[73] I.J.R. 38.

burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the Department or other participants. It is particularly important that the court include an order modifying the case plan or permanency plan (when appropriate), ordering the participants to comply with the plan, and setting further proceedings. The court should include a finding as to which participants were present and, if any necessary participants were not present, a finding that proper notice was given.

CONCLUSION

Review hearings are critical to the successful completion of the case plan or permanency plan. The key functions of the review hearing are to comprehensively assess the status of the case, to document the participants' progress on the case plan or the permanency plan, and to modify the case plan or the permanency plan based on the progress, or lack of progress, made by the participants. The essence of an effective hearing is not, however, just to tick off items on the list of statutory requirements. The essence of an effective hearing is for the court to actively engage with all participants, to motivate the participants through problem-solving, acknowledgement and praise of positive effort and progress, and where appropriate, to hold the participants accountable for insufficient effort. A well-devised plan, together with regular effective review, enables the court to ensure that the case moves forward to a timely and successful resolution that protects the rights of the parties and the best interests of the child.

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CHAPTER 9: Termination of Parental Rights

9.1 PURPOSE OF TERMINATION OF PARENTAL RIGHTS

The policy of the Child Protective Act (CPA) is to preserve the unity of the family to the fullest extent possible.1 Thus, prior to consideration of termination of parental rights (TPR), the Department must make reasonable efforts to reunify children with their parents, unless the court has found that the parents' conduct rises to the level of aggravated circumstances.[2] After reunification, termination of parental rights and adoption is the next preferred permanency goal, because it ensures the child a permanent lifetime family.[3]

The voluntary or involuntary termination of the parent-child relationship severs all legal rights between a child and her or his parents and frees the child for adoption. After an order of termination, parents are no longer entitled to notice of court proceedings concerning the child, to have contact with the child, to be informed of matters concerning the child, or to be involved in decisions regarding the child. An order of termination of parental rights ends the duty of a parent to continue to support the child.[4]

9.2 TIMING OF TPR PROCEEDINGS WITHIN A CPA CASE

A. Generally

The court in a CPA case retains exclusive jurisdiction over the child until the permanency goal is achieved, or until the child turns 18 (whichever comes first).[5] When the permanency goal for the child is termination of parental rights and adoption, the CPA case remains open until the adoption is finalized. When termination of parental rights is sought with respect to a child who

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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 ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] I.C. § 16-1601(1) (2009)*; see also* I.C. § 16-2001(2) (Supp. 2016).

[2] I.C. § 16-1615(5)(b) (Supp. 2016) (requiring reasonable efforts to eliminate the need for shelter care); I.C. § 16-1619(6)(a) (requiring reasonable efforts to eliminate the need for foster care) I.C. § 16-1621(3) (requiring case plan to set forth reasonable efforts to make it possible for child to return home), I.C. § 16-1602(6) (defining aggravated circumstances), I.C. § 16-1619(6)(d) (providing that if reasonable efforts are not required because aggravated circumstances were found, the case proceeds to a permanency hearing), I.C. § 16-1620(1) & (2) (providing that the permissible permanency goals do not include reunification). *See also* 45 C.F.R. § 1356.21(b)(3)(i) (2012). Requirements are different if the child is an Indian child. *See* Chapter 11 for more information about the requirements of the Indian Child Welfare Act (ICWA).

[3] 42 U.S.C. § 622(b)(8)(A)(iii), § 675(5)(C) (2012).

[4] I.C. § 16-2011 (2009). ("An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other.").

[5] I.C. § 16-1603(1) (Supp. 2016), § 16-1604 (2009).

is the subject of a CPA proceeding, the petition to terminate parental rights must be filed in the CPA proceeding.[6]

One of the goals of the CPA is to achieve permanency for the child in a manner that takes into consideration the significance of time in a child's life. One of the ways the statute and court rules seek to achieve this goal is by setting overall time standards for finalizing the permanency goal for the child, and by setting time standards for significant events in the course of a CPA proceeding. One of those significant events is the filing of the TPR petition.

In cases where aggravated circumstances are not found, reasonable efforts to reunify are required, and the overall time standard for finalizing termination of parental rights and adoption is two years from the date of removal.[7] The time standard for filing the TPR petition varies, depending on the circumstances that brought the child into state custody, and whether efforts will be made to reunify the child with the birth parent(s), and the extent to which progress has been made toward reunification. In cases where aggravated circumstances are found, reasonable efforts to reunify are not required, and the overall time standard for finalizing termination of parental rights and adoption is one year from the date of removal.[8]

In cases where aggravated circumstances are not found, continuing efforts to reunify are required. The Department's duty does not automatically cease upon the filing of a petition to terminate parental rights. The court may, however, authorize the Department to suspend further efforts to reunify.[9]

B. Child in State Custody for 15 of the Most Recent 22 Months

In cases where there is no judicial determination that the child was subjected to aggravated circumstances, a case plan is adopted that includes a reunification plan.[10] The federal Adoption and Safe Families Act and the CPA place a time standard on achieving reunification, by requiring the Department to file a petition for TPR if a child has been in the temporary or legal custody of the Department for 15 of the most recent 22 months.[11] The CPA requires the petition to be filed prior to the last day of the 15th month, unless the court finds that:

1. The child is placed permanently with a relative,
2. There are compelling reasons why termination of parental rights is not in the best interests of the child, or
3. The Department has failed to provide reasonable efforts to reunify the child with her or his family.[12]

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[6] I.C. § 16-1624(1) (Supp. 2016); I.J.R. 48(b).
[7] I.J.R. 46(a). Case planning and permanency planning are discussed in detail in Chapters 6 and 7 of this manual. The permanency plan includes a schedule for achieving permanency within the time standard, and that schedule is included in an order of the court. Amendment to the plan to extend the time must be approved by the court I.J.R. 44(a); I.J.R. 46.
[8] I.J.R. 44(b)(2).
[9] I.C. § 16-1624(6) (Supp. 2016).
[10] I.C. § 16-1621(1).
[11] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i)(A) (2012); I.C. § 16-1622(2)(g) (Supp. 2016).
[12] I.C. § 16-1622(2)(g).

C. Court-Approved Permanency Plan with a Permanency Goal of TPR and Adoption

The court is required to hold permanency hearings annually.[13] The purpose of the permanency hearing is to determine the permanency goal for the child and the plan for achieving that goal, including time guidelines. If the court approves a permanency plan with a permanency goal of TPR and adoption, the Department is required to file a TPR petition within 30 days of the order approving the permanency plan.[14] The permanency plan is required to include a schedule which has as its objective finalizing the TPR within 18 months of the date the child was removed from her or his home.[15]

Both the CPA and court rules specifically provide that a TPR petition can be filed at any time after entry of the adjudicatory decree finding the child within the purview of the CPA.[16] The court may hold a permanency hearing and approve a permanency plan with a permanency goal of TPR and adoption at any time.[17] In addition, the prosecutor has discretion to file a TPR petition at any time after entry of the adjudicatory decree when the prosecutor has determined that the state has sufficient evidence to meet its burden of proof. The Idaho Supreme Court has ruled that a permanency order with a permanency goal of termination of parental rights and adoption is not a prerequisite to the filing of a petition to terminate, nor must the state wait either the 12 months for a permanency hearing or until the child has been in state custody for 15 months.[18]

D. Aggravated Circumstances

Reasonable efforts to reunify a child with a parent are not required where the parent has subjected the child to aggravated circumstances, and when the court finds aggravated circumstances, the CPA case proceeds to planning for permanent placement for the child.[19] The Department is required to file a TPR petition within 30 days of a judicial determination of aggravated circumstances, unless there are compelling reasons why TPR would not be in the best interest of the child.[20]

E. Abandoned Infant

The CPA requires the Department to file a TPR petition within 30 days of a judicial determination that an infant has been abandoned, unless there are compelling reasons why termination of parental rights is not in the best interest of the child.[21] If the infant was

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[13] I.C. § 16-1622(2)(b).
[14] I.J.R. 46(b).
[15] I.J.R. 46(a)
[16] I.C. § 16-1624(1) (Supp. 2016), I.J.R. 48(a).
[17] I.C. § 16-1622(2)(b).
[18] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-17, 2016-18)*, 161 Idaho 398, 387 P.3d 66 (2016).
[19] 45 C.F.R. § 1356.21(b)(3) (2012); I.C. § 16-1619(6)(d) (Supp. 2016). Aggravated circumstances are discussed in detail in Chapter 3 of this manual.
[20] I.C. § 16-1624(3). A finding of aggravated circumstances is an interlocutory order that can be appealed at the time of entry of the order, but can also be appealed upon entry of the final decree terminating parental rights. *Dep't of Health & Welfare v. Doe* (*Doe 2014-15*), 156 Idaho 103, 320 P.3d 1262 (2014).
[21] I.C. § 16-1624(3) (Supp. 2016).

abandoned pursuant to the Idaho Safe Haven Act, the Department must file a TPR petition as soon as possible after the initial 30-day investigation period.[22]

9.3 PROCEDURAL ISSUES GOVERNING TPR PROCEEDINGS

When the child is subject to the court's jurisdiction under the CPA, a TPR petition must be filed *within* the CPA case.[23] The same guardian *ad litem*, assigned caseworker, and attorneys continue to participate in the case, reducing delays and improving representation and decision-making.[24] In many instances, this will also result in the same judge presiding over the proceedings on the petition to terminate. [25]

Court rules clarify that even though the TPR petition is filed in the CPA case, the petitioner must still serve process in accordance with the TPR statute, and the record in the CPA case is not part of the record on the TPR petition unless admitted pursuant to the rules of evidence.[26]

Although Idaho law specifically provides that TPR trials "may be conducted in an informal manner," the court must make its findings based on evidence admitted in accordance with the Idaho Rules of Evidence. [27] The petitioner has the burden of proving grounds for termination by clear and convincing evidence.[28]

9.4 VOLUNTARY TERMINATION OF PARENTAL RIGHTS

Prior to or after the filing of a TPR petition, parents' counsel should discuss with the parents the option of voluntary termination of parental rights. The form for consent to terminate parental rights is established by statute.[29] Voluntary termination of the parent/child relationship can serve a number of purposes. First, when reunification is not possible, voluntary consent can expedite the termination process and free the child for placement in a permanent home. Second, involuntary termination of parental rights to a child constitutes an aggravated circumstance, which can be grounds for relieving the Department of its obligation to make reasonable efforts to prevent removal and to reunify the family if another child is subsequently removed from the home.[30] Third, it allows both parents and children to move forward with their lives when the parent recognizes he/she is not in a position to raise the child.

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[22] I.C. § 39-8205(5) (2011). The Safe Haven Act is discussed further in Chapter 12 of this manual.
[23] I.C. § 16-1624(1) (Supp. 2016); I.J.R. 48(b).
[24] I.J.R. 48(b).
[25] The Idaho Supreme Court has ruled that the parent's due process rights are not violated when the same judge presides over the child protection proceeding and the TPR proceeding. The court may not, however, consider any evidence from the child protection proceeding in the TPR proceeding unless it is properly admitted pursuant to the rules of evidence. *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-47)*, 162 Idaho 236, 395 P.3d 1269 (2017).
[26] *Id*.
[27] I.C. § 16-2009 (2009); I.J.R. 51(c); I.R.E. 101.
[28] I.C. § 16-2009.
[29] I.C. § 16-2005(4) (Supp. 2016).
[30] I.C. § 16-1602(6).

Voluntary consents must be witnessed by a district judge, a magistrate judge, or an equivalent judicial officer in another state.[31] The effect of the consent is to relinquish all rights to the child, to consent to termination of parental rights, to waive hearing on the petition to terminate parental rights, and to request entry of a decree of termination.[32]

Idaho law requires the court to accept a termination or relinquishment from another state that has been ordered by a court of competent jurisdiction under like proceedings, or in any other manner authorized by the laws of another state.[33]

The judge witnessing the execution of the consent should question the parent to ensure that the parent's consent is knowing and voluntary. The following suggested questions can be asked by counsel and/or the court and answered by the parent:

- Are you the [birth] parent of the child named in the consent form?
- When and where was the child born? (It may be advisable to wait a reasonable period of time after birth, to establish that the parent was not rushed into courtroom while still under the emotional stress of childbirth.)
- How old are you? What is your educational background?
- Do you understand why you are here today? Can you tell me in your own words why you are here?
- Are you under the influence of any medicine, drug, alcohol, or any other substance that might affect your state of mind?
- Do you have any mental or physical illness that might affect your ability to decide what you want to do?
- Did you see the child after birth? [Or, have you seen the child recently?]
    - If not, did someone prevent you from seeing the child, or did you make your own decision not to see the child?
    - If so, did you have any concerns about your baby's health? Did seeing the child make you change your mind about consenting to terminate your parental rights to the child?
- When did you decide to sign the consent to termination? Have you had enough time to think about it?
- Has anyone in any way tried to pressure you into signing the consent to terminate?
- Has anyone made any promises to you to influence your decision?
- Have you talked to a lawyer to get legal advice about this? If not, do you want to?
- Do you have a friend or family member who you talk to when you need to make an important decision? Did you talk to them? Is there someone you want to talk to before you do this?

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[31] I.C.§ 16-2005(4). ICWA imposes special requirements for execution of a consent to the termination of parental rights of an Indian child and has provisions for withdrawal of consent. 25 U.S.C. § 1913 (2012). *See* Chapter 11: ICWA.

[32] I.C. §§ 16-2005(4) (Supp. 2016), 16-2011 (2009). Another section of the termination statute also provides a procedure for waiver of notice and appearance on the petition to terminate parental rights, although presumably the waiver of the right to hearing includes waiver of the right to notice of the hearing. I.C. § 16-2007(3) (Supp. 2016). This separate section of the code may have been enacted because there may be circumstances in which a parent does not want to consent to termination, but is willing to waive notice and allow the termination to proceed.

[33] I.C. § 16-2005(4) (Supp. 2016).

- Do you understand that you will be giving up all your rights concerning this child? You will not have the right to contact the child, to be notified of anything concerning the child, or to be involved in any decisions concerning the child.
- Do you understand that you will be giving up all your rights to your child forever? Once you sign this document, if you later change your mind, it will be extremely difficult, and maybe impossible, to undo your decision to terminate your parental rights.
- Do you understand that by terminating your rights as a parent, you are opening the door for someone else to adopt the child?
- Do you believe that agreeing to terminate your parental rights is in the child's best interests? Why?
- Do you think that agreeing to terminate your parental rights is in your best interests? Why?
- Are you a member of an Indian tribe, or are you eligible for membership in an Indian tribe or Alaska Native corporation? If so, which one(s)? If it is possible that the child might be of Indian or Alaska Native heritage, is there anyone who might have more information about the child's Indian or Alaska Native heritage? How can that person be contacted?
- Have you seen and carefully read the consent form? Would you read it again now? Take as much time as you need to read it carefully.
- Is there anything in the form that you don't understand or with which you do not agree?
- Do you still want to terminate your parental rights?

Usually the parent in a termination proceeding arising in a CPA case executes the consent when appearing in the CPA proceeding, in which case the original of the consent is retained in the court file, and a copy is provided to the parent executing the consent. Sometimes the parent who wants to execute a consent simply schedules an appearance before an available local judge. In such cases, the court keeps a copy of the consent and returns the original to the parent for filing in the proceeding on the termination petition.

In child protection cases, termination may not be granted based upon a parent's voluntary consent alone. The state must file a petition to terminate parental rights stating that it is in the best interests of the child to grant termination and conditions exist for termination per Idaho Code § 16-2005 (1), (2) or (3).[34] This point was reinforced by the Idaho Supreme Court in *Idaho Dep't of Health & Welfare v. Doe 1* (*In re* Doe).[35] In that case, a couple adopted a child who had been the subject of a child protection proceeding. Post-adoption, the child was charged with sexually assaulting a sibling. The juvenile proceeding was expanded to a child protection proceeding, and the child was placed in a treatment facility in Utah. The Department filed a petition to terminate parental rights on the basis that the parents were unable to fulfill their parental responsibilities because the return of the child to the home would endanger other

[34] I.C. § 16-2005(4) is not a condition for which termination can be granted in the child protection context. That section is applicable only to petitions filed by the persons or person proposing to adopt the child or where consent to termination has been filed by a licensed adoption agency. In a child protection case, the petition will always be filed by either a prosecutor or DAG on behalf of DHW, so I.C. § 16-2005(4) cannot apply.

[35] *Idaho Dep't of Health & Welfare v. Doe 1 (In re Doe),* 163 Idaho 83, 408 P.3d 81 (2017).

siblings in the home. The parents executed voluntary consents to termination of their parental rights, and the trial court granted termination in part based on those consents. The Idaho Supreme Court reversed the decision of the trial court on other grounds, but in its opinion, stated: "Termination of parental rights may only be ordered if the court finds by clear and convincing evidence that at least one of the nonexclusive conditions under Idaho Code § 16-2005 is met."[36]

In light of *Doe (2017-27)*, in a child protection act case where a permanency goal of termination of parental rights and adoption has been approved, the court may accept a voluntary consent from the parent. However, the voluntary consent – by itself – cannot be the condition under which termination is granted. The effect of a parent voluntarily consenting is that it negates the need for a contested trial on the state's petition. The court is not relieved of its obligation to issue written findings of fact and conclusions of law -- based on clear and convincing evidence -- that termination is in the child's best interest and that at least one of the conditions under I.C. § 16-2005 (1), (2) or (3) has been met. A separate judgement should then be entered. It is recommended best practice when parents voluntarily consent that the court still conduct an uncontested hearing on the petition where the state can present evidence to support the necessary best interests and grounds for termination findings.

The decree should notify the parents that the case is sealed and that they may register with the voluntary adoption registry through the State Registrar of the Bureau of Vital Statistics.[37] Although the parents who have consented to termination have waived notice, best practice is to provide parents and their attorney(s) with a conformed copy of the decree terminating their parental rights.

9.5 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A. Content of the Petition

Idaho law sets forth requirements for the petition in a TPR proceeding.[38] It must specifically state the statutory grounds that are the basis for the petition.[39] If the child is an Indian or Alaska Native child, the petition must include allegations that meet the requirements of ICWA.[40] The petition must be filed with the court and served on all parties.

Idaho Code § 16-2006 requires the petition to contain the following information:

- The name and place of residence of the petitioner.
- The name, sex, date and place of birth, and residence of the child.
- The basis for the court's jurisdiction.
- The relationship of the petitioner to the child or the fact that no relationship exists.

[36] *Id* at 6.
[37] I.C. § 39-259A (2011).
[38] I.C. § 16-2006 (2009).
[39] The grounds for parental termination are discussed in detail in the next section of this chapter.
[40] ICWA imposes additional, different requirements for the termination of parental rights of an Indian child. ICWA is discussed in detail in Chapter 11 of this manual.

- The names, addresses, dates of birth of the parents; and, where the child is illegitimate, the names, addresses, and dates of birth of both parents if known to the petitioner.
- Where the child's parent is a minor, the names and addresses of the minor's parents or guardian; and where the child has no parent or guardian, the relatives of the child to and including the second degree of kinship.
- The name and address of the person having legal custody or guardianship of the person or acting *in loco parentis* to the child or the authorized agency having legal custody or providing care for the child.
- The grounds on which termination of the parental relationship is sought.
- The names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred.
- A list of the assets of the child together with a statement of the value of the assets.[41]

B. Grounds for Involuntary Termination (Best Interest must be Shown)

Idaho Code § 16-2005 sets forth the grounds for termination. Grounds for termination of parental rights must be shown by clear and convincing evidence, because each parent has a fundamental liberty interest in maintaining a relationship with her or his child.[42] The statutory grounds for termination are independent, and termination may be granted if any one of the grounds is found.[43]

1. Abandonment

The court may terminate parental rights if it finds that such termination is in the best interests of the child and that the parent has abandoned the child.[44] The termination of parental rights statute defines "abandoned" as follows:

> [T]he parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact. Failure of the parent to maintain this relationship without just cause for a period of one (1) year shall constitute *prima facie* evidence of abandonment under this section; provided however, where termination is sought by a grandparent seeking to adopt the child, the willful failure of the parent to maintain a normal parental relationship without just cause for six (6) months shall constitute prima facie evidence of abandonment.[45]

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[41] While effective pleading of the petition in a termination case will help adequately guide the proof and findings in the case, the Idaho Court of Appeals has found that the pleading is adequate as long as the language used essentially follows the statutory requirements. *Idaho Dep't of Health & Welfare v. Doe (In re Doe)*, 149 Idaho 653, 239 P.3d 451 (Ct. App. 2010). The Idaho Supreme Court has found that a grandparent's petition to adopt was insufficient notice to the child's father of the possible termination of his parental rights where it did not state any grounds for seeking termination. *Doe v. Doe*, 155 Idaho 660, 315 P.3d 848 (2013).

[42] *Idaho Dep't of Health & Welfare v. Doe (In re Doe)*, 152 Idaho 263, 270 P.3d 1048 (2012).

[43] I.C. § 16-2005 (Supp. 2016); *Doe v. Dep't of Health & Welfare*, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).

[44] I.C. § 16-2005(1)(a).

[45] I.C. § 16-2002(5).

The evidence and argument in contested cases focuses largely on whether the failure to maintain a relationship was willful and without just cause. Once the petitioner establishes a *prima facie* case (failure to maintain a relationship for one year), the respondent has the burden of producing evidence that the failure was not willful or that the parent had just cause. The petitioner retains the ultimate burden of persuasion that the failure to maintain a relationship was willful and without just cause.[46] Appellate court decisions focus on whether the trial court gave due consideration to the difficulties associated with maintaining a relationship. Trial court decisions have been vacated and/or reversed where the appellate court found that the trial court failed to give adequate consideration to the difficulties associated with disability,[47] military service and parental animosity,[48] incarceration,[49] mental illness,[50] geographic distance,[51] immigration status,[52] and concealment and parental hostility.[53] Other appellate decisions have affirmed trial court decisions finding a variety of explanations insufficient, including lack of knowledge of the child's whereabouts,[54] geographic distance,[55] the existence of a no contact order,[56] financial difficulties,[57] incarceration,[58] and the existence of a guardianship.[59] One recent decision affirmed a trial court decision that found grounds for termination based on abandonment, but found that termination was not in the best interest of the child.[60]

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[46] *In re Matthews*, 97 Idaho 99, 540 P.2d 284 (1975).
[47] *Clayton v. Jones*, 91 Idaho 87, 416 P.2d 34 (1966).
[48] *In re Matthews*, 97 Idaho 99; *Doe v. Doe* (*In re* Doe), 150 Idaho 46, 244 P.3d 190 (2010).
[49] *Doe v. Dep't of Health & Welfare*, 137 Idaho 758, 53 P.3d 341 (2002).
[50] *Doe v. Doe (In re Doe)*, 138 Idaho 893, 71 P.3d 1040 (2003).
[51] *Doe v. Doe (In re Doe*), 143 Idaho 188, 141 P.3d 1057 (2006).
[52] *In re Doe*, 153 Idaho 258, 281 P.3d 95 (2012).
[53] *Doe v. Doe* (*Doe 2013-30*), 156 Idaho 532, 328 P.3d 512 (2014).
[54] *Clark v. Jelinek*, 90 Idaho 592, 414 P.2d 892 (1966).
[55] *In Interest of Crum*, 111 Idaho 407, 725 P.2d 112 (1986).
[56] *Doe v. Doe*, 149 Idaho 392, 234 P.3d 716 (2010). *But see Doe I v. Doe II* (*In re* Doe), 148 Idaho 713, 228 P.3d 980 (2010) (affirming a decision of the trial court finding that the father had not willfully abandoned the child where the father was on probation for felony injury to a child, the terms of the sexual abuse treatment program required that he have no contact with minor child, and the mother refused to consent to contact with their children).
[57] *Doe v. Doe*, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[58] *Doe v. Dep't of Health & Welfare* (*In re* Doe), 146 Idaho 759, 203 P.3d 689 (2009); *Idaho Dep't of Health & Welfare v. Doe (In re Doe)*, 154 Idaho 175, 296 P.3d 381 (2013).
[59] *Doe v. Doe* (*Doe 2014-12*), 157 Idaho 59, 333 P.3d 874 (Ct. App. 2014).
[60] *In re Doe*, 157 Idaho 14, 333 P.3d 125 (2014). In that case, mother and stepfather sought to terminate the parental rights of father. The trial court concluded that the evidence and argument focused primarily on showing that stepfather had been a better father than the biological father had been, which went to issues of custody, rather than termination of parental rights. The magistrate concluded that there was no evidence that the children would be harmed by allowing the father to reestablish a relationship with the children, and that the children would lose nothing by having the father continue as the legal parent while the stepfather continued to serve as the daily father figure. The Idaho Supreme Court affirmed, stating that the court's finding was supported by substantial and competent evidence and the appellate court would not reweigh the evidence. *But see:* In re Doe *(Doe 2017-15)*, 402 P. 3d 1106 (2017). In that case, the trial granted termination of the father's parental rights on grounds of neglect, and the appellate court ruled that the trial court properly considered the child's relationship with the step-parent in determining whether termination was in the best interest of the child.

The court has held that lack of reasonable support, by itself, is sufficient to establish abandonment.[61]

The appellate decisions are highly fact-dependent, so there is no clear rule on what constitutes *willful* failure to maintain a relationship or *just cause* for failure to maintain relationship. There are, however, some discernible patterns. First, it is important that the court consider all the evidence, giving due consideration to the obstacles to maintaining a relationship, in detailed findings and conclusions. In addition, the less effort the parent has made, and the greater the length of time in the child's life, the less likely the reasons for the lack of contact will be found persuasive.

For example, in *Doe (2002)*, the appellate court reversed a trial court decision finding that an incarcerated parent had abandoned the child. The appellate court ruled that, where the child was born while the parent was incarcerated, the parent attempted to maintain contact with the child through cards, gifts and phone calls, the parent contacted the case worker a number of times, and the father contacted the court in the termination proceeding, the father's failure to complete the rider program and get out of prison early was not substantial competent evidence to support a finding of abandonment.[62] In *Doe (2009)*, the appellate court affirmed a trial court decision finding abandonment with respect to both incarcerated parents, where the parents made no effort to contact the child, even by mail or telephone, and did not participate in the CPA proceeding in any way.[63] And in *Doe (2013)*, the appellate court affirmed a trial court decision finding abandonment with respect to a father who had been in prison when his child was born, had made no contact with the child in several years, and who had been released from prison and continued to commit new offenses resulting in further incarceration.[64]

Similarly, in *Doe (2006)*, the appellate court reversed a trial court decision finding abandonment where the father had made sporadic contact and was in arrears on child support, concluding that the trial court failed to take into consideration the distance between the parties (father lived in Arizona), and the fact that the father had missed work due to injuries and was heavily in debt.[65] In contrast, in *Crum*, the appellate court affirmed a trial court decision finding that a father in Texas had abandoned his children, where he had had no contact with them, failed to pay child support, and did not contact IDHW when he knew his children were in foster care.[66]

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[61] *Doe v. Doe* (Doe 2016-23), 161 Idaho 532, 387 P.3d 785 (2016), (finding that the trial court did not err in determining that the parent had at least some financial ability to provide reasonable support but failed to do so). *See also In re* Doe, 150 Idaho 46, at 52, 244 P.3d 190, at 196 (2010), (a parent's failure to provide reasonable support or maintain regular personal contact are independent grounds for finding abandonment, but provision of reasonable financial support is a factor to be considered in determining whether abandonment has occurred).
[62] *Doe v. Dep't of Health & Welfare*, 137 Idaho 758, 53 P.3d 341 (2002).
[63] *In re* Doe, 146 Idaho 759, 203 P.3d 689 (2009). *See also Doe v. Doe* (Doe 2017-31), Idaho Supreme Court Docket No. 45419, 2018 Opinion No. 38 (March 8, 2018) (finding that there was substantial evidence to support the trial court's determination that an incarcerated parent had abandoned the child).
[64] *In re* Doe, 154 Idaho 175, 296 P.3d 381 (2013).
[65] *Roe v. Doe* (*In re* Doe), 143 Idaho 188, 141 P.3d 1057 (2006).
[66] *In Interest of Crum*, 111 Idaho 407, 725 P.2d 112 (1986).

Recent appellate cases indicate that the fundamental questions are: What effort did the parent make, and what more could the parent have reasonably done to maintain the parent-child relationship in light of the circumstances? Thus, in *Doe (2002)*, discussed above, the court looked at the incarcerated father's contacts with the child, the Department, and the court, and found that the failure to complete the rider program was not sufficient to show willfulness.[67] In *Doe (2011)*, the court affirmed a trial court decision finding a father had abandoned the child, examining a litany of reasons before finding that they were not persuasive in explaining why a father who lived 30 miles away had only one or two contacts with his children (father was on probation and couldn't travel out-of-county, but could have asked probation officer for permission to travel out-of-county; father didn't have a driver's license for a period of time but could have asked family or friends to give him or children a ride; father had financial difficulties, but that didn't explain the lack of phone contact or letters).[68]

In *Doe (2014)*,[69] the court clarified the distinction between "willful" failure to maintain a relationship, and "just cause" for failing to maintain the relationship (finding willfulness and no just cause on the facts in that case). The court stated that the key issue regarding willfulness is whether the parent is capable of maintaining a normal relationship, because for a person to willfully fail to do something, he or she had to have had the ability to do it. The court said that financial and logistical difficulties were evidence of just cause that should be adequately considered.

2. Neglect

Idaho law permits the termination of the parent-child relationship where the parent has neglected the child and termination is in the best interests of the child.[70] The termination statute provides two independent bases upon which a child can be determined to be neglected. [71]

a. Failure, Refusal, or Inability to Provide Necessary Care

The first basis for neglect is the definition set forth in the CPA: "Neglected" means a child:

(i.) Who is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental

[67] *Doe v. Dep't of Health & Welfare*, 137 Idaho 758, 53 P.3d 341 (2002).
[68] *Doe v. Doe*, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[69] *Doe v. Doe* (*In re* Doe), 155 Idaho 505, 314 P.3d 187 (2013).
[70] I.C. § 16-2005(1)(b) (Supp. 2016).
[71] I.C. § 16-2002(3)(a).

care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code; or,

(ii.) Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or,

(iii.) Who has been placed for care or adoption in violation of law; or,

(iv.) Who is without proper education because of the failure to comply with section 33-202, Idaho Code.[72]

In many of the appellate decisions, the court found demonstrable harm to the child(ren) over an extended period of time.[73] The court has held, however, that demonstrable harm is not required; the burden of proof is met by long-term lack of contact and support, which is necessary for the child's well-being.[74]

The court has found that evidence that was insufficient to support a finding of abandonment was sufficient to show neglect.[75] In abandonment cases, inability to parent has been the basis of a finding that the lack of a parental relationship was not willful; where the inability to parent is so significant that the child was left without necessary parental care, the court has upheld a finding of neglect.[76] Incarceration is

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[72] I.C. § 16-1602(28). § 16-1627, cross-referenced in the definition of neglect, provides a process by which a court may order emergency medical treatment for a child. Section 33-202, cross-referenced in subsection (d) of the definition, requires parents to provide for the educational instruction of children between the ages of seven and sixteen.

[73] *Rhodes v. Dep't of Health & Welfare*, 107 Idaho 1120, 695 P.2d 1259 (1985) (physical abuse, developmental delays); *Tanner v. Dep't of Health & Welfare* (*In re* Aragon), 120 Idaho 606, 818 P.2d 310 (1991) (physical abuse, lack of bonding/fear by children); *Doe v. Dep't of Health & Welfare* (In Interest of Doe), 122 Idaho 644, 837 P.2d 319 (Ct. App. 1992) (unstable, unnurturing, dangerous environment, poor physical condition of children); *Doe v. Dep't of Health & Welfare*, 141 Idaho 511, 112 P.3d 799 (2005) (reactive attachment disorder, developmental delays); *State v. Doe* (*In re* Doe), 143 Idaho 343, 144 P.3d 597 (2006) (neglect, abuse, domestic violence); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 149 Idaho 474, 235 P.3d 1195 (2010) (child positive for methamphetamine, behavioral disorders).

[74] *Dep't. of Health & Welfare v. Cheatwood*, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985) (long-term neglect and substance abuse). *See also Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986) (same standard of proof applies in TPR filed by family members who are raising the child as in TPR proceedings brought by the state private TPR as one brought by state; evidence included long-term substance abuse and leaving children in care of others); *Casi Found., Inc. v. Doe* (*In re* Doe), 142 Idaho 397, 128 P.3d 934 (2006) (long-term substance abuse, criminal record, unstable home and employment, rudimentary parenting skills, and encouraging mother to use drugs while pregnant); *Bush v. Phillips* (In Interest of Bush), 113 Idaho 873 749 P.2d 492 (1988). TPR was sought by grandparents who were raising a toddler. The trial court found grounds for termination based on neglect, but found termination was not in the child's best interest if the parents submitted to testing for alcohol and drugs, maintained sobriety, and submitted to supervision, direction and training from the Department to improve their parenting. The parents agreed. Some months later, the grandparents sought TPR because the parents were not complying with the agreement. The trial court granted TPR, and the appellate court affirmed.

[75] *Dayley v. Dep't of Health and Welfare* (In Interest of Dayley), 112 Idaho 522, 733 P.2d 743 (1987). *See also Roe v. Doe (In re* Doe), 142 Idaho 174, 125 P.3d 530 (2005) (sporadic contact, minimal support, unstable housing and employment, in private TPR). *But see Dep't of Health & Welfare v. Roe* (*In re* Interest of Doe), 139 Idaho 18, 72 P.3d 858 (2003) (affirming trial court decision dismissing TPR; mother attempted to contact children many times while in foster care, paid child support though garnishment, minor children allowed to refuse gifts and visits, parent was allowed such minimal contact with the children that she was unable to establish a good relationship with them).

[76] *Doe v. Dep't of Health & Welfare*, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993) (inability due to mental illness); *Brown v. State* (In Interest of Brown), 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987) (inability due to mental

not a defense to termination based on neglect; an incarcerated parent is unable to discharge parental responsibilities, leaving the child without necessary parental care.[77] In *Doe (2017-15)*, the court found that substantial evidence supported a trial court's decision finding the father neglected a child, despite evidence that the mother had frustrated the father's efforts to maintain contact with the child.[78]

It has been argued on appeal that a child who is in the custody of the Department is not neglected because the child did not lack necessary care. The Idaho Supreme Court has rejected this argument, stating that the parent is not relieved of the responsibility to parent when the child comes into state custody by virtue of the parent's neglect.[79] In determining neglect based on failure to provide necessary care, the court may consider evidence of neglect prior to the initiation of a CPA case, and may also consider the parent's lack of progress on the case plan during the CPA case.[80]

b. Failure to Comply with the Case Plan

The second basis upon which a child can be determined to be neglected is the parent's failure to comply with the case plan in a CPA proceeding. The termination statute provides that neglected means:

The parent has failed to comply with the court's orders in a child protective act case and:

(i.) The Department has had temporary or legal custody of the child for fifteen (15) of the most recent twenty-two (22) months; and

(ii.) Reunification has not been accomplished by the last day of the fifteenth month in which the child has been in the temporary or legal custody of the Department. [81]

In CPA cases where there is no judicial determination that a parent subjected the child to aggravated circumstances, a case plan is adopted that includes a reunification and a

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disability). *See also Idaho Dep't of Health & Welfare v. Doe* (*In re* Child I), 149 Idaho 165, 233 P.3d 96 (2010) (inability to parent except for short visits despite extensive private and public assistance; mother had been reported for failure to supervise and leaving children with others.) Recent amendments to the child protective act require the state to provide adaptive equipment and assistance to parents as part of the case planning process. Those requirements may impact the persuasiveness of these arguments in later cases. *See infra* part 9.5(B)(e) of this chapter.

[77] Dept. of Health and Welfare v. Doe (Doe 2015-01) 158 Idaho 764, 351 P.3d 1222 (2015).

[78] In re Doe (Doe 2017-15), 402 P. 3d 1106 (2017).

[79] Dep't of Health & Welfare v. Doe (In re Doe), 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct. App. 1999) (citing Thompson v. Thompson, 110 Idaho 93, 97, 714 P.2d 62, 66 (Ct. App. 1986), for proposition that parent is not relieved of responsibility to parent by informally placing child in care of family or friend), implicitly overruled on other grounds. See also Idaho Dept. of Health and Welfare v. Doe (Doe 2017-5), 162 Idaho 400, 397 P.3d 1159 (Ct.App. 2017) (affirming finding of neglect where mother had not provided for any of child's needs for two years while mother was incarcerated and child was in foster care).

[80] Idaho Dept, of Health & Welfare v. Doe (Doe 2016-43), 162 Idaho 69, 394 P.3d 112 (Ct. App. 2017).

[81] I.C. § 16-2002(3)(b) (Supp. 2016).

concurrent plan.[82] The reunification portion of the case plan identifies the issues that need to be addressed before the child can safely be returned home, the tasks to be completed by each parent and the Department to resolve each issue, and the services to be provided by the Department to assist the parent and in which the parent is required to participate. It is often referred to as the road map to reunification. The CPA seeks to recognize the significance of time in a child's life by placing a time standard on achieving reunification, and does so by making failure to achieve reunification within the time standards a basis for termination of parental rights.[83]

Failure to comply with the case plan as a basis for termination of parental rights is a fairly recent addition to the termination statute, but there have been a number of appellate cases decided pursuant to it. Most of the cases have affirmed trial court decisions terminating parental rights, and the cases are difficult to summarize because they are very fact-dependent. The cases do show, however, that in every case, the failure to comply was substantial, and that the issues that brought the child into care had not been sufficiently resolved to allow the child to safely return home.[84]

In one case, the appellate court affirmed a trial court decision terminating parental rights, where the trial court found that the father had complied with the case plan, but nonetheless granted termination on the first statutory definition of neglect, discussed above.[85] Although the father had made recent progress with sobriety, employment, and probation, the court based its decision on the father's long-term failure to parent, substance abuse, criminality, and particularly, the father's inability to care for the child's special needs.[86] The often-quoted characterization of the father's progress on the case plan was that it was "too little, too late."[87]

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[82] I.C. § 16-1621.
[83] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i) (2012); I.C. § 16-1622(2)(g) (Supp. 2016).
[84] *See Dep't of Health & Welfare v. Doe* (*In re* Doe), 145 Idaho 662, 182 P.3d 1196 (2008); *Dep't of Health & Welfare v. Doe* (*In re* Doe), 148 Idaho 124, 219 P.3d 448 (2009); *Idaho Dep't of Health & Welfare v. Doe* (In Interest of Doe), 149 Idaho 401, 234 P.3d 725 (2010); *Dep't of Health & Welfare v. Doe*, 149 Idaho 409, 234 P.3d 733 (2010); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 149 Idaho 564, 237 P.3d 661 (Ct. App. 2010); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 149 Idaho 627, 238 P.3d 724 (Ct. App. 2010); *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 151 Idaho 356, 256 P.3d 764 (2011); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 151 Idaho 846, 264 P.3d 953 (2011); *In re* Doe, 152 Idaho 910, 277 P.3d 357 (2012); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 152 Idaho 953, 277 P.3d 400 (Ct. App. 2012); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 154 Idaho 175, 296 P.3d 381 (2013); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 155 Idaho 145, 306 P.3d 230 (Ct. App. 2013); *Idaho Dep't of Health & Welfare v. Doe* (Doe 2017-27 & 2017-28), Idaho Supreme Court Docket Nos. 45363 and 45385, 2018 Opinion No. 21(March 6, 2018); *Idaho Dep't of Health & Welfare v. Doe* (Doe 2017-36), Idaho Supreme Court Docket No. 45485, 2018 Opinion No. 12 (February 9, 2018).
[85] *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 152 Idaho 644, 273 P.3d 685 (2012).
[86] Perhaps what this case best demonstrates is the necessity for a case plan that is specific both to tasks and to desired results, such as, for example: 1) the parent will submit to random drug testing, *and* have no failed tests, 2) the parent will attend, participate in, and complete drug treatment, *and* maintain sobriety as shown through drug testing for a specified period of time, or 3) the parent will take a (specified) parent education class or program, *and* demonstrate (specified) skills learned during supervised visits. Case plans are discussed in detail, in Chapter 6 of this manual.
[87] *Id.* at 647.

In *Doe (2016-14)* [88], the Idaho Supreme Court recognized impossibility as a defense to neglect for failure to complete the case plan. The trial court is not required to find willful non-compliance, but must find that the parent is responsible, either directly or indirectly, for non-compliance with the requirements of the plan. The court stated that this requirement reflects the reality presented by parents who engage in behavior that results in non-compliance with no apparent thought or consideration of the effect of that behavior on the case plan.

In *Doe (2016-14)*[89], the court did not identify where the burden of proof lies with respect to the defense of impossibility. Where termination is sought on grounds of abandonment, the petitioner makes a *prima facie* case of failure to maintain a normal parental relationship, the respondent bears the burden of producing evidence that there was just cause for the lack of a normal relationship, but the petitioner retains the burden of proving that the lack of a normal parental relationship was without just cause.[90] In recognizing impossibility as a defense to neglect for failure to complete the case plan, the Idaho Supreme Court looked to previous decisions in cases of termination on grounds of abandonment. Therefore, with respect to the defense of impossibility where termination is sought on grounds of neglect for failure to comply with the case plan, it is likely that where the petitioner makes a prima facie case of failure to comply with the case plan, the burden of production rests with the respondent, but the burden of proof remains with the petitioner.

Two other recent decisions have addressed the impossibility defense. In *Doe (2016-47)*[91], the court affirmed a decision of the trial court terminating a mother's parental rights. The trial court found that the mother's mental health issues impacted her ability to comply with the case plan, but did not render compliance impossible. In the alternative, the trial court found, if her mental health issues did render compliance impossible, then termination was still proper because her mental health issues rendered her unable to discharge her parental responsibilities. In *Doe (2017-3),*[92] the Court also affirmed a decision of the trial court terminating a mother's parental rights. The trial court found that Doe's actions while incarcerated resulted in her failure to parole, and therefore it was the mother's conduct while incarcerated that directly or indirectly resulted in the mother's non-compliance with the case plan.

In two other cases, the appellate court reversed trial court decisions terminating parental rights on the basis of failure to comply with the case plan. In both cases, the court found that grounds for termination – that the parent had failed to comply with the case plan – had been established by clear and convincing evidence. But in both cases, the appellate court found that the trial court's finding that termination was in the best interest of the child was not supported by substantial evidence. In *Roe (2006)*, the appellate court concluded that the trial court erred in focusing too much

[88] *Dept. of Health and Welfare v. Doe (Doe 2016-14)*, 161 Idaho 596, 389 P.3d 141 (2016).
[89] *Id.*
[90] *Doe v. Doe*, 149 Idaho 392, 234 P.3d 716 (2010).
[91] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-47)*, 162 Idaho 236, 395 P.3d 1269 (2017).
[92] *Idaho Dept. of Health and Welfare v. Doe (Doe 2017-3)*, 162 Idaho 380, 397 P.3d 1139 (2017).

on the mother's past criminal behavior while dismissing evidence such as the social worker's testimony that reunification was possible and was occurring.[93] In *Doe (2011),* the appellate court concluded that the trial court placed excessive emphasis on the father's "admittedly abhorrent behavior" prior to removal of the children, and minor noncompliance with reporting requirements, while disregarding or giving minimal weight to the compelling evidence of father's success in overcoming alcoholism, complying with treatment requirements, maintaining employment, and becoming a nurturing parent with whom the child had developed a strong bond.[94]

These decisions emphasize that the bottom line in CPA and TPR cases is the best interest of the child. Termination is in the child's best interest when a parent has substantially failed to comply with the case plan because the parent has not resolved the safety issues that prevent the child from returning home. The child protection and termination statutes place a deadline on the parents' efforts to achieve reunification. This deadline does not compel the termination of parental rights when the parent has made such substantial progress that termination is no longer in the child's best interest.

There have been a number of cases in which a parent has argued on appeal that the Department failed to make reasonable efforts to reunify, but none have prevailed. In *Doe (2014),*[95] a parent appealed a trial court decision granting termination on grounds of neglect, asserting that the Department had failed to make reasonable efforts to reunify, thereby violating his due process rights. The appellate court declined to address the issue because the issue had not been raised before the trial court. The court noted, however, that whether the Department has made reasonable efforts at reunification is not part of the magistrate court's analysis when terminating parental rights on grounds of neglect, and that where the Department's efforts are substandard, this should be addressed during the CPA proceeding by motion or argument to the court, citing Idaho Code § 16-1622(2)(g)(iii). The appellate court in that case further ruled that the magistrate court did not abuse its discretion in denying a motion by the parent to find compelling circumstances to delay termination. In *Doe (2016-11),*[96] the court affirmed the trial court decision finding that IDHW made reasonable efforts, but noted that the issue was irrelevant because a finding of reasonable efforts is not required pursuant to the termination statute. In *Doe (2016-32)*[97], the court rejected the mother's argument that the case plan was invalid because it did not set forth reasonable efforts to reunify. The court affirmed the trial court decision finding that the case plan did set forth reasonable efforts, and noted that the mother's argument attempted to shift the analysis from its proper focus, stating that the court was often presented with arguments that the Department did not do enough when the analysis should primarily focus on what the parent did or did not do.[98]

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[93] *State v. Roe* (*In re* Doe), 142 Idaho 594, 130 P.3d 1132 (2006).
[94] *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 150 Idaho 752, 250 P.3d 803 (Ct. App. 2011).
[95] *In re* Doe, 156 Idaho 682, 330 P.3d 1040 (2014).
[96] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-11),* 160 Idaho 824, 379 P.3d 1094 (2016).
[97] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-32),* 161 Idaho 754, 390 P.3d 1281 (2017).
[98] *See also Idaho Dept of Health and Welfare v. Doe (Doe 2015-21),* 160 Idaho154, 369 P.3d 932 (2016). In this case, the court rejected the argument that the prosecutor obstructed her from complying with the case plan by

In a recent case, the Idaho Supreme Court found that the trial court made a procedural error that violated a father's due process rights.[99] The trial court found that the father had not complied with the case plan and the children had been in state custody for more than 15 months. The trial court further found that the father had, however, shown enough progress on the case plan that it would not be in the children's best interest to terminate parental rights "at that time." The trial court held its decision in abeyance rather than entering judgment. Six months later, and after further trial, the trial court found that, although the father had made further progress, the father had not completed the case plan and reunified with his children, and granted the petition to terminate parental rights. The Idaho Supreme Court reversed, stating that, where the court found at the first trial that termination was not in the best interest of the child, the court should have issued judgment for the father and dismissed the petition to terminate.

3. Abuse

Idaho law permits the termination of the parent-child relationship when the parent has abused the child and termination is in the best interests of the child.[100] The parental termination statute defines abuse through a cross-reference to the CPA.[101] The CPA provides:

"Abused" means 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 an 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.[102]

There have been two cases where the appellate courts affirmed trial court decisions granting termination of parental rights, in both cases the mother physically abused the children, and the father's rights were also terminated on the basis that the father knew of the abuse and failed to

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pursuing criminal matters, noting that this confused the rule of the prosecutor and the Department, and noting that nothing in the CPA imposes a duty of reunification upon prosecutors; the court rejected the argument that IDHW obstructed her from complying with the case plan, noting that the argument attempted to frame the Department's concerns and discretion regarding her case plan as obstruction; and the court rejected the argument that the child's placement in a home eight hours away was not unreasonable since it was a relative placement and IDHW made arrangements and paid expenses for visitation.

[99] *Idaho Dep't of Health and Welfare v. Doe* (Doe 2017-32), Idaho Supreme Court Docket No. 45435, 2018 Opinion No. 34 (April 13, 2018).

[100] I.C. § 16-2005(1)(b) (Supp. 2016).

[101] *Id.*, I.C. § 16-2002(4) (cross-referencing I.C. § 16-1602(1)).

[102] I.C. § 16-1602(1).

protect the children.[103] In another recent case, the court affirmed a trial court decision granting termination of parental rights where the father was incarcerated after abusing some of the children, and the mother's rights were also terminated on grounds of neglect, based on a finding that the mother knew of the abuse and failed to protect the children. In affirming the termination of the mother's parental rights, where it was shown that all of the children faced potential harm, it was not necessary to show that the father had abused each child. The court further ruled that there is no requirement that a parent be criminally charged or convicted to support a finding of abuse, and that hearsay evidence, once properly admitted, may be considered.[104]

4. The Presumptive Parent is Not the Biological Parent of the Child

The Idaho termination of parental rights statute provides that parental rights may be terminated where the court finds that the "presumptive parent" is not the biological parent of the child and finds that termination would be in the child's best interests.[105] The termination of parental rights statute defines "presumptive father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred days after the marriage is terminated."[106]

This ground for termination of parental rights has not been directly interpreted by the Idaho Courts. Recently, however, the court declined to consider a man claiming "equitable parental rights" who did not fit the statutory definition of "presumptive parent", or any other definition of parent, a proper party to a parental termination action.[107]

5. Parent is Unable to Discharge Parental Responsibilities

Parental rights may be terminated where "the parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals and well-being of the child." [108] Pursuant to this provision, it also must be shown that termination of parental rights is in the child's best interests.

Parental rights might be terminated under this subsection for many different reasons. One in particular, specifically addressed in the statute, regards parents with disabilities.[109] First, the

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[103] *Castro v. Idaho Dep't of Health & Welfare* (In Interest of Castro), 102 Idaho 218, 628 P. 2d 1052 (1981); *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 149 Idaho 653, 239 P.3d 451 (Ct. App. 2010).
[104] *In re Doe & Doe (Doe 2017-6 and 2017-7)*, 162 Idaho 280, 396 P.3d 1162 (2017).
[105] I.C. § 16-2005(1)(c) (Supp. 2016).
[106] I.C. § 16-2002(12).
[107] *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 150 Idaho 195, 245 P.3d 506 (Ct. App. 2010). *See also Idaho Dep't of Health & Welfare v. Doe (In re* Doe), 150 Idaho 140, 244 P.3d 1226 (2010). In that case, the appellate court concluded that the trial court erred in entering judgment terminating parental rights, where it had not been established that the appellant was a father. In such circumstances, the court can only enter an order stating that the person has no parental rights.
[108] I.C. § 16-2005(1)(d) (Supp. 2016).
[109] "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual

parental termination statute establishes the over-arching policy that the statute is not to be "construed to allow discrimination in favor of, or against, on the basis of disability."[110] Second, the parental termination statute provides that a parent with a disability "has the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child."[111] While these provisions regarding parents with disabilities apply in all termination actions, they are particularly relevant when the ground for termination is the parent's capacity to discharge parental responsibilities.

In *Doe (2010)*,[112] the court terminated parental rights based on this provision of the statute. It reasoned that the parents' emotional, psychological and behavioral impairments, coupled with their inability to participate in and implement aspects of the case plan over an eighteen month period, provided clear and convincing evidence that they were unable to discharge parental responsibilities and would be unable to do so for a prolonged, indeterminate period of time. In addition, the court reasoned that supportive services would not enable the parents to discharge their parental responsibilities. There have been a number of other cases in which the court has affirmed a trial court decision finding inability to parent based on a parent's persistent misconduct that was injurious to the child.[113]

6. Parent is Incarcerated

Idaho law permits termination of parental rights where a "parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority" and where such termination is in the child's best interests.[114]

The Idaho Supreme Court has interpreted the language of the statute to require two findings: first, that the parent has been incarcerated, and second, that, during the child's minority, the parent is likely to remain incarcerated for a substantial period of time following the date of the evidentiary hearing. The court stated that the length of incarceration prior to the time of the evidentiary hearing was irrelevant.[115]

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preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment. I.C. § 16-2002(17).

[110] I.C. § 16-2001(2) (2009).

[111] I.C. § 16-2005(6) (Supp. 2016).

[112] *Dep't of Health & Welfare v. Doe*, 149 Idaho 207, 233 P. 3d 138 (2010). *See also Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 153 Idaho 700, 291 P.3d 39 (2012).

[113] *See Idaho Dept. of Health and Welfare v. Doe (Doe 2015-10)*, 159 Idaho 664, 365 P.3d 420 (Ct. App. 2015) (over period of years, father knew wife was abusing children but did not try to protect them and continued to deny abuse, father made little progress on case plan); *Doe v. Doe (Doe 2015-03)*, 159 Idaho 192, 358 P.3d 77 (2015) (father unable to discharge parental responsibilities because of ongoing incarceration, alcohol abuse, and his violent and controlling behaviors); *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-11)*, 160 Idaho 824, 379 P.3d 1094 (2016) (mother's inability to parent shown by drug abuse, criminal history, failure to make any progress throughout the CPA proceeding until after the termination hearing); *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-32)*, 161 Idaho 754, 390 P.3d 1281 (2017) (mother's "recent and modest improvements were insufficient to overcome her history of demonstrated unfitness").

[114] I.C. § 16-2005(1)(e) (Supp. 2016).

[115] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-14)*, 161 Idaho 596, 389 P.3d 141 (2016); *In re Doe (Doe 2014-26)*, 158 Idaho 548, 348 P.3d 163 (2015). In *Doe 2014-26*, the court vacated a trial court decision terminating

Neither the legislature nor the court has defined what constitutes a substantial period of time. However, the court has identified some factors to consider, including, but not limited to: the age of the child; the relationship, if any, that has developed between the parent and the child; and the likely period of time that the parent will remain incarcerated.[116] In determining the likely period of time that the parent will remain incarcerated, the court may also consider the likelihood of parole, including the parent's performance in prison, the parent's criminal history, and the parent's performance on probation.[117]

In *Doe (2009),*[118] the court affirmed TPR where the children were two and six years old, the children had little relationship with their father, and the father had been sentenced to serve a minimum of 25 years in prison. In *Doe (2011),*[119] the court affirmed TPR where the child was 20 months old at the time of termination, father had been incarcerated since the child's birth, the child would be three years old at the time of father's earliest release, upon release the father would have to work a case plan to achieve reunification, and reunification would likely take a considerable amount of time due to father's substance abuse, criminal history, and failure to comply with probation.

A significant procedural issue arises with the conduct of trial in cases where a parent is incarcerated. If a parent is incarcerated in Idaho, the court can enter a transport order so that the respondent can appear at trial. Occasionally, the Department of Corrections will ask the court to vacate an order to transport a high-risk inmate, or simply decline to transport. Sometimes the parent does not want to be transported, because time away from educational and treatment programs at the correctional facility will delay the parent's release from prison. If the parent is incarcerated in another state, an Idaho court does not have jurisdiction to order the correctional facility in the other state to transport the inmate. In cases where the parent cannot or does not want to be transported, arrangements can be made for the parent to appear in court by telephone. The court has denied a due process objection by a parent incarcerated in Texas, where the parent had the opportunity to appear through counsel and by deposition.[120]

7. Best Interests of Parent and Child

The final ground for involuntary termination in Idaho law is where the court finds that termination of parental rights is in the best interests of both the parent and the child.[121] In *State v. Doe,*[122] the court relied on this provision to terminate the parental rights of a father who had abused one child but not the second child. The court reasoned that termination was in the best

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a father's parenting rights, where the sole evidence of grounds for termination was the father's criminal conviction which was vacated on appeal. *See also Doe v. Doe (Doe 2015-03),* 159 Idaho 192, 358 P.3d 77 (2015) (the parent provided no authority suggesting that a court cannot find a person unable to parent for a prolonged period, when the finding is based on a conviction pending appeal).

[116] *(Doe 2014-26),* 158 Idaho at 552, 348 P.3d at 167.

[117] *Idaho Dept. of Health and Welfare v. Doe (Doe 2017-4),* 162 Idaho 266, 396 P.3d 695 (2017).

[118] *Doe v. Doe (In re* Doe), 148 Idaho 243, 220 P.3d 1062 (2009).

[119] *Idaho Dep't of Health & Welfare v. Doe* (*In re* Doe), 151 Idaho 605, 261 P.3d 882 (Ct. App. 2011).

[120] *Dep't of Health & Welfare v. Doe (*In Interest of Baby Doe), 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

[121] I.C. § 16-2005(3) (Supp. 2016).

[122] *State v. Doe,* 143 Idaho 383, 146 P.3d 649 (2006).

interests of the father because he was an "untreated child molester in denial" and would likely commit further abuse if reunified with his child. It reasoned that termination was in the best interests of the child, despite her attachment to her father and her wish that her relationship with him not be terminated, because it would ensure the safety of the child and enable the child to be placed in a safe and supportive family.

C. Grounds for Termination Where TPR is Rebuttably Presumed to be in the Child's Best Interest

With respect to the grounds for termination discussed above, the burden of proof is on the petitioner to establish first, that there are grounds for termination, and second, that termination is in the best interest of the child. There is another category of grounds for termination, discussed in this subsection, where the court may rebuttably presume that termination of parental rights is in the best interest of the child (grounds must still be shown by clear and convincing evidence).[123]

1. Child Conceived as a Result of Sexual Misconduct

The statute provides that there are grounds for TPR where the parent caused the child to be conceived as a result of sexual misconduct. Sexual misconduct is defined by the statute to include "rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child under the age of sixteen (16) years, as defined in sections 18-6101, 18-1508, 18-1506 and 18-6602, Idaho Code."[124]

2. Aggravated circumstances

The statute provides that there are grounds for termination where the following circumstances are present:

(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 continuing the relationship 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 section 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108 or 18-6608, Idaho Code;

(iii.) Torture of a child; any conduct described in the code sections listed 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;

(iv.) The parent has committed murder, aided or abetted a murder, solicited a murder or attempted or conspired to commit murder….[125]

[123] I.C. § 16-2005(2) (Supp. 2016).
[124] I.C. § 16-2005(2)(a).
[125] I.C. § 16-2005(2)(b).

Each of these grounds for termination is also a basis for a finding of aggravated circumstances in the CPA proceeding.[126] Where the court has found aggravated circumstances and, as a result, no efforts at reunification were required, the CPA proceeding moves directly to termination of parental rights.[127]

3. Abandoned Infant

   The statute provides that abandonment of an infant is grounds for termination.[128] This ground is not available in cases where one parent seeks the termination of the other parent's rights.[129] The Idaho Safe Haven Act[130] has special provisions regarding an infant abandoned to a "safe haven."

4. The Rebuttable Presumption

As noted above, with respect to these grounds for termination, the statute provides that the court "may rebuttably presume" that termination of parental rights is in the best interests of the child. Idaho Rule of Evidence 301 defines the effect of a rebuttable presumption, which is often referred to as the "bursting bubble" rule. The presumption imposes on the responding parent the burden of producing evidence that TPR is not in the best interests of the child. The burden of production means to introduce sufficient evidence to permit reasonable minds to conclude that termination is not in the best interests of the child. The burden of proof remains with the petitioner, which is the state in a CPA/TPR proceeding. If the respondent parent meets the burden of production, the court determines whether TPR is in the best interests of the child based on the admitted evidence, without reference to the presumption.

9.6 NOTICE AND HEARING

Once a petition has been filed, the court must set a time and place for the hearing, and the petitioner must notify the appropriate individuals of the hearing.[131]

A. Persons Entitled to Notice

The answer to the question of who is entitled to notice of a parental termination action is complex. Idaho Code § 16-2007 establishes the notice requirements for parental termination actions. In addition to specifying notice to certain persons and entities, I.C. 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption

[126] I.C. § 16-1602(5)(a), (b). In *Doe v. Dep't of Health & Welfare*, 144 Idaho 420, 422, 163 P.3d 209, 211 (2007), the court found that long-term deprivation of food so that the child was seriously malnourished and grossly underweight constituted chronic abuse.
[127] The determination of aggravated circumstances is governed by I.C. § 16-1620. It is discussed in detail in Chapter 3 of this manual.
[128] I.C. § 16-2005(2)(c) (Supp. 2016).
[129] *Id.*
[130] I.C. §§ 39-8201 – 8207 (2011). The Safe Haven Act is discussed in Chapter 12 of this manual.
[131] I.C. § 16-2007(1) (Supp. 2016).

proceeding.[132] The adoption notice provision, in turn, requires that notice of an adoption proceeding be provided to certain specified individuals, but also to any person or agency whose consent to an adoption proceeding would be required and to "[a]ny person who has registered notice of the commencement of paternity proceedings pursuant to section 16-1513 . . .."[133] The upshot of this web of notice requirements is that any person or entity named in the parental termination notice provision, the adoption notice provision, or the adoption consent provision is entitled to notice of a parental termination action.[134]

When the overlapping notice provisions of the adoption and parental termination statutes are considered together, notice must be provided to:[135]

- The child, if he or she is over age 12.[136]
- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage.[137]
- The mother of the child if the parents are unmarried.[138]
- The father or putative father of the child[139] who has not signed a consent to termination[140] or a waiver of notice and appearance[141] whose rights have not been previously terminated, if he:
  - is currently married to the mother or was married to the mother at the time she executed a consent to termination of parental rights or otherwise relinquished the child,[142]
  - has been adjudicated the father of the child prior to the execution of a consent to termination by the mother,[143]
  - has registered notice of the commencement of a paternity action pursuant to the Idaho putative father registry statute,[144]
  - is recorded on the birth certificate as the child's father with the knowledge and consent of the mother,[145]
  - is openly living in the same household with the child and holding himself out as the child's father at the time the mother executes a consent or relinquishment,[146]
  - has filed a voluntary acknowledgment of paternity,[147]

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[132] I.C. § 16-2007(1), referring to I.C. § 16-1505 (2009).
[133] I.C. § 16-1505, referring to I.C. § 16-1513 (Supp. 2016).
[134] I.C. §§ 16-2007, 16-1505 (2009), 16-1504 (Supp. 2016), 16-1513.
[135] In addition to the individuals discussed below, notice also must be provided to the adoptee's spouse, I.C. § 16-1504(1)(h), and to the guardian or conservator of an incapacitated adult, I.C. § 16-1504(1)(g). These provisions are unlikely to apply in a CPA-connected adoption.
[136] I.C. § 16-1504(1)(a).
[137] I.C. § 16-1504(1)(b).
[138] I.C. §§ 16-1504(1)(c), 16-2007(1) (separately requiring notice to any "parent").
[139] The question of who is entitled to be treated as the father in a CPA proceeding and in an action to terminate parental rights is subject to ambiguity under Idaho law and has constitutional implications. The current state of Idaho and federal law in this area is discussed in Chapter 12 of this manual.
[140] I.C. § 16-2005(4) (Supp. 2016).
[141] I.C. § 16-2007(3).
[142] I.C. §§ 16-1505(1)(c), (f) (2009), 16-1504(1)(b) (Supp. 2016).
[143] I.C. § 16-1504(1)(d).
[144] I.C. §§ 16-2007(3), 16-1505(1)(b) (2009),16-1513 (Supp. 2016).
[145] I.C. § 16-1505(1)(d) (2009).
[146] I.C. § 16-1505(1)(e).
[147] I.C. § 7-1106 (2010).

  - has developed a substantial relationship with the child who is more than 6 months old and has taken responsibility for the child's future and financial support,[148] or
  - has developed a substantial relationship with a child under the age of 6 months and has commenced paternity proceedings and complied with Idaho Code § 16-1504(2)(b).[149]
- The legally-appointed guardian of the person or custodian of the child.[150]
- The guardian *ad litem* for the child and/or for the parent.[151]
- IDHW, if it is not the petitioner.[152]

The Idaho putative father registry statute, Idaho Code § 16-1513, is cross-referenced in the notice requirements of the termination statute quoted above. Section 16-1513, Idaho Code, provides that notice of adoption need not be given to putative fathers who have not complied with the registration or other provisions of the statute. Through the cross-reference, the TPR statute relieves parties of the responsibility to notify putative fathers who have failed to timely file a paternity action and/or to timely file notice of the filing of a paternity action.

The putative father statute was amended in 2013. The constitutionality of the revised statute has not been reviewed by a court. Federal law requires that putative father notice provisions must be 1) likely to notify most interested fathers, and must 2) provide a mechanism by which an unwed father can assert parental rights without the consent or support of the mother.[153]

To ensure permanency for the child, as well as due process to the parents, it is strongly recommended that diligent efforts be made to identify, locate, and serve process on putative fathers (including paternity testing, until the biological father is identified) resulting in either a decree terminating that individual's rights or a decree establishing non-paternity (or, in appropriate cases, reunification with a father).

B. Manner of Notice

The statute also contains provisions as to the manner in which service of process will be made.[154] Notice to the parents or guardians must be by personal service. If all reasonable efforts have been made to notify the parents, and these efforts have been unsuccessful, the petitioner should file a motion requesting service of process by publication and registered or certified mail to the person's last known address. Notice must be published for three successive weeks in the newspaper designated by the court as most likely to give notice to the person to be served. The hearing should take place no sooner than 10 days after service of the notice and 10 days after the last date of publication.[155]

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[148] I.C. § 16-1504(2)(a) (Supp. 2016).
[149] This basis for notice, in particular, is discussed in more detail in Chapter 12 of this manual.
[150] I.C. § 16-1504(f).
[151] I.C. § 16-2007(1).
[152] *Id.*
[153] *Lehr v. Robinson*, 463 U.S. 248, 263-264 (1983).
[154] I.C. § 16-2007(2) (Supp. 2016).
[155] I.C. § 16-2007(2) (Supp. 2016).

Reasonable efforts to notify by personal service should include a search of all of IDHW's available databases (particularly the child support database), Idaho's court record repository, as well as other state databases (particularly prison databases). It is strongly recommended that the affidavit in support of the motion for notice by publication fully document the efforts at personal service and the available information as to the person's known address. This minimizes the potential for a parent to seek to invalidate a TPR decree based on lack of service and promotes permanency for the child.

In cases where a parent has properly executed, and the court has accepted a consent to terminate parental rights, notice has been waived by that parent.[156]

9.7 PRE-TRIAL ISSUES

A. Appointment of Counsel and Guardians ad litem

Idaho law provides for appointment of counsel for indigent parents in termination proceedings.[157] Idaho law also provides for the appointment of a guardian *ad litem* for a parent if the parent is determined to be incompetent to participate in the proceeding.[158]

As noted above, the TPR petition must be filed in the CPA case, and appointments of attorneys and guardians *ad litem* remain in effect for proceedings on the TPR petition, unless otherwise ordered by the court.[159] If for some reason these appointments cannot be continued, or if a parent is newly located and identified, the court must expeditiously appoint new counsel for any indigent parties[160] and/or a new guardian *ad litem* for the child.[161] Because the court may have reviewed these issues at the most recent permanency hearing, another hearing may not always be necessary to make these determinations. Immediately upon the filing of the motion and petition, the court should review the need for appointment of counsel and/or a guardian *ad litem* so that each can be present at the first pretrial hearing.

B. Pretrial Conference

In some cases, particularly those where all necessary parties are already joined and participating in the CPA case, the state files its petition to terminate, and the court schedules further proceedings. In some cases, particularly those where some necessary parties have not already been located and joined, or are not participating in the CPA case, the state files its petition to terminate, along with a summons and notice of hearing, and serves process of the petition,

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[156] I.C. § 16-2005(4). The process for consent to termination of parental rights is discussed earlier in this chapter.
[157] I.C. § 16-2009 (2009).
[158] I.C. § 16-2007(5) (Supp. 2016). *See also* In re Doe (Doe 2016-31), 161 Idaho 373, 386 P.3d 916 (2016) (interpreting "incompetent to participate" to mean the lack of capacity to understand the proceedings against him or to assist in his defense, the same as in a criminal case, and affirming the trial court decision denying a motion to appoint a guardian *ad litem* for the parent).
[159] I.J.R. 48(b).
[160] I.C. § 16-2009 (2009).
[161] I.C. § 16-1614(1) (Supp. 2016).

summons, and notice of hearing.[162] (In some counties, the prosecutor does this in all cases.) If a party fails to appear and contest the proceeding, the matter may proceed to hearing, and the court may enter judgment.

An uncontested trial is not a default.[163] A party may seek default judgment, but must file a motion, with a supporting affidavit, and give three days' notice. After hearing, the court enters an order of default, and then enters judgment based upon the default.[164] A party seeking default judgment in a termination case must still present clear and convincing evidence of grounds for termination, and that termination is in the best interest of the child.[165] The recommended best practice is to proceed to an uncontested trial, rather than a default, to ensure the finality of the judgment and permanency for the child. Pursuant to the civil rules, an order of default may be set aside for good cause, and the default judgment can be set aside under rule I.R.C.P. 60(b).[166]

If the party appears, the court can make the necessary appointments and schedule further proceedings.

As a matter of best practice, the court should immediately set a pretrial conference, for a date within 30 days of the filing of the petition to terminate parental rights or the parent's first appearance. The American Bar Association recommends that the pretrial and subsequent hearings be heard by the same judge who heard the CPA case.[167] At the pretrial, the court should establish all of the following:

- Whether the parents will contest or will consent to terminate their parental rights.
- That discovery will be completed in sufficient time to allow all parties to review the material prior to a settlement conference.
- The date for pretrial or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made but another conference is needed, there is adequate time for the second conference. The recommended timeframe for the first conference is four weeks prior to the trial date. Counsel must notify the court immediately following a conference as to whether agreement was reached.
- A trial date.

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[162] The summons must include notice that the parent or guardian is entitled to a lawyer, and if they cannot afford one, they can have one appointed for them. I.C. § 16-2009. The summons should include information for contacting the court to ask for a court-appointed lawyer, similar to the summons in a CPA proceeding. *See* I.J.R. 33.
[163] I.R.C.P. 55(a)(3), In re Doe *(Doe 2014-22)*, 157 Idaho 955, 342 P.3d 557 (2015).
[164] *Id.*
[165] *Idaho Dept. of Health and Welfare v. Doe (Doe 2015-08)*, 159 Idaho 386, 360 P.3d 1067 (Ct. App. 2015).
[166] I.R.C.P. 55(d).
[167] COMMITTEE ON JUDICIAL EXCELLENCE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS, AMERICAN BAR ASSOCIATION, JUDICIAL EXCELLENCE IN CHILD ABUSE AND NEGLECT PROCEEDINGS STANDARD A.8 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/child_law/Judicial%20Excellence%20Standards%20Abuse-Neglect%20ABA%20Approved%20(3).authcheckdam.pdf (last visited on May 1, 2018). The Idaho Supreme Court has ruled that the parent's due process rights are not violated when the same judge presides over the child protection proceeding and the TPR proceeding. The court may not, however, consider any evidence from the child protection proceeding in the TPR proceeding unless it is properly admitted pursuant to the rules of evidence. *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-47)*, 162 Idaho 236, 395 P.3d 1269 (2017).

- Whether transport orders[168] will be needed for incarcerated parents or telephonic hearing for parents incarcerated in another state that cannot be transported.

Best practice is to schedule a firm trial date that allows sufficient time to prepare for trial. Bifurcating termination trials is strongly discouraged because of the resulting delay in permanency for the child(ren). The court should enter a scheduling order with the objective of finalizing proceedings on the TPR petition within six months of the date of the permanency hearing approving a permanency goal of termination of parental rights and adoption and 18 months from the date the child was removed from the home.[169] Best practice is to schedule trial dates within 90 days of the filing of the petition.[170]

Finally, if a petition for adoption is not filed in conjunction with the parental termination action, the statute provides that the court shall order IDHW Bureau of Child Support Enforcement to submit a written financial analysis report within 30 days detailing the un-reimbursed public assistance monies paid by the State of Idaho on behalf of the child. The report, if ordered, should contain recommendations for repayment and provisions for the future support of the child. [171]

9.8 CONDUCTING THE HEARING

At this point in the court process, one of two circumstances will exist – either the parents will have voluntarily relinquished their parental rights or the case will move to trial. When pretrial negotiations result in an agreement that the parents will voluntarily relinquish parental rights, counsel should notify the court immediately. The court can then use the beginning portion of the dates previously set (either for the final pretrial or the trial for the final hearing on the petition to terminate parental rights) to take the parents' voluntary consent and hear uncontested evidence that the termination of parental rights is in the best interests of the child and that one of the conditions under Idaho Code § 16-2005(1), (2) or (3) has been met.[172] Remaining trial dates and time can be freed for other court business.

Idaho law provides that a termination of parental rights trial is heard by the court without a jury, is closed to the public, and must be on the record. The court's findings must be based on clear and convincing evidence.[173] The rules of evidence apply to proceedings on the petition to

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[168] To ensure adequate notice to the agency responsible for transporting an incarcerated parent, transport orders should be obtained 30 days prior to the hearing or trial.
[169] I.J.R. 44(b). If the court found aggravated circumstances in the CPA proceeding, then the court must enter a scheduling order with the objective of finalizing the petition to terminate within six months from the approval of the permanency plan.
[170] I.J.R. 46(a), (b).
[171] I.C. § 16-2008(1) (Supp. 2016). In termination proceedings arising from a CPA proceeding, the permanency goal is termination of parental rights *and* adoption (see Chapter 7 of this manual regarding permanency planning). So, even though the adoption proceedings are not filed until after the termination is finalized, the court generally does not order the financial report.
[172] *Idaho Dep't of Health & Welfare v. Doe 1 (In re Doe),* 163 Idaho 83, 408 P.3d 81 (2017).
[173] I.C. § 16-2009 (2009).

terminate, and the court may not consider evidence from the child protection proceeding unless it is admitted in the proceedings on the TPR petition in accordance with the rules of evidence.[174]

A. Participants

The following persons should be present for trial, although some may be excluded when not testifying:

- The judge
- County Prosecutor or Deputy Attorney General[175]
- The child, when appropriate (the role of the child is further discussed below)
- Attorney for the child, if appointed[176]
- The parent(s)
- Attorney(s) for the parent(s) (separate attorneys if conflict warrants)
- A representative of the Department of Juvenile Corrections, if the child is placed in its custody
- Guardian *ad litem* for the child
- Attorney for the guardian *ad litem*
- Indian Custodian, the child's tribe, and attorney, if applicable[177]
- IDHW personnel with knowledge of the facts and authority to enter into agreements
- Court reporter, security personnel, and interpreter(s), as needed.

Other children, foster parent(s), pre-adoptive parent(s), or a relative providing care for a child may be present for specific purposes, such as testifying as witnesses or as a resource in reaching a voluntary settlement.[178]

B. The Role of the Child

The role of the child who is the subject of the proceeding is a developing issue. Historically, a child was the subject of a proceeding, but not a participant in the proceeding. There is a growing

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[174] I.J.R. 51(c), *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-47)*, 162 Idaho 236, 395 P.3d 1269 (2017). *See also Idaho Dept. of Health and Welfare v. Doe (Doe 2015-21)*, 160 Idaho 154, 369 P.3d 932 (2016) (trial court was mandated to take judicial notice of adjudicatory hearing transcript where prosecutor followed proper procedure in making request and giving notice); *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-35)*, 161 Idaho 745, 390 P.3d 866 (Ct. App. 2017) (evidence of incident in which mother was out-of-control and entered stranger's residence was relevant and admissible, notwithstanding the dismissal of criminal charges arising from the incident).

[175] I.C. § 16-2009 provides that the prosecuting attorney shall represent the Department at all stages of the hearing. In some counties, the prosecutor and the attorney general have entered into agreements for the attorney general to appear on behalf of the state in some or all proceedings on TPR petitions.

[176] The termination statute does not provide for appointment of counsel for children who are the subject of the TPR petition. The CPA statute provides that the court shall appoint counsel for a child 12 years of age or older, and may appoint counsel for a younger child. I.C. § 16-1614 (2014). Court rules provide that those appointments will continue in the proceedings on the TPR petition unless otherwise ordered by the court. I.J.R. 48(b).

[177] See Chapter 11 of this manual for further information regarding Indian children and the Indian Child Welfare Act (ICWA).

[178] I.J.R. 40. The rule provides that foster parents have the right to be heard in all post-adjudicatory hearings. Rule 48(b) provides that the petition to terminate parental rights will be filed in the same case as the proceeding under the Child Protective Act. It is unclear whether these two rules create a right for foster parents to be heard in hearings on the petition to terminate parental rights.

trend for children to have greater opportunities to participate in child protection proceedings, but there is no statute, court rule, or appellate decision that explicitly makes a child a party to child protection or termination proceedings.

As noted above, the termination statute provides for notice to children age 12 and older.[179] Idaho Juv. R. 40(b) provides that children eight years of age or older have the right to be heard in all post-adjudicatory hearings. Rule 48(b) provides that the petition to terminate parental rights will be filed in the same case as the proceeding under the CPA. It is unclear whether these two rules create a right for children eight years of age or older to be heard in hearings on the petition to terminate parental rights. The CPA statute provides that, in CPA proceedings, the court shall appoint counsel for a child 12 years of age or older, and may appoint counsel for a younger child.[180] The termination statute does not provide for appointment of counsel for children who are the subject of the TPR petition, but Rule 48(b) provides that the appointments made in the CPA proceeding will continue in the proceedings on the TPR petition unless otherwise ordered by the court. In *Doe (2017-21)*,[181] the Idaho Supreme Court reversed a trial court decision granting termination of parental rights, on an appeal *by the child* (filed by counsel for the child). The decision contains no discussion of the child's status at trial or on appeal.

9.9 FINDINGS AND CONCLUSIONS

The termination statute provides that, "every order terminating the parent and child relationship … shall be in writing and shall recite the findings upon which such order is based, including findings pertaining to the court's jurisdiction." The Idaho Court of Appeals has interpreted this to require that the trial court make case-specific findings of fact in writing. The appellate court vacated and remanded trial court decisions where the trial court made oral findings of fact on the record, and subsequently entered a written order incorporating its oral findings by reference.[182] The Idaho Supreme Court has indicated that it strongly disapproves of the trial court making oral findings of fact on the record, and then directing counsel to prepare written findings.[183]

As noted above, it is important for the judge to make detailed findings and conclusions regarding grounds for termination and whether termination is in the best interest of the child. Most appeals are based on the argument that the decision of the trial court was not supported by substantial evidence. Detailed findings of fact that include a thorough review of the evidence are the best means to demonstrate that the court thoroughly considered the evidence and gave the evidence appropriate weight in reaching its conclusions.

At the conclusion of the termination case, the court must issue both findings of fact and conclusions of law, and a separate decree terminating parental rights. Best practice is for the court to issue its findings and conclusions and decree as soon as practicable after the close of the

[179] I.C. § 16-1504(1)(a) (Supp. 2016).
[180] I.C. § 16-1614.
[181] *In re Doe (Doe 2017-21)*, 408 P. 3d 81 (2017).
[182] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-43)*, 162 Idaho 69, 394 P.3d 112 (Ct.App. 2017), *see also Doe v. Doe (Doe 2015-07)*, 159 Idaho 461, 362 P.3d 536 (2015).
[183] *Idaho Dept. of Health and Welfare v. Doe (Doe 2016-14)*, 161 Idaho 596, 389 P.3d 191 (2016).

trial (and any post-trial briefing). The issuance of a separate decree is required by the Idaho Rules of Civil Procedure.[184] ICWA imposes significantly different standards for the termination of the parent-child relationship and the state proceeding must comply with this federal law. Failure to comply with this law could result in decree of termination and adoption invalidated at a later date.[185] After the entry of the decree, the court clerk serves copies on the parties.

9.10 APPEALS

Court rules provide for expedited appeals directly to the Idaho Supreme Court from final decisions on TPR petitions. Appeals of TPR decrees are governed by Idaho Appellate Rules 11.1, 12.1 and 12.2.[186] An appeal from any decree granting or denying a TPR petition must be made by physically filing a notice of appeal with the clerk of the district court within fourteen days from the issuance of the order. Such filing is jurisdictional and can result in dismissal if the filing deadline is not met. The clerk's record and transcript must be prepared within twenty-one days of the filing of the notice of appeal. The appellant's brief is due within twenty-one days of the clerk's record being filed, and the respondent's brief is due within twenty-one days of service of the appellant's brief. If there is no cross-respondents' brief, the reply brief from the appellant is then due seven days from service of the respondent's brief. No extensions will be granted except upon a verified showing of "the most unusual and compelling circumstances."[187] Oral argument, if requested, must be held within 120 days of the filing of the appeal.[188] The filing of an appeal does not stay the termination decree without further action of the appellant, and permanency planning for the child may continue.[189]

On appeal, the standard of review applied to the trial court's factual findings on the grounds for termination is whether the findings are supported by substantial and competent evidence. [190]

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[184] I.R.C.P. 54(a).
[185] 25 U.S.C. § 1914 (2012); *see also* Chapter 11 of this Manual.
[186] IDAHO APP. R. 11.1 (providing for appeal as a matter of right to the Supreme Court in the expedited manner provided in Rule 12.2), 12.1 (providing for permissive appeals to the Supreme Court when such an appeal serves the best interest of a child), and 12.2 (establishing procedures for expediting appeals under either Rule 11.1 or 12.1).
[187] IDAHO APP. R. 12.2(e).
[188] IDAHO APP. R. 12.2(f).
[189] I.C. § 16-2014 (Supp. 2016).
[190] *See e.g., Dep't. of Health & Welfare v. Doe* (In Interest of Doe), 150 Idaho 88, 90, 244 P.3d 232, 234 (2010).

CHAPTER 10: Adoption

10.1 INTRODUCTION

This chapter is focused on the finalization of an adoption arising from a Child Protective Act (CPA) proceeding. By the time an adoption proceeding is filed in a CP case, a permanency plan will have been approved in the CPA case with a permanency goal of termination of parental rights and adoption. The termination(s) of parental rights will already have been completed. In most cases, the child will be in a foster placement that will be the child's adoptive placement. In some cases, the child will be in the process of transitioning to or stabilizing in a foster placement that will be the child's adoptive placement. The Department, pursuant to the permanency plan, may be continuing to provide services to address the child's special needs or to ensure the stability of the placement. The Department will have assigned an adoption specialist to the case. The focus of the Department's efforts at the point of adoption is on ensuring that the proper documentation is provided to the court in the adoption proceeding to finalize the adoption, and accessing adoption assistance.[1]

10.2 THE ADOPTION PROCESS

A. Jurisdiction and Venue

An adoption proceeding is initiated when the person(s) proposing to adopt the child files a petition to adopt with the court. Where the adoption arises from a CPA case, the adoption petition must be filed in the court having jurisdiction over the CPA case unless that court relinquishes jurisdiction.[2] If the court relinquishes jurisdiction, the adoption proceeding must be initiated with the court where the prospective adoptive parents reside.[3] The special jurisdictional rule for adoptions connected to a CPA case arises from the CPA court's responsibility to ensure that the child's permanency plan is finalized and the CPA proceeding is appropriately terminated.[4] Where the permanency goal is termination of parental rights and adoption, the child's permanency plan is not finalized until the adoption is finalized.

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] *See* 42 U.S.C. §§ 622(b)(8)(A)(iii) (2012), 675(5)(C) (2012). The federal government has put in place numerous incentives to support adoptive placements, detailed in the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub .L. No. 110-351, 122 Stat. 3949, and strengthened again with 2014's Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919. Program instructions for both acts are available on the Administration for Children and Families website. Permanency planning and termination of parental rights are discussed in previous chapters of this manual.

[2] I.C. §16-1506(1).

[3] I.C. § 16-1506(1) (Supp. 2014).

[4] I.C. § 16-1603(1) (2009), § 16-1604(1) (Supp. 2014).

In many cases, however, the prospective adoptive parents live in a different county within the state, or a different state, or sometimes a different country. The adoption statute gives the judge in the CPA case the discretion to relinquish jurisdiction over the adoption proceeding, thereby allowing the adoption to be filed in the court where the prospective parents reside.[5] Neither the adoption statute nor the CPA set forth a procedure for obtaining that relinquishment. The recommended best practice is for the prosecutor to ask the court in the CPA proceeding for a relinquishment order at a review or permanency hearing and for the Department to provide a copy of the order to the prospective adoptive parents to attach to the adoption petition. A template for an order of relinquishment can be found on the Idaho Supreme Court Child Protection website.

If the adoptive parents reside in another state or another country and the court in the CPA proceeding relinquishes jurisdiction, then the adoption proceeding may be initiated in that state or country. International adoptions are beyond the scope of this manual.

If the adoption is filed in Idaho, Idaho law requires that the petitioners in an adoption proceeding have resided in the state for at least six consecutive months before the filing of the petition.[6]

B. Social Investigation/Home Study

Idaho law requires that a thorough social investigation of all members of the prospective adoptive family must be made, in accordance with rules promulgated by the Department. The adoption cannot be finalized if the report of investigation does not include a positive recommendation.[7]

The statute requires that the investigation be made prior to placement, but allows an exception for exigent circumstances. If the court finds exigent circumstances such that a social investigation could not be completed before the child is placed in the home, the child may remain in the home unless the best interests of the child are served by another placement. The social investigation must then be initiated within five days of placement.[8] In most cases arising under the CPA, the child will already be residing in the proposed adoptive home as a foster placement. The Department begins a social history of the child, which includes the child's parentage and medical history, and other circumstances of the child, when the child first enters foster care. The Department conducts pre-adoptive home studies of the potential adoptive placements, which is an investigation and report of a proposed adoptive placement. When the termination of parental rights is finalized, the Department updates and merges the social history and the adoptive home study into the social investigation report that is filed with the court.

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[5] *Id.*
[6] I.C. § 16-1506(1) (2009).
[7] I.C. § 16-1506(4); *see also* IDAHO ADMIN. CODE rr. 16.06.01.750-771 (2014) for regulations regarding the investigation process. In adoptions not arising from a CPA case, where the prospective adoptive parent is married to the birth parent or is a grandparent of the child, no social investigation is required unless ordered by the court.
[8] I.C. § 16-1506(3).

The pre-placement social investigation must be completed within 60 days of its initiation, and the report must be filed with the court within 30 days of service of the petition to adopt upon the Department. The statute provides that the petition must be served on the Director of the Department of Health and Welfare by registered mail or by personal services within five days "by the court receiving the [p]etition".[9] The general practice is for the petitioners to prepare a proposed order for social investigation for signature by the court, and a certificate of service for signature by the clerk, and to submit those documents to the court along with the petition for adoption, which is discussed further below.

The statute requires that the investigative report include:

1. All reasonably known medical and genetic information regarding the child and the biological parents.
2. Reasonably known or available providers of medical care or services to the natural parents.
3. The source(s) of the information contained in the report.[10]

The social investigation and report are completed by the Department, a licensed children's adoption agency, or a certified adoption professional. The Department has a list of licensed Idaho Children's Adoption Agencies and Idaho Certified Adoption Professionals, and contact information for agencies in other states that may qualify under Idaho law. If an agency other than the Department completes the home study, a copy must be provided to the Department. The statute also requires that a copy of the medical and genetic information compiled in the investigation be provided to the adopting family prior to entry of the final order of adoption.[11]

C. Consent to Adopt

The adoption statute has detailed provisions as to the persons from whom consent is required in adoption proceedings.[12] Where consent is required, the recommended best practice is for the person consenting to the adoption to execute a written consent in the presence of the court, and for the court to confirm that the consent was executed knowingly and voluntarily.

1. Parents

In an adoption arising from a CPA proceeding, parental rights have been terminated previously so no consent from the parent(s) is required.[13] With regard to putative fathers, care should be taken to either terminate parental rights or obtain an adjudication of non-paternity. Failure to do so may mean certain putative fathers are entitled to notice of the adoption proceeding (see below).[14] Certified and conformed copies of the

[9] I.C. § 16-1506(4).
[10] I.C. § 16-1506(4).
[11] I.C. § 16-1506(4).
[12] *Id*, I.C. § 16-1504 (Supp. 2014).
[13] I.C. § 16-1504(7).
[14] The adoption statute purports to eliminate the consent requirement for a father who is not married to the mother and does not comply with statutory requirements to establish his paternity. *See* I.C. § 16-1504(2)-(5). There may be issues as to the constitutionality of these statutes, which are discussed in more detail in Chapter 12 of this manual.

decree terminating parental rights should be submitted to the court to establish a record that the consent requirement has been met. The decree(s) is often included in the social investigation report; many attorneys include the decree(s) with the petition to adopt.

If the child is an Indian child, the Indian Child Welfare Act (ICWA) has specific additional rules that apply to consent to termination of parental rights. Before proceeding with an adoption, it is important to make sure that the termination of parental rights complied with the requirements of ICWA.[15] Chapter 11 of this Manual provides detailed information regarding compliance with ICWA.

2. Department

In an adoption arising from a CPA proceeding, consent is required from the Department, as the guardian and legal custodian of the child.[16] The Director of IDHW executes a written consent that is filed with the court prior to the hearing on the petition. The Department's practice is to have the assigned caseworker sign a second consent in the presence of the court at an adoption hearing held in Idaho.

3. Spouse of the Adoptive Parent

The statute requires consent from the spouse of the person petitioning to adopt the child, if the spouse is not joined in the petition.[17]

4. The Adoptive Child

If the child to be adopted is 12 years of age and older, the consent of the child is required, "unless he does not have the mental capacity to consent." [18]

D. Notice of the Adoption Proceeding

The adoption statute has complex, detailed provisions as to the persons to whom notice must be given in adoption proceedings intended to address a wide variety of factual scenarios.[19] Notice is required to any person whose consent to the adoption was required. Additional

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The recommended best practice is to not rely on these statutory provisions while the constitutional issues remain unresolved. To ensure permanency for the child, it is strongly recommended that all putative fathers be joined in the proceeding to terminate parental rights, concluding with either a decree terminating parental rights or a decree establishing non-paternity.

[15] In a child protection case a parent's rights will have been terminated prior to the adoption. In adoption cases that do not stem from a CPA case, parental termination and adoption will often occur at the same time. In such cases, the special ICWA consent will extend to adoption. ICWA is discussed in Chapter 11 of the manual.

[16] I.C. § 16-1504(1)(f). In the rare instance where the adjudicatory decree in the CPA proceeding vests legal custody of the child with an authorized agency other than the Department, then the consent of that agency, as the custodian of the child, will be required. I.C. § 16-1619(5).

[17] I.C. § 16-1503 (2009) (providing, in addition, that consent is not required if the non-petitioning spouse is not capable of giving consent).

[18] I.C. § 16-1504(1)(a) (Supp. 2014).

[19] I.C. § 16-1505(1) (2009).

notice requirements will be driven by the facts of the case and counsel are strongly encouraged to review the notice provisions with great care.

The notice "need not disclose the name of the mother of the child who is the subject" of the adoption.[20] It must be served at least 20 days prior to the final dispositional hearing.[21] The notice must also state that if the person served wishes to object to the adoption she or he must do so within 20 days of being served. If a person fails to make objection within the 20-day period, she or he waives the right to further notice.[22]

In an adoption arising from a CPA proceeding, notice is required as follows:

1. Parent(s)

The statute requires notice to parents of a termination proceeding. However, in an adoption proceeding arising from a CPA proceeding, parental rights will have been terminated, and so no notice to the parent is required.[23] Certified and conformed copies of the decree terminating parental rights should be submitted to the court to establish a record that the notice requirement has been met. The standard practice is for the decree(s) terminating parental rights to be included in the social investigation report; many attorneys include the decree(s) with the petition to adopt.

A putative father may be entitled to notice if his parental rights have not been previously terminated and he fits in one of the following categories: 1) he has registered notice of commencement of paternity proceedings pursuant to Idaho Code §16-1513; 2) he is recorded on the birth certificate as the child's father; 3) he is living openly in the household of the child's mother and holding himself out as the child's father; or 4) he is married to the child's mother at the time she executes her consent to the child's adoption. Consideration should be given to terminating the parental rights or to obtaining an adjudication of non-paternity regarding men who fit the above categories.[24]

2. Department

In an adoption arising from a CPA proceeding, notice to the Director of the Department is required, both because the Department is the guardian and legal custodian of the child and because of the requirement for a social investigation, discussed above.[25]

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[20] I.C. § 16-1505(3).
[21] I.C. § 16-1505(4).
[22] I.C. § 16-1505(4), (5)(b).
[23] I.C. § 16-1505(1).
[24] The adoption statute purports to eliminate the consent and notice requirements for a father who is not married to the mother and does not comply with statutory requirements to establish his paternity. *See* I.C. § 16-1504(2)-(5). The putative father statute was amended in 2013. The constitutionality of the revised statute has not been evaluated by an Idaho court. The 2013 revisions did not change the notice provisions in I.C. §16-1505. For this reason, ambiguity may exist in certain cases regarding whether a putative father is entitled to notice of an adoption. To ensure permanency for the child, it is recommended that notice required by I.C. § 16-1505 be provided.
[25] I.C. § 16-1504(1)(f) (Supp. 2014). In the rare instance where the adjudicatory decree in the CPA proceeding vests legal custody of the child with an authorized agency other than the Department, then the consent of that agency, as the custodian of the child, will be required, and therefore notice to that agency is required. I.C. § 16-1619(5).

3. Spouse of the Adoptive Parent

   The statute provides for notice to the spouse of the person petitioning to adopt the child, if the spouse is not joined in the petition.[26]

4. Child

   If the child to be adopted is twelve years of age or older, notice to the child is required."[27]

E. Service

Notice of the petition to adopt must be personally served on those whose consent to the adoption is required. If reasonable efforts to effect personal service are unsuccessful, a court may order service by registered or certified mail to the last known address of the person to be notified; a court may also order service by publication. The statute specifies that if service is by publication, the court must designate the parties to be identified in the notice, but the notice will not include the names of the adoptive parents. For others entitled to notice, service by certified mail, return receipt requested, is sufficient.[28] As noted in the discussion above regarding the social investigation and report, the petition must be served on the Director of the Department by registered mail or personal service.[29] Court rules also require service of process on the Attorney General.[30]

Proof of service on all those required to be given notice of the adoption must be filed with the court before the final hearing on the adoption petition.[31]

F. Petition

The adoption statute provides that the petition must contain the following information:

- The name(s) and address(s) of the petitioner(s).
- The name of the child to be adopted.
- The name by which the adopted child will be known if the adoption is granted.
- The degree of relationship, if any, of the child to the petitioner(s), and
- The names of any person or agency whose consent to the adoption is necessary. [32]

In addition, the petition should contain the following information:

- A statement that the petitioners have resided in the state of Idaho for six months.[33]

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[26] I.C. § 16-1505(1)(c) (2009). As a matter of best practice, consider serving the guardian *ad litem* appointed in the child protection case, the attorney for the guardian *ad litem* and/or the attorney for the child.
[27] I.C. § 16-1505(1)(a) 2009), § 16-1504(1)(a) (Supp. 2014).
[28] I.C. § 16-1505(6) (2009).
[29] I.C. § 16-1506(4).
[30] I.R.C.P. 4(d)(5).
[31] I.C. § 16-1505(7).
[32] I.C. § 16-1506(1).
[33] *Id.* Residency is a jurisdictional requirement.

- The marital status of the prospective adoptive parents.[34]
- The ages of the prospective adoptive parents (demonstrating that they are at least fifteen years older than the child being adopted or are at least 25 years of age),[35] and
- That the parental rights of the mother and the father have been terminated.

G. Objections to the Adoption

Although adoptions are generally uncontested, Idaho law provides a procedure for objections to an adoption.[36] A person who has been served with notice must file written objections within twenty days after service. The written objection must set forth the "specific relief sought" and must be accompanied by a "memorandum specifying the factual and legal grounds upon which the written objection is based."[37] If a person fails to file written objections within twenty days of service, notice of any further proceedings in connection with the adoption is waived and the person "forfeits all rights in relation to the adoptee, and is barred from thereafter bringing or maintaining any action to assert any interest in the adoptee."[38]

H. Hearings

The prospective adoptive parents and the child must appear in person at the hearing on the adoption petition. At the time of the hearing, the prospective adoptive parents must execute an agreement "to the effect that the child shall be adopted and treated in all respects as [their] own lawful child should be treated."[39]

At the hearing, the judge must examine each of the parties appearing at the hearing separately and must review the investigative report.[40] The court must find that the interests of the child will be promoted by the adoption.[41]

I. Decree/Order of Adoption

Based upon the examination of all of the parties and of the investigative report, an order of adoption may be entered if the judge is "satisfied that the interests of the child will be promoted by the adoption."[42] The order must declare that, "the child shall thenceforth be regarded and treated in all respects as the child of the person adopting."[43] Several additional provisions of the adoption statute make clear that the standard for approval is the best

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[34] If the person adopting a child is married, the consent of the person's spouse is required. I.C. § 16-1503.
[35] The person adopting a child must be at least 15 years older than the child or at least 25 years of age or older unless the person adopting the child is the spouse of a parent. I.C. § 16-1502. A minor may consent to the adoption of a child on the same basis as an adult. I.C. § 16-1504(6) (Supp. 2014).
[36] I.C. § 16-1505(5) (2009).
[37] I.C. § 16-1505(5)(a).
[38] I.C. § 16-1505(5)(b).
[39] I.C. § 16-1506(1).
[40] I.C. § 16-1506(1), § 16-1507.
[41] I.C. § 16-1507.
[42] *Id*.
[43] *Id*.

interests of the child. For example, the adoption notice provision states that "[e]xcept to those persons whose consent to an adoption is required . . ., the sole purpose of notice under this section is to enable the person served to present evidence to the court relevant to the best interest of the child."[44] Likewise, section 16-1506 provides that "[i]n all disputed matters under this chapter . . . the paramount criterion for consideration and determination by the court shall be the best interests of the child."[45]

Upon entry of the decree of adoption, the prosecutor in the CPA proceeding should file a motion and proposed order to vacate the CPA proceeding as to the child. The motion should be accompanied by a copy of the decree of adoption or an affidavit of the caseworker establishing where and when the final adoptive decree was entered. If the motion is accompanied by the appropriate documentation, most Idaho courts will enter the order without further hearing.

10.3 FINALIZING PERMANENCY AND ADOPTION ASSISTANCE

A. Federal Requirements Regarding Finalization of Permanency

The federal Adoption and Safe Families Act requires that reasonable efforts extend beyond the permanency planning hearing to actual achievement of permanency for a child and closure of the case.[46] Adoption recruitment is one of the activities that judges must now determine to be reasonable. Adoption recruitment includes:

- Adequate programs to recruit and identify prospective adoptive parents, both locally and beyond state boundaries.
- Adequate support to approve adoptive families including completion of home studies in a timely manner, preparation of adoption assistance agreements, interstate documentation, and provision of relevant information to the family regarding the child, and
- Appropriate and accessible post-adoption services to support and stabilize a child in the adoptive home.[47]

B. Adoption Assistance: Federal Adoption Assistance for Special Needs Children

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[44] I.C. § 16-1505(9).
[45] I.C. § 16-1506(5).
[46] 45 C.F.R. § 1356.21(b)(2)(i) (2012) ("The [State] agency must obtain a judicial determination that it has made reasonable efforts to *finalize* the permanency plan")(emphasis added)*; see also* CECILIA FIERMONTE, JENNIFER L. RENNE, & CLAIRE SANDT, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 39 (Claire Sandt ed., 2002) [hereinafter MAKING IT PERMANENT] ("The purpose of the reasonable efforts inquiry is to (1) ensure that the agency is working diligently to secure a child's adoption and (2) ensure the adoption process is thorough to reduce the risk of disruption later.").
[47] This reasonable effort requirement is found in 42 U.S.C. § 671(a)(15)(C) (2012). *See* MAKING IT PERMANENT, *supra* note 46 at 40-44 (discussing the nature of the state agency's responsibility under the reasonable efforts provision in the context of a permanency plan of adoption). *See also* I.C. § 16-1622(2)(c) (Supp. 2014) (requiring the court to make written case-specific findings whether the Department made reasonable efforts to finalize the primary permanency goal in effect for the child).

Federal adoption assistance is administered under the Federal Title IV-E adoption assistance program.[48] Payments to the parents of an eligible child with special needs can take the form of either one-time (nonrecurring) adoption assistance or ongoing (recurring) adoption assistance. These funds are paid through IDHW and are available for children being adopted from foster care.

1. Eligibility for Federal IV-E Adoption Assistance (either Non-recurring or Recurring)

   First, a child is eligible for federal adoption assistance funds if two conditions are met.[49] First, the child must have "special needs." A child with special needs is a child who:

   - Cannot or should not be returned home to his or her parent(s), **and**
   - Has a physical, mental, emotional, or medical disability, or is at risk of developing such disability based on the child's experience of documented physical, emotional, or sexual abuse or neglect,[50] **or**
   - Is at an age which makes it difficult to find an adoptive home, **or**
   - Is being placed for adoption with at least one sibling, **and**
   - Has not been able to be placed without adoption assistance (attempts at placement for adoption were made, but were unsuccessful), except where it would be against the best interests of the child.[51]

   This eligibility determination is made by the Department pursuant to detailed federal regulations.

   The second requirement for adoption assistance eligibility, which only applies to recurring adoption assistance, is that the child meets one of the following criteria:

   a) The child was eligible for IV-E match funds at the time the child was removed from the home. Although there are other requirements, the key consideration for the court and for the attorney for the adoptive parents is that at the time of removal, in the first order sanctioning removal, the court made a finding that remaining in the home was contrary to the child's welfare and that removal was in the child's best interests. [52]
   b) The child was eligible for supplemental security income (SSI) programs under the Social Security Act before adoption. [53]
   c) The child's parent was in foster care and receiving Title IV-E funds that covered both the parent and the child when the adoption was initiated.

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[48] CHILD WELFARE INFORMATION GATEWAY, ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE (Feb. 2011), *available at* https://www.childwelfare.gov/pubpdfs/f_subsid.pdf. The provisions for federal adoption assistance were part of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. The Act is primarily codified at 42 U.S.C. § 673 (2012).
[49] 42 U.S.C. § 673(a)(1)(B).
[50] Pursuant to federal law, this element of "special needs" is defined on a state-by-state basis. I.C. § 673(c)(1)(B); ADOPTION ASSISTANCE, http://www.benefits.gov/benefits/benefit-details/822 (last visited March 30, 2018). In Idaho, the definition is found in IDAHO ADMIN. CODE r. 16.06.01.900.02(b) (2015).
[51] 42 U.S.C. § 673(c) (2012).
[52] 42 U.S.C. § 672(a)(1); 45 C.F.R. § 1356.21(b), (d).
[53] *See* ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 48.

d) The child previously received adoption assistance and her or his adoptive parent(s) died or the adoption was dissolved.
e) The child meets age or sibling status criteria established by the Fostering Connections to Success and Increasing Adoptions Act of 2008.[54]

2. Nonrecurring Adoption Assistance

Nonrecurring adoption assistance is paid or reimbursed for one-time reasonable and necessary expenses directly related to the legal adoption of a child with special needs that have not been reimbursed from other sources or funds. These reimbursable expenses may include the home study fees, attorney fees, replacement of the birth certificate, and travel for visits to the child (including mileage, lodging, and meals). The federal maximum for this type of assistance is $2,000 for each adoptive placement.[55]

3. Recurring Adoption Assistance

Ongoing adoption assistance provides funds that may be used for any identifiable need of the child. These usually take the form of monthly payments to the parents of eligible children. The maximum payment amount may not exceed the amount that would have been paid for maintenance if the child had remained in a foster home in Idaho. Payments can continue until the child reaches age 18, and these payments continue even if the family moves to another state.[56]

4. Family Income and Determination of Need

Federal law mandates that the resources of the adoptive parents cannot be considered when determining a child's eligibility for Title IV-E adoption assistance.[57] However, the circumstances of the family and the needs of the child may both be taken into consideration when determining the amount of assistance.[58]

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[54] 42 U.S.C. § 671(a)(31). *See also* ADMIN. FOR CHILDREN AND FAMLIES, U.S. DEP'T. HEALTH AND HUMAN SERVS, FOSTERING CONNECTIONS PROGRAM INSTRUCTION (2010), *available at* http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf (last visited March 31, 2018).
[55] *See* CHILDREN'S BUREAU, U.S. DEP'T. HEALTH AND HUMAN SERVS., 8.2D.3 TITLE IV-E, ADOPTION ASSISTANCE PROGRAM, PAYMENTS, NON-RECURRING EXPENSES http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=50#745 (last visited March 31, 2018).
[56] *See* ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 48.
[57] 45 C.F.R. § 1356.40(c) (2012). *See* CHILDREN'S BUREAU, U.S. DEP'T. HEALTH AND HUMAN SERVS., 8.2A.2 TITLE IV-E, ADOPTION ASSISTANCE PROGRAM, AGREEMENTS, MEANS TEST, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=81 (last visited March 31, 2018) to read the section of the Child Welfare Policy Manual that says that states cannot employ a "means test" in negotiating adoption assistance agreements.
[58] *Id.*

C. State Adoption Assistance

Under IDHW regulations, a child qualifies for state adoption assistance if the child has special needs but is not eligible for federal adoption assistance. Such a situation may arise if the appropriate federal findings were not made in the child's CPA case. The requirement for special needs is the same as the requirement for federal assistance, discussed above.[59] In addition, under Department regulations, children with special needs are eligible for Medicaid coverage. This coverage may end if the child moves to another state.[60]

D. Federal and State Tax Credits

Federal and state tax credits are available for the tax year in which an adoption is finalized. The credits are non-refundable, which means they can be used only to decrease tax liability on income. The Idaho tax credit is available for certain qualified expenses. The amount of the federal credit depends on income. The credits can be substantial, so adoptive parents should contact their tax consultant for further information.

10.4 ADDITIONAL CONSIDERATIONS FOR PRIVATE COUNSEL COORDINATING WITH THE DEPARTMENT IN A CPA-RELATED ADOPTION

A. Retention of Counsel by the Adoptive Parents to Finalize the Adoption

IDHW usually advises the potential adoptive parents to seek private counsel to finalize the adoption. Counsel, in a CPA-related adoption, must coordinate with the Department's social workers to finalize the adoption. The attorney should contact with local adoption social worker as soon as possible. Prior to the initial contract with the Department, the attorney should ascertain from her or his clients:

- The name of and contact information for the adoption social worker
- The status of the adoption assistance application process
- The full name the child will be given at the completion of the adoption
- Whether the family knows the identity of the natural parents

The adoption social worker is the source of the following crucial information:

- The status of the case
- A reasonably anticipated timeframe for the adoption petition to be filed or heard
- What steps in the permanency plan remain to be completed by the prospective adoptive parent, if any, and how the attorney can assist in completing the steps
- The process to submit the attorney's fee and cost estimate
- Any anticipated problems or unique issues to the adoption
- Whether the child is an Indian child under the Indian Child Welfare Act[61]

[59] IDAHO ADMIN. CODE r. 16.06.01.900.02.
[60] IDAHO ADMIN. CODE r. 16.06.01.911.03.
[61] ICWA is discussed in detail in Chapter 11 of this manual.

At the time of the initial contact, the attorney will be asked to provide an estimate of her or his costs and fees to finalize the adoption.

B. Preparing for the Adoption Action: the "Attorney Letter" from the Department

Once an attorney contacts the adoption social worker and confirms that she or he is the attorney for the prospective adoptive parents, the attorney will receive an "attorney letter" from the Department. This letter is a roadmap to completing the adoption process. It spells out:

- When the child was placed with the prospective adoptive parents
- Confirmation of the statutory requirement that the attorney provide a copy of the petition to the Department within five days of filing[62]
- Confirmation that the Department has thirty (30) days after the filing to provide the court with the report of the social investigation and the Director's consent to the adoption[63]
- The Department's request that the attorney provide it with a copy of the completed notice of hearing that will be proposed to the court at the time the petition is filed
- That the final Departmental consent to the adoption, in addition to the Director's consent, must be given in court by the social worker and witnessed by the judge

A majority of Idaho courts will allow the clerk to set an adoption hearing at the time the petition is filed. If this is the case, the attorney should set the hearing for a future time that will allow completion of notice and the documentation necessary to finalize the adoption. As a matter of best practice, the attorney should already have discussed potential unavailable dates with the social worker who must be present at hearing. This will provide adequate time for the central office of the Department to prepare its report and to obtain the Director's consent.

Some judges require that the court file be complete before they will schedule the final hearing. If this is the case, the attorney must explain to the prospective adoptive parents that the hearing date will not be known until the Department has provided all of the required information to the court. Since the Department's information goes directly to the court, the attorney will know that the hearing may be scheduled when she or he receives a copy of the Director's consent from the Department's central office. This will alert the attorney that the court report has been sent to the court. Attorneys should allow 48 hours for the local clerk's office to process the report before scheduling the hearing.

In addition to confirming the information outlined above, the attorney letter will typically have the following documents attached:

- A certified birth certificate for the child being adopted,
- The decree terminating parental rights of the mother,

[62] I.C. § 16-1506(4) (2009).
[63] *Id.*

- The decree terminating parental rights of the father (or finding non-establishment of paternity), and
- When appropriate, an order to relinquish jurisdiction over the adoption to another court.

With regard to the relinquishment, if one is required because the adoption will not be filed in the same court handling the CPA proceeding, the attorney must be prepared to obtain an order of relinquishment. This can be problematic because an attorney for the prospective adoptive parents does not generally have access to the CPA case file. The attorney will need to work with the Department and with the prosecutor or deputy attorney general in the county where the child protection case is filed to obtain the order of relinquishment.

C. Post-Filing Recommendations

Once the petition is prepared and filed, copies should immediately be provided to the social worker and IDHW's central office. If the hearing was scheduled at the same time of filing, a notice of hearing should accompany the copies of the petition.

To obtain the consent of the Director of IDHW to the adoption, the social worker submits an adoption report to the court, copies of the family's home study, placement documentation, and legal documentation to the Department's central office. At the central office, the adoption file undergoes a quality assurance review. The file is then submitted to the Director for written consent. The Department has 30 days to complete this review and sign the consent. It is important to note that consent to the adoption is not signed by the Director until a copy of the petition to adopt is received by the central office.

Upon receipt of the Director's consent authorizing the social worker to consent to the adoption, the Department's central office sends a packet of information via certified mail or express courier to the clerk of the court where the adoption will be finalized. This packet includes the following:

- Adoption report to the court,
- Director's written consent to the adoption,
- Copies of the child's Child and Family Social and Medical Information Form,
- Copies of the pre-adoptive parents' adoption home study and criminal history clearances,
- Copy of the petition to adopt, and
- The social worker brings to the hearing a document evidencing his/her consent to the adoption, which he/she will sign during the court hearing.[64]

D. The Adoption Hearing

Prior to the scheduled hearing, the attorney should consider discussing the following matters with the client:

- Review the agreement of adoption and the proposed decree of adoption.

[64] I.C. § 16-1506(2) (2009), § 16-2005(4) (Supp. 2014), § 67-2405 (2010).

- Have the clients prepare as much of the original Idaho Certification of Adoption as possible before the meeting ends.
- Always have the client fill in the information on the second line of question number 22.[65]

At the hearing, the attorney should consider asking the following questions:

- Have the adoptive parents been provided all appropriate information regarding the physical and mental health of the child?[66]
- Does the child have special needs?
- Will the Department remain involved with the child?

Children must be present for the hearing.[67] If the child to be adopted is 12 years of age or older, she or he must be present at the hearing to execute the consent.[68] Three questions should be asked of the child:

- What are we doing here today?
- Is this what you want? Do you wish (clients) to be your Mother and Father forever?
- Do you understand the consent and do you want to sign it?

E. Post-Hearing Best Practices

After the hearing, counsel should provide copies of the following documents to:

- The Client(s):
  - Two court-certified copies of the decree of adoption (sometimes referred to as an order of adoption). Counsel should advise his or her clients not to give away the court certified copies to anyone. If requested, the clients should offer *copies* of the order; however, the original certified copy of the order should remain with the client. Also, the client should always retain the order even after the new birth certificate arrives. There have been instances where clients have applied for a passport for the child only to be asked to show proof of why the child's name was changed. The new birth certificate is not satisfactory to answer the question.
  - Conformed copy of the agreement of adoption.
  - Conformed copy of the Department's consent to adoption.

- The Department Social Worker. (The following list anticipates the social worker will forward on all required documents to the Department's central office.)
  - Two court-certified copies of the decree of adoption. This is necessary for the family to receive adoption assistance and for the Department to end the child protection case.
  - Conformed copy of agreement of adoption.

[65] Regarding the information on line 15, the client needs to give their residential address as of the day the child was born – not where they now live.
[66] I.C. § 16-1506(3) (2009).
[67] I.C. § 16-1506(1).
[68] I.C. § 16-1504(1)(a) (Supp. 2014).

- Two court-certified copies of the Department's consent to adoption.

- Counsel
  - One court-certified copy of the decree of adoption. (If the child was born out of state, retain two court-certified copies in the file. The birth state may require a certified copy to issue the new birth certificate.)
  - Conformed copy of agreement of adoption.
  - Conformed copy of the Department's consent to adoption.
  - Some clerks' offices will retain the Idaho Certificate of Adoption and forward it on to the Idaho Bureau of Vital Statistics. If this is the case, counsel should also have the clerk provide him or her with a copy of the Idaho Certificate of Adoption after it is fully filled out and stamped by the clerk.

Counsel should remember that the adoption file will be sealed shortly after the hearing. Access to the file can then only come about after a motion has been filed to reopen the file and a court order issued allowing reopening.

Following the adoption proceedings, the Department will work with their prosecuting attorney or deputy attorney general to obtain an order to vacate the child protection case.

F. Securing the New Birth Certificate

The attorney for the prospective adoptive parents should accept the role of securing the new birth certificate. Idaho and out-of-state-requests for new birth certificates are routed through the Idaho Bureau of Vital Statistics. Sending it to the Idaho Bureau of Vital Statistics ensures it is properly forwarded to the state of the child's birth.

If the child was born in a foreign country, Idaho will issue the new birth certificate.

The attorney will receive a copy of the letter from the Bureau of Vital Statistics forwarding the Idaho Certificate of Adoption to the state in which the child was born. Thereafter, the attorney will receive a letter from the out-of-state Bureau informing her or him of the cost and required documents needed to secure the amended birth certificate.

The new birth certificates are always mailed to the attorney – never to the client. When the attorney's office receives them, the best practice is to make a copy for the file and to ask the social worker if she or he wishes a copy. The adoptive parents should then receive a copy, delivered in person.

CONCLUSION

The creation of a new, stable, and loving family through adoption is a life-changing, and sometimes life-saving, experience for children in foster care. Care must be taken that the adoption is processed correctly and that eligibility for adoption assistance is preserved whenever appropriate.

Although the focus of efforts is on ensuring that the proper documentation is prepared for finalizing the adoption, the adoption hearing is a milestone in the often-long journey to creating a new family. The participants should be encouraged to mark the event by inviting extended family, taking photos, bringing balloons, or whatever is best suited to their family. Courts are encouraged to conduct the hearing with ceremony befitting the event.[69]

[69] Sample ceremony: Do you promise to shelter and protect this child/ these children, to support and encourage him/her/them, to teach and guide him/her/them throughout this life, and to love this child/these children, forever? I hereby pronounce that this child/these children shall now and hereafter be known as _____, son/daughter of _____, brother/sister of _____.

CHAPTER 11: The Indian Child Welfare Act (ICWA)

11.1 INTRODUCTION

The Indian Child Welfare Act (ICWA)[1] is a federal statute that was enacted to protect Indian children, preserve Indian families and preserve the ties between Indian children and their tribes. Congress passed ICWA in 1978 in response to the wholesale removal of Indian children from their families.[2] At the time of its enactment, Congress stated that "it is the policy of this Nation to protect the best interests of Indian children...." Congressional findings memorialized in ICWA included that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions" and that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[3]

The Department of Interior, Bureau of Indian Affairs (BIA) promulgated regulations governing ICWA in 2016 (BIA Regulations).[4] These binding regulations provide additional definitions, timelines, and required judicial findings that must be made on the record in an effort to create more consistency in ICWA implementation. The statute and regulations together constitute the minimum federal requirements to protect Indian children and preserve Indian families. States may increase protections and requirements, but may not decrease them beneath the floor created by federal law.[5] In addition to the regulations, the BIA also published non-binding *Guidelines for Implementing the Indian Child Welfare Act* (BIA Guidelines or Guidelines).[6]

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] 25 U.S.C. §§ 1901-1963 (2012).

[2] At the time Congress passed ICWA, state courts and social services agencies were removing an extraordinary number of Indian children and placing them in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970s, 92.5% of adopted American Indian children in California had been placed with non-Indian families. This ratio for out-of-culture placement was six times more than that of any other minority group in the country. The adoption rate for Indian children was 8.4 times greater than the adoption rate for non-Indian children. There were 2.7 times as many Indian children in foster care as non-Indian children. *See* American Indian Child Resource Center, *ICWA*, http://aicrc.org/icwa/ (last visited April 30, 2018); B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (1996); Carol Locust, *Split Feathers… Adult American Indians Who Were Placed in Non-Indian Families as Children*, 13 PATHWAYS 11 (September/October 1998).

[3] 25 U.S.C. § 1901(5).

[4] 25 C.F.R. §§ 23.02 – 23.144.

[5] 25 C.F.R. § 23.106.

[6] Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (December 2016*), available at* https://www.indianaffairs.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (last visited May 3, 2018).

ICWA imposes three categories of requirements in cases involving an Indian child. First, ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, ICWA imposes substantive requirements for the removal of Indian children and the termination of parental rights, including a higher standard for determining whether the state met the duty to avoid removal of the child and a higher standard to justify the removal. Third, in addition to these jurisdictional and substantive requirements, ICWA imposes limitations on the placement of Indian children to ensure that, to the extent possible, they are not separated from their families, tribes and/or their Indian culture and community.

11.2 INDIAN CHILD WELFARE ACT BASICS

Is the Child an Indian Child? The child is an "Indian child" if he or she is an unmarried person under the age of 18, **and**

1. is a member of a federally recognized Indian tribe; **or**
2. A) is eligible for membership in a federally recognized Indian tribe **and**
   B) is the biological child of a member of a federally recognized Indian tribe.[7]

How is the child's tribe designated?

- Tribes have sole authority to determine their own membership. The state court may not substitute its own determination.
- To make a judicial designation of the Indian child's tribe, the state court may rely on tribal documents or testimony indicating membership or eligibility for membership.
- If the child can be a member of more than one tribe, the state court should
  - give deference to the tribe in which the child is already a member, unless otherwise agreed upon by the tribes,
  - provide opportunity for the tribes to determine which tribe should be designated, and, finally,
  - designate the tribe with which the child has more significant contacts as the child's tribe if the tribes are unable to reach an agreement.[8]

When does ICWA apply? ICWA applies if:

- the proceeding is a child custody proceeding or other covered proceeding under ICWA (such as certain removals in juvenile court and/or emergency removals) and
- the court knows or has reason to know that the child is an Indian child.[9]

Child custody proceedings are defined as:

- Foster care placements – this includes any action where the child is removed from his or her parent or Indian custodian for temporary placement in a home or institution, including

[7] 25 U.S.C. § 1903(4).
[8] 25 C.F.R. § 23.109.
[9] 25 U.S.C. § 1903(1); 25 U.S.C. § 1903(4).

guardianship and conservatorship, and where the parent or custodian cannot have the child returned upon demand but where parental rights have not been terminated.[10]
- Termination of parental rights proceedings.[11]
- Pre-adoptive placements.[12]
- Adoptive placements.[13]

ICWA also applies to the following proceedings:
- Status offenses.[14]
- Voluntary placements under state law where the parent or Indian custodian could be prohibited from regaining custody of his or her child upon demand.[15] "Upon demand" means upon simple verbal request without any formalities or contingencies.
- Emergency proceedings, including any time a child is removed on an emergency basis from the home.[16]

If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because a child reaches 18 during the pendency of the proceeding.[17]

When does ICWA not apply?
- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child.[18]
- A voluntary placement that does not prohibit the child's parent/Indian custodian from regaining custody upon demand. "Upon demand" means upon simple verbal request without any formalities or contingencies.[19]
- A placement based upon an act which, if committed by an adult, would be deemed a crime.[20]

11.3 THE IMPACT OF ICWA ON A CPA CASE

A. Voluntary Placement of an Indian Child: Stipulations and Parental Consent

[10] 25 U.S.C. § 1903(1)(i).
[11] 25 U.S.C. § 1903(1)(ii).
[12] 25 U.S.C. § 1903(1)(iii).
[13] 25 U.S.C. § 1903(1)(iv).
[14] 25 C.F.R. § 23.103(a)(iii).
[15] 25 C.F.R. § 23.103(a)(ii); In Idaho, the Department and the parent(s), prior to the removal of the child or the filing of a Petition under the CPA, may enter into an agreement known as a safety plan agreement, also known as a voluntary placement agreement, in which the parent(s) agree that the family will accept services and the child will be placed in an out-of-home placement. ICWA does not apply in these situations because the parent(s) can demand return of the child at any time.
[16] 25 U.S.C. § 1922.
[17] 25 C.F.R. § 23.103(d).
[18] 25 U.S.C. § 1903(1).
[19] 25 C.F.R. § 23.2.
[20] 25 U.S.C. § 1903(1).

ICWA imposes procedural protections to ensure that parent's consent to foster care placement is voluntary. Where any parent or Indian custodian voluntarily consents to a foster care placement, the consent must be "executed in writing and recorded before a judge." The judge must certify that the terms and consequences of the consent were "fully explained in detail *and were fully understood* by the parent or Indian custodian."[21] Furthermore, the judge must certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or custodian understood. Consents to voluntary placement of an Indian child may not be given prior to or within 10 days after the child's birth.[22]

Pursuant to the BIA Regulations, the written consent must clearly set forth any conditions to the consent. The consent should contain:

- the name and birthdate of the Indian child,
- the name of the Indian child's tribe,
- the tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the tribe,
- the name, address and other identifying information of the consenting parent or Indian custodian,
- the name and address of the person or entity, if any, who arranged the placement, and
- the name and address of the prospective foster parents if known.[23]

The BIA Regulations contain specific requirements to determine that the terms and consequences of consent were fully explained and understood. The regulations require that "[p]rior to accepting the consent the court must explain to the parent or Indian custodian: 1) The terms and consequences of the consent in detail; and 2) [that] [t]he parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned . . .."

The BIA Regulations further require that before accepting a voluntary consent, the court must require the participants to state on the record whether the child is an Indian child or whether there is reason to believe that the child is an Indian child.[24] Furthermore, if there is reason to know the child is an Indian child, the court must ensure that the Department has taken all reasonable steps to verify the child's status. If the court has reason to know that the voluntary placement involves an Indian child, it must comply with ICWA placement preferences.[25]

In order to withdraw a consent to a foster care placement, the parent or Indian custodian must file a written document with the court or otherwise testify before the court making the request to withdraw the consent. Other methods of withdrawing consent

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[21] 25 U.S.C. § 1915 (emphasis added); 25 C.F.R. § 23.125.
[22] *Id*.
[23] 25 C.F.R. § 23.126.
[24] 25. C.F.R. § 23.124. Curiously, C.F.R. § 23.124 refers to the "reason to believe" standard as opposed to the "reason to know" standard. The section specifically cross-references C.F.R. § 23.107 which establishes the "reason to know" standard.
[25] 25 C.F.R. § 23.126.

permitted by state law are also appropriate. If the original placement was a voluntary placement, the court must ensure that the child is returned to the parent or Indian custodian as soon as practicable.[26]

One result of these requirements is that parental stipulations to placement of the child during the pendency of a foster care proceeding cannot be treated as "voluntary placements" under ICWA. Moreover, parental stipulations cannot bind the child's tribe which is either a party or eligible to intervene in every ICWA case. For this reason the court should always be careful to make the required ICWA findings supported by facts in the record and should not rely on parental stipulations.

B. Shelter Care Hearing

ICWA assumes that an emergency removal proceeding and a child custody proceeding might be separate cases. Thus the act and the BIA Regulations refer to the initiation of a child custody proceeding after an emergency removal.[27] Under Idaho law, unless the child is removed from the home as part of a proceeding under the Juvenile Corrections Act, the emergency removal and child custody proceeding would be part of the same child protection case – the shelter care hearing is the hearing on the emergency removal, while the adjudicatory hearing begins the child custody proceeding.[28]

At the shelter care hearing when a child is removed, a court must determine whether it has reason to know the child is an Indian child. If the court determines that there is reason to know the child is an Indian child, the court must immediately apply ICWA's emergency removal standards and the child should be treated as an Indian child until the court determines that the child is not an Indian child.[29] At the shelter care hearing, the court may order an emergency removal from the parent or Indian custodian only to prevent imminent physical damage or harm to the child.[30]

An emergency removal of an Indian child must terminate as soon as the risk of imminent physical damage or harm is over and, in any case, should not be continued beyond 30 days without making new findings discussed later in this section.[31] These ICWA findings must be made in addition to any findings required by state and other federal law discussed in Chapter 4 of this Manual.

1. Procedural considerations related to ICWA at the Shelter Care Hearing

a. Exclusive Jurisdiction

[26] 25 C.F.R. § 23.127.
[27] *See, e.g.* 25 U.S.C. § 1922 and § 1912(e); 25 C.F.R. § 23.113.
[28] 81 F.R. 38821 (June 14, 2016).
[29] 25 U.S.C. § 1922, 25 C.F.R. § 23.113.
[30] 25 C.F.R. § 23.113.
[31] 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e).

ICWA provides that tribal courts have *exclusive* jurisdiction over any child custody proceeding involving an Indian child domiciled within the reservation of the tribe asserting jurisdiction.[32] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[33] In addition, the tribal court retains exclusive jurisdiction over any Indian child who remains a "ward" of the tribal court, notwithstanding the child's domicile.[34] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Mississippi Band of Choctaw Indians v. Holyfield*.[35]

Domicile is broadly defined for purposes of ICWA. The BIA regulations define domicile as follows:

> (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
> (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.[36]

For purposes of ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[37] Thus, the reservation includes any territory within the exterior boundaries of the reservation, including fee-held land, any dependent Indian community, and any Indian allotment and the rights-of-way running through them.

Despite what appears to be clear language in ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states that have assumed jurisdiction granted by Public Law 280.[38] Public Law 280 is a separate piece of federal legislation from ICWA. Public Law 280 is a 1950's Congressional enactment granting states the option to extend their criminal jurisdiction over reservations within their borders. In 1963, Idaho used the authority granted to it by Congress to "assume and accept" jurisdiction over limited areas of the law, including "dependent, neglected and abused children" in Indian country located in Idaho.[39] Thus, Idaho is considered a "partial" Public Law 280 state.

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[32] 25 U.S.C. § 1911(a) (The only potential exception to exclusive jurisdiction for reservation domiciled Indian children arises if a state has assumed jurisdiction under Public Law 280); 18 U.S.C. § 1162. See discussion of P.L. 280 below.
[33] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990). Many tribes have procedures for transferring the case to the child's tribe.
[34] 25 U.S.C. § 1911(a).
[35] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[36] 25 C.F.R. 23.2 (definition of "Domicile").
[37] 25 U.S.C. § 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act; *See* 25 C.F.R. §23.2 (definition of "Reservation").
[38] 67 Stat. 588 (1953).
[39] IDAHO CODE ANN. § 67-5101 (2010).

Such state jurisdiction did not displace existing tribal jurisdiction, but is assumed to be concurrent to the tribe's jurisdiction. This concurrent jurisdiction appears to conflict with the tribe's exclusive jurisdiction conferred in ICWA.[40] However, because ICWA was adopted after P.L. 280, and because ICWA's explicit purpose was to address the very specific problem of Indian children being placed at extremely disproportional rates in non-Indian foster and adoptive placements without benefit of tribal input, ICWA jurisdictional provisions should control. However, in the only federal court decision to consider the apparent conflict between P.L. 280 and ICWA, the Ninth Circuit determined that the exclusive jurisdiction provisions of ICWA were not intended to displace concurrent state court jurisdiction under P.L. 280 for a mandatory P.L. 280 state, specifically, California.[41]

b. State Court Emergency Jurisdiction

State courts may exercise jurisdiction over children who are not domiciled on a reservation. They may also exercise emergency temporary jurisdiction if a child domiciled on the reservation is temporarily residing off the reservation in order to prevent immediate physical damage or harm to the child.[42] In either case, ICWA and the BIA Regulations provide that such a temporary emergency placement should "terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child."[43] Moreover, ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with ICWA, transfer jurisdiction to the appropriate tribe, or restore the child to the parent or Indian custodian.[44]

c. Notice

An emergency proceeding, such as a shelter care hearing, is governed by ICWA but is not a child custody proceeding under the Act. Thus, ICWA statutory notice is not required for an emergency proceeding.[45] If possible, however, the Department should attempt to contact the tribe if there is reason to know that the child is an Indian child and the child's tribe is known.[46] Where the tribe is present at the shelter care hearing it may

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[40] 25 U.S.C. § 1911(a).
[41] Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). *Doe* originated in California, a mandatory P.L. 280 state, while Idaho is not a mandatory state. The Court's reading of P.L. 280 and ICWA has been criticized. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][b][ii] n. 107 (2005)(reviewing the case and concluding that "[t]he Ninth Circuit's reading is questionable"). For a discussion of *Doe v. Mann* in light of Idaho law, *see* Clay Smith, *Doe v. Mann: The Indian Child Welfare Act, the Rooker-Feldman Doctrine, and Public Law 280*, THE ADVOCATE, Feb. 2006 at 14; Jake J. Allen, *Chipping away at the Indian Child Welfare Act: Doe v. Mann and the Court's "1984" Interpretation of ICWA and PL 280*, unpublished student paper, available at https://www.law.msu.edu/indigenous/papers/2007-03.pdf (last visited May 3, 2018).
[42] 25 U.S.C. § 1922.
[43] *Id.*
[44] *Id.*
[45] 81 F.R. 38819 (June 14, 2016).
[46] *Id.*

participate in the proceeding. State law requirements regarding notice for a shelter care hearing also apply.[47]

d. Termination of the Emergency Removal Proceeding

The state court may terminate the emergency removal proceeding by transferring the Indian child to the jurisdiction of the child's Indian tribe. The child may stay in a particular placement if the tribe chooses to keep that placement upon exercising jurisdiction.[48]

2. Who should be Present

In addition to those who would normally be present at a shelter care hearing, the following persons should be present at a shelter care hearing involving an Indian child if possible:

- Parents. "Parent" is defined by ICWA as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom."[49] ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[50] Thus, putative fathers who have acknowledged paternity, but who have not yet established paternity are considered parents for purposes of ICWA.
- Indian custodian or other custodial adults. ICWA defines "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[51] Thus, where tribal law or custom recognizes that a third party has legal custody pursuant to an informal process, the third party is an Indian custodian.[52] For example, another relative such as an aunt or grandparent may be caring for the child and be the Indian custodian.
- Extended relatives, as defined by the child's tribe, other tribal members, or other Indian families who may serve as a placement resource for the child. ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe."[53] If the tribe has not codified a definition of "extended family member," ICWA provides that an extended family member is "a person who has reached the age of eighteen and who is the Indian child's

[47] I.C. § 16-1615.
[48] 81 F.R. 38820 (June 14, 2016).
[49] 25 U.S.C. § 1903(9).
[50] *Id.*; 25 C.F.R. 23.2.
[51] 25 U.S.C. § 1903(6) & § 1912; 25 C.F.R.§ 23.2.
[52] Many tribal codes are available online and can be consulted to determine whether an individual would be recognized as an Indian custodian under tribal law. However, many tribes recognize Indian custodians as a matter of tribal customary law and practice.
[53] 25 U.S.C. § 1903(2) & 1915(b).

grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[54]

- Qualified expert witness, if possible. In an emergency situation it may not be possible to immediately find a qualified expert witness in time for the shelter care hearing, but once the court has determined that removal is necessary to prevent imminent physical damage or harm to the child, it is required to "expeditiously initiate" the adjudicatory hearing subject to all ICWA hearing requirements to determine if clear and convincing evidence exists that removal or placement is still necessary to prevent serious emotional damage or harm to the child, which would require a qualified expert witness.[55]
- Tribal caseworker, if available;
- Indian child's tribe and tribal attorney, if possible;
- Interpreter, if necessary.

3. The Petition

If the child's status as an Indian child is known at the time of the shelter care hearing, or there is reason to know the child is an Indian child, the petition should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child.[56]

The petition or its accompanying documents should also contain the following information:

- The name, age, and last known address of the Indian child;
- The name and address of the child's parents and Indian custodians, if any;
- The steps taken to provide notice to the child's parents, custodians, and tribe about the emergency proceeding;
- If the child's parents and Indian custodians are unknown, a detailed explanation of the efforts that have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);
- The residence and the domicile of the Indian child;
- If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;
- The tribal affiliation of the child and of the parents or Indian custodians;
- A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe's jurisdiction; and

[54] *Id.*
[55] 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122.
[56] 25 C.F.R. § 23.113(d).

- A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

4. Inquiries at the Shelter Care Hearing

a. Is the child an Indian child?

At the shelter care hearing, the court must inquire whether each participant knows or has reason to know that the child is an Indian child. This inquiry must be made at the commencement of the proceeding and all responses should be on the record. If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know.[57]

To assist the court in determining whether the child is an Indian child and to evaluate the court's jurisdiction under ICWA, the court should also make the following inquiries:

- If the child was in the custody of an Indian custodian prior to the hearing;
- If the child resides or is domiciled on a reservation or if the child is already a ward of a tribal court (regardless of domicile);
- What efforts, if any, were made by the agency to identify extended family or other tribal members or Indian families for placement of the child;
- Has the agency attempted to create a family chart or genogram, or solicited assistance from neighbors, family, or members of the Indian community who may be able to offer information;[58]
- Do the parents or Indian custodian understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

The BIA Regulations provide that a court has reason to know the child is an Indian child under the following circumstances:

- Any participant in the proceeding, officer of the court involved in the proceeding, tribe, Indian organization or agency informs the court that the child is an Indian child;
- Any such participant informs the court that it has discovered information indicating that the child is an Indian child;
- The child who is the subject of the proceeding gives the court reason to know she or he is an Indian child;
- The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native Village;
- The court is informed that the child is or has been a ward of a tribal court; or
- The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

[57] 25 C.F.R. § 23.107(a).
[58] 25 U.S.C. § 1915(b); 25 C.F.R. § 23.2(4).

The court should also confirm (via report, declaration, or testimony) on the record that the Department is using due diligence to identify and work with all tribes in which the child may be eligible for membership and verify whether the child is in fact an Indian child.[59]

If the court knows or has reason to know the child is an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child.[60]

b. Which tribe is the child's tribe?

If the evidence available at the shelter care hearing regarding the child's tribal membership is unambiguous, the court may determine the child's tribe. The child's tribe has the ultimate responsibility for determining the child's membership. In all cases the court should ensure that the record reflects the tribal verification of the child's tribe. If there is ambiguity regarding the child's tribe, it is particularly important that the court allow the verification process to proceed prior to making a determination of the child's tribal membership.

An unmarried child under the age of 18 is an Indian child under two circumstances. First, if the child is a member of a federally recognized tribe, the child is an Indian child. Second, if the child is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe, the child is an Indian child.

The determination of a child's tribal membership or eligibility for membership is solely within the jurisdiction and authority of the tribe.[61] Likewise, a tribe has sole jurisdiction to determine that the biological parent of the child is a member of the tribe. The state court may not substitute its own determination of tribal membership for the determination of a tribe. The court may rely on documentation such as membership or enrollment documents issued by the tribe.

If the child is a member of or is eligible for membership in more than one tribe, the BIA regulations set the process for determining which tribe is the child's tribe for purposes of the ICWA proceeding. Pursuant to the regulations, the court should give deference to the tribe in which the child is already a member unless otherwise agreed by the tribes. If the child is a member of more than one tribe, the court must provide the opportunity to the tribes to determine which should be designated as the child's tribe. The court should respect the agreement of the tribes. If the tribes are unable to reach an agreement, the court should designate the tribe with which the child has the more significant contacts as the child's tribe.

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[59] 25 C.F.R. § 23.107(a)(1).
[60] 25 C.F.R. § 23.107(a)(2).
[61] *Doe v. Shoshone Bannock Tribes, 159 Idaho 741, 367 P.3d 136 (2016).*

If the court must designate the child's tribe because the possible tribes cannot reach an agreement, the court should take into consideration : 1) the preference of the parents for membership of the child, 2) length of past domicile or residence on or near the reservation of each tribe; 3) membership of the child's custodial parent or Indian custodian, 5) the interest asserted by each tribe in the child custody proceeding, 6) whether there has been a previous adjudication with respect to the child by a court of one of the tribes, 7) the child's self-identification if the child is of sufficient age and capacity to meaningfully self-identify.

Finally, state courts should be aware, that the child's tribe may change during the pendency of a case where the child is eligible for membership in more than one tribe.

c. Should the case be transferred to tribal court?

If an Indian child is the subject of a foster care placement proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[62] A request to transfer may be made orally on the record or in writing.

ICWA does not impose any timeframe for a request to transfer jurisdiction. The BIA Regulations provide that a request to transfer jurisdiction may be made at any stage of a proceeding and/or during each discrete proceeding. Thus, a request to transfer may be made as early as the shelter care hearing or as late as a termination of parental rights proceeding (even though no request was made during the child protection proceeding). A request for transfer may be made after termination of parental rights and prior to adoption. [63]

If a request to transfer to tribal court is made, the court must ensure that the tribal court is promptly notified in writing of the transfer request. The state court may request that the tribal court provide a timely response regarding whether the tribal court wishes to decline the transfer.

Upon receipt of an appropriate request to transfer, the court must transfer the case unless the court determines that transfer is not appropriate because either parent objects to the transfer, the tribal court declines the transfer or the court finds good cause for denying the transfer.

If a party believes there is good cause to deny a transfer of the case to tribal court, the reasons for the belief must be stated orally on the record or provided in writing to the parties. The court must allow all the parties to the proceeding to present views regarding whether good cause to deny a transfer exists. For this reason, the court should hold a hearing and ensure that the reasons for the denial of transfer and the views of all the parties are on the record. The basis for the court's decision to deny transfer also should be stated orally on the record or in a written order. [64]

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[62] 25 U.S.C. § 1911(b).
[63] 25 C.F.R. § 23.115.
[64] 25 C.F.R. § 23.118(a), (b) & (d).

The BIA Regulations provide that in determining whether good cause to deny a transfer exists the court must not consider the following:

- whether the case is at an advanced stage, if the child's parents, custodian or tribe did not receive notice of the proceeding until an advanced state;
- whether there have been prior proceedings involving the child for which no petition to transfer was filed;[65]
- Whether the transfer could affect the placement of the child;
- The Indian child's cultural connections with the tribe or its reservation; or
- Socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.[66]

Once a case is transferred to tribal court, the state jurisdiction ends. The responsibility to re-consider issues such as the designation of the child's tribe lies with the tribal court to which the case was transferred.

d. If the child is an Indian child, is removal necessary to prevent imminent physical damage or harm to the child?

If the court determines that the child is an Indian child or that it has reason to know that the child is an Indian child, the shelter care hearing must be treated as an emergency removal proceeding under ICWA.

In an ICWA emergency removal the court must find on the record that the removal or placement is necessary to prevent imminent physical damage or harm to the child. The removal may only continue as long as it is necessary to prevent imminent physical damage or harm to the child. The removal must be ended and the child returned home if the removal or placement is no longer necessary to prevent such imminent physical damage or harm. The court must "promptly hold a hearing to determine whether the emergency removal continues to be necessary whenever new information indicates that the emergency has ended.[67]

In any case, the BIA Regulations provide that the emergency proceeding should not be continued for more than 30 days. Thus the adjudicatory hearing which, under Idaho law marks the beginning of the child custody proceeding under ICWA, must be held within 30 days of the shelter care hearing. If the adjudicatory hearing is not held within 30 days of the shelter care hearing, the court must either return the child home or make the following three findings: 1) returning the child home would subject the child to imminent physical damage or harm, 2), the court is unable to transfer the proceeding to

[65] ICWA treats the child protection proceeding (foster care placement under ICWA) as a separate action from termination of parental rights and/or adoption. Thus, for example, when deciding whether to transfer a case in a termination of parental rights action, the fact the judge in the child protection proceeding denied transfer to tribal court does not constitute good cause.
[66] 25 C.F.R. § 23.118(c).
[67] 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e).

the appropriate tribe, and 3) it has not been possible to schedule an adjudicatory hearing and thereby initiate a child custody proceeding.[68]

e. Have active efforts to prevent the removal of the Indian child been made?

Neither ICWA nor the BIA Regulations require this finding to be made at the shelter care hearing (the ICWA emergency removal hearing). However, the court is required to make this finding at the adjudicatory hearing which must be held within 30 days of the emergency proceeding. The standard for evaluating the Department's efforts to prevent removal is higher under ICWA than under state law. For this reason, if the court has reason to know that the child is an Indian child, it should make inquiry into the efforts that have been made to prevent removal. This requirement of ICWA is discussed in detail in the adjudicatory hearing section of this chapter.

f. Does the child's placement comply with the ICWA placement preferences?

As with the active efforts, this finding is not required at the shelter care hearing. However, in 30 days at the adjudicatory hearing, the court must make a finding that the child's placement complies with ICWA's placement preferences or that clear and convincing evidence of good cause to depart from the placement preferences is present. If the court has reason to know that the child is an Indian child, it should make inquiry into the child's placement. If the child is placed in an ICWA compliant placement at the onset of the case, it is less likely that the placement will need to be changed later in the process.

g. Key ICWA findings and decisions at the shelter care hearing

- Is there reason to know the child is an Indian child?
    - The record of the hearing should show that the court inquired whether each participant had reason to know the child is an Indian child.
    - If the evidence is sufficient at the shelter care hearing, the court should determine whether the child is an Indian child.
    - If there is reason to know that the child is an Indian child but the evidence is not sufficient for the court to make a determination that the child is an Indian child, the court must:
        - Instruct each party to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.
        - Confirm on the record through a report, affidavit or testimony whether the Department has used due diligence to identify and work with all the tribes where the child may be a member or eligible for membership.
        - Treat the child as an Indian child unless and until it can be determined that the child is not an Indian child.

[68] 25 C.F.R. § 23.113(e).

- If the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If the child is an Indian child, the court has jurisdiction, and the evidence of the child's tribal membership is unambiguous, in which tribe is the child a member or eligible for membership?
- If the child is a member or eligible for membership in more than one tribe, is there unambiguous evidence as to which tribe will be treated as the child's tribe for purposes of ICWA?
- If the child is an Indian child and either the parent, Indian custodian or tribe has requested a transfer to tribal court, should the case should be transferred to tribal court?
    - If the court grants a request to transfer the case, orders that are necessary to ensure smooth transfer of court records and the child's custody.
    - If the request to transfer is denied, what is the good cause to deny transfer?
- Is removal necessary to prevent imminent physical damage or harm to the child?

C. Adjudicatory Hearing

1. Who should be present

The same persons discussed at the shelter care hearing should also be present at the adjudicatory hearing. By the time of the adjudicatory hearing, the child's status as an Indian child is much more likely to be resolved. At a minimum it is more likely that a court will have reason to know that a child is an Indian child even if there is still insufficient evidence on which to base a determination of the child's status. If the court has reason to know the child is an Indian child, it must treat the case as an ICWA case. This means that the child's tribe should be present, and that a Qualified Expert Witness (QEW) must be present. The court cannot make the necessary finding of serious emotional or physical damage without the testimony of a qualified expert witness.

2. Inquiries the court must make at the adjudicatory hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, the court must make the same inquiries at the adjudicatory hearing as are required at the shelter care hearing. These are discussed above. BIA Guidelines B.7 suggests that once the verification process has been triggered a court should make an independent determination of whether a child is an Indian child only after a tribe has failed to respond to multiple requests for verification of the child's membership/citizenship status.[69]

[69] BIA Guidelines B.7.

b. Has the Department sent the ICWA-compliant notice?

ICWA imposes specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. Pursuant to these requirements, if the identity of the child's parent, Indian custodian or tribe is known, the Department (the party seeking the foster care placement) must directly notify the parents, Indian custodian and tribe by registered or certified mail (return receipt requested) of the pending child custody proceedings and their right of intervention. The tribal notice must be sent to each tribe in which the child may be a member or eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court. [70] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers, if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- The name of each tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
- A copy of the petition and the name and address of petitioner's attorney;
- A statement that any parent or Indian custodian of the child has the right to intervene if they are not already a party to the proceeding;
- A statement that the tribe may intervene at any time in the state court proceeding;
- A statement that if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigence by the court, the parent or Indian custodian has the right to court-appointed counsel;
- A statement of the right to up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the parent or Indian custodian and the Indian child's tribe to petition for transfer of the case to tribal court;
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- An explanation of the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian;
- And a statement that all parties must keep confidential the information contained in the notice.[71]

If the identity or location of the child's parents, Indian custodian or the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate

[70] 25 C.F.R. § 23.11 (a).
[71] 25 C.F.R. § 23.111(d).

BIA Regional Director.[72] In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[73]

If there is reason to know that a parent or Indian custodian possesses limited English proficiency and is not likely to understand the notice, the court must provide language access services as required by Title VI of the federal Civil Rights Act and other federal laws.[74]

The notice must be received by the parent, Indian custodian or tribe at least 10 days prior to the adjudicatory hearing (which is the ICWA child custody proceeding.) The parents, custodian and/or tribe may each request 20 additional days from the date notice was received to prepare for the proceeding.[75]

c. Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful?

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[76] The legislative history of ICWA makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Regulations provide that "prior to ordering an involuntary foster-care placement or termination of parental rights the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[77]

The regulations define active efforts as follows:

> "Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

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[72] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).
[73] 25 C.F.R. § 23.11(a).
[74] 25 C.F.R. § 23.111(f).
[75] 25 U.S.C. § 1912(a); 25 C.F.R. § 23.112 (a).
[76] The Adoption and Safe Families Act of 1997 (Public Law 105-89).
[77] 25 C.F.R. § 23.120. This provision appears to limit the scope of a 2013 U.S. Supreme Court case, Adoptive Couple v. Baby Girl, 570 U.S. 637(2013). In *Adoptive Couple*, the Court held that the active efforts requirement applies when a child is removed from a family member who has a legally recognized relationship with the child. Thus, active efforts were not required in a case where a child was placed for voluntary adoption over the objection of an unwed father who had not established parental rights pursuant to state law and who had never had any form of custody of the child.

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

1. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
3. Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
4. Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
5. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe;
6. Taking steps to keep siblings together whenever possible;
7. Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
8. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
9. Monitoring progress and participation in services;
10. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
11. Providing post-reunification services and monitoring."[78]

The BIA Regulations require that active efforts must be documented in detail in the record.[79]

Neither ICWA nor the BIA Regulations include a specific provision regarding the burden of proof applicable to the "active efforts" requirement. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. In 2015, the Idaho Supreme Court held: "that a party seeking termination of parental rights with respect to an Indian child 'shall satisfy' the

[78] 25 C.F.R. § 23.2.
[79] 25 C.F.R. § 23.120.

court that active efforts to prevent the breakup of the family have been made, not that the party show by clear and convincing evidence that such efforts have been made."[80]

d. Is there clear and convincing evidence, including the testimony of one or more qualified expert witnesses, demonstrating that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child?

Compared to state law, ICWA requires a heightened evidentiary standard, a more difficult substantive standard and a specialized expert witness to support the foster care placement of an Indian child. These requirements are the heart of ICWA's policy to prevent the unnecessary removal of Indian children from their parents and tribe. The Act requires that the Department show that the foster care placement of an Indian child must be supported by clear and convincing evidence, including the testimony of a QEW, and that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[81] The BIA Regulations specifically provide that the evidence of serious emotional or physical damage must be causally linked to the particular conditions in the home. Evidence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not meet the burden of proof for serious emotional and physical harm.[82] Given the ICWA standard for removal, parental unfitness, abandonment and/or unstable home environment under the Idaho CPA are not automatic grounds for removal of an Indian child *unless* the facts show a causal link to danger to the child.

The legislative history of ICWA establishes that a qualified expert must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[83] Congress envisioned that the qualified expert would be more than a social worker.[84] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices and to provide testimony regarding the specific tribal context and the child's situation.

The BIA Regulations provide that the QEW "must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. A person may be

[80] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015). The BIA Guidelines state that while the regulations do not establish a burden of proof for active efforts, "the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided." BIA Guidelines E.6.
[81] 25 U.S.C. § 1912(e).
[82] 25 C.F.R. § 23.121.
[83] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[84] *Id.* at 21.

designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe."[85] Furthermore, the regulations provide that either the court or a party may request the assistance of the Indian child's tribe or the BIA office serving the child's tribe in locating qualified persons to serve as expert witnesses. The regulations specifically state that the social worker assigned to the case may not serve as the qualified expert witness.[86]

In *In the Matter of Baby Boy Doe*,[87] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness involving an Indian child from a different tribe. This case was decided before the current regulations were issued.

e. Is the child's placement within the placement preferences required by ICWA?

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[88] In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[89] Congress recognized that even where the child was removed from his or her parents or Indian custodians, the child's best interests and the interests of the tribe are served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[90]

The placement of an Indian child at the adjudicatory hearing implicates the ICWA placement preferences for foster care and pre-adoptive placements. ICWA establishes different placement preferences for proceedings involving adoptive placements. These foster care and pre-adoptive placement preferences apply to both voluntary and involuntary placements of the Indian child, to pre-adoptive placements, and to placements made in contemplation of termination of parental rights.[91] ICWA requires that the child be placed in the "least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home."[92]

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[85] 25 C.F.R § 23.122.
[86] *Id.*
[87] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).
[88] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[89] Holyfield, 490 U.S. at 36.
[90] 25 U.S.C. § 1902. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that these preferences may not apply in a voluntary adoption situation where the child has not been removed from a recognized family member and no one is before the court who meets the preferred placement criteria offering to serve as a placement for the child. Adoptive Couple, 570 U.S. at 743. The BIA Regulations, issued after the case was decided, make clear that this does not change the general rule that the preferences apply to both voluntary and involuntary placements. 25 C.F.R. § 23.129.
[91] 25 U.S.C. § 1915(b).
[92] 25 U.S.C. § 1915.

In determining the suitability of a placement, the test is whether the placement is within the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides" or with which the parent or extended family "maintain social or cultural ties."[93] The ICWA foster care placement preferences apply even where the child has not previously resided in an Indian family.

The BIA Regulations further provide that "[T]he child must be placed in the least restrictive setting that: (1) Most approximates a family taking into consideration sibling attachment; (2) Allows the Indian child's special needs (if any) to be met; and (3) Is in reasonable proximity to the Indian child's home, extended family and siblings."[94]

In the absence of good cause to the contrary, ICWA and the BIA Regulations impose the following placement preferences for foster care and pre-adoptive placements, in the order of their applicability:[95]

- A member of the Indian child's extended family as defined by ICWA.[96]
- A foster home licensed, approved, or specified by the child's tribe.
- An Indian foster home licensed or approved by an authorized non-Indian agency, or
- An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[97]

ICWA permits tribes to change the placement preferences by resolution and requires that state courts adhere to the tribally altered preferences. The tribal resolution must comply with ICWA's mandate that the placement be the "least restrictive setting."[98] Tribal resolutions and enactments regarding placement preferences can often be found on the appropriate tribal website.

ICWA and the BIA Regulations also provide that the court must, where appropriate, consider the wishes of the Indian child or the Indian child's parents for placement.[99]

f. If the child's placement is not within the ICWA placement preferences, is there clear and convincing evidence of good cause to depart from the preferences?

ICWA provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. An assertion of good cause to depart from the preferences by any party must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the preferences must establish good cause by clear and convincing evidence. The court must make its finding of good cause to depart from the preferences on the record and in writing.[100]

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[93] 25 U.S.C. § 1915(d).
[94] 25 C.F.R. § 23.131.
[95] 25 C.F.R. § 23.131.
[96] 25 U.S.C. § 1903(2).
[97] 25 U.S.C. § 1915(b).
[98] 25 U.S.C. § 1915(c); 25 C.F.R. § 23-131.
[99] 25 C.F.R. § 23.131.
[100] 25 C.F.R. §23.132.

The BIA Regulations provide that the court's decision to depart from the preferences should be based on one or more of the following considerations:

- The request of one of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- The presence of a sibling attachment that can be maintained only through a particular placement;
- The extraordinary physical, mental or emotional needs of the Indian child such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find a placement meeting the placement preference criteria. The regulations specify that for purposes of this provision the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Finally, the BIA regulations provide that a placement may not depart from the preferences based on the relative socioeconomic status of the placement compared to one that complies with the preferences. Nor may a placement depart from the preferences "based solely on ordinary bonding and attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[101]

g. Key ICWA findings and decisions at the adjudicatory hearing

- If the child's status as an Indian child has not yet been determined, is there reason to know the child is an Indian child? See Key Findings and Decisions at the Shelter Care Hearing regarding the child's status as an Indian child.
- If the child is an Indian child or if there is reason to know the child is an Indian child, has ICWA compliant notice been given with copies to the BIA, and have copies with proof of delivery been filed with the court?
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the Tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, which tribe(s) is the child a member or eligible for membership in?
- See Key Findings and Decisions at the Shelter Care Hearing regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.

[101] 25 C.F.R. §23.139. Even if the placement was not in violation of ICWA, BIA Guidelines H.5 provides that courts and agencies should carefully consider whether the child's relationship with a non-preferred placement outweighs the long-term benefits of maintaining connections with the family and tribal community.

- Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful? An affidavit documenting the active effort made by the Department must be submitted.
- Is there clear and convincing evidence, including the testimony of one or more qualified expert witnesses demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child?.
- Is the child's placement within the placement preferences required by ICWA?
- If the child's placement is not within the placement preferences, is there clear and convincing evidence of good cause to depart from the placement preferences?

D. Amended Disposition Hearing

When the child is removed from protective supervision an amended disposition hearing is held. [102] The removal and redisposition of the case does not begin a new child protection proceeding under state law, but does trigger the required IV-E and ICWA findings.

When the child is removed from protective supervision, the amended disposition hearing must be treated as an emergency removal proceeding. If the child's status as an Indian child was not previously determined, the court must make the ICWA findings required for the shelter care hearing. Within 30 days of the amended disposition hearing the court also must make the required active efforts and serious emotional damage or harm findings.

E. Case Plan Hearing and Review Hearings

1. Inquiries to be made at the case plan, review and permanency hearings.

a. Is the child an Indian child?

The child's status as an Indian child will hopefully have been determined by this point in the case. If new information has been disclosed by one of the parties or has otherwise become available such that the court has reason to know the child is an Indian child, the court must make this determination before proceeding further with the case. See the shelter care hearing and adjudicatory hearing sections of this chapter for information on making the determination of the child's status as an Indian child.

The inquiry regarding the child's status as an Indian child must be made at every hearing until the record contains sufficient evidence for the court to make a finding. Even if the child was not initially identified as possibly being an Indian child, if information comes to light during the case such that any of the participants know or have reason to know that the child may be an Indian child, the court must immediately begin treating the child as

[102] I.C. § 16-1623.

an Indian child and move to resolve the question of the child's status as quickly as possible.

b. Is the child's placement still within the ICWA placement preferences?

If the child's placement has changed since the time of the adjudicatory hearing, the court must ensure that the child's current placement is within the ICWA placement preferences. If the child's placement has changed to a non-preferred placement, the court should determine whether there is good cause to deviate from the placement preferences either before or immediately after the placement changes. These preferences are detailed in the adjudicatory hearing section of this chapter. If the child's placement is not within the preferences, the court should order the Department to locate a placement that complies with ICWA or should require that the Department establish by clear and convincing evidence that there is good cause to depart from the placement preferences. The good cause requirement is also discussed in the adjudicatory section of this chapter.

c. What are the active efforts that will be made to enable the child to return home?

The case plan sets forth the efforts that will be made by the Department to enable the child to return home. If the child is an Indian child, these efforts must meet the active efforts requirement of ICWA. The active efforts requirement is discussed in the adjudicatory hearing section of this Chapter. The court should ensure that the efforts contemplated by the case plan will be sufficient to meet the active efforts standard.

d. Is the child's alternate plan and/or permanency goal termination of parental rights and adoption?

If the concurrent plan and/or permanency goal is termination of parental rights and adoption, the Department must prepare for the heightened standards of ICWA. In a termination of parental rights proceeding, ICWA imposes a beyond a reasonable doubt burden of proof to show that the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage. The concurrent plan or permanency goal of termination of parental rights and adoption may not be realistic in an ICWA case, given this extremely high burden of proof. The court should enquire into whether the planning for the higher requirements for termination of parental rights has been taken into consideration. The court should also consider whether guardianship is a viable option. Establishing and working on a realistic concurrent plan and permanency goal is important if the child is not able to be reunified with his or her parents of Indian custodian.

F. Termination of Parental Rights

1. <u>Who should be present</u>

The same persons discussed at the adjudicatory hearing should also be present at the termination of parental rights hearings. By the time of a proceeding to terminate parental rights, the child's status as an Indian child is more likely to be resolved. If facts arise at this point in the case giving any participant reason to know the child is an Indian child, the court must treat the case as an ICWA case and move quickly to resolve the child's status. The sections of this chapter regarding the shelter care hearing and adjudicatory hearings contain detailed discussions of the requirements for making a determination of the child's status. If there is reason to know that the child is an Indian child, the child's tribe should be present, and a Qualified Expert Witness should be present.

2. Inquiries the court must make at the termination of parental rights hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, but the court has reason to know that the child is an Indian child, it must make the same inquiries at the termination of parental rights proceeding as are required at the shelter care hearing. These are discussed above.

b. Has the Department sent the ICWA-compliant notice?

ICWA and the BIA Regulations impose specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. The termination of parental rights proceeding is a new action and ICWA compliant notice of this action must be provided. Pursuant to these requirements, if the identity of the child's parent, Indian custodian or tribe is known, the Department (the party seeking the termination of parental rights) must directly notify the parents, Indian custodian and tribe by registered or certified mail (return receipt requested) of the pending child custody proceedings and their right to intervene. The tribal notice must be sent to each tribe of which the child reasonably may be a member or of which the child may be eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court. [103] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- The name of each tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
- A copy of the petition and the name and address of petitioner's attorney;

[103] 25 C.F.R. § 23.11(a).

- A statement that any parent or Indian custodian of the child has the right to intervene if they are not already a party to the proceeding;
- A statement that the tribe may intervene at any time in the state court proceeding;
- A statement that if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigence by the court, the parent or Indian custodian has the right to court-appointed counsel;
- A statement of the right to up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the parent or Indian custodian and the Indian child's tribe to petition for transfer of the case to tribal court;
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- An explanation of the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian; and
- A statement that all parties must keep confidential the information contained in the notice.[104]

If the identity or location of the child's parents, Indian custodian or the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate BIA Regional Director.[105] This does not relieve the Department of the responsibility of providing notice to the child's tribe. However, the regional BIA office may be able to provide information on which tribes to contact. In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[106]

If there is reason to know that a parent or Indian custodian possesses limited English proficiency and is not likely to understand the notice, the court must provide language access services as required by Title VI of the Federal Civil Rights Act and other federal laws.[107]

The notice must be received by the parent, Indian custodian or tribe at least 10 days prior to the hearing on the petition to terminate parental rights (which is a child custody proceeding under ICWA). The parents, custodian and/or tribe may request 20 additional days from the date notice was received to prepare for the proceeding.[108]

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[104] 25 C.F.R. § 23.111(d).
[105] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).
[106] 25 C.F.R. §23.11(a).
[107] 25 C.F.R. § 23.111(f).
[108] 25 U.S.C. §1912(a); 25 C.F.R. § 23.112(a)

c. Should the case be transferred to tribal court?

If an Indian child is the subject of a termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[109] A request to transfer may be made orally on the record or in writing. This request may be made at any time during the proceeding. The fact that a request to transfer was not made during the earlier phases of the child protection proceeding does not bar a transfer at the time of the parental termination proceeding. [110]

ICWA does not impose any timeframe for a request to transfer jurisdiction. The BIA Regulations provide that a request to transfer jurisdiction may be made at any stage of a proceeding and/or during each discrete proceeding. Thus a request to transfer may be made as early as the shelter care hearing or as late as a termination of parental rights proceeding (even though no request was made during the child protection proceeding).[111]

If a request to transfer to tribal court is made, the court must ensure that the tribal court is promptly notified in writing of the transfer request. The state court may request that the tribal court provide a timely response regarding whether the tribal court wishes to decline the transfer.

Upon receipt of an appropriate request to transfer, the court must transfer the case unless the court determines that transfer is not appropriate because either parent objects to the transfer, the Tribal court declines the transfer or the court finds good cause for denying the transfer.

If a party believes there is good cause to deny a transfer of the case to tribal court, the reasons for the belief must be stated orally on the record or provided in writing to the parties. The court must allow all the parties to the proceeding to present views regarding whether good cause to deny a transfer exists. For this reason the court should hold a hearing and ensure that the reasons for the denial of transfer and the views of all the parties are on the record. The basis for the court's decision to deny transfer should be stated orally on the record or in a written order. [112]

The BIA Regulations provide that in determining whether good cause to deny a transfer exists the court must not consider the following:

- whether the case is at an advanced stage, if the child's parents, custodian or tribe did not receive notice of the proceeding until an advanced state;
- whether there have been prior proceedings involving the child for which no petition to transfer was filed;

[109] 25 U.S.C. § 1911(b).
[110] 25 C.F.R. § 23.115 and § 23.118(c)(2).
[111] 25 C.F.R. § 23.115.
[112] 25 C.F.R. § 23.118(a), (b) & (d).

- Whether the transfer could affect the placement of the child;
- The Indian child's cultural connections with the tribe or its reservation; or
- Socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.[113]

Once a case is transferred to tribal court, the state court's jurisdiction ends. The responsibility to re-consider issues such as the designation of the child's tribe lies with the tribal court to which the case was transferred.

d. Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so, were these efforts successful?

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[114] The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Regulations provide that "prior to ordering an involuntary foster-care placement or termination of parental rights the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[115]

The regulations define active efforts as follows:

"Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

1. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
3. Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family

[113] 25 C.F.R. § 23.118(c).
[114] 25 C.F.R. § 23.106 and BIA Guidelines A.1.
[115] 25 C.F.R. § 23.120. This provisions appears to reverse the impact of a 2013 U.S. Supreme Court case, Adoptive Couple v. Baby Girl, 570 U.S. 637(2013). In *Adoptive Couple*, the Court held that the active efforts requirement applies when a child is removed from a family member who has a legally recognized relationship with the child. Thus, active efforts were not required in a case where a child was placed for voluntary adoption over the objection of an unwed father who had not established parental rights pursuant to state law and who had never had any form of custody of the child.

and in family team meetings, permanency planning, and resolution of placement issues;
4. Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
5. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe;
6. Taking steps to keep siblings together whenever possible;
7. Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
8. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
9. Monitoring progress and participation in services;
10. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
11. Providing post-reunification services and monitoring."[116]

The BIA Regulations require that active efforts be documented in detail in the record.[117]

Neither ICWA nor the BIA Regulations include a specific provision regarding the burden of proof applicable to the "active efforts" requirement. In 2015, the Idaho Supreme Court held: "that a party seeking termination of parental rights with respect to an Indian child 'shall satisfy' the court that active efforts to prevent the breakup of the family have been made, not that the party show by clear and convincing evidence that such efforts have been made."[118]

e. Is there evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child?.

ICWA requires that the Department show that the termination of parental rights regarding an Indian child must be supported by evidence beyond a reasonable doubt demonstrating that continued custody by the child's parent or Indian custodian likely to result in serious emotional or physical damage to the child. As with foster care proceedings, this showing must include the testimony of a qualified expert witness. The BIA Regulations

[116] 25 C.F.R. § 23.2.
[117] 25 C.F.R. 23.120.
[118] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).

specifically provide that by itself, evidence of serious emotional or physical damage is not enough to meet the standard so it must be causally linked to the particular conditions in the home. Evidence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not meet the burden of proof for serious emotional and physical harm.[119] Given the ICWA standard for removal, parental unfitness, abandonment and/or unstable home environment under Idaho's Termination of Parent-Child Relationship Statute are not automatic grounds for removal of an Indian child *unless* the facts show a causal link to serious emotional or physical damage to the child.

ICWA requires that the court's finding of likely serious emotional or physical damage to a child be supported by the testimony of a qualified expert witness.[120] The legislative history of ICWA establishes that a qualified expert witness must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[121] Congress envisioned that the qualified expert would be more than a social worker.[122] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices and to provide testimony regarding the specific tribal context and the child's situation.

The BIA Regulations provide that the QEW "must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe."[123] Furthermore, the regulations provide that either the court or a party may request the assistance of the Indian child's tribe or the BIA office serving the child's tribe in locating qualified persons to serve as expert witnesses. The regulations specifically state that the social worker assigned to the case may not serve as the qualified expert witness.[124]

In *In the Matter of Baby Boy Doe,*[125] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness involving an Indian child from a different tribe. However, this case was decided before the current regulations were issued.

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[119] 25 C.F.R. § 23.121.
[120] 25 U.S.C. § 1912(e).
[121] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[122] *Id.* at 21.
[123] 25 C.F.R § 23.122.
[124] *Id.*
[125] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).

f. Key ICWA findings and decisions at the termination of parental rights hearing

- Is there reason to know the child is an Indian child? See Key Findings and Decisions at the shelter care hearing in this chapter regarding the child's status as an Indian child.
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, in which tribe is the child a member or eligible for membership?
- See Key Findings and Decisions at the shelter care hearing in this chapter regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.
- Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful? An affidavit documenting the active effort made by the Department must be submitted
- Is there evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child?

G. Adoption

1. Who should be present

- Judge
- Adoptive Parents
- Caseworker if one was assigned
- Tribal caseworker or representative
- Guardian *ad litem* for the child;
- The child

2. Inquiries to be made at the Adoption Hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, but the court has reason to know that the child is an Indian child, it must make the same inquiries at the adoption proceeding as are required at the shelter care hearing. These are discussed above.

b. Has the Department sent the ICWA-compliant notice?

ICWA and the BIA Regulations impose specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. The adoption proceeding is a new action and ICWA compliant

notice of this action must be provided. In an adoption proceeding connected to a CPA proceeding, the parental rights of the parents will have already been terminated, so notice to the parents and/or Indian custodian is not required. However pursuant to the BIA regulations, if the identity of the child's tribe is known, the prospective adoptive parent (the party(s) seeking the adoption) must directly notify the tribe by registered or certified mail (return receipt requested) of the pending adoption and the tribe's right of intervention. The tribal notice must be sent to each tribe in which the child may be a member or is eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court.[126] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names know (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- The name of each tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
- A copy of the petition and the name and address of petitioner's attorney;
- A statement that the tribe may intervene at any time in the state court proceeding;
- A statement of the right to, up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the Indian child's tribe to petition for transfer of the case to tribal court;
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- And a statement that all parties must keep confidential the information contained in the notice.[127]

If the identity or location of the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate BIA Regional Director.[128] In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[129]

c. Does the adoptive placement comply with the ICWA placement preferences for adoption?

[126] 25 C.F.R. § 23.11 (a).
[127] 25 C.F.R. § 23.111(d).
[128] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).
[129] 25 C.F.R. § 23.11(a).

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[130] In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[131] Congress recognized that even where the child was placed for adoption, the child's best interests and the interests of the tribe would be served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[132]

Thus, in the absence of good cause to the contrary, ICWA and the BIA Regulations impose the following placement preferences for adoptive placements, in the order of their applicability:[133]

- A member of the Indian child's extended family as defined by ICWA.[134]
- Other members of the Indian child's tribe.
- Other Indian families.[135]

ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally altered preferences. [136] Tribal resolutions and enactments regarding placement preferences can often be found on the appropriate tribal website.

ICWA and the BIA Regulations also provide that the court must, where appropriate, consider the wishes of the Indian child or the Indian child's parents for placement.[137]

d. If the child's placement is not within the ICWA placement preferences, is there good cause to depart from the preferences?

ICWA provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. An assertion of good cause to depart from the preferences by any party must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the preferences must establish good cause by clear and convincing evidence. The court must make its finding of good cause to depart from the preferences on the record and in writing.[138]

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[130] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[131] Holyfield, *supra* note 44, at 36.
[132] 25 U.S.C. § 1902. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that these preferences may not apply in a voluntary adoption situation where the child has not been removed from a recognized family member and no one is before the court who meets the preferred placement criteria offering to serve as a placement for the child. Adoptive Couple, 570 U.S. at 741.
[133] 25 C.F.R. § 23.130.
[134] 25 U.S.C. § 1903(2).
[135] 25 U.S.C. § 1915(b); 25 C.F.R. §23-130.
[136] 25 U.S.C. § 1915(c); 25 C.F.R. §23-131.
[137] 25 C.F.R. § 23.130.
[138] 25 C.F.R. § 23.132.

The BIA Regulations provide that the court's decision to depart from the preferences should be based on one or more of the following considerations:

- The request of one of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- The presence of a sibling attachment that can be maintained only through a particular placement;
- The extraordinary physical, mental or emotional needs of the Indian child such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find a placement meeting the placement preference criteria. The regulations specify that for purposes of this provision the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Finally, the BIA regulations provide that a placement may not depart from the preferences based on the relative socioeconomic status of the placement compared to one that complies with the preferences. Nor may a placement depart from the preferences "based solely on ordinary bonding and attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[139]

e. Key ICWA findings and decisions at the adoption hearing

- Is there reason to know the child is an Indian child? See Key Findings and Decisions at the shelter care hearing in this chapter regarding the child's status as an Indian child.
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, in which tribe is the child a member or eligible for membership?
- See Key Findings and Decisions at the shelter care hearing in this chapter regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.
- Is the adoptive placement within the ICWA placement preferences for adoption?
- If the placement departs from the adoptive placement preferences, is there clear and convincing evidence of good cause to depart from the placement preferences.

[139] 25 C.F.R. § 23.139.

Chapter 12: Special Topics

12.1 RELEVANT FEDERAL STATUTES[1]

Timeline of Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption

2010's

Family First Prevention Services Act Subtitle A-Investing in Prevention and Support Families (of 2017) (P.L. 15-123)

Preventing Sex Trafficking and Strengthening Families Act (of 2014) (P.L. 113-183)

Intercountry Adoption Universal Accreditation Act of 2012 (P.L. 112-276)

Protect our Kids Act of 2012 (P.L. 112-275)

Child Protection Act of 2012 (P.L. 112-206)

Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34)

CAPTA Reauthorization Act of 2010 (P.L. 111-320)

Patient Protection and Affordable Care Act of 2010 (P.L. 111-148)

2000's

Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351)

Tax Relief and Health Care Act of 2006 (P.L. 109-432)

Child and Family Services Improvement Act of 2006 (P.L. 109-288)

Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248)

Safe and Timely Interstate Placement of Foster Children Act of 2006 (P.L. 109-239)

Deficit Reduction Act of 2005 (P.L. 109-171)

Fair Access Foster Care Act of 2005 (P.L. 109-113)

Adoption Promotion Act of 2003 (P.L. 108-145)

Keeping Children and Familes Safe Act of 2003 (P.L. 108-36)

Promoting Safe and Stable Families Act of 2001 (P.L. 107-133)

Intercountry Adoption Act of 2000 (P.L. 106-279)

Child Abuse Prevention and Enforcement Act of 2000 (P.L. 106-177)

1990's

Foster Care Independence Act of 1999 (P.L. 106-169)

Adoption and Safe Families Act of 1997 (P.L. 105-89)

Child Abuse Prevention and Treatment Amendments (CAPTA) of 1996 (P.L. 104-235)

The Interethnic Provisions of 1996 amends MEPA (P.L. 104-188)

Multiethnic Placement Act (MEPA) of 1994 (P.L. 103-382)

Family Preservation and Support Services Program Act of 1993 (P.L. 103-66)

Child Abuse, Domestic Violence, Adoption, and Family Services Act of 1992 (P.L. 102-295)

1980's

Child Abuse Prevention, Adoption, and Family Services Act of 1988 (P.L. 100-294)

Child Abuse Amendments of 1984 (P.L. 98-457)

Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272)

1970's

Indian Child Welfare Act (ICWA) of 1978 (P.L. 95-608)

Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 (P.L. 95-266)

Child Abuse Prevention and Treatment Act (CAPTA) of 1974 (P.L. 93-247)

[1] Child Welfare Information Gateway. (2017). About CAPTA: A legislative history. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

12.2 IDAHO JUVENILE RULE 16 EXPANSIONS

Idaho Juvenile Rule 16[2] is a powerful tool, used by judges in Juvenile Corrections Act (JCA) cases to ensure collaboration between the juvenile justice system and the child protection system. Each system offers different services and resources and the workers in each system have different strengths and skill sets. Both systems may be needed to meet the needs of a child and her or his family.

Without notice, a chance to plan, or an opportunity to follow normal investigative procedures, Rule 16 expansions may place the Department in a difficult and time sensitive situation. Sometimes there are no other options; when possible, however, actions can be taken to more effectively use a Rule 16 expansion.

In some cases, the facts present decision makers with a choice regarding whether a child is required to appear before a judge in a juvenile corrections case or whether her/his parents appear in a child protection case. For example, if a child is caught stealing food at a local market, he or she can be charged with violation of the JCA. The officer might charge and release, or charge and notify parents, or charge and take the child to detention. If the officer choses any of these options, the child becomes subject to the jurisdiction of the juvenile justice system. In the alternative, the officer might decide to take the child home where the officer might discover that the child's parents cannot be located. Further investigation might reveal that the child and/or the child's siblings were left by the parents with inadequate food and that hunger lead to the stealing incident. Rather than pursuing one of the options provided by the JCA, the officer might decide to make a declaration of imminent danger. If this happens, the child, and most likely her or his siblings, will become part of the child protection system.

> *"Over the last forty years, researchers have repeatedly demonstrated the connection between childhood maltreatment and delinquency. Many of our maltreated youths cross over into the juvenile justice and other systems of care, as child abuse and/or neglect increases the risk of arrest as a juvenile by 55% and the risk of committing a violent crime by 96%."*
>
> Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice: Two Sides of the Same Coin*, JUVENILE & FAMILY JUSTICE TODAY (Fall 2008), p. 17.

Much research has focused on the link between juvenile justice and child welfare.[3] Research demonstrates that abused and neglected youth are at heightened risk for early onset of delinquency.[4]

While judges in Idaho do not determine how the child enters the court system, Idaho judges have the authority to take actions to meet the needs of the child by expanding JCA cases to CPA cases. Idaho Code § 20-520(m) provides that JCA judges can "[o]rder the proceedings expanded or altered to include consideration of the cause pursuant to Chapter 16,

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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.

[2] The statutory basis for Rule 16 is found in I.C. § 20-520(m) (2017).

[3] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 21 (2005).

[4] Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice: Two Sides of the Same Coin, Part II*, JUVENILE & FAMILY JUSTICE TODAY (Winter 2009), p. 21.

Title 16, Idaho Code."[5] Idaho Juvenile Rule 16 prescribes the procedure for expanding a JCA case to a CPA case and also allows the court to order the Department of Health and Welfare to investigate and report to the court without expanding to a CPA.

The Child Protective Act also contemplates a CPA case expanding to a JCA proceeding. Section 16-1613(3) provides: "At any stage of a proceeding under this chapter, if the court determines that it is in the best interests of the child or society, the court may cause the proceeding to be expanded or altered to include full or partial consideration of the cause under the juvenile corrections act without terminating the original proceeding under this chapter."[6] However, there is no rule that prescribes how this expansion is to occur and the process has been rarely used.

Tools in both systems allow a judge to access collateral information and services to meet the needs of the youth. These include:

1. Idaho Code § 20-511A allows the court, in a JCA or a CPA case, to order assessment and screening teams for juveniles with mental health issues.[7]
2. Idaho Code § 20-520, the sentencing provisions for the JCA, give judges broad authority to order the evaluation, assessment, and treatment of substance abuse or mental health issues.[8]
3. Idaho Code § 20-523 allows the court in a JCA case to order a screening team composed of officers or agencies designated by the court to screen and make recommendations to the court.[9]

Each of these tools has its own purpose. The key is using each tool at the proper time to address the child's issues and to provide resources from different sources. The division of responsibilities within and between agencies can sometimes create barriers to the delivery of services to the child. The court can facilitate collaboration among agencies to ensure appropriate and timely services for the child.

Best practice recommendations in the use of Rule 16 include:

1. Inviting an IDHW representative to JCA hearings when the use of Rule 16 is contemplated.
2. When possible, ordering an investigation prior to an expansion.
3. Using screening teams, as authorized by Idaho Code Section 20-511A and Idaho Juvenile Rule 19, where possible.
4. If expansion or investigation is ordered, providing a copy of court records to IDHW from the JCA proceedings.

* * *

[5] I.C. § 20-520(l) (2017).
[6] I.C. § 16-1613(3) (2009).
[7] I.C. § 20-511A (2017). Childhood maltreatment and neglect can cause a host of short and long-term negative consequences. Early physical abuse and neglect may impede development and cause adverse alterations to important regions of the brain, which can have long-term cognitive, emotional, and behavioral consequences. Children abused early in life may exhibit poor physical and mental health well into adulthood. ROBIN KARR-MORSE, ET AL., GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE (1999).
[8] I.C. § 20-520.
[9] I.J.R. 19 allows the court to convene screening teams with state agencies (e.g.: the Department of Health and Welfare and the Department of Juvenile Corrections), and local entities (e.g.: county Juvenile Probation and school districts), and the family of the child, required by the court to cooperate in planning for the child.

12.3 NOTIFYING AND INCLUDING UNWED FATHERS IN CHILD PROTECTIVE ACT PROCEEDINGS

The Idaho Child Protective Act (CPA) does not define the term "parent." As a result, significant issues can arise in determining whether and when an absent father should be joined as a party in a CPA proceeding. Courts and lawyers confronted with questions regarding the status of an alleged father in a CPA case should carefully evaluate related statutory definitions of parents contained in the Idaho adoption and termination of parental rights statutes and in the Idaho law regarding the establishment of paternity. In addition, state and federal case law regarding the constitutional rights of unwed fathers also should be considered.

A. Idaho Statutory Provisions Regarding the Definition of "Parent"

1. Paternity Statute

The paternity statute establishes two processes for legally establishing paternity. Paternity proceedings may be initiated by the filing of a verified Voluntary Acknowledgement of Parentage[10] or by filing a verified complaint naming a defendant who is the alleged father of the child.[11]

The paternity statute does not define the term "parent." However, the term "father" is defined as "the biological father of a child born out of wedlock."[12] In *Johnson v. Studley-Preston*,[13] the Idaho Supreme Court interpreted the phrase "born out of wedlock" in this definition to refer to the status of the biological parents' relationship to each other. Thus, the Court concluded that a child born to a married woman, but biologically conceived with a man other than her husband, was "born out of wedlock" even though the biological mother of the child was married, because the biological parents of the child were not married to each other.[14] Based on this reasoning, the Court concluded that the father of a child born while the mother was married to another person had standing to bring an action under the paternity statute.

2. Adoption Statute

The adoption statute does not define the term "parent." By implication, as the following analysis indicates, however, the statute provides guidance on who might be

[10] I.C. § 7-1111(1) (2010); see also I.C. § 7-1106 (governing voluntary acknowledgments of paternity which are discussed later in this section).
[11] *Id*.
[12] I.C. § 7-1103(4).
[13] 119 Idaho 1055, 812 P. 2d 1216 (1991). *But see* Doe v. Roe (In re Doe), 142 Idaho 202, 127 P. 3d 105 (2005) (*Doe I 2005*). In *Doe I 2005*, the married, presumed father brought an action to terminate the parental rights of the unmarried, biological father of the child. The Court held that an unmarried biological father was not a "father" and that he had no rights that required termination because he had not pursued a paternity action, filed a voluntary acknowledgement of paternity, or taken steps to establish a relationship with his child. In an appropriate situation, the court could enter an order of non-establishment of paternity, to clarify the status of the biological father.
[14] *Johnson*, 119 Idaho at 1057, 812 P. 2d at 1218.

considered a parent through its provisions regarding who must consent to and/or receive notice of an adoption.

a. *Consent*

The consent of the man who fits in one of the following four groups is required for an adoption:

i. **The consent of both parents (including the father) is required for the adoption of a child who was "conceived or born within a marriage**."[15] This provision implies that a man who is married to the mother at the time a child is conceived or born has at least an interest in being considered the father of the child. In addition, the notice provisions of the adoption statute provide that "any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption" is entitled to notice of the adoption proceeding.[16] These provisions are consistent with the termination of parent-child relationship statute ("TPR statute") which defines a "presumed father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated." [17]

This provision of the adoption statute is also consistent with the paternity statute, which provides a means by which the man married to the mother at the time of the conception or birth of a child, can file an "affidavit of non-paternity."[18] The negative implication is that, without such a process, the man married to the mother at the time of the conception or birth of a child might otherwise be considered the father of the child.

These statutory provisions were not addressed by the Court in *Johnson v. Studley-Preston*,[19] discussed above, where the court concluded that the unmarried biological father of a child could be considered the father under the paternity statute even where the mother was married to someone else at the time of the child's birth. As a result of the court's reasoning in *Johnson* and the language of the adoption statute, it may be necessary to treat both the unmarried biological father and the husband of the biological mother, as fathers for purposes of adoption.

[15] I.C. § 16-1504(1)(b) (Supp. 2014).
[16] I.C. § 16-1505(1)(f) (2009).
[17] I.C. § 16-2002(12) (Supp. 2014), discussed later in this Chapter.
[18] I.C. § 7-1106(1) (2010).
[19] 119 Idaho 1055, 812 P. 2d 1216 (1991)

ii. **A man who has been adjudicated the biological father by a court**, prior to the mother's execution of consent to the adoption, must consent to an adoption.[20] Pursuant to this provision, the consent of any man who obtains a timely adjudication of paternity is required for a subsequent adoption of the child.[21]

iii. **An unmarried biological father who has filed a voluntary acknowledgement of paternity** pursuant to the paternity statute.[22] The paternity statute provides that an appropriately executed, notarized voluntary acknowledgement of paternity filed with the Department "shall constitute a legal finding of paternity."[23] While the language of the adoption statute could be read to imply that the father can file such an acknowledgment on his own, the paternity statute makes clear that a voluntary acknowledgement of paternity must be executed by both the "alleged father" and the mother of the child.[24] The Idaho Paternity statute appears to extend parenthood only to a *biological* father who signs a voluntary acknowledgement of paternity. Yet the Supreme Court has recently held that a voluntary acknowledgement of paternity signed by a man who was not the biological parent of the child, could only be set aside based on fraud, duress or material mistake of fact.[25]

iv. **An unmarried biological father who demonstrates through his conduct that he is committed to fulfilling his responsibilities as a father** toward the child must consent to an adoption if he meets certain requirements and conditions.[26] Pursuant to the adoption statute, the unmarried biological father must fall within one of these three categories:[27]

a. If the child is more than six months of age at the time of placement, the unmarried biological father must have "developed a substantial relationship with the child, taken some measure of responsibility for the child and the child's future, and demonstrated a full commitment to the responsibilities of parenthood by financial support of the child," and, when not prevented from doing so by a third party, either visited the child monthly or communicated with the child regularly;

[20] I.C. § 16-1504(1)(d) (Supp. 2014).
[21] Interestingly, the Paternity Statute assumes that a man would either voluntarily acknowledge paternity or would resist the allegation that he is the father of a child, as it provides the verified complaint in a paternity proceeding must allege that "the person *named as defendant* is the father of the child." I.C. § 7-1111(1) (2010)(emphasis added).
[22] I.C. § 16-1504(1)(i)(Supp. 2014).
[23] I.C. § 7-1106(1) (2010).
[24] *Id*.
[25] *Gordeon v. Hedrick*, 159 Idaho 605,610, 364 P. 3d 951, (2015).
[26] I.C. § 16-1504(1)(e) (Supp. 2014).
[27] These provisions are all set forth in I.C. § 16-1504(2).

b. The unmarried biological father must have lived openly with the child for a period of six months within one year after the birth of the child and immediately preceding the placement of the child with adoptive parents, and must have "openly held himself out to be the father of the child"; or,

c. If the child is under six months of age at the time of placement, the unmarried biological father must have commenced paternity proceedings and must file an affidavit stating that he is fully able and willing to have full custody of the child, setting forth his plans for the care of the child, and agreeing to a court order of child support and payment of expenses incurred in connection with the mother's pregnancy and the child's birth. In addition, the unmarried biological father must file a notice of his commencement of paternity proceedings with the Bureau of Vital statistics pursuant to Idaho Code § 16-1513. Finally, if he had actual knowledge of the pregnancy he must pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth in accordance with his means and assuming he was not prevented from doing so by a third party. Idaho Code § 16-1513 provides that the required notice and filing of paternity proceedings must be filed prior to the placement of the child for adoption.[28]

d. If an unmarried biological father resides in another state, he may contest an adoption if he and the mother both resided in the other state, the mother left without notifying or informing the father that she could be found in Idaho, the father attempted through every reasonable means to locate the mother, and the father complied with the unwed father requirements of the state in which he resides.[29] To avoid a later attack on an adoption, best efforts must be undertaken to identify and notify unwed fathers in other states even though they have not complied with Idaho's adoption provisions.

In *Doe I 2005*[30] the Idaho Supreme Court interpreted these provisions in the context of a termination of parental rights case. The TPR statute cross-references and incorporates the notice and consent provisions of the adoption statute.[31] In *Doe I 2005*, the Idaho Supreme Court held that an unmarried biological father was not a "father" whose rights had to be terminated under the TPR statute. It reasoned that the father in the case was not entitled to notice of the termination of parental rights action because he did not fall within any of the categories of men under the TPR statute or under the incorporated adoption notice and consent

[28] I.C. § 16-1513(2). *But see Burch v. Hearn*, 116 Idaho 956, 782 P. 2d 1238 (1989)(A paternity action may be filed at any time within the paternity statute's time limitations if it is not connected to an adoption or action to terminate parental rights).
[29] I.C. § 16-1504(8).
[30] *Doe I 2005*, 142 Idaho 202, 127 P. 3d 105.
[31] *See* I.C. § 16-2007, cross-referencing and incorporating the adoption notice provisions in I.C. § 16-1505. I.C. § 16-1505, the adoption notice provision, cross-references and incorporates the adoption consent provision, I.C. § 16-1504.

provisions, who were entitled to notice. The unmarried biological father had not filed in the Putative Father Registry nor had he attempted to file a voluntary acknowledgment of paternity. He had not commenced paternity proceedings. Finally, he had never attempted to support his child or establish a relationship with his child over a four-year period.[32] Since the child's birth, the father had had no contact with the child and had not paid support; he had expressed interest in the child at the urging of the mother in order to assist her in her custody dispute with her husband (the "presumed father"[33] of the child).

The Idaho Supreme Court recently affirmed the reasoning of *Doe I 2005* in *Department of Health & Welfare v. Doe* (hereinafter *Doe II 2010*).[34] It held that an unmarried biological father was not a person whose rights had to be terminated under the TPR statute. In *Doe II 2010*, the Court concluded that there was no reason to terminate the rights of an unmarried biological father who had not been adjudicated the father of the child, had not filed a voluntary acknowledgement of paternity, and had not established a relationship with the child or supported the child. In the four years after the child's birth, the biological father had been in prison, had only two contacts with the child, and had contributed only a very small amount indirectly to the child's support.

b. *Notice*

In addition to the consent provisions outlined above, the adoption statute provides that certain additional men, whose consent is not required by the statute, must nonetheless receive notice of an adoption proceeding. The adoption statute expressly provides that the purpose of notice is to enable the notified person to "present evidence to the court relevant to the best interest of the child."[35] Three categories of people are entitled to such notice:

- Any person recorded on the birth certificate as the child's father with the knowledge and consent of the mother unless such right to notice or parental rights have been previously terminated.[36]
- Any person who is openly living in the same household with the child at the time the mother's consent is executed or relinquishment made, and who is holding himself out to be the child's father, unless such rights to notice or parental rights have been previously terminated.[37]
- Any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption.[38]

These notice provisions are especially ambiguous. The first two provisions expressly condition the right to notice on the fact that the parental rights of the

[32] *Doe I 2005*, 142 Idaho at 205, 127 P. 3d at 108.
[33] The Idaho TPR statute provides that the man married to the mother at the time the child is conceived or born is the "presumptive father." I.C. § 16-2002(12).
[34] *Dep't. of Health & Welfare. v. Doe* (*In the interest of Doe*), 150 Idaho 88, 244 P. 3d 232 (2010)(Doe II 2010).
[35] I.C. § 16-1505(9) (2009).
[36] I.C. § 16-1505(1)(d).
[37] I.C. § 16-1505(1)(e).
[38] I.C. § 16-1505(1)(f).

covered persons have not been terminated. Yet some individuals who come within these notice provisions would not be required to consent to an adoption of the child, and under Doe I 2005 and Doe 2010 do not have parental rights that must be terminated. Yet, the consent of a man under the third provision is expressly required by the adoption statute.

The Idaho Supreme Court has not interpreted these provisions of the adoption statute. Thus, it is not clear whether this right to notice for the purpose of presenting evidence regarding the child's best interest means that men covered under these provisions but not fitting in any of the provisions regarding consent to adoption could be considered to be a father of the child.

B. Termination of Parental-Child Relationship Statute

The TPR Statute defines "parent" as:

(a) The birth mother or the adoptive mother,
(b) The adoptive father,
(c) The biological father of a child conceived or born during the father's marriage to the mother, and
(d) The unmarried biological father whose consent to an adoption of the child is required pursuant to § 16-1504, Idaho Code.[39]

With regard to part (d), any person in one of the four adoption consent categories discussed above would be considered a "parent" for purposes of termination of parental rights.

The TPR statute further provides that a "presumptive father" is "a man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated."[40] Finally, the TPR statute provides that "unmarried biological father "…means the biological father of a child who was not married to the child's mother at the time the child was conceived or born."[41]

While the definitions of a parent whose rights may be terminated under the TPR statute appear at first blush to be consistent with the provisions for consent to adoption (although not the provisions for notice of adoption), the notice provision in the TPR statute creates new ambiguity. It states that where a "putative father" has failed to commence paternity proceedings in a timely fashion notice is not required "*unless such putative father is one of those persons specifically set forth in section*

[39] I.C. § 16-2002(11) (Supp. 2014). In *Roe Fam. Servs. v. Doe (In re Bay Boy Doe)*, 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*), the Court reasoned that a father who, with the mother, had completed a "Voluntary Acknowledgement of Paternity Application" and who was subsequently listed as the father on the child's birth certificate was an "unmarried biological father" under I.C. § 16-2002(p) (Supp. 2014). This section has been amended and is now I.C. § 16-2002(11).
[40] I.C. § 16-2002(12).
[41] I.C. § 16-2002(15).

16-1505(1), Idaho Code."[42] The referenced provision is the adoption *notice* provision. Thus, it appears that by its express language the TPR statute requires notice to be provided to any person whose consent would be required for adoption because such persons are "parents" for purposes of the TPR statute, as well as any person who is entitled to notice of an adoption action. Like the adoption statute's notice provisions, the TPR notice provisions do not clarify whether the parental rights of a man entitled to notice but not fitting the definition of "parent" must be terminated.

C. U.S. Supreme Court Authority Relevant to the Constitutional Rights of Unmarried Fathers

In a series of cases beginning with *Stanley v. Illinois*,[43] and through *Lehr v. Robertson* the United States Supreme Court has made clear that an unwed father has a constitutionally protected liberty interest in establishing a relationship with his child. The Court has concluded that this interest is strongest when the father has lived together with the child in a family unit and that the right cannot be unilaterally terminated without notice by a state's failure to provide an adequate procedural framework that allows the unwed father to protect his rights.

In *Stanley*, the unwed father and mother had lived together for approximately 18 years, during which they had three children. When the mother died suddenly, the state of Illinois initiated a dependency proceeding, took custody of the children as wards of the state, and declined to give Stanley, the father, an opportunity to be heard. The state court reasoned that Stanley did not have a right to be heard because he was not married to his children's mother. The state statutory scheme assumed that "an unwed father is not a 'parent' whose existing relationship with his children must be considered."[44]

The Supreme Court rejected the implicit state presumption that all unwed fathers were unfit. Rather, the Court held that a state cannot terminate the parental rights of an unwed father who has lived together with his children in a family unit without first conducting a hearing to determine whether the father is unfit. It rejected the state's argument regarding efficient handling of adoption, concluding instead that:

> [p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[45]

The *Stanley* reasoning was extended by the U. S. Supreme Court in *Quilloin v. Wolcott*[46] and *Caban v. Mohammed*.[47] In both of these cases, stepfathers sought to adopt stepchildren over the objections of the children's biological fathers. As in

[42] I.C. § 16-2007(5).
[43] *Stanley v. Illinois*, 405 U.S. 645 (1972).
[44] *Stanley*, 405 U.S. at 649-50.
[45] *Id.*
[46] *Quillion v. Wolcott*, 434 U.S. 246 (1978).
[47] *Caban v. Mohammed*, 441 U.S. 380 (1979).

many states at the time, statutes in both jurisdictions provided that an unmarried father's child could be adopted without his consent if the court found the adoption to be in the child's best interests. However, the statutes also allowed other categories of parents, "married fathers and all mothers," to veto adoption of their children unless the vetoing parent was found to be unfit or to have abandoned the child. In both *Quilloin* and *Caban*, the unmarried fathers challenged the constitutionality of these statutory schemes on equal protection and substantive due process grounds arguing that, like other parents, their parental rights could not be terminated without notice and a hearing, at which they would be accorded the opportunity to present evidence regarding the best interests of the child.

In *Quilloin*, the unwed father had had little or no contact with the child or mother in the nine years after the child's birth. He had not paid child support, had rarely visited or contacted the child, and had not filed any action to establish his paternity. Only after the stepfather began proceedings to adopt the child did the unwed birth father make any attempt to assert his parental rights. The Court held that because the father had not lived together in a family unit with his child and had not "seized his opportunity interest," he had no protectable liberty interest in establishing his parentage.[48] Thus, it upheld the statutory scheme.

In *Caban*, the father had lived together with his children and their mother for two years, and thereafter had substantial, although sometimes indirect, contact with the children. The Court reasoned that he had a cognizable liberty interest in continuing his relationship with his children. He had lived with them and their mother for the first two years of their lives. After that, he had indirect contact with them through their grandmother over a period of several years. He did not seek to establish his paternity formally. Nor did he pay child support to the children's mother. However, the Court recognized that, despite failing to comply with formal obligations of parenthood, Caban had "established a parental relationship" with his children, and the Court thus concluded that the statutory scheme that treated an unwed father with an established parental relationship differently from mothers and married fathers violated Caban's equal protection rights.[49]

Together, *Stanley*, *Quilloin*, and *Caban* established the fundamental principle that an unwed father who has lived in a family unit with his children or otherwise has established a relationship with them through contact, establishing paternity, and/or paying child support has a constitutionally protected liberty interest that cannot be ignored because he has not filed a paternity action and was not married to his children's mother. The most important factor considered by the court in this trio of cases was whether the father actually had resided with the children as part of a family unit. The cases did not address the rights of unwed fathers who had not yet had the opportunity to establish a parental relationship.

[48] *Quilloin*, 434 U.S. at 256.
[49] *Caban*, 441 U.S. at 385.

This latter situation was addressed in *Lehr v. Robertson*.[50] In *Lehr*, the father had expressed his interest in parenting the child since the child's birth but never had the opportunity to establish a relationship with the child because of the interference of the mother and because of his own ineffectiveness. The Court recognized than even a father with no established relationship with his child has a liberty interest protected by the Constitution:

> [T]he significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."[51]

The Court concluded that a state could terminate the parental rights of an unwed father who had not established a relationship with his child only if the state provided the opportunity for the father to assert his relationship. Such an opportunity is provided where the state has a statutory scheme that is likely to notify most interested fathers and that provides the father a way of asserting parental rights independent of the mother. In *Lehr*, the Court found that the New York statute in question required notice be provided to seven categories of men who might be interested in being a father, including men who had resided with the mother during the pregnancy and/or after the child's birth and who held themselves out as the father of the child. In addition, the Court approved New York's "putative father registry", which permitted men to register their interest in paternity by filing a post card with the state.

The most recent U.S. Supreme Court case in this area is *Michael H. v. Gerald D.*[52] The Court held that California's conclusive presumption that the man married to the mother at the time of the child's birth is the legal father of the child did not violate the due process rights of the unwed biological father. The case involved a situation in which the mother, while separated from her husband, had a child and lived with the child and the child's biological father in a family unit for a period of time. The relationship between the mother and father broke up and the mother reconciled with her husband. When the biological father attempted to formally establish his paternity and obtain visitation with the child, the mother and her husband argued that California law barred the father's action. The Supreme Court recognized the constitutional rights of the unwed father, but reasoned that a state could constitutionally prefer the marital father to the unwed father because of the importance of protecting the marital relationship.

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[50] *Lehr v. Robertson*,463 U.S. 248 (1983).
[51] *Lehr*, 463 U.S. at 262.
[52] *Michael H. v. Gerald D* .,491 U.S. 110 (1989).

Read together, *Stanley*, *Quilloin*, *Caban*, and *Lehr* stand for the proposition that all fathers have a constitutionally protected interest in parenting their children. While fathers who have established relationships with their children are entitled to more constitutional protection than fathers who have not yet established their relationships with their children, even unwed fathers in this latter group cannot be completely foreclosed from decision making regarding their child under all circumstances. These men, according to *Lehr*, have an "opportunity interest" that no other man has to establish a relationship with their children. Because of this interest, states may not terminate the parental rights of a man who has an established family relationship with his children without providing notice and a right to be heard on the question of the children's best interests. Furthermore, states must have a statutory scheme that is calculated to include most responsible unwed fathers within the requirement for notice and which provides an unmarried father the ability to assert parental rights that is within the reach of the putative father and not subject to veto through the actions of a third party (such as the child's mother). Finally, however, the constitutional rights of an unwed father may be secondary to a state's interest in protecting and fostering marriage.

D. Idaho Supreme Court and Court of Appeals Cases Relevant to the Rights of Unmarried Fathers

The Idaho Supreme Court and Court of Appeals have decided a number of cases in recent years relevant to the interpretation of the Idaho provisions regarding unwed fathers.

The first such case was *Steve B.D. v. Swan.*[53] There, the Idaho Supreme Court adopted some of the reasoning of *Lehr*. In *Steve B.D.*, the father knew of the child's birth and visited the child and mother in the hospital. After that time, however, he had no contact with the child, offered no financial support for the child, refused to sign an affidavit of paternity, and did not marry the child's mother. The father also did not file in the Idaho Putative Father Registry, which existed at that time.[54] After the child's birth, the mother, without the knowledge of the father, placed the child for adoption and stated under oath that she did not know who the father of the child was.

Subsequently, the mother attempted to revoke her consent to the adoption.[55] At the time, efforts were being made to provide the father with notice by publication (based on the mother's testimony that she did not know who the father was), and the unwed father was subsequently permitted to intervene in the mother's action to revoke her consent to adoption. The father argued that he relied on the mother's representations that she planned to keep the child. Under those circumstances, the Idaho Court found that although the father had an "opportunity interest" under *Lehr v. Robinson*, he had not established a substantial relationship with the child and had not seized his interest

[53] *Steve B.D. v. Swan* ,112 Idaho 22, 730 P. 2d 732 (1986).
[54] The statutory scheme in existence at the time of the *Steve B.D.* decision was completely revised in 2000.
[55] *See DeBernardi v. Steve B.D.*, 111 Idaho 285, 723 P. 2d 829 (1986)(denying the mother's attempt to revoke her consent to adoption).

in any other cognizable way. Thus, the Court concluded that the father's consent was not needed for the adoption.

Interestingly, the Idaho Court, while relying on *Lehr*, did not review the constitutional sufficiency of the Idaho statutory scheme for notice of adoption and TPR proceedings. Instead, the Court focused on the quality of the father's relationship with the child. It is not clear whether the scheme in force at the time was constitutionally sufficient.

The Idaho Supreme Court next addressed the rights of unwed fathers in *Johnson v. Studley-Preston*.[56] In *Johnson*, the Court reversed the trial court's holding that an unwed father lacked standing to file a paternity action because he had failed to establish a substantial relationship with the child. The Supreme Court held that the adoption notice provisions regarding putative fathers only applied to limit paternity claims where such claims arise in connection with an adoption or termination of parental rights case. In *Johnson*, no action for adoption or TPR had been filed. Instead, after the mother left her relationship with the unwed biological father and married another man, the unwed biological father sought to establish his parental relationship by seeking an order of paternity. Further, the Court held that although the mother of the child was married at the time of the child's birth, the child was, nonetheless, a "child born out of wedlock" for purposes of the paternity statute because the mother was not married to the biological father. Thus, the unwed biological father's paternity action was not barred by his failure to register in the putative father registry and was properly filed under the provisions of the paternity statute.

In *Roe Family Services v. Doe (Doe 2004)*,[57] the Court addressed the requirements for notice to an unwed father under the TPR statute. It held that an unmarried biological father recorded on the birth certificate as the child's father was entitled to notice of a TPR proceeding pursuant to the TPR statute. That provision (now Idaho Code § 16-2007) required then, and still requires today, that notice be provided to any person included in the adoption notice provision – Idaho Code § 16-1505. Thus, the Court concluded that the unmarried father, listed on the birth certificate, was entitled to notice of the TPR proceeding. Furthermore, the Court held that where the mother and the father both acknowledged the father's paternity, the father's action should not be barred by his failure to register in the putative father registry pursuant to Idaho Code § 16-1513.

In *Doe I 2005*,[58] the Supreme Court held that an unmarried, biological father was not a parent whose rights must be terminated because he had not established paternity, had not filed a Voluntary Acknowledgement of Paternity, and had not established a relationship with his child. In *Doe I 2005*, the mother was married at the time the child was born. The husband was listed as the father of the child on the

[56] *Johnson v. Studley-Preston*, 119 Idaho 1055, 812 P. 2d 1216 (1991).
[57] *Roe Family Services v. Doe* (*In re Baby Boy Doe*), 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*).
[58] *Do I 2005*, 142 Idaho 202, 127 P. 3d 105 (2005).

birth certificate and thereafter held himself out and functioned as the child's father in every way. Several years later, during a pending divorce action, the husband learned that he was not the father of the child. Nonetheless, the magistrate in the divorce case found that the husband was the presumed father of the child by virtue of his marriage to the mother, and the Court gave full custody to the husband. In response to the award of custody, the mother contacted the biological father of the child and urged him to obtain a paternity test and to pursue his parental rights. To secure his relationship with the child, the husband then filed an action to terminate the parental rights of the unmarried biological father. The unwed father was named as the defendant, was notified of the action, and participated in it.

In *Doe I 2005*, the Court reasoned that the parental termination statute was premised on the assumption that the "defendant parent has some parental right to his or her child, which should be terminated…."[59] Based on the facts of the case and on both Idaho and U.S. Supreme Court precedent, the court held that the biological father did not have such a parental right. It reasoned that to have parental rights a father must 1) establish paternity through a court decree, 2) file a Voluntary Acknowledgment of Paternity, or 3) his consent to an adoption must be required pursuant to the adoption statute.[60] The unmarried biological father had not established paternity, had not filed a Voluntary Acknowledgment, nor had he established any relationship with the child. The Court reasoned that its holding was consistent with both *Steve B.D.* and with *Lehr v. Robinson.* Based on those cases, it rejected the biological father's argument that he had not established paternity because the mother lied to him and told him that the child was not his. The Court reasoned that the father had plenty of time and opportunity to question the mother's representations and to seek to establish his relationship with the child, but had not done so.

In *Doe II 2010*,[61] the factual situation was similar to *Doe I 2005*. The mother was married at the time of the child's birth to a person who was not the biological father of the child. While the mother was pregnant, the biological father was sent to prison. Mother told the biological father that he might be the father of the child and he made inquiries into the possibility of establishing paternity. However, he never pursued any formal steps to establish paternity. Prior to the biological father's release from prison, the child and her siblings were removed from the care of the mother and her husband by IDHW, and a child protective case was initiated. The husband was listed as the father of the child in the CPA proceeding. The Department became aware of the biological father at some point during the case and attempted to contact him in Walla Walla, where he lived after his release from prison. He did not respond. The child was not reunified with the mother, and the Department filed a TPR proceeding

[59] *Id*. at 204, 127 P. 3d at 107

[60] As discussed previously, the following men must consent to an adoption: 1) the man married to the mother at birth or conception; 2) a man who has established paternity through a court decree; 3) a man who has filed a Voluntary Acknowledgment of Paternity; or 4) a man who has established a sufficiently close relationship with the child as defined in the adoption statute.

[61] *Do I 2010*, 150 Idaho 88, 244 P. 3d 232 (2010).

against the mother, her husband, and the biological father. Relying on *Doe I 2005*, the Idaho Supreme Court affirmed the magistrate's finding that the biological father did not have parental rights that required termination. Although he had a paternity test, he never filed a paternity action. Nor did the biological father file a Voluntary Acknowledgment of Paternity. Finally, the court reasoned that the biological father's two brief contacts and payment of a very small amount of support did not establish a sufficient relationship to constitute a parental right that must be terminated. The Court concluded that the father's due process rights were not violated, relying on *Doe I 2005*, *Caban*, *Lehr*, and *Steve B.D.*

In *Department of Health and Welfare v. Doe* (*Doe III 2010*),[62] the Idaho Court of Appeals held that a man who believed that he was the child's father and who had resided with the child and the child's mother, was not a "father" whose rights had to be terminated prior to an adoptive placement. In *Doe II 2010*, paternity testing during the child protective proceeding revealed that Doe was not the biological father of the child. He argued that he had standing to participate in the proceeding and to object to the termination of his parental rights. His theory was that he was a "presumed father" under Idaho Code § 16-2002(12), or that, in the alternative, he should be considered a parent under the equitable doctrine of *in loco parentis*. Although Doe believed he was the father, had resided with the child and the child's mother as a family unit, and had actively participated in the child's case plan, he had never married the mother. The court held that Doe did not meet the definition of "presumptive father" because he never married the child's mother. Further, the court declined to extend the doctrine of *in loco parent* to the facts of the case. Thus, it affirmed the magistrate's conclusion that Doe was not a father and that he did not have standing to object to the termination of parental rights. Finally, the court concluded that Doe's constitutional rights to access the courts and to due process were not impaired by the court's conclusion. Regarding access to the courts, the Court pointed out that Doe had been permitted to fully participate in the proceeding on the issue of whether he was the child's father. Regarding due process, the Court concluded that Doe did not have a cognizable liberty interest because he was not the biological parent of the child. It reasoned, "[t]his Court declines to recognize a liberty interest in this case. No jurisdiction has identified a liberty interest in a non-biological person who is neither a legal guardian, adoptive parent, step-parent, bold relative, nor foster parent."[63]

Despite the Court's frequent consideration of issues regarding notice of unwed fathers, it has never had the opportunity to evaluate the constitutionality of the current adoption and parental termination notice provisions. Rather, the Idaho Court has evaluated the quality of an unwed father's relationship to determine whether he has established a constitutionally sufficient interest to challenge a TPR proceeding or adoption. In each of the Idaho cases, with the exception *Steve B.D.* and *Doe 2004*, the unmarried father had received notice and was permitted to participate in proceedings for the purpose of determining whether his relationship with the child warranted recognition. *Steve B.D.* was decided prior to the current notice provisions.

[62] *Dep't. of Health & Welfare v. Doe* (*In re Doe*),150 Idaho 195, 245 P. 3d 506 (App. 2010) (*Doe III 2010*).
[63] *Id*. at 200, 245 P. 3d at 511.

In *Doe 2004*, the court did not reach the constitutional question because it found that the Idaho TPR statute required that the father be notified.

E. Best Practice Recommendations in CPA Proceedings Based on the Idaho Statutory Scheme

Based on the Idaho statutory scheme, the following individuals should be notified of a CPA proceeding. This recommendation, which attempts to harmonize the disparate provisions of the statutes discussed above, is made because such individuals may become integral to the case at any of its stages (removal and legal custody, TPR, and adoption), and failure to notify them may cause delays in permanency for the child:

- The man married to the mother at the time the child is conceived or born.
- Any man who has been adjudicated the father by a court of competent jurisdiction.
- Any man who has, with the mother, signed a voluntary acknowledgement of paternity.
- Any man who is able to demonstrate that he has maintained a substantial relationship, as defined in § 16-1504(2), with a child who is more than 6 months of age.
- Any man who has lived with the child for at least six months, within the first year after the child's birth and immediately preceding the initiation of an adoption proceeding, and who has openly held himself out as the father of the child.
- Any man who, prior to the child's placement for adoption, has commenced a paternity proceeding, and who has filed a notice of commencement of paternity proceedings and an affidavit of support and care for the child.
- Any man who is recorded on the birth certificate as the father of the child with the knowledge and consent of the mother.
- Any man who is openly living in the household with the child at the time the mother's consent to adoption is executed and who holds himself out as the father of the child.
- Any man who resides in another state and who may not have had the opportunity to perfect his parental rights.

* * *

12.4 THE IDAHO SAFE HAVEN STATUTE

In 2001, Idaho adopted the Idaho Safe Haven Act. Similar statutes have been enacted in most states as a response to reported instances of infanticide and the abandonment of infants.[64] The Idaho Safe Haven Act is codified in Title 39, Chapter 82 of the Idaho Code. The Act permits a parent to safely relinquish a baby to a designated location where the baby will be protected and cared for until a permanent home can be found. The law permits the parent to remain anonymous and be shielded from prosecution for abandonment or neglect. It also establishes procedures to secure permanency for the child.

A. Who May Leave a Baby at a Safe Haven

A custodial parent may deliver a child to a safe haven in Idaho. Pursuant to the Act, the custodial parent is the parent with whom the child resides. [65] A child left at a safe haven must be no more than 30 days of age at the time it is left at the safe haven.[66] If a custodial parent leaves a child at a safe haven, the parent is not subject to prosecution for abandonment.[67]

B. Save Havens

In Idaho, safe havens authorized to receive a child pursuant to the Safe Have Act, include: Idaho licensed hospitals or physicians, staff working at a licensed office or clinic, Idaho licensed or registered advanced practice professional nurses and physician assistants, emergency medical personnel responding to a "911" call from a custodial parent, or fire stations.[68]

C. Responsibility of Safe Havens

If a safe haven takes custody of a child, it has a number of responsibilities under the Act. The safe haven must "perform any act necessary in accordance with generally accepted standards of professional practice, to protect, preserve, or aid the physical health and safety of the child during the temporary physical custody, including but not limited to, delivering the child to a hospital for care or treatment."[69] The safe haven also is required to "provide notice of the abandonment to a peace officer or other person appointed by the court."[70]

The safe haven may not "inquire as to the identity of the custodial parent."[71] Moreover, if the identity of the parent is known to the safe haven, it must "keep all information as to the identity confidential."[72] In addition, the parent cannot be required to provide "any information" to the safe haven, although the safe haven may collect information voluntarily offered by the parent.[73]

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[64] *See* Child Welfare Information Gateway, *Infant Safe Haven Laws: Summary of State Laws*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm (2010).
[65] I.C. § 39-8203(1)(b)(2011)(specifying that the child must be delivered by the custodial parent) and I.C. § 39-8202(1)(defining the term custodial parent).
[66] I.C. § 39-8203(1)(a).
[67] I.C. § 39-8203(5).
[68] I.C. § 39-8202(2).
[69] I.C. § 39-8203(2)(a).
[70] I.C. § 39-8203(2)(b).
[71] I.C. § 39-8203(3).
[72] *Id*.
[73] *Id*.

A safe haven exercising its responsibilities under the statute is immune from civil or criminal liability "that otherwise might result from their actions," so long as the safe haven is acting in good faith in receiving the child and performing its duties.[74]

D. Permanency for the Relinquished Child

Once a peace officer or other person designated by the court is notified by a safe haven that it has taken custody of a child, the officer must take protective custody of the child and immediately deliver the child to the care, control, and custody of the Department of Health and Welfare. If the child needs further medical care, the child may be left in the care of a hospital and the peace officer must notify the court and the prosecutor of the child's location.[75]

Once the child is delivered to the Department, the Department must "place the abandoned child with a potential adoptive parent as soon as possible."[76]

The Safe Haven Act provides that a shelter care hearing must be held pursuant to Idaho Code § 16-1615, and that the *Department* must file a "petition for adjudicatory hearing pursuant to Idaho Code § 16-1621."[77] The process envisioned by these provisions is ambiguous.

Idaho Code § 16-1615 requires a shelter care hearing to be held within 48 hours of a child's emergency removal from the home pursuant to the Child Protective Act (CPA). Presumably, the Safe Haven Act anticipates that the shelter care hearing in a safe haven case should take place within 48 hours of the child's relinquishment to a safe haven, although this timing is not specified in the Act. As a matter of best practice to ensure the safety of the child, the appropriateness of the safe haven's actions, and to begin the investigation into the other parent of the child, the shelter care hearing should be held within 48 hours of the time the child is left at the safe haven.

A second ambiguity in the Safe Haven Act is the cross reference to Idaho Code § 16-1621 regarding the filing of a petition and the adjudicatory hearing. Idaho Code Section 16-1621 is the Case Plan Hearing section of the CPA. Presumably, this cross reference should refer to the CPA provision regarding the CPA petition – Idaho Code § 16-1610 – and/or the provisions of the CPA regarding the adjudicatory hearing – Idaho Code § 16-1619.

A third ambiguity is that the Safe Haven Act requires that the *Department* file a CPA petition. The CPA provides that either the county prosecutor or a deputy attorney general – not the Department – file the petition in a CPA case.[78] The best

[74] I.C. § 39-8203(4).
[75] I.C. § 39-8204(1). The Safe Haven Act further provides that the peace officer or other authorized person acting pursuant to the statute will not be held liable unless "the action of taking custody of the child was exercised in bad faith." I.C. § 39-8204(3).
[76] I.C. § 39-8204(2).
[77] I.C. § 39-8205.
[78] I.C. § 16-1610(1)(a).

practice is for the Department to consult with the prosecutor, who can then file the petition at the time of the shelter care hearing as provided for in the CPA.

The Safe Haven Act requires that an adjudicatory hearing must be held pursuant to Idaho Code § 16-1619 and § 16-1621.[79] This section repeats the confusing cross reference to the CPA Case Plan Hearing provision (§ 16-1621), but also directly cross-references the CPA adjudicatory hearing provision. The adjudicatory hearing in a safe haven case should be held within 30 days after the petition is filed. Within the initial 30 days after the safe haven assumes custody of the infant, the Department is also required to conduct an investigation to ensure that the infant is not a missing child[80] and may, if ordered by the court, initiate a child protective or criminal investigation if a claim of parental rights has been made.[81] In addition, the Department must conduct the investigations required by the CPA.[82]

As soon as practicable, after the first 30 days in which the child is in custody, the Department must petition to terminate the parental rights of the parent who abandoned the child and of any absent parent.[83]
No further procedures are set forth in the Safe Haven Act itself. The inference is that the case should proceed as a typical CPA proceeding to the final adoptive placement of the child. This proceeding is likely to be truncated because the parents of the child are not participating in the action. Also, the Safe Haven Act seems to anticipate that the permanent placement for a safe haven child is adoption.

E. Parental Rights

Care must be taken to respect the parental rights of the absent parent in a Safe Haven Act proceeding. Two potential issues could arise regarding the rights of that parent that can affect the stability of the child's placement.

1. Constitutional Rights of Parents

The absent parent has a constitutionally protected liberty interest in establishing a relationship with the child. Both federal and state law regarding the nature and scope of this liberty interest are discussed in the section of this chapter regarding the rights of unwed fathers.

2. Indian Child Welfare Act

If the child is an Indian Child, any adoption may be void if the provisions of ICWA are not complied with. Chapter 11 of this manual contains a detailed discussion of ICWA. Care must be taken in a safe haven case to ensure that the child's status as an Indian Child is investigated. Although there is no case law on this point, it is likely

[79] I.C. § 39-8205(4).
[80] I.C. § 39-8205(3).
[81] I.C. § 39-8205(2).
[82] I.C. § 16-1616(1) (2009).
[83] I.C. § 39-8205(5) (2011).

the federal requirements of ICWA would prevail: that the state's duty to determine the child's status under ICWA pre-empts inconsistent state laws providing that inquiry into the parents' identity and background cannot be made. This direct statutory clash between state and federal law poses serious issues where there is any indication that the child may be an Indian child.

3. Procedural Requirements of the Safe Haven Act to Protect Parental Rights

a. *Registration in the Abandoned Child Registry and Notice*

The Safe Haven Act contains some provisions aimed at protecting the parental rights of the absent parent. Although the act specifically disallows inquiry into the identity of the custodial parent, it provides that during the first 30 days the child is in custody, "the department shall request assistance from law enforcement officials to investigate through the missing children information clearinghouse and other state and national resources to ensure that the child is not a missing child."[84]

The Act also provides that the vital statistics unit of the Department must maintain a "missing children's registry" where a parent may make a claim of parental rights of an abandoned child.[85] To be effective, the Act provides that a claim of parental rights must be filed before an order terminating parental rights is entered by a court. The Act states that "[a] parent that fails to file a claim of parental rights prior to entry of an order termination their parental rights is deemed to have abandoned the child and waived and surrendered any right in relation to the child, including the right to any judicial proceeding in connection with the termination of parental rights or adoption of the child."[86] Prior to a hearing on a petition to terminate parental rights, the Department must file a certificate from the Department of Vital Statistics stating that a diligent search of the missing children registry was conducted and setting forth the results of the search or stating that no claim of parental rights was made.[87]

The Safe Haven Act specifically provides that registration of notice of the commencement of paternity proceedings pursuant to Idaho Code § 16-1513 does not satisfy the requirements of the Safe Haven Act.[88] Given that unwed parents have a constitutional right to parent their children, this provision may be of doubtful constitutionality. The federal and state cases regarding parental rights are discussed in the unwed fathers section of this chapter. For example, an unwed father who resided with the mother and supported her during her pregnancy, who timely filed pursuant to Idaho Code § 16-1513, but did not file a claim of parental rights of an abandoned child pursuant to the Safe Haven Act, might nonetheless

[84] I.C. § 39-8205(3).
[85] I.C. § 39-8206(1). This provision also establishes procedural requirements for the registry and for the filing of claims.
[86] I.C. § 39-8306(1).
[87] I.C. §§ 39-8306(2) and (4).
[88] I.C. § 39-8206(1).

be constitutionally entitled to notice of an action terminating parental rights or an adoption action. Likewise, a father who lived together in a family unit with the child's mother and the child after the child's birth, albeit briefly, also would likely be constitutionally entitled to notice even despite failing to file the claim of parental rights required by the Safe Haven Act.

b. *Filing a claim of parental rights*

If a claim of parental rights is timely filed, notice of the action to terminate parental rights must be provided to the person claiming parental rights pursuant to Idaho Code § 16-2007 (the TPR statute). In addition, the court must hold the action of involuntary termination of parental rights "in abeyance" for a period not to exceed 60 days.[89]

During the 60-day period of abeyance, the court must order genetic tests to establish maternity or paternity at the expense of the person claiming parental rights. In addition, the act directs the Department to conduct an investigation pursuant to Idaho Code § 16-2008.[90]

When indicated, a shelter care hearing must be conducted within 48 hours to determine whether the child should remain in the custody of the Department or should be returned to the parent. Presumably, this shelter care hearing is in addition to the shelter care hearing that was conducted when the child was initially abandoned and hearing must be held within 48 hours of the filing of a claim of parental rights, although the statute does not state how the time requirement should be implemented.[91] In making a determination regarding whether to return the child to the parent, continue a CPA proceeding, or terminate parental rights, the act provides that "a parent shall not be found to have neglected or abandoned a child" solely because the child was left at a safe haven.[92]

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[89] I.C. § 39-8206(3).
[90] I.C. § 39-8306(3)(a) and (b). The referenced investigation includes a financial analysis regarding unreimbursed public assistance provided on behalf of the child. In addition, the section directs that a social study of the circumstances of the child and the case be conducted. I.C. § 16-2008.
[91] I.C. § 39-8206(3)(c).
[92] I.C. § 39-8206(3)(d).

12.5 DEFACTO CUSTODIANS AND CHILD PROTECTIVE ACT PROCEEDINGS

In 2009, the Idaho Legislature enacted the *De Facto* Custodian Act.[93] This statute provides a procedural mechanism by which a relative of a child may obtain an order of legal or physical custody of the child.

If a *de facto* custodian has been appointed for a child prior to the removal of the child from the home, the custodian is a proper party to the CPA proceeding.[94] In addition, depending on the facts of the case, the custodian may be considered as a possible resource for the child during the CPA proceeding.

However, where a *de facto* custodian has not been appointed by a court prior to the initiation of the CPA proceeding, this statute does not provide a basis for the alleged custodian to participate as a party in the CPA proceeding or to use a CPA placement as a bootstrap for a legal order of custody.

The *De Facto* Custodian Act, itself, makes clear that that a person cannot qualify as a *de facto* custodian based on a placement made pursuant to the CPA.[95] Thus, placement of the child with a relative as part of a CPA proceeding cannot provide a basis for the relative to seek appointment as a *de facto* custodian.

The CPA provides that the court in the CPA proceeding has exclusive jurisdiction of the matter.[96] The Idaho Rules of Civil Procedure provide that proceedings filed under Title 16 of the Idaho Code (including adoptions, child protective act proceedings, and parental termination actions) are not "child custody proceedings" in which an individual may intervene to seek appointment as a *de facto* custodian.[97]

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[93] I.C. §§ 32-1701 – 32-1705 (Supp. 2014).
[94] I.C. § 16-1602(16) defines the term "custodian" as "a person, other than a parent or legal guardian to whom legal or joint legal custody of the child has been given by a court order." This definition would include a de facto custodian who has been awarded legal custody. A custodian must be identified in the CPA petition with specificity, I.C. § 16-1610(2)(d), is to be notified of the CPA proceeding in the Summons, I.C. § 16-1611(3), and must receive notice of the shelter care hearing, I.C. § 16-1615(2). *See* I.C. §§ 16-1602(12) (Supp. 2014), 16-1610(2)(d), and 16-1611(3)(2009).
[95] I.C. § 32-1703(4)(a) (Supp. 2014).
[96] I.C. § 16-1603(1) (2009).
[97] I.R.C.P. 24(d).

12.6 FINDINGS REQUIRED TO ESTABLISH AND/OR MAINTAIN A CHILD'S ELIGIBILITY FOR IV-E FUNDING

In order for an Idaho child placed in foster care to establish and maintain eligibility to receive federal IV-E foster care maintenance payments, the judge hearing the child protection case must make specific findings at specific times in the child protection case. This section is designed to review the specific findings, their language, and the timing of each throughout the child protective process.

A. Contrary to the Welfare

The first order pertaining to the removal of the child from the home must contain a finding that it would be contrary to the welfare of the child to remain in the home. Failure to make this finding will cause an otherwise eligible child to be ineligible for federal foster care maintenance payments as well as adoption assistance funds.

The first order pertaining to the removal of a child from the home could be:

1. Initial detention orders in juvenile corrections cases
2. Idaho Juvenile Rule 16 expansion orders[98]
3. Orders of removal[99]
4. Orders that continue shelter care hearings to another date[100]
5. Orders issued at shelter care hearings that place the children in shelter care, based on the stipulation of the parties[101]
6. Orders issued at shelter care hearings that place the children in shelter care, based upon the evidence presented[102]
7. Orders issued at adjudicatory hearings that place the children in the custody of the IDHW, based upon the stipulation of the parties[103]
8. Orders issued at adjudicatory hearings that place the children in the custody of IDHW, based upon the evidence presented at the adjudicatory hearing[104]
9. Orders issued at an amended disposition hearing (for example, a child is removed from home after having been placed in the home under protective supervision)[105] or
10. Orders issued at a review hearing[106] or a 12-month permanency hearing,[107] if the child is removed from the home at that time.

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[98] I.J.R. 16.
[99] I.C. § 16-1611(4).
[100] I.C. § 16-1615.
[101] *Id*.
[102] *Id*.
[103] I.C. § 16-1619 (Supp. 2014).
[104] *Id*.
[105] I.C. § 16-1623.
[106] I.C. § 16-1622.
[107] I.C. § 16-1622(2)(b).

1. Finding

The judge hearing a child protection case must make a finding that it would be "contrary to the welfare of the child to remain in the home."[108]

2. Timing

Federal law requires this finding to be made in the first order pertaining to the removal of the child from the home.[109] Idaho Code § 16-1615(5)(d) requires that the "contrary to the welfare finding" be made at the shelter care hearing and Idaho Code § 16-1619(6) requires that the "contrary to the welfare" finding be made at the adjudicatory hearing.

If the child has been removed from the home, the shelter care hearing is continued, and custody of the child is mentioned in any way, the contrary to the welfare finding must be made at that hearing.[110]

3. Corrective Action

If the "contrary to the welfare" determination is not made in the first court order pertaining to the child's removal from the home, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.[111] Additionally, the child will also likely be ineligible for federal adoption assistance payments.

If the "contrary to the welfare" finding was made but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[112]

B. Reasonable Efforts to Prevent Removal

1. Finding

A judicial determination must be made as to whether or not the Department made reasonable efforts to prevent the removal of the child from her/his home.[113]

2. Timing

Under federal law, the reasonable efforts to prevent removal finding must be made **no later than sixty (60) days from the date the child was removed from home.** Idaho law requires that the "reasonable efforts to prevent removal" finding be made at the shelter care and, if the court vests

[108] 42 U.S.C. § 672(a)(2)(A)(ii) (2012); I.C. §§ 16-1615(5)(d) (2009), 16-1619(6)(a-c) (Supp. 2014).
[109] 45 C.F.R. § 1356.21(c) (2011).
[110] 45 C.F.R. § 1356.21(c) (2011).
[111] *Id*.
[112] 45 C.F.R. § 1356.21(d)(1).
[113] 42 U.S.C. § 671(A)(15)(B)(1).

legal custody in the Department, at the adjudicatory hearing as well.[114] The adjudicatory hearing may not be continued to a date more than 60 days from the date of removal unless the court has made case specific, written, reasonable efforts to prevent removal findings.[115]

3. Corrective Action

Federal Law provides that "[i]f the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, an otherwise eligible child is not eligible under Title IV-E foster care maintenance payments program for the duration of the child's stay in foster care."[116]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than 60 days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent regarding a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

C. Removal from Protective Supervision

1. Finding and Timing

When the child returns home under protective supervision, the Department relinquishes custody of the child and custody of the child is returned to the parent(s). If the child is ultimately returned to care, it is treated as a new removal and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings must be made at the amended disposition hearing.[117]

2. Corrective Action

If the contrary to the welfare finding is not made in the first order of removal, which could be an order of removal or the order resulting from the amended disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[118]

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[114] 45 C.F.R. § 1356.21(b)(1)(i) and (ii); I.C. §§ 16-1615(5)(b) (2009), § 16-1619(6)(a-c) (Supp. 2014).
[115] I.J.R. 41(b).
[116] 45 C.F.R. § 1356.21(b)(1)(i) and (ii) (2011).
[117] I.J.R. §§ 16-1623 (Supp. 2014), I.C. § 16-1619; 42 U.S.C. § 672(a)(2)(B) (2012) and 45 C.F.R. § 1356.21(g)(3).
[118] 45 C.F.R. § 1356.21(c).

If the "contrary to the welfare" finding was made at the amended disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[119]

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent in regard to a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

D. Extended Home Visit

1. Finding and Timing

When a child is returned home on an extended home visit, the Department retains custody of the child, and the "contrary to the welfare" **and** "reasonable efforts to prevent removal" findings need be made only if the child is returned to care after a home visit that exceeds six months without prior court approval.[120]

2. Corrective Action

If the contrary to the welfare finding is not made in the first order of removal, which could be an Order of Removal or the order resulting from the amended disposition hearing, an otherwise eligible child will be rendered ineligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care. Additionally, the child will likely be ineligible for adoption assistance payments.[121]

If the "contrary to the welfare" finding was made at the amended disposition hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return a copy of the original order with the transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.[122]

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[119] 45 C.F.R. § 1356.21(d)(1) (2011).
[120] 45 C.F.R. § 1356.21(e).
[121] 45 C.F.R. § 1356.21(c).
[122] 45 C.F.R. § 1356.21(d)(1).

If the "reasonable efforts to prevent removal" finding was not made, or was incorrectly made, **and less than sixty (60) days have elapsed from the date of removal,** federal regulations recognize a subsequent reasonable efforts finding but do not allow the finding to be made in an amended order. A new hearing must be held and the finding timely made in an order issued as a result of the new hearing. Federal regulations, the Idaho Child Protective Act, and the Idaho Juvenile Rules are silent regarding a process for scheduling a hearing for this purpose.

If the "reasonable efforts to prevent removal" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to a copy of the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

E. Reasonable Efforts to Finalize the Permanency Plan

1. Finding

A judicial determination must be made as to whether the Department did or did not make reasonable efforts to finalize the permanency plan that was in effect. The finding must be a *retrospective review* of the efforts made by the Department to finalize the permanency plan *that is in effect*.[123] Idaho law requires that, after the permanency hearing, the court make "written case-specific findings" as to whether the "[D]epartment made reasonable efforts to finalize the primary permanency goal in effect for the child."[124]

2. Timing

This finding must be made **within 12 months of the date the child is considered to have entered foster care and at least once every 12 months thereafter.** A child is considered to have entered foster care on the earlier of the date of the first judicial finding that the child has been subjected to child abuse or neglect or the date that is 60 calendar days after the date on which the child is removed from the home. A state may use a date earlier than that required by federal regulations.[125]

Idaho law requires that the hearing to review the permanency plan be held ***prior to* 12 months** from the date the child is removed from the home or the date of the court's order taking jurisdiction under this chapter, whichever occurs first.[126]

Federal policy regarding the failure to make this finding and the ability to quickly reinstate such funding is as follows: "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section (45 C.F.R. § 1356.21), the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made, and

[123] 45 C.F.R. § 1356.21(b)(a)(i) and (ii).
[124] I.C. § 16-1622(2)(b) (Supp. 2014); I.J.R. 46(c).
[125] 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i) and (ii).
[126] I.C. § 16-1622(2)(b).

remains ineligible unless such a determination is subsequently made. The eligibility re-commences the first day of the month the finding is eventually made.[127]

3. Corrective Action

a. *Problem:* Twelve (12) month permanency plan hearing not held on time.

Action: Schedule and hold the permanency review hearing at the earliest possible date.

b. *Problem:* Twelve (12) month permanency plan hearing was held, but no (or incorrect) "reasonable efforts to finalize the primary permanency goal in effect" finding is made.

Action: If the "reasonable efforts to finalize the primary permanency goal in effect" finding was made at a hearing, but omitted from the resulting order, the court may attach a copy of the relevant portion of the transcript to the **original** order and return the order with attached transcript to the office of the Department of Health and Welfare handling the case. This will reinstate the child's eligibility.

If the "reasonable efforts to finalize the primary permanency goal in effect" finding was not made, or was incorrectly made, the finding must be made. The "reasonable efforts to finalize the primary permanency goal in effect" finding can be made by the court upon evidence presented to it by the state without a formal hearing. This finding can be made from the bench or from chambers based on testimony.[128] If the "reasonable efforts to finalize the permanency plan" finding is not made, not made within the mandated time frame, or made but the language of the finding is incorrect, IV-E funding will end on the last day of the month which is 12 months from the date of removal. The IV-E funding will be restored on the first day of the month in which the permanency hearing is held and the "reasonable efforts to finalize the primary permanency goal in effect plan" finding is made.

F. Placement and Care Authority

The state IV-E agency must have placement and care authority in order to be eligible for federal IV-E funding. Although placement and care authority is generally associated with legal custody there is no absolute federal requirement that legal custody be vested in the agency in order for the child to be eligible for IV-E funding. Legal custody may be translated to mean placement and care authority.[129]

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[127] 45 C.F.R. § 1356.21(b)(2)(ii).
[128] 42 U.S.C. § 672(a)(15)(B).
[129] 42 U.S.C. § 672(a) (2) (B)(1). *See also* U.S. Dept. Health & Human Services, Admin. for Children & Families Program Instruction ACYF-CB-PI-08-07 available at: http://www.acf.hhs.gov/programs/cb/resource/pi0807 (December 24, 2008) (last visited April 29, 2018).

If the court orders a child into a specific placement setting, facility, home, or institution, this action may be considered to have usurped the IV-E agency's authority for placement and care, thus making the child ineligible for federal IV-E funding.[130] When the court's order merely names the child's placement as an endorsement or approval, or generally references of the agency's choice, eligibility for IV-E funding is not precluded.[131]
Federal IV-E guidelines do not require that the court always concur with the agency's recommendation regarding placement. The IV-E guidelines state that the court may take testimony and after hearing such testimony or recommendations, including that from IV-E representatives and/or others, the court may accept such recommendations and name a specific placement in its order. In all such situations, the court should make it clear that the designation of the specific facility is based upon the evidence presented at the hearing and upon a bona fide consideration of the agency's recommendation regarding placement.[132]

G. Required Findings at Permanency and Review Hearing for Children and Youth in Foster Care and for APPLA Placements

In 2014, Congress passed the Preventing Sex Trafficking and Strengthening Families Act.[133] This Act limits the use of APPLA as a permanency goal to youth age sixteen and older and also imposes requirements on agencies and courts aimed at improving foster care placements for children and youth.[134] The requirements discussed below are effective in September 2015 (one year from the date of enactment). Because the legislation is so recent, implementing regulations have not been adopted by the Department of Health and Human Services although the Administration for Children, Youth, and Families has released an "Information Memorandum"[135] regarding the legislation.

1. APPLA Placements

Where the permanency goal for a youth sixteen or older is APPLA, the new federal law requires that IDHW document at each permanency hearing:

- The efforts to place the youth permanently with a parent, relative, or in a guardianship or adoptive placement.[136]
- The foster family follows the "reasonable and prudent parent standard" when making decisions regarding their foster child(ren). This Act defines the standard as the standard characterized by careful and sensible parental decisions that maintain a child's health,

[130] 45 C.F.R. § 1356.21(g) (3).
[131] 42 U.S.C. § 672(a)(2)(B); 45 C.F.R. § 1356.21(g)(3).
[132] U.S. Dept. Health & Human Services, Admin. for Children & Families Program Instruction ACYF-CB-PM-8.3A.12 available at: http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0807.htm (12/24/2008) (last visited April 29, 2018).
[133] 42 U.S.C. §675.
[134] 42 U.S.C. §675.
[135] U.S. Dept. Health & Human Services, Admin. for Children & Families Program Instruction ACYF-CB-PI-14-06 available at: http://www.acf.hhs.gov/programs/cb/resource/pi1406 (11/21/2014) (last visited April 29, 2018).
[136] 42 U.S.C. § 675A(a)(1).

safety and best interests while at the same time encouraging a child's emotional and developmental growth.[137]

- The child has regular opportunities to engage in "age or developmentally appropriate activities." Age and developmentally appropriate activitiesare defined as suitable, developmentally appropriate activities of children of a certain age or maturity level based on the capabilities typical for the age group and the individual child.[138]

In addition, at each permanency hearing, the judge must ask the youth about her or his desired permanency outcome. The court must make a finding that APPLA is the best permanency plan for the child and that there are compelling reasons why it is not in the child's best interests to be placed with a parent, relative, or in a guardianship or adoptive placement.[139]

2. Youth Transitioning to Adulthood

Finally, the act requires that the case plan and permanency hearing must describe the services to help youth transition to successful adulthood.[140]

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[137] *Id*. at (10)(A).
[138] *Id*. at (11)(A).
[139] 42 U.S.C. § 675A(a)(2)(B).
[140] *Id*. at §§ (1)(B),(1)(D),(5)(C)(i) and (5)(C)(iii).

12.7 INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

A. Introduction

The Interstate Compact on the Placement of Children[141] (ICPC) is the best means to ensure protection of and services to children who are placed across state lines for foster care or adoption. The Compact is a both an interstate agreement and a uniform law that has been enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands.[142] It establishes orderly procedures for the interstate placement of children and fixes responsibility for those involved in placing the child. Provisions of the Compact ensure the same protection and services to children as if they had remained in their home state. The compact contains 10 Articles and 13 Regulations. The Association of Administrators of the ICPC ("AAICPC") promulgates regulations.

Although the ICPC includes private adoptions and placements for residential care, the majority of Idaho ICPC cases involve children in foster care. According to statistics provided and maintained by IDHW's ICPC Compact Administrator, each year, Idaho processes between 1,000-1,100 total ICPC requests, with the majority being public cases. From those ICPC requests, about 300 placements are made from other states with Idaho families, and roughly 200 placements are made from Idaho public agencies with out-of-state families.

The ICPC has been the subject of much criticism in recent years. In 2009, AAICPC proposed revisions to the ICPC. These revisions were controversial and have only been adopted in 10 states. Idaho has not adopted the revisions. The AAICPC has published a side-by-side comparison of the original ICPC and the new ICPC and maintains information on which states have adopted the new compact.[143]

B. Goals of the ICPC

1. Safety

The ICPC provides the sending agency[144] the opportunity to obtain home studies in the receiving state prior to placement of the child. Originally, prospective receiving

[141] Interstate Compact on the Placement of Children, available at http://icpcstatepages.org/Idaho/info/ (last visited April 29, 2015). The Compact is codified in Idaho at I.C. §§ 16-2101 – 16-2107 (2009).

[142] An interstate compact is an agreement between two or more states of the United States of America. Article I, Section 10 of the United States Constitution provides that "no state shall enter into an agreement or compact with another state" without the consent of Congress. Frequently, these agreements create a new governmental agency that is responsible for administering or improving some shared resource such as a seaport or public transportation infrastructure. In some cases, a compact serves simply as a coordination mechanism between independent authorities in the member states. *See* Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS 13, 14 (1994).

[143] New ICPC, available at http://www.aphsa.org/content/AAICPC/en/NewICPC.html (last visited April 29, 2015). The criticisms of the ICPC and of the new ICPC are discussed in Vivek Sankaran, *Wells Conference on Adoption Law: Judicial Oversight Over the Interstate Placement of Foster Children: The Missing Element in Current Efforts to Reform the Interstate Compact on the Placement of Children*, 38 CAP. U.L. REV. 385 (2009).

[144] I.C. § 16-2102, Art. III(b) ("Sending agency" is defined in the ICPC as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought, any child to another party state.").

state were asked to ensure that the placement was not "contrary to the best interests of the child" and that all applicable laws and policies are followed before it approved the placement. However, in 2013, the AAICPC asked ICPC administrators to review how parents were being evaluated in home studies and to carefully scrutinize denials for parent placement requests. Compact administrators were asked to work within their respective states to apply the standard for placement approval of "Would placement with the parent be detrimental to the child?" rather than the previous contrary to the best interests standard. Parent denials should be based on clear and identifiable safety issues or the inability of a parent to meet a child's basic needs. If a parent can meet minimum sufficient levels of care standards, placement with a parent should be approved.

2. Permanency and Well-Being

The ICPC guarantees the child's legal and financial protection once the child moves to the receiving state.[145] The receiving agency agrees to provide supervision and send regular reports on the child's adjustment and progress in the placement to the sending agency and ensures the sending state does not lose jurisdiction over the child.[146]

C. Situations Where the ICPC Applies

The core provision of the ICPC establishes that:

> No sending agency shall send, bring or cause to be sent or brought into any other party state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and wit the applicable laws of the receiving state governing the placement of children therein.[147]

Pursuant to this provision and the definitions in Article II of the Compact, the ICPC applies to the following situations where the child is being placed from one state to another:

- Children who are within the custody of the Department (or in a parallel arrangement in another state) and who are being placed with a parent or relative when a parent or relative is not making the placement.
- Children who are entering foster care or a placement for the purpose of adoption.
- Children who are within the custody of the Department (or in a parallel arrangement in another state) for placement in a group home and/or residential treatment facility.
- Children who are to be placed in a group home and/or residential treatment facility by a legal guardian.

[145] I.C. § 16-2102, Art. II(c) ("Receiving state" is defined in the ICPC as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local authorities or for placement with private agencies or persons.").
[146] I.C. § 16-2102, Art. V.
[147] I.C. § 16-2102, Art. III(a).

- Children who are placed by a legal guardian with a person outside of the third degree of relationship, *i.e.* child's second cousin.
- Children who are adjudicated delinquents for placement in a group home and/or residential treatment facility.[148]

The Compact does not apply to placement of children in an institution that cares for the "mentally ill, mentally defective or for individuals with epilepsy, or an institution that is primarily educational in character, and/or a hospital or other medical facility."[149]

D. Placement and Maintaining Jurisdiction

Under the compact, the sending state must provide written notice to the appropriate public authorities in the receiving state of "the intention to send, bring, or place the child in the receiving state."[150] The notice must contain: 1) the name, date and place of birth of the child; 2) the identity and address(es) of the parents or legal guardians of the child; 3) the name and address of the person, agency or institution to which the sending agency proposes to send the child; and 4) a "full statement" of the reasons the child is being sent and the authority pursuant to which the proposed placement is being made.[151]

A child may not be sent to a receiving state until the receiving state notifies the sending state that the placement is in the best interests of the child.[152] In order to make this determination, once notice of the proposed interstate placement is received by the public authorities in the receiving state, the receiving state may request, and is entitled to receive, additional information necessary to carry out the purposes of the compact.[153]

Finally, pursuant to the ICPC, the sending state must maintain jurisdiction until the child is adopted, reaches the age of majority, or the child protection case is closed with concurrence from the receiving state.[154]

E. Timeframes

Under the Safe and Timely Interstate Placement of Foster Children Act of 2006, all states are required to have home studies completed and back to the sending state within 60 calendar days. Failure to do so could result in penalties for the state failing to complete the home study within the timeframes. Permission to place continues to be valid for six months.[155]

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[148] I.C. § 16-2102, Art. VI.
[149] I.C. § 16-2102, Art. II(d). This language, directly from the statute, does not reflect currently accepted vocabulary discussing children with special needs.
[150] I.C. § 16-2102, Art. III(b).
[151] *Id*.
[152] I.C. § 16-2102, Art. III(d).
[153] I.C. § 16-2102, Art. III(c).
[154] I.C. § 16-2102, Art. V(a).
[155] 42 U.S.C. § 671(a)(25)-(26) (2011).

F. Special Cases

1. Regulation 1 – Intact Moves

a. Temporary moves

Regulation 1[156] of the ICPC applies when a child is placed with a family and the family plans to move to another state.[157] Pursuant to the regulation, the child may accompany the family to the new state (the receiving state). If the child will be in the receiving state for 90 days or less, the receiving state has no obligations. The sending state (the state from which the child moved) has the duty to ensure the child's safety while the child is in the receiving state. If the child will be temporarily moving to the receiving state for more than 90 days, the sending state must take action to ensure the safety of the child while in the receiving state, including seeking return of the child if the receiving state requests that the child return to the sending state. The receiving state must conduct a home study and approve the child's placement.

b. Provisional approvals

If the child moves to the receiving state prior to completing the ICPC process, the sending state must, nonetheless, request that the receiving state respond to the relocation within five days of its decision to send the child. The sending state must provide required documentation to the receiving state. Upon request, the receiving state must reply within five days and conduct a home study, which must be completed within 60 days. During the transition, Regulation 1 provides that the receiving state must honor the home study completed in the sending state until it is able to complete its own evaluation.[158]

The procedure for provisional approval should be used sparingly. One of the purposes of the ICPC is to ensure the sending state's continuing authority over a child under its exclusive jurisdiction. Sending a child to another state without the protection of an ICPC approval will make enforcement of the sending state's court orders more difficult.

2. Regulation 7 – Priority Cases Involving Placement with a Relative Only

ICPC Regulation 7 provides for expedited handling of interstate placements with a relative under some circumstances. Pursuant to Regulation 7, a request can be made when the proposed placement is with a relative AND the child is under four years OR the child is in an emergency shelter OR the court finds the child has a substantial relationship

[156] The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) is an interstate agency consisting of representatives from all 50 states that has the authority under the ICPC to "promulgate rules and regulations to carry out more effectively the terms and provisions of the compact." *See* I.C. § 16-2102 Art. VII (2009). The regulations adopted by AAICPC are available at: http://www.aphsa.org/content/AAICPC/en/ICPCRegulations.html (last visited April 29, 2015).
[157] INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, Reg. No. 1(3)(2010), available at http://www.aphsa.org/content/AAICPC/en/ICPCRegulations.html (last visited April 29, 2015).
[158] *Id*. at Reg. No. 1(5)-(6).

with the proposed placement.[159] Regulation 7 requires a court to make the specific finding just described in order to qualify for expedited handling.[160]

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[159] *Id*. at Reg. No. 7(6)(a).
[160] *Id*.

12.8 IDAHO JUVENILE RULE 40: INVOLVING CHILDREN AND FOSTER PARENTS IN COURT

Children and youth are the most important part of a child protection case, and making decisions based on the young person's best interests requires her or his voice to be heard throughout the proceedings. Children and youth are often understandably frustrated when they are excluded from court proceedings in which their family relationships, physical safety, health, education, and where they will live are all at stake.[161] With this fundamental idea in mind, Idaho Juvenile Rule 40 was enacted to give children and youth (and foster parents), after phase I of the Adjudicatory hearing the right to notice and the right to be heard at each subsequent stage of the proceedings.

IJR 40 requires that a foster parent, pre-adoptive parent, relative placement, and/or a child eight years of age or older, must be provided with notice of, and have a right to be heard in, any post-adjudicatory hearings to be held with respect to the child.[162] This does not give foster parents, pre-adoptive parents, or relative placements the status of a party to the proceedings.[163] The Department has the duty of providing notice to the individuals included in Rule 40 and must confirm to the court that notice was given.[164] To further the policy of giving children a voice in the courtroom, the guardian *ad litem* appointed to the case has the duty of inquiring of any child capable of expressing her or his wishes and including the child's express wishes in the report to the court.[165]

Many judges and child welfare advocates have concluded that children should be present in court to have their voices heard in the proceedings. Many questions arise from both judges and practitioners on how to best involve children and youth in the proceedings and gain insights to aid decision making. One question that often arises concerns *ex-parte* communications between the youth and judge. In *State of Idaho v. Clouse*,[166] the court determined it was permissible for the judge to interview the child in chambers, with no record taken and where parents' counsel was not permitted to cross-examine. The court applied the reasoning used in domestic relations cases. Considering both the *Clouse* decision and the Idaho Code of Judicial Conduct,[167] some best practice recommendations for interviewing the child or youth in chambers include:

- Getting parties' consent to such an interview on the record
- Making a record of the interview
- If possible, having counsel (but not parents) present
- Having an advocate available to accompany the child
- Offering parties and/or counsel an opportunity to submit questions if either will not be present during the interview

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[161] William G. Jones, *Making Youth a Meaningful Part of the Court Process,* JUV. & FAM. JUSTICE TODAY 16 (Fall 2006).
[162] I.J.R. 40(a),(b).
[163] I.J.R. 40(a).
[164] *Id*.
[165] I.C.§ 16-1633(2).
[166] 93 Idaho 893, 477 P.2d 834 (1970).
[167] "A judge may not have *ex parte* communications concerning a pending proceeding with any party on any substantive matter." IDAHO CODE OF JUDICIAL CONDUCT CANNON 3-(B)(7).

Another concern often voiced by judges and child welfare experts is that information discussed in court may be disturbing and upsetting to children and youth who attend the hearings. It is worth noting that children and youth are involved in court proceedings because of real-life events they have experienced. They have already been exposed to, and survived, the harsh realities ultimately discussed in court. If certain parts of the proceeding are unusually upsetting, the child or youth can be excluded for that part of the hearing. Participation allows the child or youth to hear how the parent has progressed in meeting requirements and to have a better ability to come to terms with what the court orders.[168] If children or youth are excluded for part of the hearing, best practice is to allow them to return at the conclusion of the hearing so that they are available to hear the outcome of the hearing.

Finally, concerns arise over disruptions in the child's or youth's schedule to attend court hearings. The judge can alleviate some of this concern by scheduling hearing times so child or youth miss the least amount of school possible. Ensure the hearings are scheduled before or after school hours or on school holidays. The judge can also ensure that when youth are present, he or she hears those cases first.

While the child or youth is in court, the role of the judge, attorneys, and child welfare workers is twofold: to make the experience a positive one, and to gain as much relevant information about the child and family as possible.[169] The following best practice tips accomplish both tasks:

- Arrange for or allow children or youth to have a support person present if they desire.
- Provide age-appropriate reading material describing the court process to the child or youth and a list of some legal terms and definitions that may be used during the hearing.
- Address the child or youth directly using a supportive voice and making eye contact.
- Explain your role to the child or youth and explain what issues you can address.
- Avoid acronyms or legal jargon that a child or youth would not understand.[170]

Most importantly, take the time to prepare for a child's or youth's involvement using proper language, asking good questions, and talking about the right issues.

When children and youth have a voice in court and the opportunity to participate in the critical processes that profoundly impact their lives, the entire system benefits from better-informed decision-making. Whether the child or youth attends a hearing, or the social worker, guardian *ad litem*, or child's attorney informs the court of the child's or youth's wishes, the child or youth has the chance to be heard and to make an impact on some of the most important decisions in her/his life.

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[168] ANDREA KHOURY, ESTABLISHING POLICIES FOR YOUTH IN COURT—OVERCOMING COMMON CONCERNS (2008) available at http://www.isc.idaho.gov/cp/docs/Establishing%20Policies%20for%20Youth%20in%20Court-Common%20Concerns.pdf (last visited April 3, 2018).

[169] Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court,* A.B.A. CHILD L. PRACTICE, Nov. 2007.

[170] Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court,* A.B.A. CHILD L. PRACTICE, Nov. 2007.

12.9 EDUCATIONAL NEEDS OF CHILDREN

"Our greatest natural resource is the minds of our children." – Walt Disney

A. Overview

When children come into care for abuse, neglect, abandonment, or unstable homes, it is almost certain that their education has been harmed in some way by the action or inaction of their parents. Studies have confirmed this fact.[171]

Research indicates that "[e]ach year, an estimated 400,000–440,000 infants (10–11% of all births) are affected by prenatal alcohol or illicit drug exposure. Prenatal exposure to alcohol, tobacco, and illicit drugs has the potential to cause a wide spectrum of physical, emotional, and developmental problems for these infants. The harm caused to the child can be significant and long-lasting, especially if the exposure is not detected and the effects are not treated as soon as possible."[172] Exposure to maltreatment as a child is especially detrimental in the context of education. Children's "brains are developing at life-altering rates of speed. Maltreatment chemically alters that development and can lead to permanent damage to the brains architecture. Every year, 196,476 children from birth to 3 years old come into contact with the child welfare system."[173]

Other issues in the home, such as tobacco use, have also been linked to cognitive problems for children:

> The effects of prenatal tobacco exposure are particularly concerning because so many expectant mothers smoke---by one estimate, over 10 percent in the United States. In utero exposure to tobacco byproducts had been linked to cognitive deficits in laboratory animals and human adolescents. Some studies suggest that such exposure can lower general intelligence; for example, one found a 12-point gap in full scale IQ between exposed and unexposed middle-class adolescents. In another study, the odds of having attention deficit hyperactivity disorder (ADHD) were more than three times as great for adolescents whose mothers smoked during pregnancy compared with children of nonsmoking mothers.[174]

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[171] ADVOCATES FOR CHILDREN OF NEW YORK, INC. EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER DARE SYSTEM (2000) available at http://www.eric.ed.gov/PDFS/ED443910.pdf (last visited April 30, 2018); MARK E. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004); PETER J. PECORA, P., ET. AL. ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY (2003).

[172] Nancy K. Young et al., SUBSTANCE EXPOSED INFANTS: STATE RESPONSES TO THE PROBLEM 9 (2009), *available at* http://www.ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf (last visited April 30, 2018).

[173] Matthew E. Melmed, A CALL TO ACTION FOR INFANTS AND TODDLERS IN FOSTER CARE (2011) available at ZerotoThree.org, http://mha.ohio.gov/Portals/0/assets/Initiatives/TIC/ChildrenYouthAdolescents/A%20Call%20to%20Action%20for%20Infants%20and%20Toddlers%20in%20Foster%20Care.pdf (last visited April 30, 2018).

[174] Thomas J. Gould, *Addiction and Cognition*, NIDA ADDICTION SCIENCE & CLINICAL PRACTICE, Dec. 2010 at 4.

Studies report that up to 47% of children and youth in foster care receive special education services at some time in their schooling.[175]

Medicaid pays for 37% of births nationally and well above that level in several states. The good news is that interventions at birth for substance-exposed infants can remedy much of the harm and have the children ready for success when entering school. The bad news is that few states pay for or provide these expensive comprehensive services and parents in poverty are not always well equipped to access existing services or advocate for their children. The best option is prevention. Healthcare providers that take the time to educate expectant mothers see significant reductions in prenatal substance abuse. Early intervention for substance-exposed infants can also prevent a lifetime of expensive services and costs to the criminal justice system.[176]

"From the moment of conception to the initial, tentative step into a kindergarten classroom, early childhood development takes place at a rate that exceeds any other stage of life. The capacity to learn and absorb is simply astonishing in these first years of life. What impact does childcare have on a child's development? What lasting toll does family stress have on a child? What are the most important known influences on early brain development? Can early interventions alter the course of early development for the better? The conclusions and recommendations are very specific and derived from a rich and extensive knowledge base firmly grounded in four core themes:

1. All children are born wired for feelings and ready to learn.
2. Early environments matter and nurturing relationships are essential.
3. Society is changing and the needs of young children are not being addressed.
4. Interactions among early childhood science, policy, and practice are problematic and demand rethinking."[177]

B. Legal Framework for Assessing Educational Needs

1. Federal Law

In response to the clear data of a failed system in regards to educational needs of foster children, the federal government has responded with legislation designed to motivate local jurisdictions. These include:

a. The Fostering Connections to Success and Increasing Adoptions Act of 2008.[178] (Fostering Connections) This act places the responsibility on local child welfare agencies to collaborate with local school districts for the educational success of foster children. Reimbursement (part of IV-E funding going to the Department) helps pay for transportation to keep foster children in their original school when appropriate.

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[175] COURTNEY, *supra* note 1 at 40, Tbl. 38.
[176] Young, *supra* note 2 at 4-5.
[177] NATIONAL RESEARCH COUNCIL AND INSTITUTE OF MEDICINE, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 4 (Jack P. Shonkoff & Deborah Phillips eds. 2000).
[178] Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. No. 110-351, 122 Stat. 3949 (2008), amending portions of 42 U.S.C. § 671 - 675 (2012).

b. The McKinney Vento Homeless Assistance Act (McKinney Vento).[179] This act forces action by local school districts to support educational efforts of the Department with the threat of loss of federal funds for non-action.

Of the two laws, Fostering Connections is far more comprehensive and implemented by state child welfare agencies. McKinney Vento directs the efforts of local school districts, and the districts are responsible for the cost of implementation. On the issue of who pays the cost of meeting children's special needs – the child welfare agency or the schools – the courts can bring the parties together in a comprehensive manner. The case plan must include "an assurance that the state [or local child welfare agency] has coordinated with appropriate local education agencies … to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement" unless moving is in the child's best interest.[180]

Unique challenges exist in Idaho because of differences in the size and resources available in school districts around the state. For some children, it may be helpful to move the child to a county where needed services are available. If this option is considered, care should be taken to look at the transferability of any existing or needed "Individual Education Program" (IEP) plans. The latest version of the Individuals with Disabilities Education Act (IDEA 2004) made parents of children with special needs even more crucial members of their child's education team. Parents can now work with educators to develop an IEP. The IEP describes the goals the team sets for a child during the school year, as well as any special support needed to help achieve them. The plan should address who is to act in the role of parent and interact with the school on educational issues -- the foster parents, the caseworker, or a specially assigned educational advocate. The child's case plan must include "assurances that the placement of a child in foster care takes into account the appropriateness of the current educational setting and proximity to the school in which the child is enrolled at the time of placement."[181]

C. Idaho Law

Idaho has responded to the educational needs of children by amending the definition of neglect in the CPA. It now provides:

> (26) "Neglected" means a child:
> (d) Who is without proper education because of the failure to comply with section 33-202, Idaho Code [mandatory school attendance].[182]

Idaho statutes relating to education provide guidance on what constitutes a "proper education." For example, the state compulsory school attendance law provides:

> The parent or guardian of any child resident in this state who has attained the age of seven (7) years at the time of the commencement of school in his district, but not the age

[179] McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11301 – 11432 (2012).
[180] 42 U.S.C. § 675(1)(G) (2012). *See U.S. Department of Education, Building the Legacy: IDEA 2004* for general information about the Individuals with Disabilities Education Act (IDEA) at http://idea.ed.gov/ (last visited April 30, 2018).
[181] *Id.*
[182] I.C. § 16-1602(26) (Supp. 2014).

> of sixteen (16) years, shall cause the child to be instructed in subjects commonly and usually taught in the public schools of the state of Idaho. To accomplish this, a parent or guardian shall either cause the child to be privately instructed by, or at the direction of, his parent or guardian; or enrolled in a public school or public charter school, including an on-line or virtual charter school or private or parochial school during a period in each year equal to that in which the public schools are in session; there to conform to the attendance policies and regulations established by the board of trustees, or other governing body, operating the school attended.[183]

In addition, Idaho Code section 16-1621(3)(a) regarding the case plan hearing requires that the child's educational needs be met by the case plan. Section 16-1621(3)(a) and (b) requires that the case plan identify services to be provided including services to: (a)…meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, or to ensure the stability of the placement; (b) address options for maintaining the child's connection to the community, including individuals with a significant relationship to this child, and organizations or community activities with who the child has a significant connection"[184]

D. Issues for Social Workers Regarding Education Needs of Children

The child protection system can appear to require social workers to manage a child's situation in inconsistent ways. For example, the CPA's concurrent planning requirement means that caseworkers must to seek to reunify the child with the parents and, at the same time, plan for failure by developing a permanency plan if reunification is not timely. Educational mandates described above can raise similar conflicts – should a social worker keep a child in his home school or place the child in a foster placement that will require the child to be in a different school district or even state?

Social workers are trained to evaluate cases by focusing on an escalating ladder of risk assessment, starting at addressing immediate safety issues and escalating through imminent risk, risk of harm, imminent risk of severe harm, immediate physical danger, threat of harm, and finally, threat of imminent harm.[185] It is not always obvious how the child's educational needs fit into this type of assessment. It is not likely that the Department will pursue many CPA cases simply based on educational neglect. Yet, a child with unmet educational needs may face many future obstacles. Nonetheless, educational issues are more likely to surface through truancy charges in juvenile court or charges against the parents rather than through a CPA case.

Social workers making school stability determinations need to document and justify their actions to the court in review hearings. Best practice is to answer these questions in the Department's reports to the court:

1. How was the best interest determination made for the child's school selection?
2. Who made the best interest decision?

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[183] I.C. § 33-202 (Supp. 2014).
[184] I.C. § 16-1621 (a) and (b).
[185] *See* Therese Roe Lund & Jennifer Renne, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-19 (2009).

3. What role did the parents play in making these decisions?
4. If there were disputes how were they resolved?
5. How did the Department and the school district collaborate?
6. How long is the child's current placement expected to last?
7. How many schools has the child attended this year? The past few years?
8. How strong is the child academically?
9. What is the availability of programs and activities at the different school options?
10. Which school does the student prefer?
11. How deep are the child's ties to the school?
12. How was the timing of a transfer decided? End of year or testing timing?
13. How did changing schools affect the student's ability to earn full credits, participate in sports or extra-curricular activities, or graduate on time?
14. How does the length of the commute to the school of origin impact the child?
15. What school do the child's siblings attend?
16. Are there any safety issues to consider?[186]

E. Suggested Questions for Judges to Assess a Child's Educational Needs

Throughout the planning process, the court should assure that all of the educational needs of the child are being addressed. In protective supervision cases and in cases progressing towards reunification, focus must be placed on the caregivers learning about the importance of education, about how to help their child succeed in school, and about how to advocate for the educational needs of their child.

As a matter of best practice, judges should read the reports provided by the Department and the guardian *ad litem*. The new reports provided to the courts in Idaho have space dedicated to answering many of the educational questions a judge may have.

A team effort between the National Council of Juvenile and Family Court Judges, Casey Family Programs, and Team Child Advocacy for Youth developed a technical assistance brief in 2005 for the use of judges and others entitled "Asking the Right Questions."[187] It provides judicial checklists to ensure that the educational needs of children and youth in foster care are being addressed. As a matter of best practice, judges, practitioners, and social workers are encouraged to use the extensive checklists found in the judicial bench cards, which compliment this manual.

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[186] *See* THE LEGAL CENTER FOR FOSTER CARE & THE NATIONAL CENTER FOR HOMELESS EDUCATION, SCHOOL SELECTION FOR STUDENTS IN OUT-OF-HOME CARE *available at* http://center.serve.org/nche/downloads/briefs/school_sel_in_care.pdf (last visited April 30, 2018).

[187] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CASEY FAMILY PROGRAMS, &TEAM CHILD ADVOCACY FOR YOUTH, ASKING THE RIGHT QUESTIONS II: A JUDICIAL CHECKLIST TO ENSURE THAT THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE ARE BEING ASSESSED (2008) *available at* http://www.ncjfcj.org/resource-library/publications/asking-right-questions-ii-judicial-checklists-meet-educational-needs (last visited April 30, 2018).

12.10 TRANSITION to SUCCESSFUL ADULTHOOD[188]

On any given day, more than 463,000 children and youth are in out-of-home care across the United States.[189] Of these children, an estimated 39% were identified as being 13 years of age or older[190] and more than 29,000 of these youth reach an age at which they must make the transition out of the child welfare system, whether or not they possess the skills and support necessary to live successfully on their own.[191] Youth who have experienced abuse, neglect, and other circumstances resulting in out-of-home placement often need additional resources to reach their full potential after leaving the child welfare system.

Independent Living services are intended to mitigate negative outcomes for former foster youth and enhance their chances for success as adults. The services provided by Idaho's Independent Living Program support older youth in foster care and assist them in developing the skills they need to live as responsible and successful adults.[192] Recognizing the unique challenges of older youth who have lived in foster care, the federal government established the Chafee Foster Care Independence Program and appropriated funds to states to assure a minimum level of preparation for independent living for older youth who have been in foster care.[193]

Effective September 15, 2015, the federal Preventing Sex Trafficking and Strengthening Families Act requires that for youth age 14 and over:

- The case plan must document the youth's education, health, visitation, and court participation rights, as well as the child's right to receive an annual credit report. The case plan must include a signed acknowledgement that these rights were explained to the youth in a developmentally appropriate way and that the youth received these services.[194]
- The youth must be involved in, and consulted regarding, the development of the case plan. At the option of the youth, the case planning team must include two members who are not the caseworker and the foster parent.[195]
- At the case plan and permanency hearings, the services to help youth transition to successful adulthood must be described.[196]

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[188] The Department is in the process of transitioning from the use of "Independent Living" to "Transition to Successful Adulthood."
[189] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU, FOSTER CARE STATISTICS 2012 (2013) *available at the Child Welfare Information Gateway*, https://www.childwelfare.gov/pubs/factsheets/foster/ (last visited March 28, 2018).
[190] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2007.
[191] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2008.
[192] IDAHO DEPARTMENT OF HEALTH AND WELFARE INDEPENDENT LIVING PROGRAM *available at* http://www.healthandwelfare.idaho.gov/Children/AdoptionFosterCare/IndependentLivingProgram/tabid/158/Default.aspx (last visited March 28, 2018).
[193] 42 U.S.C. §§ 677(b)(2)(A), 677(a)(1)-(7) (2012).
[194] Preventing Sex Trafficking and Strengthening Families Act, 42 U.S.C. § 675A(1)(b), §675(I).
[195] 42 U.S.C. § 675(1)(B), (5)(C)(iv).
[196] 42 U.S.C. § 675(1)(D), (5)(C)(i).

The goals of Idaho's Independent Living program are to achieve the goals of the Chafee Act:[197]

1. Help youth transition to self-sufficiency.
2. Help youth receive the education, training, and services necessary to obtain employment.
3. Help youth prepare for and enter postsecondary training and education institutions.
4. Provide personal and emotional support to youth aging out of foster care through mentors and the promotion of interactions with dedicated adults.
5. Provide financial, housing, counseling, employment, education and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency.
6. Assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition into adulthood.
7. Make available vouchers for education and training, including postsecondary education, to youth who have aged out of foster care.
8. Provide services to youth who, after attaining 16 years of age, have left foster care for kinship guardianship or adoption.[198]

To be eligible for Independent Living Services in Idaho, youth must meet all of the following criteria:

- be, or have been, the responsibility of the state or an Indian tribe either through a court order or voluntary placement agreement with the child's family,
- be between the ages of 14 and 21 years,
- resided in an eligible placement setting which includes foster care, group care, Indian boarding school, or similar foster care placement and excludes inpatient hospital stays, detention facilities, forestry camps, or other settings primarily designed for services to delinquent youth, and
- have resided in an eligible foster care setting for 90 cumulative days after the 14th birthday.

Every youth, 14 years of age or older and in the custody of IDHW, must have an individualized Independent Living (IL) Plan that includes a permanency plan and independent living skill development and is updated at least annually. For a youth who has attained 14 years of age, the permanency plan approved by the court must include the services needed to assist the youth to make the transition from foster care to successful adulthood.[199] Idaho law requires that at permanency hearings for youth who are 14 or older, a determination of the services needed to assist the youth to make the transition from foster care to successful adulthood must be identified.[200]

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[197] *Id.*
[198] 42 U.S.C. § 677(a).
[199] I.C. § 16-1621(3)(d)(vii).
[200] I. C. § 16-1622(2)(e); see also 42 U.S.C. § 675(1)(D).

Independent Living planning continues at 17 and 18, but formal transition planning is added at age 17 to assure that youth are prepared to move into independent living at age 18. Transition planning includes assessing the youth's readiness, resources, and skills and providing individualized services to prepare each youth to live as independently as possible after leaving care.

No earlier than 60 days before and no later than 60 days after the youth's 17th birthday, a transition planning meeting must be held. Transition planning participants include the youth for whom the plan is being developed, foster parents, biological parent(s) and family when appropriate, youth mentors, educators, service providers, and others requested by the youth or specific to the youth's needs. The plan should provide for a stable transition and support network for the youth during the transition period and following the exit from care. The Transition Plan is part of the youth's IL Plan and is required at two points, when the youth in care turns 17 and when the youth is within 90 days of aging out of care. [201]

The Fostering Connections to Success and Adoption Assistance Act of 2008 requires a Transition Plan be completed during the 90-day period immediately prior to a youth's 18th birthday or when the youth ages out of care.[202] This plan must be "personalized at the direction of the youth." Within those 90 days, the IL Transition Plan developed must be reviewed and updated to ensure that the final IL Transition Plan reflects the current status and needs of the youth.

A youth who has a final IL transition plan must be given information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if the youth becomes unable to participate in such decisions and the youth does not have, or does not want, a relative who would otherwise be authorized under State law to make such decisions.[203] The final IL transition plan provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law.

Before youth age out of foster care, they are to be given a Health and Education Passport. The passport should include the following documents:

- Birth Certificate
- Social Security Card
- Immunization Record: Complete and up to date
- Health Records and Medical Card: Allergies, hospitalizations, treatments, medications, list of all past medical exams with any diagnoses or childhood diseases
- Medical Insurance Card
- Driver's License or State-Issued Identification Card

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[201] 5 YEAR CHILD AND FAMILY SERVICES REPORT (CFSP) JULY 1, 2015 – JUNE 30, 2019, IDAHO DEPARTMENT OF HEALTH AND WELFARE, DIVISION OF FAMILY AND COMMUNITY SERVICES, CHILD AND FAMILY SERVICES 26 *available at* http://www.healthandwelfare.idaho.gov/LinkClick.aspx?fileticket=eN6p0J8AuT8%3d&tabid=74&portalid=0&mid=831 (last visited March 28, 2018).

[202] 42 U.S.C. § 677.

[203] *Id*.

- Information about the importance of designating another individual to make health care treatment decisions on behalf of the youth if he/she is unable to participate in such decisions, specifically as found in Idaho's Living Wills and Idaho's Natural Death Act
- Education Record: Past and present schools attended, report cards, IEP's, transcripts, letters of achievement
- Independent Living Plan: Most recent Independent Living Transition Plan
- Letter of Verification of Dependency in the State of Idaho: Letter of verification, which establishes eligibility for future IL services and enables the youth to receive IL services from another state if they leave Idaho
- Permanency Pact: Developed before the youth leaves care
- Education and Training Voucher (ETV) information
- State and regional resource guides, as available[204]

When the state fails to connect youth to a permanent legal family, youth struggle to create their own family or support network to meet legal, emotional, psychological, and cultural needs. Youth who age out of the system are less likely than their peers in the general population to achieve academic milestones, and find employment opportunities. They are more likely to experience violence, homelessness, mental illness, and poor health outcomes.[205] Independent living advocacy in the courtroom at each hearing, collaboration between all the child welfare participants, and close monitoring of the youth's independent living needs will ensure that the youths' needs are being met and that youth receive the supports they need for future stability and success.

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[204] CFSP Report, *supra* note 196, at 27.
[205] CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE (2008) *available at* http://isc.idaho.gov/cp/docs/Improving%20Outcomes%20for%20Older%20Youth.pdf (last visited March 28, 2018).

12.11 GUARDIANSHIPS

A. Introduction

When considering permanency options for a child, the Department and the court must take into account the permanency priorities set forth in federal law.[206] These federal permanency priorities are also embedded in the CPA.[207] They favor permanency options that maximize long term permanency and stability for the child. The highest priority permanency goal is to reunify the child with her or his parents. If the CPA court determines that reunification is not an appropriate goal the next highest priority is termination of parental rights and adoption. Guardianship is the third priority permanency goal. If these three permanency goals are not available, the child may be placed in another planned permanent living arrangement (APPLA). APPLA is only available as a placement option for a youth 16 years or older.[208]

B. Role of the Guardian

The objective for guardianship in the child protection context is to make the placement as permanent as possible even though the child is not being reunified with parents or adopted. The guardian will be undertaking a responsibility that is intended to be as close to adoption as possible, subject only to the rights that are reserved to the parents under the guardianship statute or in the order appointing the guardian(s).[209] Idaho law imposes a higher standard to modify or terminate a guardianship that is connected to a child protection case.[210] The best practice is for the court to ensure, through careful inquiry, that both the parents and the guardian understand that upon appointment, the "guardian has the rights and responsibilities of a parent upon being appointed, and a guardian in her or his discretion has the authority to have the custody of the ward and to determine with whom and under what conditions the ward can visit others."[211]

C. Requirements for a Guardianship

The Idaho Guardianship of Minors Statute (IGMS) provides that a court may appoint a guardian under two circumstances. First, a guardian can be appointed if "all parental rights of custody" have been terminated by a prior court order.[212] This ground is not generally used in child protection situations. Where parental rights have been terminated in the child protection context, adoption is the preferred permanency option. A guardianship may also be appointed "upon a finding that the child has been neglected, abused, abandoned, or whose parents are unable to provide a stable home environment."[213]

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[206] 42 U.S.C. § 675(5)(B). Cite to the CFR, also
[207] I.C. § 16-1622(2)
[208] *See* Chapter 7 of this manual for a detailed discussion of APPLA.
[209] See I.C. § 15-5-209 (detailing the powers and duties of a guardian). *See also* Doe v. Doe, 160 Idaho 311, 313, 372 P.3d 366, 368 (2016)(citing I.C. §15-5-209 and emphasizing that a guardian has the powers and responsibilities of a parent).
[210] I.C. § 15-5-212(5) & (6).
[211] Doe, 160 Idaho at 313, 372 P. 3d at 368.
[212] I.C. § 15-5-204
[213] *Id*.

The IGMS does not define "abused", "neglected" or "unstable home environment." The statute provides that "abandoned" means "the failure of the parent to maintain a normal parental relationship with the child including, but not limited to, reasonable support or regular contact."[214] The IGMS further provides that the failure to maintain such a relationship for a period of six months is prima facie evidence of abandonment.

In every guardianship case, the IGMS requires that the court must consider the best interests of the child as the "primary factor" in deciding whether to appoint a guardian.[215]

D. Information in the Permanency Plan

Although not expressly required by the CPA, the permanency plan should name the proposed guardians when known. The CPA imposes such a requirement when the permanency plan is termination and adoption.[216] Including such information in the permanency plan helps establish a link between the child protection action and the adoption action. For similar reasons the best practice recommendation is that the proposed guardians also be identified in the permanency plan when guardianship is proposed as the permanency goal.

E. Advantages and Disadvantages of Guardianship as a Permanency Goal

In limited circumstances, guardianship can be a better permanency goal for a child than termination of parental rights and adoption.

- Guardianship may be in the best interests of a child because it does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, veterans' benefits, or Social Security.
- A guardianship may be a more acceptable permanency goal for an older child who objects to adoption.
- A child's best interests may be served by a potential guardian who is willing to take on the challenge of raising a child but not willing to take the risk of financial responsibility for the child's negligent or criminal actions.[217]
- A child's best interests may be served by a relative who is committed to providing the child with parental care, but may not be willing to become an adoptive parent.
- A guardianship is more flexible than adoption. For example, when it is in the best interest of the child, the order appointing the guardian can include provisions that allow the child to have continuing contact with either or both parents.
- Guardianships can be modified if circumstances change.
- Guardianship offers the possibility of an agreed-upon solution that has active support of all the parties and minimizes conflict among people who will have a significant ongoing role in the child's life.

Guardianship also has disadvantages:

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[214] *Id*.
[215] *Id*.
[216] I.C. § 16-1622 requires "if the permanency goal is termination of parental rights and adoption, then . . . the permanency plan shall also name the proposed adoptive parents when known. . .."
[217] I. C. § 15-5-209

- Despite provisions of Idaho law intended to make CPA-connected guardianships as permanent as possible, guardianships may be modified or terminated during the child's minority. For example, parents may seek to end the guardianship without having resolved the issues that endangered the child. For this reason it is crucial that there be a detailed plan to ensure that the placement will be stable.
- Guardianships terminate when the children reaches majority. This may mean that a young adult has no "permanent family" for support.
- Independent living benefits, subsequent to the passage of Family First Prevention Services Act, will be available to "youth age 14 and older who have experienced foster care".[218] Guidance regarding the use of Chafee Independent Living funds for youth regardless of their exit process is expected in the near future. Previously, a youth was eligible for independent living benefits if the youth exited care through guardianship, provided that the guardianship occurred after the youth's 16th birthday. [219]
- APPLA benefits are only available to kids who exit care when turning 18, not when they exit through adoption or guardianship.
- Guardianships are subject to ongoing monitoring by the court until the guardianship is terminated by court order or the minor reaches the age of majority. Despite this continuing responsibility to monitor the case, the services and resources provided by the Department are no longer available when the child protection case is closed.
- Some types of insurance benefits may not apply to children in a guardianship.
- The court's powers are less extensive in a guardianship case than in a child protection case:. "[t]he court has the authority to appoint the guardian and to remove the guardian, but not to manage how the guardian exercises her or his powers and responsibilities."[220]

F. Procedural Considerations in a CP Connected Guardianship

1. Jurisdiction

The IGMS provides a specific process for guardianships that arise when a minor is under the jurisdiction of a court in a CP case or where a guardianship arises in connection with a permanency plan for a minor who was the subject of a proceeding under the CPA.[221] The CPA court has exclusive jurisdiction and venue over any related guardianship proceeding unless the CPA court declines jurisdiction. The Child Protective Act imposes an ongoing duty on the parties to a CPA case to "inquire concerning, and inform the court as soon as possible about, any other pending actions or current orders involving the child."[222] The CPA further provides that "[i]n the event there are conflicting orders from Idaho courts concerning the child, the child protection order is controlling."[223] The IGMS contemplates, and best practice is, that judges in

[218] P.L. 15-123
[219] The federal Families First legislation changed the independent living qualification from "youth who are likely to age out of care" to "youth age 14 and older who have experienced foster care." At the writing of this manual in May 2018, IDHW anticipates new guidance from the federal government about utilizing independent living funds for youth regardless of their exit reason. *See* 4 U.S.C. §677.
[220] *See* Doe v. Doe, 160 Idaho 311, 314, 372 P.3d 366, 369(2016).
[221] I.C. § 15-5-212A(1)
[222] I.C. § 16-1604(2)
[223] *Id.*

competing actions in or out of state consult as to the appropriate jurisdiction, keeping in mind the best interest of the child, including the safety needs of the child.

2. Role of the Department

The IGMS provides that notice of any action regarding a guardianship arising under the CPA must be provided to the Department, which has the right to appear and be heard in any hearing and which may intervene as a party in the action.[224] Furthermore, the guardian may not consent to adoption of the child without prior notice to the Department.[225]

3. Notice

The IGMS provides that, in addition to notifying the Department, notice of the time and place of the hearing on a guardianship petition must be provided to: a) the child if he or she is over 14; b) the person who had the principal care and custody of the minor for the 60 days preceding the date of the petition;[226] c) any de facto custodian under Idaho Code § 15-5-213; and d) any living parent of the child. Regarding "living parents," the statute further provides that the court may waive notice under two circumstances.[227] The first is where a living father of the child was never married to the mother of the child and has failed to "register his paternity as provided in 16-1504(4), Idaho Code."[228] The court also may waive notice to a living father where it "has been shown to … [the court's] satisfaction circumstances that would allow the entry of an order of termination of parental rights . . . even though termination of parental rights is not being sought as to such father."[229]

4. Appointment of Counsel and Guardian ad Litem

The IGMS does not provide for appointment of counsel for parents or for the prospective guardian in a guardianship proceeding. Because the guardianship proceeding is a new proceeding counsel appointed for parents in the CPA proceeding cannot represent them in the guardianship proceeding.

The child may have the right to appointed counsel or to appointment of a guardian *ad litem* in a guardianship proceeding. Idaho Code §15-5-207 states: "The court shall appoint an attorney to represent the minor if the court determines that the minor possesses sufficient maturity to direct the attorney. If the court finds that the minor is not mature enough to direct an attorney, the court shall appoint a guardian *ad litem* for the minor. The court may decline to appoint an attorney or guardian *ad litem* if it finds in writing that such appointment is not necessary to serve the best interests of the minor." The best practice is to appoint the same attorney and/or guardian *ad litem* who represented the child in the child protection case to serve in the same role in the guardianship proceeding. A child who is the subject of a guardianship proceeding has the right

[224] I.C. § 15-5-212A(2) & (3)
[225] I.C. § 15-5-212A(4)
[226] In a CP connected guardianship the inference is that the entity with principal care and custody of the child is the Department and not the foster parent.
[227] I.C. § 15-5-207(2)(a)-(d).
[228] I.C. § 15-5-207(2)(d)(i)
[229] I.C. § 15-5-207(2)(d)(ii). The constitutional rights of unwed fathers are discussed in chapter 12.2 of this manual.

to object to a proposed guardian and will need legal help to follow the statutory process making the objection.[230]

5. Modification and Termination of CP Connected Guardianship

The IGMS imposes a higher standard for termination of a guardianship connected to a CPA case. The moving party in a proceeding for modification, termination or removal of a guardian has the burden of proving by clear and convincing evidence that there has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship and that termination of the guardianship would be in the best interests of the minor.[231] Nonetheless, it is easier for a guardian to withdraw from their responsibilities compared with adoptive parents. There have been instances in which guardians have returned the child to her or his parents, or left the child with others. Although such actions do not terminate the guardianship,[232] the situation often does not come to the attention of the court. The formal procedure for resignation is set out in Idaho Code § 15-5-212. An older child, age 12 in the Child Protective Act and age 14 under this section, should be represented by an attorney. Death, incapacity, or resignation of a guardian can require immediate difficult decisions and action by the court.

G. Guardianship Assistance

For children in foster care, guardianship assistance may be available in specific circumstances under both federal and state law.[233]

IV-E Guardianship Assistance may be available to a relative guardian for the support of a child who is fourteen (14) years of age or older, who without guardianship assistance, would remain in the legal custody of the Department. In cases of multiple children the amount of guardianship assistance may be less than that available under adoption assistance.

State Guardianship Assistance may be available to a legal guardian for the support of a child if the parental rights have been terminated and there are documented unsuccessful efforts to place the child for adoption.

The subsidies that are available to assist adoptive families and special needs children in the case of adoption are not usually available in guardianships.

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[230] *See* I.C. § 15-5-203 regarding the child's right to object to the guardian.
[231] I.C. § 15-5-212A(5) & (6)
[232] *See* I.C. § 15-5-210 (resignation of a guardian without the appointment of a successor guardian does not terminate the guardianship until it has been approved by the court.")
[233] 42 U.S.C. § 673. *See* Administration for Children and Families, *Title IV-E Guardianship Assistance* (July 26, 2013) *available at* https://www.acf.hhs.gov/cb/resource/title-iv-e-guardianship-assistance (describing the federal guardianship assistance program). *See also* Idaho Department of Health and Welfare, Children and Family Services, *Standard for guardianship Assistance* (January 27, 2017) available at http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/GuardianshipAssistance.pdf (last visited May 3, 2018).

The services of the Department and the guardian *ad litem* are not available to monitor the child's welfare while in the care of the guardian or to find a new placement for the child if the guardian resigns, both of which may be necessary in some circumstances. Services may not be available to assist the guardian or the child, except to the extent the guardian or child qualifies under other programs independent of the CPA proceedings. In some cases, such services may be appropriate or necessary to ensure the success of the placement, particularly where the child has special needs and the guardian has limited resources.

H. Temporary Guardianship

The IGMS allows for appointment of temporary guardian(s).[234] In some instances the Department asks for termination of the child protection case once a temporary appointment is made. In such situations, the CPA court must determine if the temporary appointment is "permanent" enough to allow for closing of the child protection case before the guardianship is finalized.

[234] *See* I.C. § 15-5-207