IDAHO CHILD PROTECTION MANUAL

A practical guide for judges and attorneys

Fourth Edition

The Supreme Court of the State of Idaho
Administrative Office of the Court
2015

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ACKNOWLEDGEMENTS

The 2015 Fourth Edition of the Idaho Supreme Court Child Protection Committee's "Idaho Child Protection Manual" began as a response to new federal and revised state legislation passed over the last two years. It turned into an opportunity to further strengthen and enhance this valuable resource for attorneys and judges.

We extend a special thank you to the University of Idaho College of Law's James E. Wilson Distinguished Professor, Elizabeth Brandt, who shaped and guided the overall project and who edited the Manual in its entirety.

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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 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]

2. *Avoid Unnecessary Separation of Children and Families.* Consistent with the Idaho Child Protective Act, "[t]he state of Idaho shall . . . seek to preserve, protect, enhance and reunite the family relationship."[3] The child's family - barring insurmountable safety issues - is the first choice for permanency. 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 caretakers. The services should be easily accessible, adequate, appropriate, and delivered in a culturally competent framework.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] Information on Child Protection Committee, Idaho Supreme Court, http://isc.idaho.gov (last visited on April 29, 2015).

[2] IDAHO CODE ANN. § 16-1601 (2009).

[3] *Id.*

3. *Provide Close Judicial Oversight of Child Protection Cases and Practice One Family/One Judge.* The best practice is that one judge presides over the entire child protection case from the shelter care hearing through permanency (including, where appropriate, termination of parental rights and adoption). 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. The child's case must be monitored until a permanent home is finalized. Judges should use the full extent of their authority to ensure that the child is safe. 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. *Provide Access to Competent Representation in Child Protection Cases.* In child protection proceedings, attorneys for the state, the parents, the guardian *ad litem*, and the children should be well trained and culturally competent.[4] 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. *Avoid Delay.* The court should ensure timely decision making at all stages of the child 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.[5] 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.

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[4] The Idaho State Bar provides an opportunity for attorneys to obtain a Child Welfare Specialist certification through the National Association of Counsel for Children (NACC). Additional information on this certification can be found at their website, Child Welfare Specialist Certification, National Association of Counsel for Children, http://www.nacc.org (last visited on April 29, 2015).

[5] § 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(12) (Supp. 2014).

6. *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 fathers 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.

7. *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)

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

9. *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.

10. *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.

11. *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.

12. *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.

13. *Promote Collaboration with Child Welfare Professionals and the Community.* 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.

14. *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.

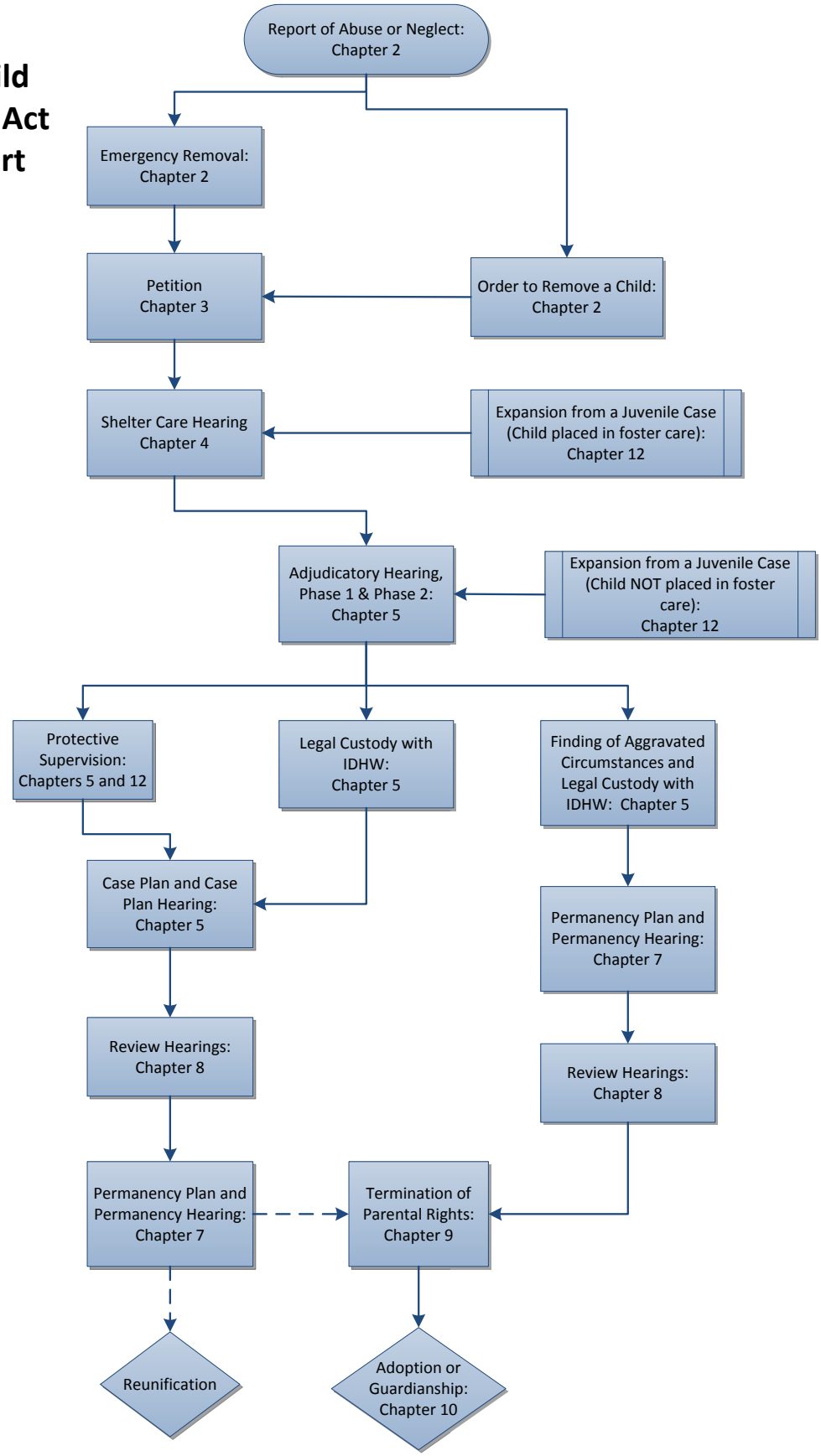
Chapter 12 focuses on specific substantive issues that may arise in CPA cases:

- 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
- Independent Living Requirements for Older Youth in Care
- Guardianships

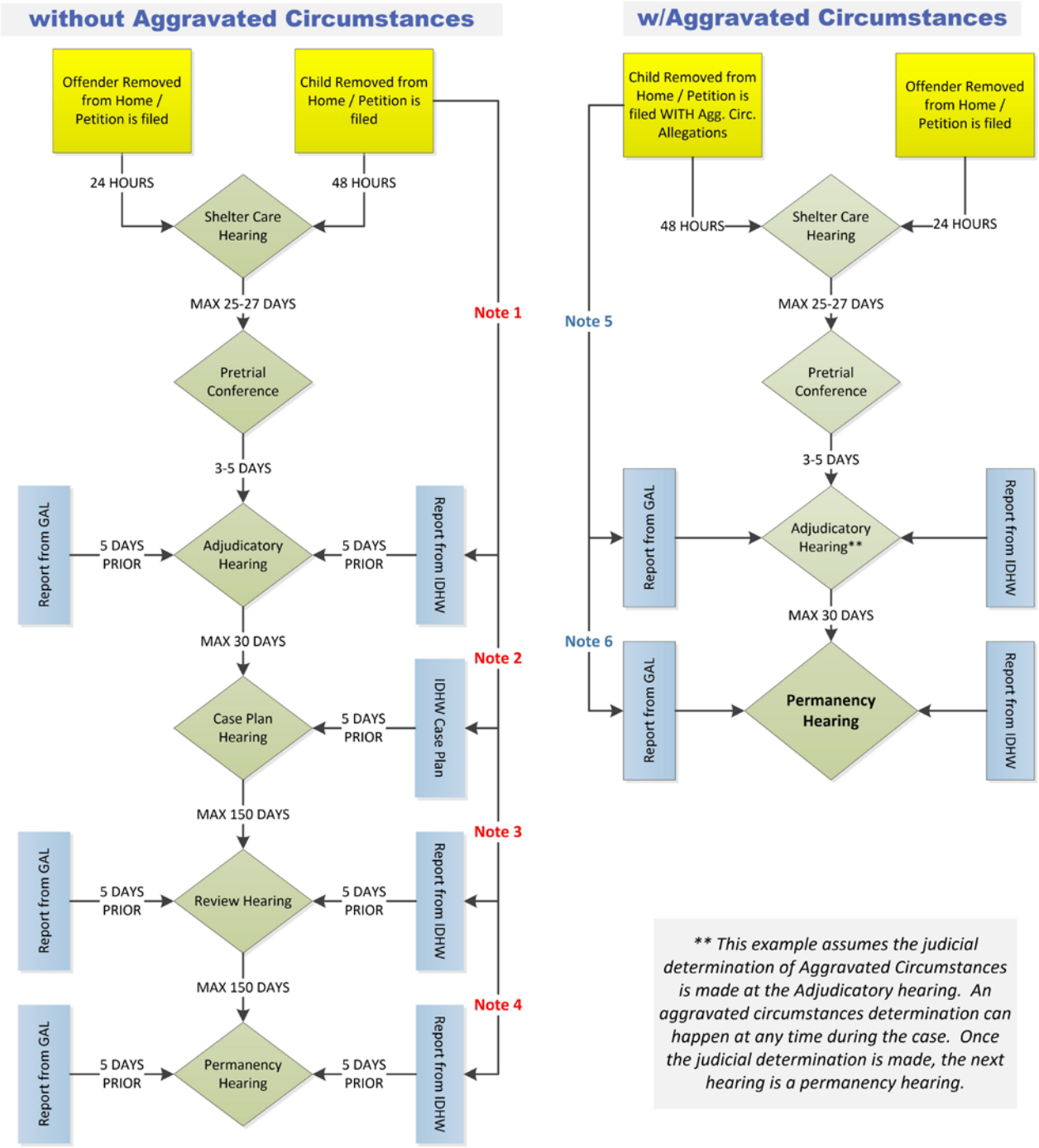
The Idaho Child Protection Manual, the Idaho Child Protection Bench Cards, and the Idaho Child Protection Court Forms are updated as statutes and best practices change. The most up-to-date versions of these materials are available in the Child Protection section of the Idaho State Judiciary website at:

isc.idaho.gov/child-protection/resource

Idaho Child Protective Act Flow Chart



Child Protective Act Case Timelines



*** 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 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.

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))

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. section 501(c)(3);

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1605(1) (2009).

[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] § 16-1605(4).

[4] § 16-1606.

[5] § 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).

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

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.[7] 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.[8]
- *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[9], the referral is assigned one of three priority responses. Priority is determined by the Priority Response Guidelines, which classify, report,

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[6] § 16-1605(3).
[7] IDAHO ADMIN. CODE r. 16.06.01.550 (2015) (The Idaho Administrative Code is also known as "IDAPA."); *See also* IDAHO CODE ANN. § 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").
[8] § 39-8203 (2009) (Idaho Safe Haven Act).
[9] § 16-1602(1), (2), and (28) (Supp. 2014).

and organize responses based on the level of threat to the child's safety and well-being.[10] 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.

Under 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. [11]

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.

Idaho law requires this notification because the assessment must be coordinated with law enforcement's investigation.[12]

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] IDAPA r. 16.06.01.554 (2015).
[11] IDAPA r. 16.06.01.554.01.
[12] IDAPA r. 16.06.01.554.02.

Under *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.[13]

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.[14] 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.[15]

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. 16.06.01.554.03.

[14] § 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).

[15] §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[16] 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 his or her 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 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.

[16] Throughout this Manual "best practice recommendations" are included. These recommendations are not required by Idaho law but represent instead generally accepted guidelines for judge's 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.

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.[17]

According to both the federal Child Abuse Prevention Treatment Act[18] and the Idaho CPA,[19] 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
- 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

[17] *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).
[18] 42 U.S C §§ 5106a(b)(2)(B)(xviii) (2011); 42 U.S.C. § 5116(a)–(f) (2011).
[19] § 16-1629(7)(b) (Supp. 2014).

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 30 working days after first seeing the child. It contains information collected from the assessment tools used by the Department, discussed below.

1. The Six Domains of Information Collection[20]

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[21]

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.
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.

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

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[22]

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.

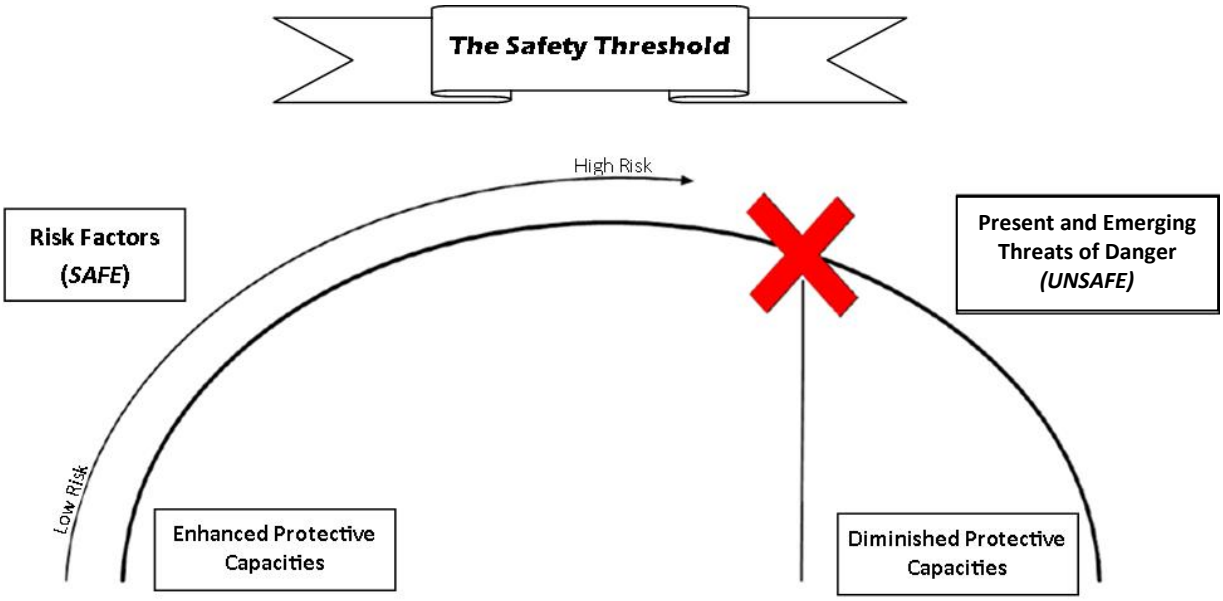
4. Caregiver Protective Capacities

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 include a parent's knowledge, understanding, and perceptions that contribute to how well a parent carries out his/her parental responsibilities.[23] Protective capacities also refer to observable

[22] *Id*.
[23] *See* LUND & RENNE, *supra* note 17, at "Benchcard D."

behaviors of a parent that prevent threats of danger from occurring, as well as the parents' feelings, attitudes, and motivation to protect the child.[24]

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.

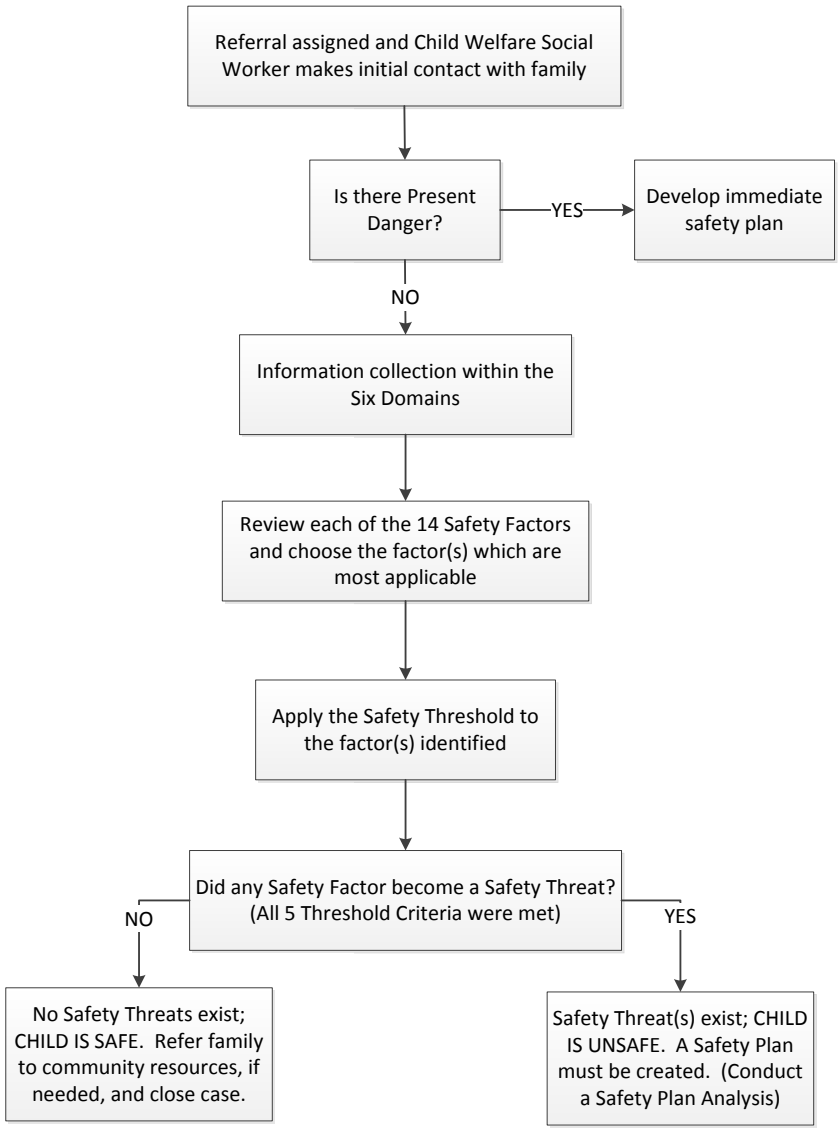
Decisions related to child safety are not made alone. Pursuant to IDHW practice, a supervisor reviews all cases assigned for assessment. The supervisor considers the following:

- 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? [25]

[24] *Id*.
[25] *See* 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.[26] "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."[27]

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:

[26] 42 U.S.C. § 621 (2011); IDAHO CODE ANN. § 16-1601 (2009).
[27] 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 section 16-1608(1)(b)
- Removal of an offender through a Domestic Violence Protection Order – Idaho Code sections 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.[28]

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.[29]

[28] §16-1619(5)(a) (Supp. 2014); IDAHO JUV. R. 41(h).
[29] §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]

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1608(1)(a) (2009); IDAHO JUV. R. 31. (The process for removal pursuant to a declaration of imminent danger is discussed in detail later in this chapter).

[2] § 16-1611(4); IDAHO JUV. R. 34(c).

[3] § 16-1611(5). *See* § 16-1602(30) (Supp. 2014) (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] § 16-1611(1) (2009) (provides for issuance of a summons without the emergency removal of a child); §16-1611(5); I.J.R 34 provide for issuance of a summons with an order for removal of a child) *See also* § 16-1610 (Supp. 2014), which generally governs the petition in a CPA case. CPA petitions are discussed later in this chapter.

[5] §§ 20-501 - 549 (2009).

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

[7] §§ 39-8203 through 8205 (2011). The Safe Haven Act is discussed briefly in this chapter and in detail in Chapter 12 of this manual.

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 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 declares a child to be in imminent danger pursuant to Idaho Code section 16-1608(1)(a). A declaration of imminent danger can be made "only 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]

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 danger to the child is not imminent and immediate removal is not necessary, 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 forty-eight hours of removal.[10]

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[8] § 16-1629 (Supp. 2014) (provides that "[t]he department . . . shall have the primary responsibility to implement the purpose" of the CPA). *See also* § 16-1631(1) (2009) (authorizes the Department to act any time it receives information that a child may be abused, neglected, or abandoned).
[9] § 16-1608(1)(a).
[10] § 16-1608(2).

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 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 make 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. This finding is required to preserve the child's eligibility for federal IV-E match funds that are applied to the costs of shelter care.[16] Federal law requires this finding to be made in the first order sanctioning removal of the child from the home. 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

[11] § 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] IDAHO JUV. R. 32 (sets forth the prescribed form of this notice).
[13] § 16-1611(4)–(5); IDAHO JUV. R. 34(a).
[14] IDAHO JUV. R. 34(c).
[15] § 16-1611(4).
[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.

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 that IDHW made reasonable efforts to prevent removal of the child from the home or that the efforts to prevent the child's removal from his/her home were reasonable given that the Department's assessment accurately determined that no preventative services could have been safely offered.[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. To avoid the unnecessary removal of the child from the home and to ensure that the reasonable efforts findings are timely made, the court should begin the process of reviewing the Department's efforts at the hearing for the Order to Remove the Child.

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 to Idaho Code section 16-1615(f).[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.

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[17] § 16-1615(5)(b)(i)-(ii) (2009).
[18] 45 C.F.R. § 1356.21(b) (1) (i)-(ii) (2011).
[19] §§ 16-1615(5) (2009); 16-1619(6) (Supp. 2014). *See also* IDAHO CODE § 39-6309 (relating to the issuance of protection orders).
[20] §§ 16-1611(5) (2009); 39-6306(1)(c) (2011).
[21] § 16-1611(5) (2009).
[22] §16-1602(31) (Supp. 2014). (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).

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]

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

[23] § 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] § 16-1619(5)(a) (Supp. 2014) (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.
[26] §§ 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] §§ 20-501 to 549.
[28] IDAHO JUV. R. 1–30.

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 focuses on "six domains of information" 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

[29] Grounds for jurisdiction under the CPA are discussed later in this chapter.
[30] §§ 39-8201 to 8207 (Idaho Safe Haven Act) (2011).
[31] §§ 39-8202 to 8205
[32] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 3–5 (2009).

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 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 section 16-1610, the petition must be entitled "In the Matter of _____, a child (children) under the age of eighteen years." It must be signed by the county prosecutor or deputy attorney general and verified. The petition may be based on information and belief rather than on the personal knowledge of the person(s) signing the petition, but the petition must state the basis for the information and belief.[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.

[33] § 16-1610(2) (Supp. 2014).
[34] *Id*. at (h).

- 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 other authorized agency, and
  2. Reasonable efforts were made to prevent the removal of the child, or efforts to prevent the removal of the child from the home were reasonable given that the Department's assessment accurately determined that no preventative services could have been safely offered, or reasonable efforts to prevent placement were not required as the parent subjected the child to aggravated circumstances.[35]
- 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. [36]

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.[37]
- If there is reason to believe that the child is an Indian child, the petition should include additional substantive allegations required by the Indian Child Welfare Act.[38]

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.[39] A summons may be issued for and served on any other person whose presence is required by the child or any

[35] §§ 16-1602(5); 16-1619(6)(d). Aggravated circumstances are discussed later in this chapter.
[36] § 16-1610(2).
[37] IDAHO JUV. 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).
[38] 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 the ICWA.
[39] §16-1611(1)–(3) (2009).

other person whose presence, in the opinion of the court, is necessary.[40] 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.[41] 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.[42]

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.

The affidavit should contain all the information necessary to support the findings and conclusions the court is required to make.[43] 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.[44]
- IDHW made reasonable efforts to prevent removal of the child from the home OR that the efforts to prevent the child's removal from his/her home were reasonable given that the Department's assessment accurately determined that no preventative services could have been safely offered.
- 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.[45]

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[40] §16-1611(1).
[41] IDAHO JUV. R. 33(b).
[42] IDAHO JUV. R. 34; *See also* § 16-1611(4).
[43] 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.
[44] § 16-1603 (setting forth the grounds for jurisdiction such as abuse, neglect, etc.; discussed later in this chapter).

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.[46] Service of process must be made by the sheriff or another person appointed by the court.[47] The summons includes a return of service, which must be completed and filed with the court to show that service has been made.[48]

Where personal service is impracticable, the prosecutor must file a motion seeking court approval of service by registered mail and publication.[49] The motion should be filed and heard 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 must 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,[50] legal guardian(s), or custodian(s). This includes non-custodial parents and adoptive parents but does not include a

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[45] § 16-1615(5).
[46] § 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.
[47] § 16-1612(3).
[48] *Id.*
[49] §§ 16-1612(1) to (2).
[50] § 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.

parent whose parental rights have been terminated.[51] 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 of 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[52] 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.[53]

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. The 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[54]

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[51] § 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").
[52] 25 U.S.C. §§ 1901 to 1963 (2011). A detailed discussion of the ICWA can be found in Chapter 11 of this manual.
[53] 25 U.S.C. § 1912. *But see*: BIA Guidelines B.6(e) (effective Feb. 25, 2015).
[54] § 16-1603 (2009).

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. [55]

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."[56] 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:
    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. [57]

    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.[58] 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.[59]

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." [60]

    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

[55] § 16-1602(1).
[56] § 16-1602(2) (Supp. 2014).
[57] § 16-1602(28).
[58] § 16-1602(28)(a).
[59] § 16-1627 (2009).
[60] § 16-1602(23) (Supp. 2014).

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.

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.)[61]

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

[61] § 16-1602(31).

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).[62]

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.[63] 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.[64]

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 of sections 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108, or 18-6608, Idaho Code.
> (iii) Torture of a child; a sexual offense as set forth in section 18-8303(1), Idaho Code; battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter, or attempting or conspiring to commit such voluntary manslaughter;

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[62] § 16-1603(2) (2009).

[63] § 16-1602(5) (Supp. 2014); 16-1619(6)(d). (If the case is governed by the 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).

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

(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.[65]

The statute further provides that aggravated circumstances "include but are not limited to" those specifically listed. 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.[66] 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.[67]

3.6 ICWA CONSIDERATIONS

It is critical that the court ensure compliance with the Indian Child Welfare Act.[68] Compliance with the ICWA is essential to preserve the unique interests of the Indian child and the child's tribe and to avoid disruption and delay in both placements and court proceedings. The removal of a child prior to the shelter care hearing constitutes an emergency removal of the child under ICWA. The BIA Guidelines[69] 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 the Indian Child Welfare Act.

CONCLUSION

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

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[65] § 16-1602(5).
[66] IDAHO JUV. R. 41(a).
[67] *Id.*
[68] *See generally* 25 U.S.C. § 1901–1922 (2012).
[69] GUIDELINES FOR STATE COURTS AND AGENCIES IN INDIAN CHILD CUSTODY PROCEEDINGS, 80 FED. REG. 10146 (FEB. 25, 2015).

CHAPTER 4:
Shelter Care

4.1 PURPOSE AND GOALS OF THE SHELTER CARE HEARING

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

Although they are made on an expedited basis, the court's determinations at shelter care regarding the child's best interests and welfare must be based upon a competent assessment of whether a child can be safe if the child returns to or remains in his or her home. Children are unsafe when three conditions are present: 1) threats of danger exist with 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]

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.[2]

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the 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] IDAHO CODE ANN. § 16-1608(2)-(3) (2009).

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 39(a).[3]

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 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.[4] The Idaho Rules of Evidence do not apply in shelter care hearings.[5] Rather, the court may consider "[a]ny evidence . . . which is of the type which reasonable people may rely upon."[6] The shelter care hearing must be placed on the record in the CPA proceeding.[7]

C. Exclusive Jurisdiction/Ongoing Duty to Disclose

The court initiating the CP proceeding has exclusive, original jurisdiction over all proceedings arising under the Act.[8] 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.[9]

D. Who Should Be Present at the Shelter Care Hearing

1. *Judge.* A judge presides over the shelter care hearing and is responsible for 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.

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[3] *Id.*; § 16-1615(1); IDAHO JUV. R. 39(b).
[4] § 16-1613(1).
[5] IDAHO R. EVID. 101(e)(6); IDAHO JUV. R. 39(e), 51(b) (except as to privilege, jurisdiction, and aggravated circumstances determination).
[6] § 16-1615(5)(f).
[7] IDAHO JUV. R. 39(h); *See also* §16-1613 (Supp. 2014).
[8] § 16-1603 (2009).
[9] § 16-1604(2).

2. *Parents*. The CPA does not define "parent" for purposes of the Act.[10] As a matter of best practice, any person who qualifies as a parent for purposes of the termination of parental rights statute[11] or for the adoption statute[12] 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.[13] An individual who has legal custody of a minor pursuant to a court order must also be joined in the CPA proceeding.[14] 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.[15]

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.[16]

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[10] § 16-1615(2) (requires notice to each parent and custodian). *See* Chapter 12 for a discussion of Idaho law regarding unwed fathers.
[11] §§ 16-2002(11), (12), (15), (16) (Supp. 2014) (defining parent for purposes of termination of parental rights); § 16-2007 (2009) (providing for required notice in a termination of parental rights case).
[12] § 16-1505 (providing for required notice in an adoption case); § 16-1504 (defining who must consent to adoption).
[13] §§ 16-1611(1), (3) (requiring service of the summons and petition on a legal guardian and requiring notice to guardians). §§ 15-5-201 to 213 (A court may appoint a guardian for a minor under Idaho Code).
[14] *Id*. §§ 16-1610(2) and 16-1611(3).
[15] §§ 32-1701 to 1705 (Supp. 2014) (Pursuant to this statute, a petition for appointment as *de facto* custodian cannot be initiated through intervention in a CPA proceeding); IDAHO. R. CIV. P. 24(d) (Moreover, a foster parent may **not** petition to be considered a *de facto* custodian based on the child residing with the foster parent); IDAHO CODE ANN. § 32-1703(4)(a) (Once a CPA proceeding has been filed, the CPA court has exclusive jurisdiction over the child); § 16-1603(1) (2009) (Pursuant to the *De Facto* Custodian Act, a court can award legal and/or physical custody to a *de facto* custodian) *See, e.g*. § 16-1611(3) (Pursuant to the CPA, only legal custodians are parties to a CPA proceeding).
[16] IDAHO JUV. R. 16(f). See Chapter 12 for more information on Rule 16 expansion cases.

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*. 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).[17] An Indian child's tribe has the right to notice and to an opportunity to participate in all hearings involving the child.[18] 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.[19]

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.[20]

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

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

9. *Attorney for Child, Guardian ad Litem (GAL) and/or Attorney for GAL*. Idaho law requires the appointment of either an attorney for the child or a guardian *ad litem* for the child and counsel for the guardian *ad litem*, or both, to serve at each stage of the proceeding.

   Children under Twelve. For children under the age of twelve, Idaho Code section 16-1614(1) provides that the court shall appoint a guardian *ad litem* for the child

[17] Chapter 11 discusses the requirements of the ICWA in detail.
[18] 25 U.S.C. §§ 1912(a), 1911(c) (2012).
[19] § 16-1610(1)(a) (Supp. 2014).
[20] § 16-1611(3) (2009); IDAHO JUV. R. 37(d).

and shall appoint counsel to represent the GAL. If no GAL is available, the court must appoint counsel for the child. In appropriate cases, the court may appoint a GAL and an attorney for the GAL as well as counsel to represent the child.

Youth Twelve and older. Idaho Code section 16-1614(2) provides that the court shall appoint counsel to represent the child and may in addition, appoint a GAL. When appointment of counsel is not practicable or not appropriate, the court may appoint a GAL for the child and shall appoint counsel to represent the GAL.[21] 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.[22] Upon the filing of a petition, the recommended best practice is for the court to immediately appoint an attorney or *guardian ad litem* for the child.

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

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

[21] § 16-1614(2) (Supp. 2014).
[22] *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).

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,[23] 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,[24] 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[25], 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.[26] 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.[27]

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.[28] 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).[29] When relatives are either already actively involved with a child or are interested in caring for a child, their testimony can be valuable at a shelter care hearing. Relatives can provide essential information about 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

[23] IDAHO. R. CIV. P. 7(b)(4); IDAHO JUV. R. 29.
[24] IDAHO JUV. R. 39(f).
[25] § 16-1613(1) (2009).
[26] IDAHO JUV. R. 51(b) and IDAHO R. EVID. 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* IDAHO CODE ANN. §§ 9-1801, *et seq.* (2010) (the Uniform Child Witness Testimony by Alternative Methods Act).
[27] § 16-1613(2) (2009).
[28] 42 U.S.C. § 671(a)(29) (2012).
[29] 42 U.S.C. § 671(a)(29) (West, Westlaw through P.L. 114-1, Jan. 2015). While the official U.S. Code does not yet reflect the adoption of the Preventing Sex Trafficking and Strengthening Families Act of 2014, the unofficial code is cited here to enable easier access to the revised statutory provisions.

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.[30] The petition must describe the facts that bring the child within the jurisdiction of the CPA.[31]

A recommended best practice is that the petition be verified and/or that it 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 removal of the child from the home is in the child's best interests, and the efforts made to prevent the need to remove the child from the home. The affidavit(s) should include as many of the relevant facts discussed above as possible and a thorough evaluation of the child's safety at the time of shelter care. Detailed affidavit(s) will apprise parties and participants of relevant evidence and improve decision making in the case.

[30] § 16-1615(5)(a) (2009).
[31] § 16-1610(2)(a) (Supp. 2014). Chapter 3 of this manual discusses the preparation of the petition.

B. Jurisdiction

Idaho law requires that the court find that there is reasonable cause to believe that the child comes within the jurisdiction of the court under the CPA.[32] A child is within the jurisdiction of the court pursuant to the Child Protective Act under the following circumstances:

- The child is abused, neglected, or abandoned.
- The child is homeless.
- The child's parents or legal custodian fails 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.[33]

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.[34] 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.[35]

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."[36] This finding must be *case specific* and it must be *documented* in the court order.[37] 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.[38] The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an affidavit that describes the specific circumstances making removal in the child's best interests. If the court makes the case-specific finding, but fails to document the finding in the order, the omission can only be corrected with a transcript of the hearing that documents the case-specific finding.[39] 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.[40]

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[32] § 16-1615(5)(b) (2009).
[33] § 16-1603 (The grounds for a CPA case). Chapter 3 discusses these grounds in detail.
[34] § 16-1615(5)(d)–(e).
[35] *Id.*
[36] 42 U.S.C. §§ 672(a)(1), (a)(2)(A)(ii) (2012).
[37] 45 C.F.R. § 1356.21(d) (2012).
[38] 45 C.F.R. §§ 1356.21(b)(1), (c).
[39] 45 C.F.R. § 1356.21(d).
[40] *See* Chapter 3 of this manual regarding orders to remove the child.

2. Background Information Relevant to the Child's Safety

The *ABA Child Safety Guidelines for Judges and Attorneys*[41] 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.

- *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,

[41] LUND & RENNE, *supra* note 1, pp. 3-5.

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 (eg: biological parents, live-in boyfriend, grandmother).[42]

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.[43]

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.[44]

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."[45]

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.[46] 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 make a finding that **the Department's efforts to prevent removal were reasonable given that the Department's assessment accurately determined that no preventive services could be safely provided.**[47] A finding that the Department did not make reasonable efforts, or that reasonable efforts were not required, will preclude federal funding.

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

[42] LUND & RENNE, *supra* note 1, pp. 9-10.
[43] *Id*. at 11-12.
[44] *Id*. at 13-16.
[45] § 16-1615(5)(b)(i)(ii) (2009) (Idaho law requires that the reasonable efforts to prevent removal finding be made at BOTH the shelter care and adjudicatory hearing); *See also*, §§ 16-1615(5), 16-1619(6)(a-c) (Supp. 2014).
[46] 42 U.S.C. §§ 671(a)(15)(B), 672(a)(1) to (2) (2012); 45 C.F.R. § 1356.21(b) (2012).
[47] The exact language provided in bold should be utilized, as this finding has been sufficient to preserve federal funding when reviewed in federal audits of Idaho procedures.

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.[48]

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.[49] 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.[50]

What constitutes reasonable efforts depends on the time available in which such efforts could be made.[51] 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.[52]

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

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[48] 45 C.F.R. § 1356.21(b)(1).
[49] 45 C.F.R. § 1356.21(d).
[50] 45 C.F.R. § 1356.21(b)(3); 42 U.S.C. § 671(15)(D)(i); § 16-1619(6)(d) (Supp. 2014).
[51] 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).
[52] 42 U.S.C. § 671(a)(15)(A) (2012); § 16-1601(a) (2009).
[53] § 16-1615(5)(c).

4.5 PROTECTIVE ORDER TO ENSURE SAFE RETURN HOME

The court may issue a protective order that permits the child to return home safely.[54] 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 and maintaining the child in his present surroundings...."[55] 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.[56]

Protective order is defined in the CPA in Idaho Code section 16-1602(31) 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 section 16-1615(5)(f). 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.[57] 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.[58]

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. The first option is placement of the child in the Department's temporary custody. The other is to return the child home (with or without a **protective *order***). Returning a child home under the **protective *supervision*** of the Department is **not** an option at the shelter care hearing. This is an option only after the adjudicatory hearing. 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.[59] 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.

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[54] § 16-1615(5)(f).
[55] *Id*.
[56] Safety Plans are discussed in Chapters 2 and 3. The safety principles relevant to this determination are discussed earlier in this chapter.
[57] §§ 16-1615(5)(f), 16-1602(31) (Supp. 2014), 39-6306 (2011).
[58] §§ 16-1615(5)(f) (2009), 16-1602(31) (Supp. 2014) (authorize entry of protection orders following the shelter care hearing).
[59] For more information on stipulations, see page 51.

4.6 PLACEMENT CONSIDERATIONS

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.[60]

Federal Law also requires that the Department place children with a relative so long as the relative meets the Department's "child protection standards".[61] 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.[62] Often out-of state placement is considered to accomplish the above placement priorities. When considering an out-of-state placement option, thought should be given to the impact on the reunification of the family and the opportunity for meaningful visitation between the parents and their children and between siblings. If the court approves the Department's request for out-of-state placement, immediate attention must be paid to the requirements of the Interstate Compact on the Placement of Children (ICPC). If the child will be placed out of state, the placement must be made in accordance with the ICPC.[63]

Finally, the "least restrictive environment" language of this provision 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.[64] 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.

4.7 INDIAN CHILD WELFARE ACT (ICWA)

If the child is an Indian child, the case will be governed by the Indian Child Welfare Act.[65] 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. The ICWA establishes special procedural and substantive safeguards to protect the interests of Indian children and tribes.[66] If the child is an

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[60] § 16-1629(11).
[61] 42 U.S.C. § 671(a)(19) (2012).
[62] §§ 16-1629(8) (Supp. 2014), 16-2102(Art.III)(a) (2009) .
[63] The ICPC is discussed in Chapter 12 of this manual.
[64] § 16-1629(11) (Supp. 2014).
[65] 25 U.S.C. §§ 1901–1963 (2012).
[66] *Id.* Chapter 11 discusses the ICWA requirements in detail.

Indian child, the child's tribe has the right to notice and an opportunity to participate in all hearings regarding the child. The ICWA also establishes preferences for placement of Indian children.

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.[67] 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 Connection to the Community

The shelter care placement for the child has important ramifications for the child's long-term success. Considerations to maintain the child's connection to the community should be taken into account when making the placement decision. The court should inquire at the shelter care hearing as to how these considerations are being taken into account.[68] In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) imposed a number of requirements on states relevant to these provisions of Idaho law.[69] Fostering Connections requires states to emphasize children's relationships with siblings and other close relatives.

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[67] 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).

[68] IDAHO JUV. R. 44(a)(1). Note that while evaluation of these connections is not specifically required at the time of shelter care, they become important considerations for case planning and for permanency. Thus, to the extent possible under the difficult time constraints of shelter care, preserving the child's connections to home and family should be considered

[69] 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.

D. Continuity of Education

Fostering Connections 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.[70] A best practice recommendation is for the court to inquire whether the Department's placement recommendation requires that the child leave his or her school of origin. If so, the court should inquire further as to options that would allow the child to remain in his or her school of origin. For example, it may be possible to transport the child to the school of origin and there may be assistance available for this purpose.

E. 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."[71]

4.9 ADDITIONAL ACTIVITES AT THE SHELTER CARE HEARING

A. Serving the Parties with a Copy of the Petition

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

B. Advising Parties of their Rights

The court is required to advise the parties of their rights. This specifically includes the right to court-appointed counsel, where applicable.[72] 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.

[70] 42 U.S.C. § 671(a)(30) (2012).
[71] § 16-1628(a) (Supp. 2014).
[72] IDAHO JUV. R. 39(g).

- 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.[73]

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.[74] 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.[75] As discussed previously in this chapter, federal law requires the court to make a documented, case-specific finding as to whether the agency made reasonable efforts to prevent the need for placement of the child in foster care and requires that this finding be made within 60 days from the date the child was removed from the home.

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

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

D. Agreements by the Parties

Parties are sometimes willing and able to enter into stipulations 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 on the record and are subject to court approval. It is a best practice recommendation that parents appear before the court when the stipulation is placed 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

[73] IDAHO JUV. R. 39(g).
[74] § 16-1619(1).
[75] §§ 16-1616 (2009), 16-1619 (2) (Supp. 2014), 16-1633(2) (Supp. 2014).

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.

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; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1619(4) (Supp. 2014); § 16-1603 (2009); IDAHO JUV. R. 41(a).

[2] § 16-1602(5) (Supp. 2014).

[3] § 16-1615(f) (2009); See also Chapter 4 regarding shelter care and protective orders.

[4] § 16-1619(5) (Supp. 2014); IDAHO JUV. R. 41(a). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed later in this chapter.

[5] § 16-1619(9).

[6] § 16-1619(1).

[7] § 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. 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.[9] 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.**

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.[10]

5.3 SUBMISSION OF REPORTS TO THE COURT

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, prepare a written report, and file the report with the court prior to the pretrial conference.[11] 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.[12] 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.

Neither report is admissible for purposes of determining issues during the adjudication phase[13] because they typically contain hearsay information or other information that does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes

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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] 42 U.S.C. § 671(a)(15)(B)(1) (2012); 45 C.F.R. § 1356.21(b)(1) (2011).
[10] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (1995).
[11] § 16-1616(1)-(2) (2009).
[12] § 16-1633(1)-(2) (Supp. 2014).
[13] § 16-1616(3) (2009).

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.[14] 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.[15] 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.

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

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[14] 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; IDAHO. R. CRIM. P. 26–37. To the extent that information can be voluntarily exchanged, delays in the case that can jeopardize permanency and funding for the child are also avoided.
[15] IDAHO JUV. R. 38 (sets forth minimum standards for court approval of stipulations by the parties).
[16] IDAHO R. EVID. 101; IDAHO JUV. R. 41(c), 51(b).
[17] § 16-1619(4) (Supp. 2014).
[18] IDAHO JUV. R. 41(c).
[19] § 16-1616(3) (2009).

the adjudication phase can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, caseworkers or law enforcement officers may rely on a doctor's written report of a medical diagnosis in concluding that a child is abused or neglected. Accordingly, a doctor's testimony will be necessary at the adjudicatory hearing. Since the rules of evidence apply, the caseworker cannot testify as to a doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit a doctor's written report. Regular communication and active cooperation between the prosecutor, caseworkers, and law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

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

5.6 INDIAN CHILD WELFARE ACT CONSIDERATIONS

It is critical that the court ensure compliance with the Indian Child Welfare Act.[21] Compliance with the ICWA is essential to preserve the unique interests of the Indian child and the child's tribe and to avoid disruption and delay in both placements and court proceedings. At the adjudicatory hearing, the court must make specific findings as to whether the child is an Indian child or whether further efforts are needed to determine if the child is an Indian child. If the child is an Indian child, the court must make specific findings as to whether notice has been given as required by the ICWA (and further explained in the new Guidelines from the Bureau of Indian Affairs) and whether further efforts are needed to comply with the notice requirements of the ICWA. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree. Finally, the substantive standards governing the case (for example, the need for a qualified expert witness and the active efforts findings) are unique and apply at the adjudicatory hearing. Failure to comply with the ICWA can render the court's decision void. Chapter 11 of the manual contains a detailed discussion of the Indian Child Welfare Act.

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.[22] 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 or Deputy Attorney General
- Mother, father, guardian, and/or other custodian[23]
- Attorney for parents (separate attorneys if conflict warrants)
- Indian Custodian, the child's Tribe, and attorney, if applicable

[20] §§ 16-1619(5) (Supp. 2014), 16-1633(2).
[21] *See generally* 25 U.S.C. § 1901–1922 (2012).
[22] § 16-1613(1) (2009). Additional information on the roles of the participants below can be found in Chapter 2.
[23] §§ 16-1611(1), (3). See Chapter 12 of this manual for more information on issues surrounding putative fathers.

- Child, in appropriate circumstances, if eight (8) years of age or older
- Attorney for the child[24]
- Guardian *ad litem* and attorney for guardian *ad litem*
- 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

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.[25] 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.[26] 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.[27]

5.9 KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATORY HEARING

A. Phase 1: Adjudication

1. <u>Is the child within the jurisdiction of the CPA?</u>

[24] *See* § 16-1614 (Supp. 2014) (regarding appointment of counsel for children).
[25] See Chapter 12 of this manual for a discussion of issues surrounding children and youth in court in non-witness capacities.
[26] §§ 9-1801 to 1808 (2010).
[27] § 16-1613(2) (2009).

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[28]

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.[29]

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.[30] 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.[31] At that point in time, the case may be dismissed by court order.

2. <u>Has the parent subjected the child to aggravated circumstances?</u>

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.[32]

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing. Aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.[33]

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[28] § 16-1603.
[29] § 16-1619(4) (Supp. 2014).
[30] § 16-1619(7).
[31] § 16-1604 (2009).
[32] 45 C.F.R. § 1356.21(b)(3)(i) (2012).
[33] *See* §§ 16-1610(i)(iii) (Supp. 2014); Idaho Juv. R. 41(a).

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.

Section 16-1602(5) defines aggravated circumstances:

> (a) Aggravated circumstances includes 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 sections 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108, or 18-6608, Idaho Code.
>
> (iii) Torture of a child; a sexual offense as set forth in section 18-8303(1), Idaho Code; battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter, or attempting or conspiring to commit such voluntary manslaughter;
>
> (b) The parent has committed murder, aided or abetted a murder, solicited a murder, or attempted or conspired to commit murder; or
>
> (c) The parental rights of the parent to another child have been terminated involuntarily."[34]

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.[35]
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.[36]
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.[37]

B. Phase 2: Disposition

The Idaho Child Protective Act sets forth two alternatives for disposition of the child.[38] The court must determine who has *custody* of the child: the parents or the Department. If the court

[34] § 16-1602(5) (Supp. 2014).
[35] §§ 16-1619(6)(d); 16-1620(1), (8); 45 C.F.R § 1356.21(b)(3)(i) (2012).
[36] § 16-1620(1) (Supp. 2014).
[37] §§ 16-1620(1), 1624(3).
[38] § 16-1619(5).

determines that the child cannot 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 his/her parents, under the protective supervision of the Department.[39]

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.[40]
2. *Vulnerability of the Child*. A child is vulnerable when he/she lacks the capacity to protect him/herself. Age is only one of many factors which may impact a child's vulnerability.[41]
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.[42]

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 his or her parents under the supervision of the Department.[43] At all times, the health and safety of the child is the primary concern.[44] 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.[45]

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.[46]

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[39] § 16-1619(5)(a).
[40] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-10, "Benchcard B" (2009).
[41] *Id.* at 11-13, "Benchcard C."
[42] *Id.* at 13-16, "Benchcard D." These criteria are discussed in more detail in Chapter 2, pages 13-17.
[43] § 16-1619(5)–(6).
[44] § 16-1601 (2009).
[45] 45 C.F.R. § 1356.21(b)(3)(i) (2012).
[46] LUND & RENNE, *supra* note 40, at 25-32, "Benchcard G" (2009).

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.).
- Eliminating unsafe conditions in the home.

The court should include these terms and conditions in the order for protective supervision.[47] 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.[48]

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 discussed in detail in Chapter 4.

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.[49] 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.[50]

3. Contrary to the Welfare

Federal law requires a case-specific finding that it is contrary to the welfare of the child to remain in the home in the first court order sanctioning removal of the child from the home.[51] 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).[52] Idaho law requires that this finding be made at the adjudicatory hearing in every case.[53] There are specific requirements for this finding that are necessary to ensure a child's eligibility for federal funding. These requirements are discussed in detail in Chapters 4 and 12 of this Manual.

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[47] § 16-1619(9) (Supp. 2014).
[48] §§ 16-1619(9), 1602 (31). Chapter 4 discusses protection orders in detail.
[49] § 16-1619(7).
[50] § 16-1629(8).
[51] 45 C.F.R. § 1356.21(c) (2012).
[52] Chapter 3 of this Manual contains further information about orders for removal; Chapter 4 contains further information on Shelter Care hearings.
[53] § 16-1619(6) (Supp. 2014).

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.[54] 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.[55] 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 be only be corrected by preparation of a transcript that verifies that the required determinations have been made.[56]

Idaho law also contains a requirement for a finding of reasonable efforts to prevent removal. This finding is required when the child is removed from protective supervision. To ensure the finding is timely made, this requirement is found in both the shelter care provision and the adjudicatory provision. 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;
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.[57]

The court may find that the Department failed to make reasonable efforts to prevent removal from protective supervision. 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.[58]

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[54] 45 C.F.R. § 1356.21(b)(1)(i) - (ii) (2012).
[55] 45 C.F.R. § 1356.21(d).
[56] *Id.*
[57] § 16-1619(6) (Supp. 2014).
[58] § 16-1623 (Supp. 2014).

A peace officer may remove the child who is under protective supervision pursuant to an earlier court order where the child is endangered in his or her 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).[59]

Upon removal from protective supervision, the child must be taken to a place of shelter care and the court must hold a hearing within 48 hours of the child's removal from the home. Parents must be given notice of the hearing.[60] At the hearing, the child's disposition is determined in the same manner and upon the same basis as at the disposition phase of the adjudicatory hearing.[61] 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 below.

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.[62]

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.[63] Idaho law establishes priorities for the child's placement. The first priority is for placement with a "fit and willing relative."[64] The second priority is for placement with a "fit and willing non-relative with a significant relationship with the child."[65] Finally, the third priority is for placement with "foster parents and other licensed persons."[66]

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. Idaho judges and practitioners must be familiar with the following specific provisions of Idaho and federal law and the Idaho Supreme Court decision in *Roe v. State* ("*Roe 2000*"). [67]

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[59] § 16-1623(1)(a).
[60] § 16-1623(2), (3), and (6).
[61] § 16-1623(4).
[62] 45 C.F.R. § 1356.21(b)(3) (2012).
[63] § 16-1629(8).
[64] § 16-1629(11).
[65] *Id*.
[66] *Id.*
[67] *In Re Doe*,134 Idaho 760, 9 P.3d 1226 (2000).

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.[68] The Court further stated:

> If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live. *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-1629(8), the CPA provides the court only limited authority to review the Department's placement decisions.[69]

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

Finally, federal law requires that placement authority be vested in the state agency for the child to be eligible for federal funds.[70] However, 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."[71] Attorneys who are faced with this issue are encouraged to do significant additional research.

B. 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

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[68] *Id*. at 767, 9 P.3d at 1233.
[69] *Id*.
[70] 45 C.F.R. §1356.71(d)(1)(iii) (2012).
[71] 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)) http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31 (last visited: Mar. 15, 2015).

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 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.

C. 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.[72]

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 GAL's report, and the deadlines for filing them. Transport orders may also be needed if a parent is in jail or prison or the child is in detention or in the custody of juvenile corrections. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

5.11 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-

[72] §§ 16-1620, 16-1621 (Supp. 2014). See Chapter 6 of this manual for a full discussion of the case plan hearing, and Chapter 7 regarding permanency hearing.

prepared reports submitted by IDHW and/or the guardian *ad litem*. The written findings, conclusions, order, and decree shall include the following:

- If any necessary parties were not present, a finding that proper notice was given (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).[73]
- 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.[74]
- If the child is found to be within the jurisdiction of the CPA, findings that specifically set forth the reasons for state intervention.[75]
- If aggravated circumstances are found, findings that specifically set forth the nature of the aggravated circumstances.[76]
- Findings as to the child's ICWA status. If the child is an Indian child, the court should make a finding that the Indian child's tribe and Indian custodian have received proper notice under the Act (and if not, findings and an order that further efforts are required). If the case is governed by the ICWA, additional findings must be made by the court.[77]
- 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.[78]
- 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.[79] Reasonable efforts to prevent a child's removal from the home or to reunify the child and family 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.[80]
- 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).[81]
- 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, and a protective order, where appropriate.[82]
- 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.

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[73] This finding is not specifically required by Idaho Code section 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. 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.
[74] IDAHO JUV. R. 38.
[75] §§ 16-1603 (2009), 16-1619(4) (Supp. 2014).
[76] § 16-1620.
[77] For a detailed discussion on the guidelines related to an ICWA case, please see Chapter 11.
[78] § 16-1619(6); IDAHO JUV. R. 41(f).
[79] §§ 16-1619(6)(a) to (c); IDAHO JUV. R. 41(e).
[80] 45 C.F.R. § 1356.21(b)(3).
[81] § 16-1619(7).
[82] § 16-1619(9).

- 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.

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. Failure to comply with the case plan is the basis for terminating parental rights.[2] The case plan is essential to the progress of the case and in achieving permanency for the child. The court, Department, and all parties must pay careful attention to the specificity and thoroughness of the case plan.

Idaho law requires that a case plan be prepared "in every case in which the child is determined to be within the jurisdiction of the court, and there is no judicial determination that aggravated circumstances were present…."[3] This includes cases in which the court places the child under the protective supervision of the Department or in which the parent(s) is incarcerated.

A. Case Plan Requirements

In cases with no finding of aggravated circumstances, the case plan must include a reunification plan and an alternate permanency plan (or concurrent plan).[4] In cases involving protective supervision, the case plan must include the relevant portions of the "reunification plan" outlined in Idaho Code section 16-1621(4). In cases involving a finding of aggravated circumstances, the permanency plan must have a permanency goal that does not include reunification. Permanency planning is discussed in Chapter 7 of this manual.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO JUV. R. 44.

[2] IDAHO CODE ANN. §§ 16-2005(1)(b) (Supp. 2014), 16-2002(3)(b).

[3] *Id.* § 16-1621(1).

[4] § 16-1621.

1. No Aggravated Circumstances – Child in Department Custody

In cases in which the court has not made a finding of aggravated circumstances, Idaho Code section 16-1621(3) requires that the case plan include a "reunification plan"[5] with the following provisions:

- Reasonable efforts which will be made to make it possible for the child to return to his home.
- [T]he 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.
- [O]ptions for maintaining the child's connection to the community, including individuals with a significant relationship to this child and organizations or community activities with…[whom] the child has a significant connection.
- A specific statement of the role of the Department toward each parent.
- Identification of all issues that need to be addressed before the child can safely be returned home (also known as "Conditions for Return Home")[6], without Department supervision.
- Specific identification of 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.
- [D]eadlines for the completion of each task.
- Where appropriate, specific identification of the terms for visitation, supervision of visitation, and/or child support.

Every case 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 removed from the home and placed in the legal custody of the Department, Idaho Code section 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 another planned permanent living arrangement.[7]

Concurrent planning[8] is a critical element in the initial case plan if a child is to achieve permanency in a timely manner. The plan for the concurrent permanency goal should be

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[5] § 16-1621(3)(c).

[6] 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).

[7] § 16-1621(3)(d).

[8] "Concurrent planning" is defined in the CPA as a "planning model that prepares for and implements different outcomes at the same time." *Id.* § 16-1602(12). 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…" *Id.* § 16-1601(3) (2009).

developed with as much specificity as the plan for the primary permanency goal. Waiting for reunification efforts to fail before seeking out an alternative permanency option only delays the child's arrival in a permanent placement and increases the emotional toll on the child.

Idaho Code section 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, and the schedules for accomplishing those actions;
- 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…[whom] the child has a significant connection.
- In the case of a child who has attained the age of 14 years,[9] specifically identify the services needed to assist the child to make the transition from foster care to independent living; and
- 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.

2. <u>No Aggravated Circumstances – Child under Department Supervision</u>

A case plan must also be prepared in cases where the child is home under the Department's protective supervision.[10] Such a plan must include:

- Identification of 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.
- 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…[whom] the child has a significant connection.
- Identification of all issues that need to be addressed before the child can safely live at home without the Department's supervision.
- Specific identification of 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.
- [D]eadlines for the completion of each task.

[9] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(a), (f),128 Stat. 1928, 1929 (2014) (to be codified at 42 U.S.C. § 675(5)(C)(i), effective September 29, 2015). NOTE: This new federal requirement is inconsistent with current Idaho statute at the publication of this manual.
[10] § 16-1621(4).

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.[11]

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.[12]

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."[13] 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 his or her 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[14] or older, a description of programs and services that will help the child prepare for independent living; and/or
- If the permanency goal for the child is adoption, documentation of the steps being taken to find an adoptive family.[15]

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.[16] 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

[11] § 16-1621(3)(d). Department staff often refer to the case plan as a "service plan."
[12] § 16-1621(3), (4).
[13] 42 U.S.C. § 675(1)(B) (2012).
[14] *See* Preventing Sex Trafficking and Strengthening Families Act, *supra* note 9.
[15] 42 U.S.C. § 675(1); § 16-1621(3)(vi).
[16] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(a), (f), 128 Stat. 1928, 1929 (2014) (to be codified at 42 U.S.C. § 675(1)(B), (5)(C)(iv), effective September 29, 2015).

documents[17], and the right to stay safe and avoid exploitation.[18] At the case plan and permanency hearings, IDHW must identify the services that will be provided to help the youth transition to a successful adulthood.[19]

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 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.

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[17] § 114, 128 Stat. at 1930 (to be codified at 42 U.S.C. § 675(5)(I), effective September 29, 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.
[18] § 113(d), 128 Stat. at 1929 (effective September 29, 2015).
[19] § 112(b)(2)(B)(ii)(I), (c), 128 Stat. at 1927, 1928, and § 111(b), (d), 128 Stat. at 1924, 1925 (to be codified at 42 U.S.C. § 675(5)(B) and 42 U.S.C. § 671(a)(10), respectively (both effective September 29, 2015)).

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)[20] 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.

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.[21] In making this determination, the court should evaluate the plan using the legal requirements discussed above.

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. Other

[20] FGDM is also known as family decision-making, family group conferencing, or family unity meetings.
[21] § 16-1621(1) (Supp. 2014).

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."[22] The court's order also shall require the Department to simultaneously take steps to accomplish the goal of reunification and the concurrent permanency goal.

In evaluating the case plan, the judge should ensure, first and foremost, that the case plan addresses the safety issues that brought the child into care or are preventing the child from safely returning home. In addition, judges should consider the following questions:[23]

- 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 merely a re-iteration of any safety plan previously put in place? The case plan should not duplicate the safety plan; rather, these two plans should operate concurrently. The safety plan is focused on ensuring the child's safety. The case plan should focus on what must change over time to enable the child to return home.
- How do the parents react to the case plan?
- Does the case plan focus on reducing threats of danger to the child and also increasing protective capacities of the parents? The family will have the best chance of success at reunification if the case plan addresses both the reduction of threat and increasing the parents' protective capacities.

B. Timing of the Hearing

The court shall schedule a case plan hearing to be held within thirty (30) days after the adjudicatory hearing.[24] 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.[25] 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.

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[22] § 16-1621(5).
[23] These questions were developed and are discussed in the ABA CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS. *See* LUND & RENNE, *supra* note 6, at 40.
[24] § 16-1621(1).
[25] *Id.*

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."[26] 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 Department and the Department must confirm to the court that the required notice was provided. The Juvenile Rules also makes clear that the right to notice and to be heard does not make foster parents parties to the CPA proceeding.[27]

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."[28] As with notice to foster parents, notice must be given by the Department, and the Department must confirm that notice was provided

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.[29] 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. 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.

The court must ensure that the case plan is comprehensive and that 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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[26] § 16-1621(2).
[27] IDAHO JUV. 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).
[28] IDAHO JUV. R. 40(b).
[29] IDAHO JUV. R. 38.

6.4 BEST PRACTICES TO REDUCE DELAYS AND TO ACHIEVE TIMELY PERMANENCY FOR CHILDREN 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.[30]

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:
>
> (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.[31]

Federal law requires that the Department place children with relatives so long as the relative meets the Department's "child protection standards."[32]

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.[33] Identification and investigation of all potential caretakers is essential to ensure that the

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[30] *See, e.g.*, *Doe*, 134 Idaho at 762, 9 P.3d at 1228 (acknowledging that where putative father was not contacted until child protection case had been pending for two years, the delay led to conflict between grandparent/foster parent and birth father).
[31] § 16-1629(11) (Supp. 2014).
[32] 42 U.S.C. § 671(a)(19) (2012).
[33] 42 U.S.C.A. § 671(a)(29) (2015). While the official U.S. Code does not yet reflect the adoption of the Preventing Sex Trafficking and Strengthening Families Act of 2014, the unofficial code is cited here to enable easier access to the revised statutory provisions.

placement selected is the one that best meets the needs of the child and ensures the child's safety.[34]

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. [35]

D. Compliance with the Indian Child Welfare Act (ICWA)

If the child is an Indian child, the lawyers, judge, guardian *ad litem*, and social workers involved in the case must be familiar with and implement the provisions of the ICWA.[36] The Act establishes special procedural and substantive safeguards to protect the interests of Indian children, their families, and the Indian tribe. This includes tribal determination of who is an Indian child, full tribal participation in planning and decision making in the child protection case, placement preferences for extended family members and other Indian families identified by the child's tribe, and, when requested, transfer of the child protection case to the child's tribal court.

To ensure that permanency for Indian children is not delayed, the courts and the Department should:

- Determine at the earliest possible opportunity whether the ICWA applies to one or more children in a case.
- Put procedures in place for immediate notice of the pendency of a case to the child's Indian tribe.
- Open lines of communication with the tribal representative to ensure that complete information is exchanged and that time delays are avoided.
- Be familiar with and follow the procedural and substantive requirements set out in the ICWA and the Bureau of Indian Affairs (BIA) Guidelines, effective February 25, 2015.
- Make sure that the Department documents and the court verifies all notices, consents, and "active efforts" in accordance with the requirements of the Act.

Chapter 11 of this Manual contains a detailed discussion of the Indian Child Welfare Act.

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[34] 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). The ICWA is discussed in detail in Chapter 11 of this manual.

[35] §§ 16-1629(8) (2014), 16-2102(Art. III) (2014). The ICPC is discussed in detail in Chapter 12 of this manual.

[36] *See generally* 25 U.S.C. §§ 1901-1963 (2012) and BIA Guidelines. Revised BIA Guidelines were recently published by the BIA on February 25, 2015 and can be found at 80 Fed. Reg. 10146 (Feb. 25, 2015). At the time of the publication of this Manual, the Guidelines are an authoritative but non-binding resource regarding interpretation of the ICWA. The Guidelines provide that, "These guidelines provide minimum Federal standards to ensure compliance with ICWA and should be applied in all child custody proceedings in which the act applies." BIA Guidelines § A.5(a). ***As of the publication of this Manual, the Bureau of Indian Affairs had proposed regulations making the BIA guidelines mandatory.***

CONCLUSION

The case plan is the roadmap for achieving permanency for the child. 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.

CHAPTER 7:
The Permanency Plan and Permanency Hearing

7.1 INTRODUCTION

There are three types of permanency hearings.

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 an alternate permanency plan for the child. At the first permanency hearing, the court must select a permanency goal, which must be one of the following: (1) continued efforts toward reunification for a period not to exceed three months; (2) termination of parental rights and adoption; (3) guardianship; or (4) another planned permanent living arrangement for youth aged 16 and older.[1] 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.

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.

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

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] 42 U.S.C. § 675(5)(C)(i) (2012); IDAHO CODE ANN. § 16-1622(2)(a) (Supp. 2014); IDAHO JUV. R. 44(a)(1), 46.

At every permanency hearing, the court must review and either, approve, modify, or reject the permanency plan proposed by the Department.[2] 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.[3] 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 that goal(s). Formulation of the plan requires IDHW to systematically analyze the child's needs, develop options for the child's placement, and identify advantages and disadvantages of the placement options in light of the child's needs.

A. Goals

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

1. A three month extension of efforts to reunify with the parent(s) (in the absence of a judicial determination of aggravated circumstances),[4]
2. Termination of parental rights and adoption,
3. Guardianship, or
4. For children age sixteen (16) years or older[5], "another planned permanent living arrangement" (APPLA).[6]

1. <u>Continued Efforts to Reunify</u>

The preferred option for permanency is the safe and permanent reunification of the child with his/her parents.[7] The preference for reunification embodied in both Idaho and federal 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]

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[2] § 16-1622(2)(b).
[3] *Id*.
[4] IDAHO JUV. R. 44(a)(1).
[5] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(b)(2)(A)(i), (f), 128 Stat. 1928, 1929 (2014) (to be codified at 42 U.S.C. § 675(5)(C)(i), effective September 29, 2015). NOTE: This new federal requirement is inconsistent with current Idaho statute at the publication of this manual.
[6] §§ 16-1622(2)(a), 16-1620(2).
[7] *Id.* § 16-1601 (2009).
[8] *Id.*
[9] 42 U.S.C. § 671(a)(15)(D) (2012); §§ 16-1619(6)(d), 16-1620(2) (Supp. 2014). The determination of aggravated circumstances would normally be made at the adjudicatory hearing.

Absent a finding of aggravated circumstances, reunification should be finalized within twelve (12) months from the date the child was removed from his home. The court may, so long as it is in the child's best interest, extend the time to finalize reunification for up to three (3) months.[10]

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.[11] Adoption meets all these goals of permanency. Adoption subsidy benefits are available to assist the adoptive parents in meeting the child's needs.[12]

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.[13] Nonetheless, guardianship is a less-preferred option because guardianships are not permanent and are subject to review and modification.[14]

Absent a finding of aggravated circumstances, guardianships should be finalized within thirteen (13) months from the date the child was removed from his home.[15] When there is a finding of aggravated circumstances, the court should finalize guardianships within five (5) months from the date of the judicial determination.[16] Any extension of time to finalize the guardianship requires court approval.[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

[10] IDAHO JUV. R. 44(a)(1).
[11] 42 U.S.C. § 675(5)(B) (2012); 45 C.F.R. § 1356.21(h)(3) (2012).
[12] Adoption is discussed in detail in Chapter 10 of this manual.
[13] *See* § 15-5-212A (2009).
[14] *See* Chapter 12: Special Topics.
[15] IDAHO JUV. R. 44(a)(2).
[16] IDAHO JUV. R. 44(b).
[17] IDAHO JUV. R. 44(a)(2).
[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] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(b)(2)(A)(i), (f), 128 Stat. 1928, 1929 (2014) (to be codified at 42 U.S.C. § 675(5)(C)(i), effective September 29, 2015). NOTE: This new federal requirement is inconsistent with current Idaho statute at the publication of this manual.

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] The Idaho Child Protective Act provides that a court may approve a permanency goal of APPLA only upon written, case-specific findings that there are compelling reasons why a more permanent goal is not in the best interest of the child.[21] Federal law requires, in addition, that the court find that APPLA is the best permanency plan for the child.[22]

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, 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. All Permanency Plans

In addition to identifying the permanency goal, each permanency plan must:

- 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]
- Information regarding the reasonable efforts made by the Department to place the child in the least restrictive environment for the child, and how the Department placement is consistent with the best interest and special needs of the child considering the following placement priority: "(a) a fit and willing relative, (b) a fit and willing nonrelative with a significant relationship with the child, (c) foster parents and other persons licensed in accordance with" Idaho law.[24]
- In the event the child has been in out-of-home care for 15 of the last 22 months and the Department does not intend to file a petition to terminate parental rights, compelling reasons as to why termination of parental rights is not in the best interest of the child.[25]
- Include a schedule to finalize the permanency goal in accordance with the timelines set forth in court rules.[26]
- Document the steps that the Department is taking to ensure that the foster family is following the "reasonable and prudent parent" standard and that the child(ren) has regular opportunities to engage in "age or developmentally appropriate activities."[27]

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[20] 45 C.F.R. § 1356.21(h)(3) (2012).
[21] §§ 16-1620(7) (Supp. 2014), 16-1622(2)(f).
[22] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112(b)(2)(B)(ii)(II), (c), 128 Stat. 1927, 1928 (2014) (to be codified at 45 U.S.C. § 675(5)(C), effective September 29, 2015).
[23] §§ 16-1622(2)(a) (Supp. 2014), 16-1621(3)(a).
[24] *Id.* § 16-1629(11).
[25] § 16-1622(g).
[26] IDAHO JUV. R. 44(b), 46. The timelines vary depending upon the approved permanency goal and are discussed in the preceding section.
[27] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112(b)(2)(B)(ii)(I), (c), 128 Stat. 1927, 1928 (2014) (to be codified at 42 U.S.C. § 675(5)(B) and 42 U.S.C. § 671(a)(10), effective September

2. Plans with a Concurrent Permanency Goal

At a permanency hearing, the court may approve, modify, or reject a permanency plan with both a primary and secondary permanency goal.[28] When the primary goal is a three-month period of continued efforts at reunification, the permanency plan should also include a concurrent permanency goal.[29] Failure to include a concurrent plan could delay permanency. The permanency plan should include a specific plan for achieving goals.

A plan with a concurrent permanency goal 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. If the child is in an out-of-state placement, whether the out-of-state placement continues to be appropriate and in the best interest of the child.[30]
- Address the advantages and disadvantages of each option and 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(s) within the timelines established by court rule.[31]
- Address options for maintaining the child's connection to the community, including individuals with a significant relationship to the child, and organizations or community activities with which the child has a significant connection.
- In the case of a child who has attained the age of fourteen (14)[32] years, include the services needed to assist the child to make the transition from foster care to independent living.
- 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.

When the primary permanency goal is continued efforts at reunification for a period of up to three months[33], the permanency plan must also include:

- All issues that must be addressed before the child can safely be returned home without Department supervision.
- The role of the Department toward each parent.

29, 2015). NOTE: This new federal requirement is inconsistent with current Idaho statute at the publication of this manual.

[28] §§ 16-1622(2)(a) (Supp. 2014), 16-1621(3)(d).

[29] § 16-1621(3)(c); IDAHO JUV. R. 44(a)(1).

[30] §16-1622(2)(d).

[31] IDAHO JUV. R. 44, 46. The timelines vary depending upon the approved permanency goal and are discussed in the preceding section.

[32] 42 U.S.C. § 675(1)(D) (2012). Effective September 29, 2015, the age drops from 16 to 14. Federal law requires that the Department, in consultation with the youth in foster care, prepare a personalized transition plan for youth at least 90 days prior to their exit from care, which includes education goals and plans. The plan must be as detailed as the child chooses and include specific options on housing, health insurance, education, local opportunities for mentoring, continuing support services, work force supports, and employment services. For more information on Idaho's independent living program, see Chapter 12: Special Topics, *infra*.

[33] IDAHO JUV. R. 44(a)(1).

- Specific tasks to be completed by the Department, each parent, or others to address each issue.
- Services to be made available by the Department to the parents and in which the parents are required to participate.
- Deadline for completion of each task.
- Terms of visitation, supervision of visitation, and child support.[34]

3. 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 Department is required to document the following:

- The compelling reasons why a more permanent goal is not in the best interest of the child.[35]
- The Department's efforts to place the child permanently with a parent, relative, or in a guardianship or adoptive placement.[36]
- The steps taken by the Department to ensure that the foster family follows the "reasonably prudent parent standard" and in addition, that the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities.[37]

In order to facilitate timeliness for the child, the permanency plan should contain this documentation.

4. Implementation Schedule

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 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.[38]

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

[34] §§ 16-1622(a) (Supp. 2014), 16-1621(3)(c).
[35] *Id.* §§ 16-1620(7), 16-1622(2)(f).
[36] 42 U.S.C. § 675A(a)(1) (2012).
[37] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112(b)(2)(B)(ii)(I), (c), 128 Stat. 1927, 1928 and § 111(b), (d), 128 Stat. 1924, 1925 (2014) (to be codified at 42 U.S.C. §675(5)(B) and 42 U.S.C. § 671(a)(10), respectively (both effective September 29, 2015)).
[38] IDAHO JUV. R. 46(a).

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. [39]

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.[40]

c. *All cases*

Amendments to the permanency plan to extend the time to finalize the permanency goal must be approved by the court.[41]

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.[42] In cases where aggravated circumstances are found at the adjudicatory hearing, the court is required to hold a permanency hearing within 30 days of the determination that aggravated circumstances exist.[43]

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. [44] 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.[45] 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.[46] Eligibility may be reinstated once 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.[47]

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,

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[39] IDAHO JUV. R. 44(b)(2).
[40] IDAHO JUV. R. 44(b)(1).
[41] IDAHO JUV. R. 44 and 46.
[42] § 16-1622(2)(b) (Supp. 2014).
[43] 45 C.F.R. § 1356.21(h)(2) (2012); §§ 16-1619(6)(d),16-1620(1) (Supp. 2014). Additional information about the permanency hearing in cases involving aggravated circumstances can be found in Chapter 6 of this manual.
[44] 42 U.S.C. § 675(5)(C) (2012); 45 C.F.R. § 1356.21(b)(2)(i).
[45] 42 U.S.C. § 675(F).
[46] 45 C.F.R. § 1356.21(b)(2)(ii).
[47] *Id.*

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.[48] Similarly, the guardian *ad litem* is required to file a report with the court at least five days prior to the permanency hearing.[49]

C. Engagement of Youth with a Goal of APPLA

Federal law requires more stringent permanency plan requirements and case review for youth with a permanency goal of APPLA. At every permanency hearing the Department must document the efforts it has made to place the child permanently with a parent, relative, or in a guardianship or adoptive placement. The court must ask the child about his or her desired permanency outcome and must make a judicial determination that APPLA is the best permanency goal for the child. In addition, the court must find that there are compelling reasons why it is not in the best interest of the child to be placed permanently with a parent, relative, or in a guardianship or adoptive placement. Finally, the Department must document the steps it has taken to ensure that the foster family follows the "reasonable prudent parent standard" and whether the child has regular opportunities to engage in "age or developmentally-appropriate" activities.[50]

D. Key Findings at the Permanency Hearing

Idaho and federal law require that the court must make findings regarding the following matters at the permanency hearing:

- Approving, modifying, or rejecting the permanency plan proposed by the Department and reviewing the progress in accomplishing the permanency plan.[51]
- Whether the Department made reasonable efforts to finalize the permanency plan in effect for the child. This finding must be in writing and must be case-specific. *(If the case specific finding is not timely made, an otherwise eligible child may become ineligible to receive federal IV-E match funds. Federal IV-E match funds will end on the last day of the month in which the finding should have been made. It will be reinstated on the first day of the month in which the finding was made.)*[52]
- If the permanency goal for a youth age 16 and older is another planned permanent living arrangement, whether APPLA is the best permanency goal for the child and that there are compelling reasons why it is not in the best interest of the child to be placed permanently with a parent, a relative, or in a guardianship or adoptive placement.[53]

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[48] §§ 16-1620(1), 16-1629(9) (Supp. 2014).
[49] § 16-1633(2).
[50] Preventing Sex Trafficking and Strengthening Families Act *supra* note 50.
[51] §§ 16-1622(2)(b), 16-1620(4).
[52] 45 C.F.R. § 1356.21(b)(2)(ii) (2012); § 16-1622(2)(c) (Supp. 2014).
[53] §§ 16-1620(2), 16-1622(2)(f).

- Whether the child's connections to the community, including individuals with a significant relationship to the child, religious organizations, and community activities, are appropriately maintained because it is/is not in the child's best interests to do so.[54]
- Upon motion of the Department, finding that compelling reasons exist to relieve the Department of its obligation to file a petition to terminate parental rights when the child has been in care 15 of the last 22 months.[55]
- In the case of a child in an out-of-state placement, that the placement "continues to be appropriate and in the best interest of the child."[56]
- In the case of a child who has attained the age of 14, approving "services necessary to assist the child to make a transition from foster care to independent living."[57]

E. Stipulation 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.[58] 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. 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.

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.[59] If the findings are not made, an otherwise eligible child will 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 may be reinstated on the first day of the month in which the required finding is made.[60]

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.[61] 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.[62] If the

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[54] §§ 16-1620(3)(f), 16-1621(3)(d)(v), 16-1622(2)(a).
[55] § 16-1622(2)(g).
[56] *Id*. at (2)(d).
[57] 42 U.S.C. 675(5)(C)(i) (2012); §§ 16-1620(3)(g), 16-1622(2)(e) (Supp. 2014). On September 29, 2015, the federally mandated age at which planning for "a successful adulthood" is required is lowered to 14.
[58] IDAHO JUV. R. 38.
[59] 42 U.S.C. § 675(5)(C)(i) (2012); 45 C.F.R. § 1356.21(b)(2); § 16-1622(2)(c) (Supp. 2014).
[60] 45 C.F.R. § 1356.21(b)(2)(ii).
[61] § 16-1622(2)(c) (Supp. 2014).
[62] 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

Department changes the initial permanency 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).[63] 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, once the Department changes the goal.

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 FACTORS THE COURT SHOULD CONSIDER AT THE PERMANENCY HEARING

A. Sibling Placement

There is a federal preference for placing siblings together.[64] For some children, sibling relationships are the longest and closest relationships they will experience. A child removed from his or her parents should not also suffer the separation loss from brothers and sisters. If siblings cannot be placed together, then the permanency plan should ensure ongoing interaction between the siblings unless ongoing interaction would be contrary to the safety or well-being of any of the siblings.[65]

In 2008, the federal Fostering Connections to Success and Increasing Adoptions Act imposed a number of requirements on states relevant to these provisions of Idaho law.[66] Fostering Connections requires that reasonable efforts to place siblings together in the same foster home,

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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).

[63] *Id.*

[64] 42 U.S.C. § 671(a)(31)(A), (B) (2012).

[65] *Id.*

[66] 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).

adoptive home, guardianship home, or other placement unless such a joint placement would be contrary to the safety or wellbeing of any of the siblings.[67] 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 wellbeing of any of the siblings.[68]

B. Visitation and Child Support

To the extent that maintaining the relationship is in the child's best interests and is consistent with the permanent plan for the child, it is important that the child have the opportunity for regular and meaningful contact with the parent.[69] It is equally important that visitation include appropriate terms and conditions to protect the child's safety, to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid disruption of the child's foster care placement. The plan should set forth provisions as to the frequency, duration, location, supervision, or other terms or conditions of visitation.[70] Parents who are able to pay should be expected to help cover the costs of foster care, and the amount and frequency of child support should be addressed in the permanency plan.[71]

C. Maintaining the Child's Connection to the Community

Idaho Code requires that both the case plan and the permanency plan address options to maintain the child's connection to his/her community and to maintain significant relationships in the child's life.[72] Fostering Connections requires states to emphasize children's relationships with siblings and other close relatives,[73] to maintain educational stability for the child,[74] and to provide a transition plan for children aging out of foster care without a permanent placement or community connections.[75]

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. 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.[76]

With regard to 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

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[67] 42 U.S.C. § 671(a)(31)(A), (B) (2012).
[68] *Id.*
[69] §§ 16-1622(2)(a) (Supp. 2014), 16-1621(3)(c).
[70] Idaho Code sections 16-1620(3)(f) and 16-1621(3)(a)-(d) require the case plan and the permanency plan to include provisions to maintain the child's significant relationships if in the child's best interests.
[71] *Id.* § 16-1628(1).
[72] §§ 16-1620(3)(f), 16-1621(3)(d)(v).
[73] 42 U.S.C. § 675(a)(31)(A), (B) (2012).
[74] 42 U.S.C. § 675(a)(30).
[75] 42 U.S.C. § 675(5)(H), (8)(B).
[76] 42 U.S.C. § 671(a)(29).

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.[77]

D. Youth Transitioning Out of Foster Care

With regard to the transition from foster care, federal law requires the state 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.[78]

For youth with a permanency goal of APPLA, federal law requires more stringent permanency plan requirements and case review. At every permanency hearing the Department must document the efforts it has made to place the child permanently with a parent, relative, or in a guardianship or adoptive placement. The court must ask the child about his or her desired permanency outcome and must make a judicial determination that APPLA is the best permanency goal for the child. In addition, the court must find that there are compelling reasons why it is not in the best interest of the child to be placed permanently with a parent, relative, or in a guardianship or adoptive placement. Finally, the Department must document the steps it has taken to ensure that the foster family follows the "reasonable prudent parent standard" and whether the child has regular opportunities to engage in 'age or developmentally-appropriate" activities.[79]

E. 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.

F. Subsequent Permanency Hearings

There is a continuing obligation to hold a permanency hearing once every twelve (12) months until the case is closed.[80] 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.[81] 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.[82]

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[77] 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).
[78] 42 U.S.C. § 675(H).
[79] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112(b)(2)(B)(ii)(I), (c), 128 Stat. 1927, 1928 and § 111(b), (d), 128 Stat. 1924, 1925 (2014) (to be codified at 42 U.S.C. §675(5)(B) and 42 U.S.C. § 671(a)(10), respectively (both effective September 29, 2015)).
[80] § 16-1622(2)(a), (b) (2014).
[81] § 16-1622(2)(c); IDAHO JUV. R. 45(a)(3).
[82] § 16-1622(2)(b); IDAHO JUV. R. 45(c).

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.

CHAPTER 8:
Review Hearings

8.1 INTRODUCTION

Review hearings are court proceedings that take place after approval of the case plan and that continue until permanency for the child is attained. Idaho Code section 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]

At the review hearing, the court may:

1. Modify the case or permanency plan.
2. Modify disposition.
3. Determine whether the Department has made reasonable efforts to finalize a permanency plan.
4. If the child will not be reunified with a parent(s), review the options for in- and out-of-state placement.
5. If the next review hearing is an annual permanency hearing, order the Department to prepare and file a written permanency plan.[2]
6. Enter further orders necessary to ensure that the case is moving towards achieving permanency for the child.[3]

Review hearings are critical to early 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.

These hearings are informal, the rules of evidence do not apply, and the general public is not permitted to be present.[4] Children age eight and older are entitled to notice of review hearings

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Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO JUV. R 45(a).

[2] IDAHO JUV. R 45(c) and 46.

[3] IDAHO JUV. R 45(a)(1)-(4).

[4] IDAHO CODE ANN. § 16-1613(1) (2009); IDAHO JUV. R. 51.

and have a right to be heard, in person or in writing.[5] Foster parents (including relatives providing care for a child) and pre-adoptive parents are also entitled to notice and have a right be heard at review hearings.[6]

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.[7] 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 an 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.[8] 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

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[5] IDAHO JUV. R. 40(b); Chapter 12: Special Topics.
[6] IDAHO JUV. R. 40(a); Chapter 12: Special Topics.
[7] 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).
[8] *See* IDAHO JUV. R. 44 and 46.

create incentives for IDHW to make decisions and take action concerning the permanent 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 REVIEW

The timing of review hearings is governed by both federal and state law. Federal law requires that cases involving children in out-of-home care be reviewed every six months.[9]

Idaho law requires that the court hold a hearing to review of the child's case plan or permanency plan 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.[10] Courts have the discretion and are encouraged to conduct review hearings more frequently.[11] 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 reviews more or less frequently.[12]

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

Child Protection Drug Courts (CPDC) exemplify the value and effectiveness of regular and frequent review hearings.

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 consider entering appropriate orders to ensure that all parties are prepared to proceed on the new date.

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[9] 42 U.S.C. § 675(5)(B) (2012).
[10] § 16-1622(1)(a) (Supp. 2014).
[11] Pursuant to § 16-1622(b), parents "may not request a review hearing within three months of a prior review hearing."
[12] NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 67 (1995).

8.3 SUBMISSION OF REPORTS TO THE COURT

The Idaho Child Protective Act (CPA) requires that IDHW file a written report to the court at least every six months.[13] Guardians *ad litem* must file reports with the court at the adjudicatory hearing and at all review and permanency hearings.[14] The responsibility to report coincides with the courts' responsibility to review cases under their jurisdiction. The court may or may not order more frequent reports where necessary to support review hearings.

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 the parties to consider proposals 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, where appropriate, the transition from foster care to independent living.[15] Recommended best practice is that this requirement be included in the order setting the review hearing and that the reports be verified.

8.4 KEY DECISIONS THAT THE COURT SHOULD MAKE AT THE REVIEW HEARING

A. Can the Child be Safely Returned Home Today?

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.[16]

B. Is the Child a Native American or Alaska Native?

The Indian Child Welfare Act establishes specific standards that must be met if an Indian or Alaskan Native child is removed from home.[17] State courts must, in every child custody proceeding, ask whether the child is or could be an Indian child. Early identification of a child's Indian heritage allows tribes to intervene as early as possible and provides an opportunity for the tribe to bring resources to bear and prevent the breakup of the family.[18] In addition, the state court must ask "each party in the case, including the guardian *ad litem* and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child."[19] In most cases, the child's ICWA status will have been resolved prior to the review hearing. In some cases, either the child's ICWA

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[13] § 16-1629(9) (Supp. 2014).
[14] § 16-1633(2).
[15] *Id.*
[16] § 16-1622(1)(a). *See generally* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 43-46 (2009).
[17] 25 U.S.C. §§ 1902-1963 (2012).
[18] BIA Guidelines A.(c)(3) (2015).
[19] *Id.* at B.1(b).

status has not been resolved or new information becomes available that indicates the child may be an Indian child. The best practice recommendation is that the court inquires about the child's ICWA status at each hearing until the question is resolved.[20]

C. Has IDHW Exercised and is IDHW Continuing to Exercise Due Diligence to Identify and Notify the Child's Extended Family?

Federal law requires that within 30 days of removal of the child from the parent(s)' custody, the child welfare agency exercise due diligence to identify, and provide notice of the child's removal to the following relatives of the child: all adult grandparents, all parents of a sibling of the child when the parent has legal custody of the sibling, and other adult relatives of the child (including any other adult relatives suggested by the parents).[21] The definition of "sibling" is determined by state law. Siblings include an individual who is considered to be a sibling under state law or who would be considered a sibling under state law despite a disruption in parental rights. For example, a sibling who shares a biological parent with a child in care is a sibling even though their common parent's rights to the sibling have been terminated.[22]

D. Is the Child in an Appropriate Foster Care Placement That Adequately Meets the Child's Physical, Emotional, Educational, and Developmental Needs?

When the court places a child in the custody of IDHW, state law vests authority for the placement decision in the Department, subject to review by the court.[23] Federal law requires that placement authority be vested in the Department in order for the child to be eligible for federal funds.[24] When the parties raise issues about the child's placement, "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility", the court may make appropriate placement decisions without impacting the child's eligibility for IV-E funding.[25]

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[20] *Id*. *See also* Chapter 11: Indian Child Welfare Act.
[21] 42 U.S.C. § 671(a)(29) (2012).
[22] ADMIN. FOR CHILDREN & FAMLIES, U.S. DEP'T. HEALTH & HUMAN SERVS, GUIDANCE ON PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES ACT, ACYF-CB-IM-14-03 (issued Oct. 23, 2014), *available at* http://www.in.gov/children/files/ACYF-CB-IM-14-03.pdf (last visited April 29, 2015). This program instruction is the only direction available on how this new language will be interpreted. It is not binding authority.
[23] Under Idaho law, the authority to make placement decisions resides with IDHW. *See* § 16-1629(8) and Dept. of Health & Welfare v. Hays (In re Doe), 137 Idaho 233, 236-37, 46 P. 3d 529, 532-33 (2002).
[24] *See* 45 C.F.R. § 1356.71(d)(1) (2012).
[25] 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 "[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." The court can also require the agency to include the child's foster care placement in the case plan or the permanency plan, and can then reject a plan that includes an inappropriate placement. Additionally, the court can make a finding that the department has not made reasonable efforts to eliminate the need for shelter care or finalize a permanency plan for the child and set a future hearing to review the finding. The case plan and permanency plan are discussed in further detail in chapters 6 and 7, *supra*. ADMIN. FOR CHILDREN & FAMILIES, 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=31 (last visited April 29, 2015).

E. What Services are Being Provided to Assist the Child in Adjusting to the Placement and to Ensure the Stability of the Placement?

1. General

In order to ensure the stability of the foster care placement and to ensure positive outcomes for children, the court should monitor and review the services being provided to the child and the foster family.[26] 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

In addition, the court should review and monitor whether the child's educational needs are being met, including whether the child has remained in the school of origin.[27] If continued enrollment in the child's school of origin is not in the child's best interest, the court should monitor whether the child has been or will be immediately enrolled at another school.[28]

3. Independent Living

Every youth who is 14 years or older must have an individualized Independent Living (IL) Plan that includes permanency and IL skill development.[29] At the permanency hearing, (which may also serve as a review hearing), a determination of the services needed to assist a youth 14 years or older to make the transition from foster care to independent living must be identified.[30] Services may include: (1) information on education, training, and skills necessary to obtain employment; (2) vouchers for education or training, including postsecondary education; (3) list of support network contacts for youth when he or she exits care; and (4) information on health care and how to make decisions after exit from care. In addition, each year the Department must provide the youth with a copy of his or her credit report.[31]

A youth who has been in foster care for six or more months and is aging out of foster care must be provided a copy of his/her birth certificate, social security card, driver's license or state issued identification card, medical records, and health insurance information.[32] For youth age 16

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[26] §§ 16-1621(3)(a), 16-1620(3)(a) (Supp. 2014).
[27] 42 U.S.C. § 675(1)(C), (G) (2012).
[28] *Id.* § 675(1)(G)(ii)(II). *See also* Chapter 12: Special Topics.
[29] 42 U.S.C. § 675(1)(D) (2012). Effective September 29, 2015, the age drops from 16 to 14. Federal law requires that the Department, in consultation with the youth in foster care, prepare a personalized transition plan for youth at least 90 days prior to their exit from care, which includes education goals and plans. The plan must be as detailed as the child chooses and include specific options on housing, health insurance, education, local opportunities for mentoring, continuing support services, work force supports, and employment services. For more information on Idaho's independent living program, see Chapter 12: Special Topics.
[30] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112(a)(1), (c), 128 Stat. 1926, 1928 (2014) (to be codified at 42 U.S.C. §675(5)(C)(i) effective September 29, 2015); §§ 16-1622(2)(e), 16-1621(3)(d)(vi) (2014).
[31] *Id.*
[32] 42 U.S.C. § 675(5)(H) (2012); Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183,

years and older with a permanency goal of APPLA, the court must ask the youth about his or her desired permanency outcome.[33] In addition, the court must:

- Require IDHW to document on the record efforts to place the youth permanently with a parent, relative, or in a guardianship or adoptive placement.[34]
- Make a judicial determination that APPLA is the best permanency goal for the youth.[35]
- Make a judicial determination that there are compelling reasons not to permanently place the youth with a parent, relative, or in a guardianship or adoptive placement.[36]
- Document the steps that the Department is taking to ensure that the foster family is following the "reasonable and prudent parent" standard and that the child(ren) has regular opportunities to engage in "age or developmentally appropriate activities."[37]

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

The Department, in order to qualify for IV-E foster care maintenance payments (in consultation with pediatricians, other experts in health care, and experts in and recipients of child welfare services), 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.[38] 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.

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 contact between siblings.[39]

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.[40]

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§ 114, 128 Stat. 1926, 1930 (2014) (to be codified at 42 U.S.C. §675(5)(I), effective September 29, 2015). *See also* Chapter 12: Special Topics.

[33] *Id.* at § 675A(a)(2)(A).

[34] *Id.* at (a)(1).

[35] *Id.* at (a)(2)(B).

[36] *Id.*

[37] *Id.* at (a)(3).

[38] 42 U.S.C. § 675(1)(C) (2012).

[39] 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).

[40] § 16-1621(3)(c) (Supp. 2014).

As visitation increases to include unsupervised visits in the parents' home, visits exceeding forty-eight hours (extended home visits) must be approved by the court in writing, in advance. An extended home visit may be ended by IDHW if the Department determines that termination of the visit is in the best interests of the child. If an extended home visit is terminated, IDHW must state in writing when the visit was terminated and the reasons for terminating the visit. This statement must be filed with the court within 48 hours of terminating the visit.[41]

F. Is Child Support Appropriate?

The court should review whether parents are complying with child support obligations.[42] Support amounts should either be confirmed or adjusted during review hearings.[43] The court should take care to avoid financial burdens that interfere with family reunification. In particular, delays in setting support followed by retroactive lump sum support orders can delay permanency; the financial disruption can interfere with the parent(s)' ability to maintain or to obtain residential space in preparation for the child's return home. Where a parent is not supporting their child, failure to establish a child support obligation will narrow the grounds for parental termination.

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.[44] The best practice recommendation is to include all children, of all ages, in all proceedings.[45] 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.

> "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.

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[41] IDAHO JUV. R. 42.
[42] Idaho law provides for the entry of support orders for children in the child protection system. *See* IDAHO CODE ANN. § 16-1628(1). The terms of child support should be included in the case plan.
[43] § 16-1628.
[44] Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, ABA CHILD L. PRAC. (2006) 145.
[45] NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, SEEN, HEARD, AND ENGAGED: CHILDREN IN DEPENDENCY COURT HEARINGS 8 (2012).

- 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 his/her engagement in the process.[46]

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 protect the child.[47]

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.[48] 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.[49] 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.[50]

At each review hearing, the court should confirm that a child age eight and over has been provided notice of the hearing by IDHW.[51] Children and youth should be encouraged to participate in review hearings in an age appropriate manner. For more information on how the court and practitioners can provide a meaningful opportunity for children to participate in the process, see Chapter 12.

H. Are the Needs of the Foster Parents Being Addressed?

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.[52] The best practice recommendation 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 wellbeing 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.

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[46] Khoury, *supra* note 44, at 150.
[47] NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *supra* note 45, at 8-9.
[48] IDAHO JUV. R. 40(b).
[49] § 16-1614(1) (Supp. 2014).
[50] § 16-1614(2).
[51] IDAHO JUV. R. 40(b).
[52] IDAHO JUV. R. 40(a).

I. Have the Parents Complied with the Case Plan?

The court should review information on the extent to which the parents have complied with the case plan.[53] 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 is using the skills learned in the class to decrease threats or increase his/her protective capacity. 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.

Non-compliance may also indicate a need to modify or clarify the case plan. At the review, the court can correct any misunderstood expectations. 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.

J. Is IDHW Making Reasonable Efforts?

At the permanency hearing, the court is required to make a case-specific finding that the Department did or did not make reasonable efforts to finalize the permanency plan in effect for the child.[54] 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.[55] Should reunification efforts fail, the concurrent plan must fully be in place and ready for implementation at the annual permanency hearing.

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.[56] Idaho law does not provide specific detail about the scope and content of a post-permanency review hearing.[57]

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[53] § 16-1622(1)(a)(iii).
[54] § 16-1622(2)(c).
[55] IDAHO JUV. R. 45(a)(3).
[56] § 16-1622(1)(a); IDAHO JUV. R. 45(a).
[57] *See* § 16-1622(1)(a); IDAHO JUV. R. 45(a).

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 move the case toward successful completion. 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.[58] Idaho Child Protection Forms include a template form for relinquishing jurisdiction. It and other child protection forms can be found on the Child Protection section of the Idaho Supreme Court website.

In some cases, it is a condition of the case plan that the parent who has completed the plan obtain a custody order addressing issues of custody as between the parents before the child protection case is closed. The court in the CPA case has exclusive jurisdiction over the child, which can delay progress on the custody case.[59] In such instances, counsel should ask the court in the CPA proceeding for an order relinquishing jurisdiction for purposes of the custody case.

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 STIPULATIONS 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 confirm 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.[60] 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.

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[58] IDAHO JUV. R. 45(a)(4).
[59] § 16-1603(1) (2009).
[60] IDAHO JUV. R. 38. Rule 38 sets forth the requirements for the use of stipulations in CPA proceedings

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.

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

Best practice is for the court to make written findings of fact and conclusions of law, in language understandable by the parties, with enough detail 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 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. 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.

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.[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 his or her 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

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Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1601(1) (2009)*; see also* § 16-2001(2).

[2] *See id.* § 16-1615(5)(b) (Supp. 2014) (requiring reasonable efforts to eliminate the need for shelter care); *id.* § 16-1619(6)(a) (requiring reasonable efforts to eliminate the need for foster care); *id.* § 16-1621(3) (requiring case plan to set forth reasonable efforts to make it possible for child to return home). Section 16-1602(5) defines aggravated circumstances. Pursuant to that provision, where a court makes the finding that a parent's maltreatment of a child constitutes aggravated circumstances, no efforts to reunify the parent and child are required. *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) (2012); 42 U.S.C. § 675(5)(C).

[4] § 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] § 16-1603(1) (Supp. 2014), § 16-1604.

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 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]

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.[9] 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.[10] 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 his or her family.[11]

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

The court is required to hold permanency hearings annually.[12] The purpose of the permanency hearing is to determine the permanency goal for the child and the plan for achieving that goal,

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[6] § 16-1624(1); IDAHO JUV. R. 48(a).
[7] IDAHO JUV. 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. IDAHO JUV. R. 44(b)(2), (3); IDAHO JUV. R. 46.
[8] IDAHO JUV. R. 44(b)(2).
[9] § 16-1621(1).
[10] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i)(A) (2012); § 16-1622(2)(g).
[11] § 16-1622(2)(g).

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.[13]

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.[14] The court may hold a permanency hearing and approve a permanency plan with a permanency goal of TPR and adoption at any time.[15] 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.

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.[16] 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.[17]

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 TPR is not in the best interest of the child.[18] If the infant was 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.[19]

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.[20] The same guardian *ad litem*, assigned caseworker, and attorneys continue to participate in the case, reducing delays and improving representation and decision-making.[21]

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[12] § 16-1622(2)(b).
[13] IDAHO JUV. R. 46(b).
[14] § 16-1624(1), IDAHO JUV. R. 48(a).
[15] § 16-1622(2)(b), (c).
[16] 45 C.F.R. § 1356.21(b)(3) (2012); § 16-1619(6)(d) (Supp. 2014). Aggravated circumstances is discussed in detail in Chapter 3 of this manual.
[17] § 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 (*In re* Doe), 156 Idaho 103, 320 P.3d 1262 (2014).
[18] § 16-1624(3).
[19] § 39-8205(5) (2011). The Safe Haven Act is discussed further in Chapter 12 of this manual.
[20] § 16-1624(1) (Supp. 2014); IDAHO JUV. R. 48(a).
[21] IDAHO JUV. R. 48(b).

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.[22]

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.[23] The petitioner has the burden of proving grounds for termination by clear and convincing evidence.[24]

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.[25] 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.[26] 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.

Voluntary consents must be witnessed by a district judge, a magistrate judge, or an equivalent judicial officer in another state.[27] 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.[28]

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.[29]

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:

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[22] *Id*.
[23] § 16-2009 (2009); IDAHO JUV. R. 51(c); IDAHO R. EVID. 101.
[24] § 16-2009.
[25] § 16-2005(4) (Supp. 2014).
[26] § 16-1602(5).
[27] § 16-2005(4). The 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.
[28] §§ 16-2005(4) (Supp. 2014), 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. § 16-2007(3) (Supp. 2014). 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.
[29] § 16-2005(4).

- Are you the [birth] parent of the child named in the consent form?
- When and where was the child born? (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?
- 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? If so, what tribe? If it is possible that the child might be of Indian heritage, is there anyone who might have more information about the child's Indian 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. Once the original of the consent is filed with the court in the CPA proceeding, the prosecutor can then prepare a decree terminating parental rights for the judge's signature, which the court can enter without further hearing. 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.[30] 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.[31] It must specifically state the statutory grounds that are the basis for the petition.[32] If the child is an Indian or Alaska Native child, the petition must include allegations that meet the requirements of the ICWA.[33] The petition must be filed with the court and served on all parties.

Idaho Code section 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.
- 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.[34]

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[30] § 39-259A (2011).
[31] § 16-2006 (2009).
[32] The grounds for parental termination are discussed in detail in the next section of this chapter.
[33] The ICWA imposes additional, different requirements for the termination of parental rights of an Indian child. The ICWA is discussed in detail in Chapter 11 of this manual.
[34] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 653, 239 P.3d 451 (Ct. App. 2010). While effective pleading of the petition in a termination case will help adequately guide the proof and findings in the case,

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

Idaho Code section 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 his or her child.[35] The statutory grounds for termination are independent, and termination may be granted if any one of the grounds is found.[36]

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.[37] 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 . . .[38]

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.[39] 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,[40] military service and parental animosity,[41] incarceration,[42] mental illness,[43] geographic distance,[44] immigration status,[45] and concealment and parental hostility.[46] Other appellate decisions have affirmed trial court decisions finding a variety of explanations insufficient, including lack of knowledge of the child's whereabouts,[47] geographic distance,[48] the existence of a no contact

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the Idaho Court of Appeals has found that the pleading is adequate as long as the language used essentially follows the statutory requirements.

[35] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 152 Idaho 263, 270 P.3d 1048 (2012).
[36] § 16-2005 (Supp. 2014); Doe v. Dep't of Health & Welfare, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).
[37] § 16-2005(1)(a).
[38] § 16-2002(5).
[39] *In re* Matthews, 97 Idaho 99, 540 P.2d 284 (1975).
[40] Clayton v. Jones, 91 Idaho 87, 416 P.2d 34 (1966).
[41] *In re Matthews*, 97 Idaho 99; Doe v. Doe (*In re* Doe), 150 Idaho 46, 244 P.3d 190 (2010).
[42] Doe v. Dep't of Health & Welfare, 137 Idaho 758, 53 P.3d 341 (2002).
[43] Doe v. Doe (*In re* Doe), 138 Idaho 893, 71 P.3d 1040 (2003).
[44] Roe v. Doe (*In re* Doe), 143 Idaho 188, 141 P.3d 1057 (2006).
[45] *In re* Doe, 153 Idaho 258, 281 P.3d 95 (2012).
[46] Doe v. Doe (*In re* Doe), 156 Idaho 532, 328 P.3d 512 (2014).
[47] Clark v. Jelinek, 90 Idaho 592, 414 P.2d 892 (1966).
[48] In Interest of Crum, 111 Idaho 407, 725 P.2d 112 (1986).

order,[49] financial difficulties,[50] incarceration,[51] and the existence of a guardianship.[52] 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.[53]

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.[54] 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.[55] 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.[56]

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

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[49] 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).
[50] Doe v. Doe, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[51] 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).
[52] Doe v. Doe (*In re* Doe), 157 Idaho 59, 333 P.3d 874 (Ct. App. 2014).
[53] *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.
[54] Doe v. Dep't of Health & Welfare, 137 Idaho 758, 53 P.3d 341 (2002).
[55] *In re* Doe, 146 Idaho 759.
[56] *In re* Doe, 154 Idaho 175.

heavily in debt.[57] 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.[58]

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.[59] 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).[60]

In *Doe (2014)*,[61] 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.[62] The termination statute provides two independent bases upon which a child can be determined to be neglected.[63]

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:

> a. 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

[57] Roe v. Doe (*In re* Doe), 143 Idaho 188, 141 P.3d 1057 (2006).
[58] In Interest of Crum, 111 Idaho 407, 725 P.2d 112 (1986).
[59] Doe, 137 Idaho 758.
[60] Doe v. Doe, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[61] Doe v. Doe (*In re* Doe), 155 Idaho 505, 314 P.3d 187 (2013).
[62] § 16-2005(1)(b) (Supp. 2014).
[63] § 16-2002(3)(a).

> shall be deemed for that reason alone to be neglected or lack parental 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,
> b. 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,
> c. Who has been placed for care or adoption in violation of law; or,
> d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code.[64]

In many of the appellate decisions, the court found demonstrable harm to the child(ren) over an extended period of time.[65] 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.[66]

The court has found that evidence that was insufficient to support a finding of abandonment was sufficient to show neglect.[67] In abandonment cases, inability to parent has been the basis of a finding that the lack of a parental relationship was not willful;

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[64] § 16-1602(28). Section 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.

[65] 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).

[66] 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.

[67] 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).

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.[68]

The court has rejected the argument that a child who is in the custody of the Department is not neglected, 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.[69]

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. [70]

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 concurrent plan.[71] 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.[72]

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

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[68] 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 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.

[69] 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*.

[70] § 16-2002(3)(b) (Supp. 2014).

[71] § 16-1621.

[72] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i) (2012); § 16-1622(2)(g) (Supp. 2014).

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.[73]

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.[74] 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.[75] The often-quoted characterization of the father's progress on the case plan was that it was "too little, too late."[76]

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 on the mother's past criminal behavior while dismissing evidence such as the social worker's testimony that reunification was possible and was occurring.[77] 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

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[73] *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).

[74] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 152 Idaho 644, 273 P.3d 685 (2012).

[75] 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.

[76] *Id.* at 647.

[77] State v. Roe (*In re* Doe), 142 Idaho 594, 130 P.3d 1132 (2006).

requirements, maintaining employment, and becoming a nurturing parent with whom the child had developed a strong bond.[78]

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.

In *Doe (2014)*,[79] 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 section16-1622(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 finding compelling circumstances to delay termination.

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.[80] The parental termination statute defines abuse through a cross-reference to the CPA.[81] The CPA provides:

> "Abused" means any case in which a child has been the victim of:
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> 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.[82]

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

[78] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 150 Idaho 752, 250 P.3d 803 (Ct. App. 2011).
[79] *In re* Doe, 156 Idaho 682, 330 P.3d 1040 (2014).
[80] § 16-2005(1)(b) (Supp. 2014).
[81] *Id.* § 16-2002(4) (cross-referencing § 16-1602(1)).
[82] § 16-1602(1).

father's rights were also terminated on the basis that the father knew of the abuse and failed to protect the children.[83]

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.[84] 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."[85]

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.[86]

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."[87] 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.[88] First, the 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."[89] 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

[83] 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).
[84] § 16-2005(1)(c).
[85] § 16-2002(12).
[86] 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.
[87] § 16-2005(1)(d).
[88] "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 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. § 16-2002(17).
[89] § 16-2001(2) (2009).

services will enable the parent to carry out the responsibilities of parenting the child."[90] 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)*,[91] 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.

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.[92] In *Doe (2009)*,[93] 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)*,[94] 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 occasionally 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 doesn't 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.[95]

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[90] § 16-2005(6) (Supp. 2014).
[91] 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).
[92] § 16-2005(1)(e).
[93] Doe v. Doe (*In re* Doe), 148 Idaho 243, 220 P.3d 1062 (2009).
[94] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 151 Idaho 605, 261 P.3d 882 (Ct. App. 2011).
[95] Dep't of Health & Welfare v. Doe (In Interest of Baby Doe), 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

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.[96] In *State v. Doe*,[97] 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 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).[98]

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."[99]

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

[96] § 16-2005(3).
[97] State v. Doe, 143 Idaho 383, 146 P.3d 649 (2006).
[98] § 16-2005(2).
[99] § 16-2005(2)(a).

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….[100]

Each of these grounds for termination is also a basis for a finding of aggravated circumstances in the CPA proceeding.[101] 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.[102]

3. Abandoned Infant

The statute provides that abandonment of an infant is grounds for termination.[103] This ground is not available in cases where one parent seeks the termination of the other parent's rights.[104] The Idaho Safe Haven Act[105] 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.[106]

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 section 16-2007 establishes the notice requirements for parental

[100] § 16-2005(2)(b).
[101] § 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.
[102] The determination of aggravated circumstances is governed by § 16-1620. It is discussed in detail in Chapter 3 of this manual.
[103] § 16-2005(2)(c).
[104] *Id.*
[105] §§ 39-8201 – 8207 (2011). The Safe Haven Act is discussed in Chapter 12 of this manual.
[106] § 16-2007(1).

termination actions. In addition to specifying notice to certain specified persons and entities, section 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding.[107] 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 . . .."[108] 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.[109]

When the overlapping notice provisions of the adoption and parental termination statutes are considered together, notice must be provided to:[110]

- The child, if he or she is over age 12.[111]
- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage.[112]
- The mother of the child if the parents are unmarried.[113]
- The father or putative father of the child[114] who has not signed a consent to termination[115] or a waiver of notice and appearance[116] 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,[117]
  - has been adjudicated the father of the child prior to the execution of a consent to termination by the mother,[118]
  - has registered notice of the commencement of a paternity action pursuant to the Idaho putative father registry statute,[119]
  - is recorded on the birth certificate as the child's father with the knowledge and consent of the mother,[120]
  - 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,[121]

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[107] § 16-2007(1), referring to § 16-1505 (2009).
[108] § 16-1505 referring to § 16-1513 (Supp. 2014).
[109] §§ 16-2007, 16-1505 (2009), 16-1504 (Supp. 2014), 16-1513.
[110] In addition to the individuals discussed below, notice also must be provided to the adoptee's spouse, section 16-1504(1)(h), and to the guardian or conservator of an incapacitated adult, section 16-1504(1)(g). These provisions are unlikely to apply in a CPA-connected adoption.
[111] § 16-1504(1)(a).
[112] § 16-1504(1)(b).
[113] §§ 16-1504(1)(c), 16-2007(1) (separately requiring notice to any "parent").
[114] 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.
[115] § 16-2005(4).
[116] § 16-2007(3).
[117] §§ 16-1505(1)(c), (f) (2009), 16-1504(1)(b) (Supp. 2014).
[118] § 16-1504(1)(d).
[119] §§ 16-2007(3), 16-1505(1)(b) (2009),16-1513 (Supp. 2014).
[120] § 16-1505(1)(d) (2009).

  - has filed a voluntary acknowledgment of paternity,[122]
  - 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,[123] 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).[124]
- The legally-appointed guardian of the person or custodian of the child.[125]
- The guardian *ad litem* for the child and/or for the parent.[126]
- IDHW, if it is not the petitioner.[127]

The Idaho putative father registry statute, Idaho Code section 16-1513, is cross-referenced in the notice requirements of the termination statute quoted above. Section 16-1513 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.[128]

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.[129] 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

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[121] § 16-1505(1)(e).
[122] § 7-1106 (2010).
[123] § 16-1504(2)(a) (Supp. 2014).
[124] This basis for notice, in particular, is discussed in more detail in Chapter 12 of this manual.
[125] § 16-1504(f).
[126] § 16-2007(1).
[127] *Id.*
[128] Lehr v. Robinson, 463 U.S. 248, 263-264 (1983).
[129] § 16-2007(2).

hearing should take place no sooner than 10 days after service of the notice and 10 days after the last date of publication.[130]

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.[131]

9.7 PRE-TRIAL ISSUES

A. Appointment of Counsel

Idaho law provides for appointment of counsel for indigent parents or guardians in termination proceedings.[132]

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.[133] 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[134] and/or a new guardian *ad litem* for the child.[135] 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, summons, and notice of hearing.[136] (In some counties, the prosecutor does this in all cases.) If a

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[130] *Id.*
[131] § 16-2005(4). The process for consent to termination of parental rights is discussed earlier in this chapter.
[132] § 16-2009.
[133] IDAHO JUV. R. 48(b).
[134] § 16-2009.
[135] § 16-1614(1).
[136] 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. § 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* IDAHO JUV. R. 33.

party fails to appear and contest the proceeding, the matter may proceed to default.[137] 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.[138] 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.
- Whether transport orders[139] will be needed for incarcerated parents or telephonic hearing for parents incarcerated in another state who 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.[140] Best practice is to schedule trial dates within 90 days of the filing of the petition.[141]

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

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[137] *See* IDAHO R. CIV. P. 55.

[138] 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 April 29, 2015).

[139] 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.

[140] IDAHO JUV. 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.

[141] IDAHO JUV. R. 46(a), (b).

report, if ordered, should contain recommendations for repayment and provisions for the future support of the child. [142]

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. 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.[143]

The following persons should be present for trial, although some may be excluded when not testifying:

- The judge
- County Prosecutor or Deputy Attorney General[144]
- The child, if counsel has been appointed and in other appropriate circumstances[145]
- Attorney for the child, if appointed[146]
- 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[147]

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[142] § 16-2008(1) (Supp. 2014). 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.

[143] § 16-2009.

[144] Section 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.

[145] IDAHO JUV. R. 40(b). The rule 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 Child Protective Act. 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.

[146] 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. § 16-1614 (2014). Court rules provide that those appointments will continue in the proceedings on the TPR petition unless otherwise ordered by the court. IDAHO JUV. R. 48(b).

[147] See Chapter 11 of this manual for further information regarding Indian children and the Indian Child Welfare Act (ICWA).

- 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.[148]

9.9 FINDINGS AND CONCLUSIONS

As noted above, it is important for the court to make detailed findings and conclusions regarding grounds for termination and whether termination is in the best interest of the child.

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 trial (and any post-trial briefing). The issuance of a separate decree is required by the Idaho Rules of Civil Procedure.[149] The 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.[150] 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.[151] 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."[152] Oral argument, if requested, must be held within 120 days of the filing of the appeal.[153] The filing of

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[148] IDAHO JUV. 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.
[149] IDAHO R. CIV. P. 54(a).
[150] 25 U.S.C. § 1914 (2012); *see also* Chapter 11 of this Manual.
[151] 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).
[152] IDAHO APP. R. 12.2(e).
[153] IDAHO APP. R. 12.2(f).

an appeal does not stay the termination decree without further action of the appellant, and permanency planning for the child may continue.[154]

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. [155]

[154] § 16-2014 (Supp. 2014).
[155] *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. If a child cannot be reunified with his or her family, termination of parental rights and adoption is the next preferred permanency goal, because it ensures a permanent, lifetime family for the child. At this point, 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 efforts at this point is 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. Generally, the petition to adopt is filed with the court where the prospective adoptive parents reside.[2] However, where the child is the subject of a CPA proceeding, the court in the child protection proceeding has exclusive jurisdiction over the child and retains that jurisdiction until the child's permanency plan is finalized and the CPA

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the 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] IDAHO CODE ANN. § 16-1506(1) (Supp. 2014).

proceeding is terminated or until the child turns eighteen, whichever comes first.[3] Where the permanency goal is termination of parental rights and adoption, the child's permanency plan is not finalized until the adoption is finalized.

Idaho's adoption statute therefore provides that if the adoption arises from a CPA case, the adoption petition is filed in the CPA case.[4] 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 also gives the judge in the CPA case the discretion to relinquish jurisdiction over the adoption proceeding.[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, then the adoption proceeding is initiated in that state or country. If the adoption proceeding is initiated in another state, it may be appropriate to ask the judge in the CPA proceeding to contact the court in the state where the adoption proceeding is pending to expedite the scheduling of the adoption proceeding.[6] 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.[7]

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.[8]

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.[9] In most cases arising

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[3] §§ 16-1603(1) (2009), 16-1604(1) (Supp. 2014).
[4] § 16-1506(1) (2009).
[5] *Id.*
[6] The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) allows courts in different states to communicate informally regarding scheduling. § 32-11-109 (Supp. 2014).
[7] § 16-1506(1) (2009).
[8] § 16-1506(3); *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.
[9] § 16-1506(3).

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.

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".[10] 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 does not prescribe the contents of the report, but does specify that the investigative report must 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.[11]

The social investigation and report is 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 would 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 specifies that a copy of the medical and genetic information compiled in the investigation must be provided to the adopting family prior to entry of the final order of adoption.[12]

C. Consent to Adopt

The adoption statute has detailed provisions as to the persons from whom consent is required in adoption proceedings, most of which will not apply in an adoption arising from a CPA proceeding.[13] 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.

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* § 16-1504 (Supp. 2014).

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.[14] Certified and conformed copies of the 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 has special rules that apply to consent to termination of parental rights. Before proceeding with an adoption, it is important to make sure that the termination complied with the requirements of the ICWA.[15] Chapter 11 of this Manual provides a more detailed analysis of the Indian Child Welfare Act.

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

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[14] § 16-1504(7). 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* § 16-1504(2)-(5). There are issues as to the constitutionality of these statutes, which are discussed in more detail in Chapter 12 of this manual. 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] The ICWA is discussed in Chapter 11 of the manual.

[16] § 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. § 16-1619(5).

[17] § 16-1503 (2009). Consent is not required if the non-petitioning spouse is not capable of giving consent.

[18] § 16-1504(1)(a) (Supp. 2014).

[19] § 16-1505(1) (2009).

is required to any person whose consent to the adoption was required. Additional 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 as 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) to be included in the social investigation report; many attorneys include them with the petition to adopt.

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.[24]

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.[25]

4. Child

If the child to be adopted is twelve years of age or older, notice to the child is required." [26]

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[20] § 16-1505(3).
[21] § 16-1505(4).
[22] § 16-1505(4), (5)(b).
[23] § 16-1505(1). 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* § 16-1504(2)-(5). The putative father statute was amended in 2013. The constitutionality of the revised statute has not been evaluated by a court. The 2013 revisions did not change the notice provisions in §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 strongly recommended that notice required by § 16-1505 be provided.
[24] § 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. § 16-1619(5).
[25] § 16-1505(1)(c) (2009). As a matter of best practice, consider serving the guardian *ad litem* (GAL) appointed in the child protection case, the attorney for the GAL (if one is appointed), and/or the attorney for the child.

E. Service

Notice of the petition to adopt must be personally served. 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 and/or by publication. The statute specifies that if service is by publication, the court will 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.[27] 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.[28] Court rules also require service of process on the Attorney General.[29]

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.[30]

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. [31]

In addition, the petition should contain the following information:

- A statement that the petitioners have resided in the state of Idaho for six months.[32]
- The marital status of the prospective adoptive parents.[33]
- 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),[34] 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.[35] A person who has been served with notice must file written objections within

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[26] §§ 16-1505(1)(a) 2009), 16-1504(1)(a) (Supp. 2014).
[27] § 16-1505(6) (2009).
[28] § 16-1506(3).
[29] IDAHO. R. CIV. P. 4(d)(5).
[30] § 16-1505(7).
[31] § 16-1506(1).
[32] *Id*. Residency is a jurisdictional requirement.
[33] If the person adopting a child is married, the consent of the person's spouse is required. § 16-1503.
[34] 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. § 16-1502. A minor may consent to the adoption of a child on the same basis as an adult. § 16-1504(6) (Supp. 2014).
[35] § 16-1505(5) (2009).

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."[36] 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."[37]

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."[38]

At the hearing, the judge must examine each of the parties appearing at the hearing separately and must review the investigative report.[39] The court must find that the interests of the child will be promoted by the adoption.[40]

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."[41] The order must declare, "the child shall thenceforth be regarded and treated in all respects as the child of the person adopting." [42] Several additional provisions of the adoption statute make clear that the standard for approval is the best 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."[43] 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."[44]

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.

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[36] § 16-1505(5)(a).
[37] § 16-1505(5)(b).
[38] § 16-1506(1).
[39] §§ 16-1506(1), 16-1507.
[40] § 16-1507.
[41] *Id*.
[42] *Id*.
[43] § 16-1505(9).
[44] § 16-1506(4).

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.[45] 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.[46]

B. Adoption Assistance: Federal Adoption Assistance for Special Needs Children

Federal adoption assistance is administered under the Federal Title IV-E adoption assistance program.[47] 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)

A child is eligible for federal adoption assistance funds if two conditions are met.[48] 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,[49] **or**

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[45] 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.").

[46] This reasonable efforts requirement is found in 42 U.S.C. § 671(a)(15)(C) (2012). *See* MAKING IT PERMANENT, *supra* note 45 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* § 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).

[47] 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).

[48] 42 U.S.C. § 673(a)(1)(B).

- 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.[50]

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:

1. 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. [51]
2. The child was eligible for supplemental security income (SSI) programs under the Social Security Act before adoption. [52]
3. 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.
4. The child previously received adoption assistance and his/her adoptive parent(s) died or the adoption was dissolved.
5. The child meets age or sibling status criteria established by the Fostering Connections to Success and Increasing Adoptions Act of 2008.[53]

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.[54]

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[49] Pursuant to federal law, this element of "special needs" is defined on a state-by-state basis. § 673(c)(1)(B); ADOPTION ASSISTANCE, http://www.benefits.gov/benefits/benefit-details/822 (last visited April 29, 2015). In Idaho, the definition is found in IDAHO ADMIN. CODE r. 16.06.01.900.02(b) (2015).
[50] 42 U.S.C. § 673(c) (2012).
[51] 42 U.S.C. § 672(a)(1); 45 C.F.R. § 1356.21(b), (d).
[52] *See* ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 47.
[53] 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 April 29, 2015).
[54] *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 April 29, 2015).

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.[55]

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.[56] However, the circumstances of the family and the needs of the child may both be taken into consideration when determining the amount of assistance.[57]

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.[58] 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.[59]

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 DEPARMENT 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 will be asked to make contact with the local

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[55] *See* ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 47.
[56] 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 April 29, 2015) to read the section of the Child Welfare Policy Manual that says that States cannot employ a "means test" in negotiating adoption assistance agreements.
[57] *Id.*
[58] IDAHO ADMIN. CODE r. 16.06.01.900.02.
[59] IDAHO ADMIN. CODE r. 16.06.01.911.03.

adoption social worker and provide a written estimate of his/her costs and fees to finalize. In the initial contract, the attorney should ascertain from his/her 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[60]

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[61]
- 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[62]
- 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

[60] The ICWA is discussed in detail in Chapter 11 of this manual.
[61] § 16-1506(3) (2009).
[62] *Id.*

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
- The decree terminating parental rights of the father (or finding non-establishment of paternity)
- 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 problematical 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

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.[63]

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.
- 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.[64]

At the hearing, the attorney should consider asking the following questions:

- Has the adoptive parents have been provided all appropriate information regarding the physical and mental health of the child?[65]
- Does the child has special needs?
- Will the Department will remain involved with the child?

Children must be present for the hearing.[66] 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.[67] 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.

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[63] §§ 16-1506(2) (2009), 16-2005(4) (Supp. 2014), 67-2405 (2010).
[64] 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.
[65] § 16-1506(3) (2009).
[66] § 16-1506(1).
[67] § 16-1504(1)(a) (Supp. 2014).

- 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.
    - 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 him or her 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.[68]

[68] Sample ceremony: Do you promise to shelter and protect this child/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 families and to preserve the ties between Indian children and their tribes.[2] When the ICWA applies, it pre-empts inconsistent state law provisions in child welfare cases unless the state law provides for a higher standard of care than does the ICWA.[3] The Bureau of Indian Affairs has issued Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (the "BIA Guidelines").[4]

11.2 DEFINING TERMS RELEVANT TO THE ICWA

The ICWA applies to "child custody proceedings" involving an "Indian child," and may apply in some JCA and guardian cases.[5] Some ICWA provisions also may be triggered in paternity proceedings and in certain voluntary arrangements for child placement.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the 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 the 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 29, 2015); 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), *available at* http://splitfeathers.blogspot.com/2010/02/split-feathers-study-by-carol-locust.html (last visited April 29, 2015).

[3] BIA Guidelines § A.5.

[4] Revised BIA Guidelines were recently published by the BIA on February 25, 2015 and can be found at 80 Fed. Reg. 10146 (Feb. 25, 2015). At the time of the publication of this Manual, the Guidelines are an authoritative but non-binding resource regarding interpretation of the ICWA. The Guidelines provide that, "These guidelines provide minimum Federal standards to ensure compliance with ICWA and should be applied in all child custody proceedings in which the act applies." BIA Guidelines § A.5(a). ***As of the publication of this Manual, the Bureau of Indian Affairs had proposed regulations making the BIA guidelines mandatory.***

[5] 25 U.S.C. § 1903.

A. "Indian Child"

The IWCA applies to actions involving an "Indian child." The Act defines an Indian child as a child who is either (a) a member of an Indian tribe, or (b) who is eligible to be a member of an Indian tribe and who is a biological child of a tribal member.[6] Whether a child is a member of or eligible for membership in a tribe is determined by the tribe. Tribal determinations of membership are entitled to deference in state courts and are entitled to full faith and credit under the ICWA.[7]

The ICWA applies only to federally recognized tribes and to Alaska native villages and corporations. There are more than 500 federally recognized Indian tribes in the United States. Federal law requires the Department of Interior to maintain and publish an annual list of federally recognized tribes.[8]

Each Tribe has its own laws for determining tribal membership.[9] Thus, it is imperative that the Idaho Department of Health and Welfare (IDHW) and the prosecutor consult with the tribe directly to determine if a child is a tribal member or is eligible for tribal membership. The BIA Guidelines specifically provide that "[t]he state court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes."[10]

To ensure compliance with the ICWA, steps must be taken early in every case to determine whether the child is an Indian child. If there is any reason to believe the child is an Indian child, notice must be provided and efforts must be made to verify the child's status. The Idaho Supreme Court has held that the trial court erred in finding that the ICWA did not apply where the tribe was unable to certify the child's status with certainty, but the record contained substantial evidence that the child was an Indian child.[11]

The BIA Guidelines recommend that in every child welfare case, the Department and the guardian *ad litem* certify whether they have discovered or know of any information that suggests or indicates that the child is an Indian child.[12] As part of the certification process, the court may require the agency and/or the guardian to provide the following information:

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[6] *Id*.

[7] 25 U.S.C. § 1911(d). The federal courts have long recognized that sovereignty concerns requiring tribal determinations of members are binding on state and federal courts. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The BIA Guidelines also provide that only a child's tribe may make the determination of whether the child is a member of the tribe. BIA Guidelines § B.3(a).

[8] The most recent list at the time of the publication of this Manual is dated January 14, 2015. *See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942 (January 14, 2015). The National Congress of American Indians maintains an up-to-date unofficial list of tribes on its website at http://www.ncai.org/tribal-directory (last visited March 29, 2015).

[9] Determining tribal membership is exclusively a tribal function because such determinations are a fundamental component of tribal sovereignty. Determinations of tribal membership or eligibility for membership are not subject to review or question by non-tribal courts or by the courts of other tribes. BIA Guidelines §§ B.3(b) and (c).

[10] BIA Guidelines § B.3(d).

[11] In the Matter of Baby Boy Doe, 123 Idaho 464, 469-70, 849 P. 2d 925, 930-31 (1993).

[12] BIA Guidelines § B.2(b).

> (1) Genograms or ancestry charts for both parents including known names, current and former addresses, birthdates, places of birth and death, tribal affiliation and other identifying information.
> (2) Addresses for the domicile and residence of the child and the child's parents and/or custodians and information about whether any of these individuals are domiciled on the reservation.[13]

If the identity of the child's Tribe is unknown, all possible identified Tribes should be contacted as early as feasible to seek verification of the child's Indian status.

B. "Parent"

"Parent" is defined by the 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."[14] The ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[15] Thus, putative fathers who have not established paternity are not considered parents for purposes of the ICWA. However, the BIA Guidelines elaborate that "to qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing."[16] For this reason, a man may be a putative father under the ICWA, even though he would not be recognized as a putative father under Idaho law.

C. "Indian Custodian"

The 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."[17] Indian custodians have many of the same rights as a parent in an ICWA case.[18] Thus, where tribal law recognizes that a third party has legal custody pursuant to an informal process, the third party has standing in the ICWA case in state court as an Indian custodian.[19] For example, another relative such as an aunt or grandparent may be caring for the child and be the Indian custodian.

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[13] *Id*.
[14] 25 U.S.C. § 1903(9).
[15] *Id*.
[16] BIA Guidelines § A.2 (definition of "Parent").
[17] 25 U.S.C. §1903(6). NOTE: The ICWA and proposed Regulations both identify an Indian custodian as "any Indian person who has legal custody," while the recently released BIA Guidelines identify an Indian custodian as "any person who has legal custody."
[18] *See* Ted W. v. State, Dept. of Health & Social Services, Office of Children's Services 204 P.3d 333, 337 (Alaska 2009); Pam R. v. State Dept. of Health and Social Services, Office of Children's Services, 185 P.3d 67 n.6 (Alaska 2008).
[19] 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.

D. "Extended Family Member"

The ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe."[20] If the tribe has not codified a definition of "extended family member," the ICWA provides that an extended family member is "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[21]

E. "Child Custody Proceedings"

The ICWA defines "child custody proceedings" to include any action involving a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. Most child welfare cases fall within the definitions of "foster care placement" and "termination of parental rights."[22]

1. "Foster Care Placement"

The Act defines "foster care placement" as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator, where the Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated."[23] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian where the parent or custodian may demand return of the child.[24] If a child is placed pursuant to a parent's stipulation at adjudication or disposition, the placement is not considered voluntary and is a "foster care placement" pursuant to the ICWA.

2. "Termination of Parental Rights"

The ICWA applies to any action resulting in the termination of the parent-child relationship.[25]

3. "Pre-Adoptive Placements" and "Adoptive Placements"

The Act applies both to private and agency adoptions and to adoptions that take place as part of a child protection case. Official state involvement through, for example, a child protection action, is not required.

"Pre-adoptive placement" is defined by the ICWA to include "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or

[20] 25 U.S.C. § 1903(2).
[21] *Id.*
[22] 25 U.S.C. § 1903(1).
[23] 25 U.S.C. § 1903(1)(i).
[24] Voluntary placements are discussed in more detail later in this chapter.
[25] 25 U.S.C. § 1903(1)(ii).

in lieu of adoptive placement."[26] Many guardianships and long-term foster care placements fall within this provision.

The ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[27]

F. Private Custody Actions

Generally, the ICWA does not apply to custody disputes between parents. However, ICWA may be triggered if custody of an Indian child is to be awarded to a non-parent as a result of private custody litigation.[28] Similarly, the ICWA may be triggered if a non-parent family member independently seeks guardianship or custody of a child.[29] The ICWA may also be triggered if a *de facto* custodian seeks custody of a child.[30]

G. Juvenile Corrections Act Proceedings

The BIA Guidelines expressly provide that the ICWA does not apply to most juvenile corrections cases.[31] However, placements of juveniles resulting from juvenile status offenses, where the juvenile conduct would not be criminal if the juvenile were an adult are covered by the Act.[32] When a JCA proceeding is expanded into a CPA proceeding pursuant to IJR 16, the CPA proceeding is governed by the ICWA.

H. Voluntary Foster Care Placements

The ICWA uses the term "voluntary" in two distinct ways. The first situation, which this manual refers to as a "voluntary placement," is an out-of-home placement in which parents may demand immediate return of the child. This type of placement would not involve the filing of a CP petition but would be a voluntary agreement between IDHW and the parent. This type of voluntary placement is not governed by the ICWA.[33] The second situation, referred to as a "voluntary *foster care* placement," arises after the filing of a CP petition when the parent voluntarily enters into an arrangement in which the parent may *not* demand immediate return of

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[26] 25 U.S.C. § 1903(1).
[27] 25 U.S.C. § 1903(1)(iii) to (iv).
[28] There is a conflict of authority regarding whether the ICWA applies in a purely intra-family dispute although the weight of authority supports the conclusion that the ICWA does apply. *See* J. Thompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. (Fall 2010); In re Custody of A.K.H., 502 N.W. 2d 709 (Minn. App. 1993) (holding ICWA applied in custody dispute between parents and grandmother of child); In re Bertelson, 617 P.2d 121 (Mont. 1980) (the ICWA does not apply to intra-family disputes).
[29] Guardianship of Ashley Elizabeth, 863 P.2d 451 (N.M. App. 1993).
[30] It is unclear at this time what impact Idaho's *de facto custodian* statute will have, as few other states have similar legislation and these statutes have not been reviewed by the courts as they pertain to an Indian Child.
[31] BIA Guidelines § A.3(a).
[32] Status offenses include, but are not limited to truancy, runaway, and minor in possession of tobacco.
[33] BIA Guidelines § A.3(f) (The BIA Guidelines describe this situation as a placement that does not "operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand."); BIA Guidelines § A.1.(The Guidelines define the term "upon demand" as meaning that "the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.").

the child. This type of placement is governed by the ICWA, and the parent's consent to the placement must comply with the ICWA.

When a parent consents to a voluntary foster care placement in which the parent may not demand immediate return of the child, a full-blown CPA case is not required to comply with the ICWA. However, the ICWA requires that the parent's consent must be in writing and recorded before a judge in a court of competent jurisdiction. In addition, the BIA Guidelines recommend that notice of voluntary proceedings be provided to the tribe and that the tribe be notified of its right to intervene.[34] The judge recording such consent must certify that the consequences of consenting to voluntary foster care placement were fully explained to the parent in detail and were understood by the parent. The consent should be explained in the language of the parent or Indian custodian.[35] Thus, the parent must appear before the judge for questioning. Such consent may only be executed more than ten days after the birth of a child.[36] The ICWA also provides for the withdrawal of consent at any time in a voluntary foster care placement.[37] The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent may be sufficient. If consent is withdrawn, the parent has an unqualified right to regain custody of the child *unless* an involuntary action is then initiated by the state.[38] The BIA Guidelines provide that the withdrawal of consent should be in writing and that the withdrawal should be filed in the same court where the consent document was executed.[39]

Though full application of the Act is not required in the case of a voluntary foster care placement, if a child protection case has been filed, the best practice is to comply with the ICWA and make the active efforts finding and the serious physical and emotional harm finding through testimony of a qualified expert witness at the elevated burden of proof. If the matter proceeds to an involuntary termination, these findings will become relevant in the termination action.

Finally, the ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[40]

11.3 THE IMPACT OF THE ICWA ON A CPA CASE

The ICWA imposes three categories of requirements in covered cases. First, the ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, the ICWA imposes substantive requirements for the removal of Indian children, including imposing a higher standard for determining whether the state met the duty to avoid removal of the child. The state must provide sufficient remedial services and rehabilitative programs to prevent the breakup of the family after removal, evaluate the nature of the circumstances supporting removal, and ensure through qualified expert testimony, evidence and an elevated burden of proof that an Indian child is only removed if continued custody by the parent or Indian custodian

[34] BIA Guidelines §§ E.1(b), B.6.
[35] BIA Guidelines § E. 2(c).
[36] 25 U.S.C. § 1913(a).
[37] 25 U.S.C. § 1913(b).
[38] B.J. JONES, ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 69-71 (2d ed. 2008) (hereinafter ICWA HANDBOOK).
[39] BIA Guidelines §§ E.4, E.5.
[40] 25 U.S.C. § 1913(d).

is likely to result in serious emotional or physical damage to the child. Third, in addition to these jurisdictional and substantive requirements, the ICWA imposes limitations on the placement of Indian children to ensure that, to the extent possible, they are not separated from their tribe and/or their Indian culture.

A. Procedural Requirements of the ICWA

The ICWA imposes procedural obligations on the court affecting jurisdiction, governing notice, providing for tribal intervention in child welfare cases, and conferring a right to counsel to indigent parents and Indian custodians.

B. Jurisdictional Requirements of the ICWA

1. Exclusive Jurisdiction

a. *ICWA Provisions Regarding Indian Children Domiciled Within the Reservation*

The 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.[41] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[42] 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.[43] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Mississippi Band of Choctaw Indians v. Holyfield*.[44]

Domicile is broadly defined for purposes of the ICWA. In *Holyfield*, the United States Supreme Court held that the term "domicile" in the ICWA exclusive jurisdiction provision has the same meaning as it does for purposes of diversity jurisdiction – that is, a person is domiciled in a location if she/he resides in that location and intends to remain or, if temporarily away, to return.[45] Furthermore, the Court reasoned that the jurisdiction provisions of the ICWA must be interpreted to accomplish the purpose of the Act. The BIA Guidelines provide that the domicile of an Indian child is determined either by the domicile of the child's parents, or if the parents are not married, by the domicile of the child's mother.[46] Thus, a child who is temporarily residing off the reservation but who intends to return to the reservation is domiciled on the reservation. In *Holyfield*, the Court held that twin infants born off the reservation after their mother left to escape the reach of the ICWA were "domiciled on the reservation" for purposes of the ICWA because their mother was a reservation domiciliary.

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[41] 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.
[42] 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.
[43] 25 U.S.C. § 1911(a).
[44] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[45] *Id*. at 43.
[46] BIA Guidelines § A.2 (definition of "Domicile").

For purposes of the ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[47] 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.

b. *Concurrent Jurisdiction Resulting From P.L. 280*

Despite what appears to be clear language in the ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states that have assumed jurisdiction granted by Public Law 280.[48] Public Law 280 is a separate piece of federal legislation from the 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.[49] Thus, Idaho is considered an "optional" Public Law 280 state. 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 tribal exclusivity provisions in the ICWA.[50] However, because the ICWA was adopted after P.L. 280, and because the 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, the ICWA jurisdictional provisions should control. However, in the only federal court decision to consider the apparent conflict between P.L. 280 and the 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.[51]

c. *State Court Emergency Jurisdiction*

State courts may exercise emergency temporary jurisdiction while the child is off the reservation in order to prevent immediate physical damage or harm to the child.[52] The ICWA provides 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."[53] Moreover, the ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with the ICWA, transfer jurisdiction to the appropriate tribe, or restore

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[47] 25 U.S.C. § 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act; *See also* BIA Guidelines § A.2 (definition of "Reservation").
[48] 67 Stat. 588 (1953).
[49] IDAHO CODE ANN. § 67-5101 (2010).
[50] 25 U.S.C. § 1911(a).
[51] 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 the 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 March 29, 2015).
[52] 25 U.S.C. § 1922.
[53] *Id*.

the child to the parent or Indian custodian.[54] The interaction between the ICWA and the emergency removal of an Indian Child is discussed later in this chapter.[55]

2. *Transfer Jurisdiction*

If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[56] The transfer jurisdiction provisions do not apply to pre-adoptive or adoption proceedings that are not also foster care placements or termination of parental rights proceedings. The Act does not impose any timeframe for a request to transfer jurisdiction. The BIA Guidelines 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 in a termination of parental rights proceeding even though no request was made during the child protection proceeding.[57]

If a request to transfer to tribal court is made, the case must be transferred unless one of the following exceptions to transfer applies. First, the state court may decline to transfer the case if either parent objects to the transfer. Second, the state court may retain the case if the tribal court declines to accept jurisdiction. Third, the state court may decline to transfer the case if it finds good cause not to transfer.[58]

a. Good Cause Not To Transfer

Pursuant to the BIA Guidelines, the burden of establishing good cause not to transfer is on the party opposing transfer.[59] The Guidelines further provide that parties "must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists."[60] If a state court concludes that there is good cause not to transfer a case to tribal court, the reasoning for the conclusion must be stated in writing and made available to the parties who requested transfer.[61]

In evaluating a request to transfer, the court should *not* consider the following factors:

- whether a case is in advanced stage or whether the transfer would result in a change of placement[62]
- the Indian child's contact with the tribe or reservation
- socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems, or
- the tribal court's prospective placement for the Indian child.[63]

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[54] *Id.*
[55] *See infra* at § 11.4
[56] 25 U.S.C. § 1911(b).
[57] BIA Guidelines §§ C.1(b) to (c).
[58] 25 U.S.C. §§ 1911(b) to (c); BIA Guidelines § C.2(a).
[59] BIA Guidelines § C.3(e).
[60] BIA Guidelines § C.3(b).
[61] BIA Guidelines § C.3(a).
[62] BIA Guidelines § C.3(c).
[63] BIA Guidelines § C.3(d).

With regard to the advanced stage of the proceeding or the need to change the child's placement, the Guidelines explain that the intention of the ICWA was to presume tribal jurisdiction over state jurisdiction and to protect the rights of the Indian tribe as well as the child and parents. They conclude that, "whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe."[64]

C. Notice of an ICWA Action

When there is reason to believe that the child is an Indian Child, notice of the proceeding must be provided to the child's parents, any Indian custodian, and the Indian child's tribe.[65] The BIA Guidelines formerly provided that if the child's tribe is not identified, notice could be provided to the Department of the Interior. This provision has been eliminated from the revised Guidelines.[66] The revised Guidelines now provide that if the identity or location of the parents, Indian custodians or the child's tribe cannot be ascertained, notice of the proceeding must be sent to the BIA Regional Director who may not make a determination of tribal membership, but who may be able to assist in identifying the child's tribe.[67] The ICWA requires that notice must be by registered mail and must be received at least ten days prior to the proceeding. The ICWA's notice requirements are separate and apart from the notice/service of process requirements under state law. The concepts of notice and service should be distinguished. The child's tribe is notified but not served. The BIA Guidelines provide for personal service or electronic notification, in addition to registered mail as required by the Act.[68] The non-tribal parties to the case are entitled to notice under the ICWA and also are required to be served under state law.

In Idaho, personal service of the petition is required by the state Child Protective Act, Termination of Parental Rights statute, and Adoption statute.[69]

The BIA Guidelines provide that the notice must be in "clear and understandable" language and contain the following information:

- Name of child, the child's birthdate and birthplace.
- The name of each tribe in which the child is a member or may be eligible for membership.
- A copy of the petition or other document initiating the action.
- The name and address of the petitioner and of the petitioner's attorney.
- A statement setting out the parent's or Indian custodian's or tribe's right to intervene.
- A statement setting out the parent's or Indian custodian's right to appointed counsel.
- A statement setting out the right to 20 additional days to prepare.

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[64] BIA Guidelines § C.3(c).
[65] 25 U.S.C. § 1912(a).
[66] *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings: Summary, 80 Fed. Reg. at 10148 ("The updated guidelines delete the provision allowing BIA, in lieu of the tribe, to verify the child's status. This provision has been deleted because it has become increasingly rare for the BIA to be involved in tribal membership determinations, as tribes determine their own membership.").
[67] BIA Guidelines § B.6(e).
[68] BIA Guidelines § B.6(b).
[69] *See* §§ 16-1611, 16-2007, 16-1506.

- The mailing address and telephone numbers of the court and information related to all parties to the proceeding and individuals notified pursuant to the ICWA notice provisions.
- A statement setting out the right to petition the court to transfer the case to tribal court.
- A statement setting out the legal consequences of the proceeding on the future custodial and parental rights of the Indian parents or Indian custodians.[70]

In order to assist tribes in making membership determinations, the BIA Guidelines recommend that the following additional information should be provided with the notice, if available:

- Genograms or ancestry charts for both parents that are as complete and accurate as possible
- The addresses for the domicile and residence of the child, the child's parents, and/or the Indian custodians
- Whether either parent is domiciled on or a resident of an Indian reservation or a predominantly Indian community[71]

1. Notice to the Indian Child's Tribe

The child's tribe has the right to notice in any involuntary foster care or termination of parental rights proceeding involving an Indian child.[72]

Several state courts have held that failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[73] However, courts also have held that if the need for notice is not discovered until after the proceeding has begun, rulings of the court to that point are not void.[74] For example, where the proceeding begins as a voluntary proceeding but becomes involuntary, notice must be sent at the time the case becomes involuntary. Likewise, if it is not discovered until after the proceedings have progressed that the child is an Indian child, despite appropriate inquiry, notice must be given at that point. Where notice should have been provided but was not, some courts have invalidated all actions taken in the potentially defective proceedings, while other courts have validated some of the earlier proceedings.[75] If it subsequently turns out that the child was not an Indian child, earlier actions of the court may be validated.[76]

Finding that the child is an Indian child is not a prerequisite to giving notice to a tribe of a pending action. The ICWA requires notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child.[77] The drafters of the ICWA anticipated that the tribe would participate in the determination of whether the child was eligible for membership in an

[70] BIA Guidelines § B.6(c).
[71] BIA Guidelines § B.6(d).
[72] 25 U.S.C. § 1912(a).
[73] *See, e.g.,* In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982); In re M.C.P., 571 A. 2d 627 (Vt. 1989).
[74] Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 1999).
[75] *See* In re Kahlen W., 233 Cal.App. 3d 1414, 285 Cal. Rptr. 507 (5th App. Dist. 1991).
[76] *See, Id.*
[77] 25 U.S.C. § 1912; BIA Guidelines § B.5.

Indian tribe. The BIA Guidelines suggest that a tribe receive notice if any of the following facts are present in a case:

- A party, tribe, or private agency informs the court that the child may be an Indian child.
- A public welfare agency discovers information suggesting that the child may be an Indian child.
- The child believes s/he is an Indian child.
- The child resides or is domiciled in an Indian community, or the child's parents are, or Indian custodian is known to be on an Indian reservation or in a predominantly Indian community, or
- An employee of the agency or an officer of the court involved in the proceeding has knowledge that the child is an Indian child.[78]

2. Notice to the Child's Parents or Indian Custodian

Upon receiving notice, the ICWA provides that the child's parents (regardless of whether they are Indian) or Indian custodian are entitled to an additional twenty days, upon request, to prepare for the proceeding.[79]

D. Tribal Intervention in State Court Proceedings

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.[80] The right to intervene is not limited to "involuntary" proceedings even though the Act only provides for notice in "involuntary" proceedings. Because of the right of intervention and the right to seek transfer of the case, best practice is to provide notice to the tribe in every case in which a court action is filed.

E. Right to Counsel

The ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[81] The right to counsel applies to all the actions covered by the ICWA: pre-adoptive, adoption, foster care placements, and termination of parental rights (TPR) proceedings. If there is no state right to counsel in all the circumstances covered by the ICWA, the statute provides for the Department of Interior to reimburse the state for the cost of providing counsel.[82]

The ICWA does not require the appointment of an attorney for an Indian child. However, Idaho Code section 16-1614 requires that for a child under the age of twelve years, the court shall appoint a guardian *ad litem* for the child and counsel to represent the guardian *ad litem*. For a child age twelve and older, the court shall appoint counsel to represent the child and may, in addition, appoint a guardian *ad litem*.

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[78] BIA Guidelines § B.2(c).
[79] 25 U.S.C. § 1912(a).
[80] 25 U.S.C. § 1911(c).
[81] 25 U.S.C. § 1912(b).
[82] *Id.*

11.4 SUBSTANTIVE REQUIREMENTS OF THE ICWA COVERING THE REMOVAL OF INDIAN CHILDREN FROM THEIR HOMES

To remove an Indian child from his or her home in an involuntary foster care proceeding, the party seeking to remove must show, and a court must find, that "active efforts" have been made to provide remedial and/or rehabilitative services to prevent the breakup of the Indian family and that these efforts have been unsuccessful.[83]

In addition, a court must find by clear and convincing evidence, supported by the testimony of qualified expert witnesses, that continued custody with the Indian parents or Indian custodian is likely to result in serious emotional or physical damage to the child.[84] These findings should be made at the adjudicatory hearing, as it will generally not be possible to have a qualified Indian expert in place and the evidence to make the findings may not yet be available prior to the adjudicatory hearing.

In a Child Protective Act case, in addition to meeting the requirements of the ICWA, the court must also make all the state and federal findings necessary to preserve Title IV-E funding for the child. These findings are discussed in detail throughout this manual and in the relevant section of Chapter 12.

A. Active Efforts

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.[85]

In 2013, the United States Supreme 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.[86]

The BIA Guidelines make clear that the requirement of active efforts is triggered "the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian."[87]

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 Guidelines provide that active efforts "shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers."[88]

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[83] 25 U.S.C. § 1912(d).
[84] 25 U.S.C. § 1912(e).
[85] ICWA HANDBOOK, *supra* note 24 at 57-58. See BIA Guidelines.
[86] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).
[87] BIA Guidelines § B.1(a).
[88] BIA Guidelines § D.2.

The BIA Guidelines provide an extensive list of examples of actions that constitute active efforts including:

- Engaging the child, parents and extended family
- Keeping siblings together
- Identifying appropriate services for parents and assisting them in obtaining the services
- Identifying and involving members of the child's tribe
- Conducting a diligent search for extended family members for assistances as well as placement
- Taking into account the tribe's prevailing social and cultural customs and way of life
- Offering and utilizing all culturally appropriate family preservation strategies
- Completing a comprehensive assessment of the child's family circumstances with a focus on reunification
- Notifying and consulting with extended family members
- Providing family interaction in the most natural setting that can ensure the child's safety
- Identifying community resources
- Monitoring progress and participation in services
- Providing alternative ways of addressing needs where services are unavailable
- Supporting regular visits and trial home visits
- Providing post-reunification services and monitoring[89]

Section 1912(d) does not include a specific burden of proof. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. Thus, in an involuntary foster care placement the burden of proof would be preponderance of the evidence.[90] The Idaho Supreme Court has concluded recently that the burden of proof on active efforts is preponderance of the evidence.[91]

B. Serious Emotional and Physical Damage

As previously noted, Congress intended the threat to the child be substantial before the state can break up an Indian family by removing a child. As with the finding of active efforts, the U.S. Supreme Court has recently held that this requirement applies when the child is removed from a family member who has some form of custody or legally recognized relationship with the child.[92] Addressing the type of evidence necessary to meet the standard, the BIA Guidelines state that "clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding." The Guidelines further provide that "[e]vidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child." [93]

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[89] BIA Guidelines § A.2 (definition of "Active Efforts").
[90] ICWA HANDBOOK, *supra* note 24 at 58.
[91] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).
[92] ICWA HANDBOOK, *supra* note 24 at 58. *See* Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013).
[93] BIA Guidelines § D.3(c).

Given this explanation of the standard, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child *unless* the child is in danger.

C. Qualified Expert Witness

The 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.[94] The legislative history of the 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.[95] Congress envisioned that the qualified expert would be more than a social worker.[96] 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. Thus, courts should ensure that the ICWA experts have sufficient knowledge related to tribes to fulfill the role intended by Congress.

The BIA guidelines provide that an ICWA expert should be (in descending order of preference):

- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe.
- A layperson who is recognized by the child's tribe as having substantial experience in the delivery of child and family services to Indians and knowledge of prevailing social and cultural standards and child rearing practices within the child's tribe, or
- A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.[97]

In *In the Matter of Baby Boy Doe,*[98] 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 BIA Guidelines were issued.

D. Additional Substantive Requirements for Involuntary Termination of Parental Rights

Pursuant to ICWA, no involuntary termination of parental rights may be ordered in the absence of a determination supported by evidence beyond a reasonable doubt. The evidence supporting termination of parental rights must include the testimony of a qualified expert witness that

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[94] 25 U.S.C. § 1912(e).
[95] *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).
[96] *Id.* at 21.
[97] BIA Guidelines § D.4(a).
[98] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).

continued custody would result in "serious emotional or physical harm."[99] In addition, the court must find that the petitioner has made "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[100]

In addition to terminating the rights of parents of an Indian child, it is unclear if the rights of the Indian custodian must also be terminated in applicable cases.[101] If the custodial rights arose as a result of a prior court order (as opposed to custom and practice), the court should address the continuing effectiveness of that order, if possible and appropriate.

Finally, an Indian Custodian has the same rights to active efforts and counsel for any foster care placement or other involuntary proceeding in a state court.[102]

E. Consent to Termination of Parental Rights

ICWA provides that a parent or Indian custodian of an Indian child may consent to termination of his or her parental rights. The consent must be in writing and "recorded before a judge in a court of competent jurisdiction."[103]

The judge recording such consent must certify that the consequences of consenting to voluntary termination of parental rights were fully explained and were understood by the parent or Indian custodian.[104] Thus the parent consenting to termination of parental rights must be present before the judge so that he or she may be questioned regarding the circumstances of the termination. The BIA Guidelines provide that the court "must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent."[105]

Pursuant to the BIA Guidelines, the consent must contain the following information:

- The name and birthdate of the Indian child
- The name of the Indian child's tribe, identifying tribal enrollment number, if any, or other indication of the child's membership in the tribe
- The name and address of the consenting parent or Indian custodian
- Any conditions to the consent.[106]

The Guidelines further provide that "a certificate of the court must accompany a written consent and must certify that the terms and consequences of the consent were explained in detail

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[99] 25 U.S.C. § 1912(f).
[100] 25 U.S.C. § 1912(d). As discussed previously, the Idaho Supreme Court has held that the "active efforts" finding is subject to a preponderance of the evidence standard of review; *See* Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).
[101] *See* 25 U.S.C. §§ 1912(f),1913. ICWA does not include Indian custodians within the definition of "parent" in 25 U.S.C. § 1903(9). The provisions relating to serious physical or emotional harm and voluntary termination refer to the Indian custodian but the active efforts provision and the withdrawal of consent for a voluntary termination provision do not. No cases were located in which an Indian custodian's "custodial rights" were terminated.
[102] 25 U.S.C. § 1912 (a)-(d).
[103] 25 U.S.C. § 1913(a).
[104] *Id*.
[105] BIA Guidelines § E.2(b).
[106] BIA Guidelines § E.3.

in the language of the parent or Indian custodian…and were fully understood by the parent or Indian custodian."[107]

The consent to terminate parental rights may not be executed prior to the birth of the Indian child or within 10 days of the child's birth.[108]

The ICWA also provides for the withdrawal of consent to termination of parental rights at any time prior to the entry of a final decree of termination or adoption.[109] The BIA Guidelines provide that in order to withdraw consent the parent must execute an instrument under oath stating her or his intention to withdraw consent and file the instrument in the court where the consent is filed.[110] Once consent is withdrawn, the clerk of courts is required to promptly notify the party with whom the child is placed, and the child must be returned to the parent or Indian custodian as soon as practicable.[111]

Even after a final decree has been entered in the case, consent can be withdrawn and custody regained based on fraud and duress. This right to withdraw consent based on fraud and duress exists unless the child has been adopted for more than two years.[112]

F. Placement Preferences of the ICWA

One of the most important purposes of the ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[113] In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[114] 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 would be served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[115]

1. Foster Care and Pre-Adoptive Placements

The placement preferences of the ICWA apply to both voluntary and involuntary placements, to pre-adoptive placements, and to placements made in contemplation of termination of parental

[107] BIA Guidelines § E.2(c).
[108] 25 U.S.C. § 1913(a); BIA Guidelines § E.2(e).
[109] 25 U.S.C. § 1913(c).
[110] BIA Guidelines § E.5(a) (The statute does not specify any form for the withdrawal of consent).
[111] BIA Guidelines § E.5(b)
[112] 25 U.S.C. § 1913(d).
[113] 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.).
[114] Holyfield, *supra* note 44, at 36.
[115] 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, 321 S. Ct. at 633.

rights.[116] Section 1915 of the Act 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."[117]

The ICWA placement standard 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."[118] The ICWA foster care placement preferences apply even where the child has not previously resided in an Indian family.[119]

Thus, in the absence of good cause to the contrary, the ICWA imposes the following placement preference, in the order of their applicability:

- A member of the Indian child's extended family as defined by the ICWA.[120]
- 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 and that is suitable to meet the child's needs.[121]

The ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally altered preferences. The tribal resolution must comply with the ICWA mandate that the placement be the "least restrictive setting."[122] Tribal resolutions and enactments regarding the ICWA placement preferences can often be found on the appropriate tribal website.

The ICWA provides that the court may consider the wishes of the child's parents for placement, but parental requests are not dispositive of placement decisions.[123]

2. Good Cause to Deviate from the Foster Care Placement Preferences

The Act provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. Prior to release of the updated BIA Guidelines state courts were in conflict regarding whether the level of proof for good cause is a preponderance of the evidence or clear and convincing evidence.[124] The BIA Guidelines provide that the agency must demonstrate good cause by clear and convincing evidence.[125]

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[116] 25 U.S.C. § 1915(b).
[117] 25 U.S.C. § 1915.
[118] 25 U.S.C. § 1915(d).
[119] *See* ICWA HANDBOOK, *supra* note 24 at 84-85.
[120] 25 U.S.C. § 1903(2).
[121] 25 U.S.C. § 1915(b).
[122] 25 U.S.C. § 1915(c).
[123] *Id.*
[124] *See* ICWA HANDBOOK, *supra* note 24 at 139, citing Adoption of N. P. S. 868 P. 2d 934 (Alaska 1994)(holding that a mere preponderance of the evidence is sufficient); In re Custody of S. E. G., 507 N.W. 2d 872, 878 (Minn. Ct. App. 1994*), rev'd on other grounds*, 521 N.W. 2d 357 (Minn. 1994), *cert. denied sub nom*; Campbell v. Leach Lake Band of Chippewa Indians, 513 U.S. 1127 (1995)(holding clear and convincing evidence is necessary).
[125] BIA Guidelines §§ F.1(b) and F.4(b).

The BIA Guidelines provide that as the agency conducts its search for a placement that complies with the placement preferences, it should provide notification about the placement hearing and explanation of the actions to be taken at the hearing. This notification should be provided to the following:

- The child's parents and/or Indian custodians
- All of the known or reasonably identifiable members of the child's extended family
- All foster homes licensed, approved or specified by the child's tribe
- All Indian foster homes located in the child's state of domicile that are licensed or approved by any authorized non-Indian licensing authority.[126]

The BIA Guidelines provide that the reasons for the belief that there is good cause to deviate from the placement preferences must be stated in writing or on the record and must be provided to the parties to the proceeding and to the Indian child's tribe. The finding of good cause may be based on the following considerations:

- The request of the parents, if they certify that they have reviewed the placement options that comply with the preferences.
- The request of the child if she or he is able to understand and comprehend the decision that is being made.
- The extraordinary physical or emotional need of the child, and/or
- The unavailability of a complying placement.[127]

a. Request of the Biological Parents or Child

Section 1915(c) of the ICWA provides that a state court should consider the wishes of the parent, where appropriate, when making placement decisions. This first ground for deviating from the placement preferences in the BIA Guidelines implements this section of the Act. Where a foster care placement is being made, the wishes of the parent might carry significant weight, where appropriate. However, in cases involving an adoptive placement where the parent's rights have been terminated, a parent's wishes regarding the adoptive placement should not be entitled to significant weight. This is especially true where the parent's wishes would not serve the purposes of the Act. The United States Supreme Court made clear in *Holyfield* that a parent should not be able to unilaterally defeat the intent of the Act.[128] The BIA Guidelines also specify that the parents' consent is conditioned on their review of the placement options that comply with the preferences.[129]

In addition to the wishes of the parents, the BIA Guidelines provide that the wishes of an older child may be the basis for deviating from the placement preferences of the Act. The Guidelines do not define "older child" but provide that the child should be able to "understand and comprehend" the placement decision.[130]

[126] BIA Guidelines § F.1(b)(1)-(4).
[127] BIA Guidelines § F.4(c).
[128] Holyfield, 430 U.S. at 38.
[129] BIA Guidelines § F.4 (c)(1).
[130] BIA Guidelines § F.4 (c)(2).

b. Extraordinary Emotional or Physical Needs of the Child

The BIA Guidelines provide that where the child is in need of "highly specialized treatment services that are unavailable in the community where families who meet the preference criteria reside," a court may deviate from the placement preferences. The Guidelines require that the opinion of a qualified expert witness support this ground for deviation.[131] The extraordinary services may not include "ordinary bonding and attachment" that may have occurred in a non-complying placement or the extended time the child may have been placed in such a placement. Furthermore, the needs of the child do not include a general "best interests" inquiry because "the placement preferences reflect the best interests of an Indian child in light of the purposes of the Act."[132]

c. Inability to Comply with the Placement Preferences

The Guidelines permit deviation from the placement preferences where, after a diligent search, a placement complying with the preferences cannot be located. The Guidelines define a diligent attempt as including the notifications described above as well as a showing that active efforts have been made to locate a placement that complies with the preferences.[133] The Guidelines further provide that a placement may not be considered to be unavailable if it conforms to the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides or maintains social and cultural contacts.[134] Specifically, the guidelines provide that the court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child and may not depart from the preferences based on the socio-economic status of a placement relative to another placement.[135]

G. Adoptive Placement Preferences

The placement preferences for adoptive placements differ from the preferences for foster care placements and pre-adoptive placements. Pursuant to §1915(a), preference must be given for the adoption of an Indian child to:

- A member of the Indian child's extended family
- Other members of the Indian child's tribe
- Other Indian families[136]

The BIA Guidelines also provide that "the court should, where appropriate, also consider the preference of the Indian child or parent."[137]

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[131] BIA Guidelines § F.4 (c)(3).
[132] *Id*.
[133] BIA Guidelines § F.4 (c)(4).
[134] *Id*.
[135] *Id*.
[136] 25 U.S.C. § 1915(a).
[137] BIA Guidelines § F.2(b).

As with the preferences in foster care placements, the court must follow these preferences in adoptions unless the tribe has altered the preferences by tribal resolution or good cause exists to deviate from the preferences.

H. Removal from a Foster Home

Every placement of an Indian child must be made in accordance with the placement preferences. Thus, if an Indian child is removed from a foster home or other institution, the placement preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[138]

I. Return of Child to Parent or Indian Custodian

If a decree of adoption is set aside or if the adoptive parents consent to the termination of their parental rights, the ICWA provides that a biological parent or prior Indian custodian may petition for return of the child. The court must grant the petition unless it is shown that returning the child to his or her parent or former custodian is not in the best interests of the child. The proceeding seeking return of a child is subject to the procedural protections of section 1912 of the ICWA including notice to the tribe, parents and Indian custodian, appointment of counsel, a finding of active efforts, and of serious emotional damage supported by the testimony of a qualified expert witness.[139]

11.5 THE IDAHO CHILD PROTECTION ACT AND THE ICWA INTEGRATED

A. Referral & Investigation

Under the Idaho Child Protective Act (CPA), a case is initiated when:

- A child is removed from the home through a declaration of imminent danger
- A judge orders the child's removal
- A Juvenile Corrections Act case is expanded to a CPA case, or
- A petition is filed under the Act.

In addition, children may be removed from the home through the use of a voluntary agreement with IDHW prior to the initiation of a case. An investigation that may lead to any of these actions should include an investigation into whether the child is an Indian child.[140] From the beginning of its investigation, IDHW should be taking steps to determine whether the child is an Indian child.

B. Initiation of the Case

Once the case is initiated, the court must ask whether there is reason to believe that the child is an Indian child and all parties to the case must certify on the record whether they have

[138] 25 U.S.C. § 1916(b).
[139] 25 U.S.C. § 1916(a).
[140] BIA Guidelines § A.3 (c).

discovered or know of any information that suggests or indicates that the child is an Indian child.[141]

Notice of the pending proceeding must be provided to the Indian child's tribe, parents, and Indian custodian. The ICWA requires that 10 days' notice be provided. This will not usually be possible in most cases where a shelter care hearing must be held within 48 hours.

In addition to the ten-day notice requirement, the ICWA provides that the tribe and parents must be given an additional 20 days to prepare for the proceeding, if requested. The request for additional time does not have to be in writing.

In the case of an emergency removal the BIA Guidelines require that "all practical steps" must be taken to "immediately notify" the child's parents, Indian custodians and the child's tribe of the hearings on the emergency removal.[142]

Upon the filing of the petition, counsel should be appointed for indigent parents. This step, required by the ICWA, is consistent with Idaho law, which also requires appointment of counsel for parents.

C. Special ICWA Considerations in Cases Initiated by Emergency Removal

There are two ways a child can be removed from the home in Idaho that implicate the emergency removal provisions of the ICWA. The first situation is where a law enforcement officer declares a child in imminent danger pursuant to Idaho Code section 16-1608. The second is where the child is removed pursuant to a summons that includes an order to remove the child under Idaho Code section 16-1611(4).

Where a child is removed from the home **pursuant to a declaration** made under Idaho Code section 16-1608, the standard of removal under Idaho law is similar but not the same as the BIA Guidelines. The BIA Guidelines permit removals "as necessary to prevent imminent physical damage or harm to the child."[143] Idaho law permits removals "where it is necessary to prevent serious physical or mental injury to the child."[144]

Where a child is removed from the home **pursuant to a summons** that includes an order of removal, Idaho law does not refer to this as an emergency removal, however this would be an emergency removal under ICWA. The ICWA standard for removal differs significantly from the Idaho standard for issuing an order for removal. Idaho law requires a showing that continuation in the home is contrary to the welfare of the child and that removal is in the best interests of the

[141] BIA Guidelines § B.2 (b).
[142] BIA Guidelines §§ B.8 (b)(4) to (5). Idaho Code section 16-1609 provides for notice of emergency of removal and Idaho Code section 16-1612 provides for service of the summons and order of removal. Where there is reason to believe a child is an Indian child, service of these documents should also be made upon the child's tribe and the child's Indian custodian.
[143] 25 U.S.C. § 1922; BIA Guidelines § B.8(a).
[144] § 16-1608(1)(a) (2009).

child.[145] In the case of an Indian child the ICWA requires an additional showing and an additional finding of imminent physical damage or harm.[146]

The BIA Guidelines also require that the request for emergency removal or for continued emergency removal must be accompanied by an affidavit containing the following information:

- The name age and last known address of the child.
- The name and address of the child's parents and Indian custodians.
- If the parents and/or Indian custodians are unknown, a detailed explanation of what efforts have been made to locate them.
- The facts necessary to determine the residence and domicile of the Indian child.
- If either the child's residence or domicile is believed to be on an Indian reservation, the name of the reservation.
- The tribal affiliation of the child and of the parents and/or Indian custodians.
- If the tribe has exclusive jurisdiction, the steps being taken to transfer the child to the tribe's jurisdiction.
- A statement of the active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.
- A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.[147]

The emergency removal must be as short as possible. The BIA Guidelines require that IDHW "diligently investigate" and document whether the removal "continues to be necessary to prevent imminent physical damage or harm to the child." The removal must be terminated as soon as the emergency situation has ended.[148]

The Guidelines require that each involved agency or court take all practical steps to notify the parents, Indian custodian and Indian tribe of hearings relevant to the emergency removal and keep records of the steps taken to comply with the general notice provisions of the ICWA.[149]

Finally, the BIA Guidelines provide that the temporary custody of the child pursuant to an emergency removal may not continue for more than 30 days unless a hearing is held after notice as provided in the BIA Guidelines. At the hearing the court must make one of two findings. First, custody may be continued if the court determines, by clear and convincing evidence and the testimony of a qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child.[150] Second, custody may be continued if the court finds that extraordinary circumstances exist.[151]

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[145] § 16-1611(4).
[146] BIA Guidelines § B.8(a).
[147] BIA Guidelines § B.8(d).
[148] BIA Guidelines § B.8(b).
[149] BIA Guidelines § B.8(c)(4)-(6).
[150] BIA Guidelines § B.8(f)(1).
[151] BIA Guidelines § B.8(f)(2).

D. Shelter Care

At the shelter care hearing, the court should inquire whether there is any reason to believe the child is an Indian child. If possible, the court should make a finding on the child's Indian status at the shelter care hearing. If there is any reason to believe that the child is an Indian child and if the child is going to be placed or kept in shelter care, then the ICWA standard for emergency removal applies and the child should be treated as an Indian child until the court determines that the child is not an Indian Child.[152] The court must find that the placement of the child is necessary to prevent imminent physical damage or harm to the child.[153] Both this finding and the findings required by Idaho Code section 16-1615 must be made.

The BIA Guidelines require the court to monitor the progress of the state in determining the child's status as a member of a tribe or the child's eligibility for tribal membership. The court also monitors the preparations to make the required ICWA showings at the shelter care hearing, as appropriate progress on these matters will ensure that the case is not delayed later in the process.

E. Adjudicatory Hearing

1. Phase I: Procedural Matters

At Phase I, adjudication, the court must make findings as to whether the child is an Indian child, the basis for the court's exercise of jurisdiction pursuant to the ICWA, and whether the notice to the tribe and parents complied with the requirements of the ICWA.

Different tribes approach their involvement in ICWA cases involving tribal children in different ways. Some tribes regularly seek transfer of ICWA cases to tribal court. Others intervene and actively participate in state court cases involving tribal children. Still other tribes quietly monitor the case but do not intervene and participate as a party during the adjudicatory and planning phases. Occasionally, tribes may not intervene until later in the proceedings, such as when a termination is filed. The tribe has the right to intervene at any point in the proceeding.[154]

These different approaches are the result of different cultural practices among tribes and are driven, in part, by the tribal resources available for child welfare. The ICWA anticipates many different levels of tribal involvement in cases. While it can be frustrating for state courts and for the Department when the tribe is not active or when it intervenes unexpectedly, the decision regarding involvement is the tribe's, is supported by the ICWA, and must be accommodated by the court and parties.

2. Phase I: Substantive Matters

In addition to resolving procedural issues, the required ICWA findings must be made at Phase I of the adjudicatory hearing. Thus, in addition to the findings under the CPA and federal IV-E

[152] BIA Guidelines § B.8(c)(1).
[153] BIA Guidelines § B.8(a).
[154] 25 U.S.C. § 1911(c).

findings, the court must evaluate whether active efforts for the Indian child have been offered and documented. The court must find that (1) IDHW made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those services were unsuccessful; and (2) continued custody with the parents or Indian custodian will result in serious emotional or physical damage to the child. This second finding must be supported by the testimony of a qualified expert witness. The second finding is subject to a clear and convincing standard of proof under the ICWA. The expert's testimony may not be waived. If the parties plan to stipulate at the adjudicatory, an affidavit from a qualified expert must be included that will support a finding under the ICWA. Alternatively, a separate hearing can be set for the qualified expert witness to testify regarding the serious physical or emotional harm provision under 25 U.S.C. § 1912(f).

The ICWA does not provide any exceptions to the active efforts requirement which would allow a streamlined process for situations in which the facts would support a finding of aggravated circumstances under state law. Thus, in a case involving an Indian child, courts should not make findings of aggravated circumstances and should ensure that the normal ICWA process toward permanency is observed.

3. Phase II: Disposition

During Phase II, disposition, the court must evaluate whether the disposition for the child put forth by IDHW complies with the placement preferences of the ICWA. If one of the parties argues that the placement does not meet the placement preferences, the court must make a finding of good cause based on clear and convincing evidence or it must reject the proposed placement and direct the Department to recommend a complying placement or to present evidence of good cause to support a non-complying placement.

F. Case Plan Hearing and Review Hearings

By the time case plan or review hearings are held, ideally the child's Indian child status has been firmly established, the required ICWA findings have been made if the child has been removed from the custody of his or her parents or Indian custodian, and the child is placed in an ICWA preferred placement.

What remains at this time is for the court to continue monitoring the child's status as an Indian child if the issue has not been resolved and to monitor the efforts to secure an ICWA-compliant placement if such a placement has not been identified. If the child's placement must be altered, the new placement must comply with the placement preferences or must be supported by a finding, based on clear and convincing evidence, that there is good cause to deviate from the placement preferences. In addition, the court should ensure that active efforts are being made to provide remedial services and rehabilitative programs to the family.

G. Permanency Hearing

As detailed previously, the ICWA alters the permanency options for the child in several ways. Many tribes do not recognize the concept of termination of parental rights and thus a tribe may

oppose a termination action even though the tribe has supported other permanency options including guardianship. In addition, the stricter requirements under ICWA make the case harder to prove. The ICWA does not establish independent grounds for termination; however, the serious emotional or physical damage requirement under 25 U.S.C. § 1912(f) does require the testimony of a qualified expert witness and evidence that is beyond a reasonable doubt. The active efforts finding must also be made.

CONCLUSION

Congress has declared that it is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families.[155] This congressional policy is codified in the Indian Child Welfare Act. Compliance with this congressional mandate is crucial to providing stability, security, and timely permanence to Indian children.

[155] 25 U.S.C. § 1901.

CHAPTER 12:
Special Topics in Child Protection Cases

12.1 Relevant Federal Statutes

12.2 Idaho Juvenile Rule Expansions

12.3 Notifying and Including Unwed Fathers in Child Protective Act Proceedings

12.4 The Idaho Safe Haven Statute

12.5 *DeFacto* Custodians and Child Protective Act Proceedings

12.6 Findings Required to Establish and/or Maintain a Child's Eligibility for Federal IV-E Funding

12.7 Interstate Compact on the Placement of Children (ICPC)

12.8 Juvenile Rule 40: Involving Children and Foster Parents in Court

12.9 Educational Needs of Children

12.10 Independent Living

12.11 Guardianships

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

12.1 RELEVANT FEDERAL STATUTES

Timeline of Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption

1970's
Child Abuse Prevention and Treatment Act (CAPTA) of 1974 (P.L. 93-247)
Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 (P.L. 95-266)
Indian Child Welfare Act (ICWA) of 1978 (P.L. 95-608)
1980's
Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272)
Child Abuse Amendments of 1984 (P.L. 98-457)
Child Abuse Prevention, Adoption, and Family Services Act of 1988 (P.L. 100-294)
1990's
Child Abuse, Domestic Violence, Adoption, and Family Services Act of 1992 (P.L. 102-295)
Family Preservation and Support Services Program Act of 1993 (P.L. 103-66)
Multiethnic Placement Act (MEPA) of 1994 (P.L. 103-382)
The Interethnic Provisions of 1996 amends MEPA (P.L. 104-188)
Child Abuse Prevention and Treatment Amendments (CAPTA) of 1996 (P.L. 104-235)
Adoption and Safe Families Act of 1997 (P.L. 105-89)
Foster Care Independence Act of 1999 (P.L. 106-169)
2000's
Child Abuse Prevention and Enforcement Act of 2000 (P.L. 106-177)
Intercountry Adoption Act of 2000 (P.L. 106-279)
Promoting Safe and Stable Families Act of 2001 (P.L. 107-133)
Keeping Children and Familes Safe Act of 2003 (P.L. 108-36)
Adoption Promotion Act of 2003 (P.L. 108-145)
Fair Access Foster Care Act of 2005 (P.L. 109-113)
Deficit Reduction Act of 2005 (P.L. 109-171)
Safe and Timely Interstate Placement of Foster Children Act of 2006 (P.L. 109-239)
Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248)
Child and Family Services Improvement Act of 2006 (P.L. 109-288)
Tax Relief and Health Care Act of 2006 (P.L. 109-432)
Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351)
2010's
Patient Protection and Affordable Care Act of 2010 (P.L. 111-148)
CAPTA Reauthorization Act of 2010 (P.L. 111-320)
Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34)
Child Protection Act of 2012 (P.L. 112-206)
Protect our Kids Act of 2012 (P.L. 112-275)
Intercountry Adoption Universal Accreditation Act of 2012 (P.L. 112-276)
Preventing Sex Trafficking and Strengthening Families Act (of 2014) (P.L. 113-183)

Table 12.7: Relevant Federal Child Protection Statutes
Courtesy: Child Welfare Information Gateway, 2015.

12.2 IDAHO JUVENILE RULE EXPANSIONS

Idaho Juvenile Rule 16[1] 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 each system trains their workers in different skills. The rule provides a basis for sharing resources to serve the needs of the child. Both systems may be needed to meet the needs of a child and her/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 may decide to take the child home where the officer may discover that the child's parents cannot be located. Further investigation may 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 may decide to make a declaration of imminent danger. If this happens, the child, and most likely his or her siblings, will become part of the child protection system.

Much research has focused on the link between juvenile justice and child welfare.[2] Research demonstrates that abused and neglected youth are at heightened risk for early onset of delinquency.[3]

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 section 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, Title 16, Idaho Code."[4] Idaho Juvenile Rule 16

> *"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.

[1] The statutory basis for Rule 16 is found in Idaho Code § 20-520(m) (Supp. 2014).
[2] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 21 (2005).
[3] 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.
[4] IDAHO CODE ANN. § 20-520(l) (Supp. 2014).

prescribes the procedure for expanding a JCA case to a CPA case and 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 Protection 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."[5] 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 section 20-511A allows the court, in a JCA or a CPA case, to order assessment and screening teams for juveniles with mental health issues.[6]
2. Idaho Code section 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.[7]
3. Idaho Code section 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.[8]

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, where possible.
4. If expansion or investigation is ordered, providing a copy of court records to IDHW from the JCA proceedings.

* * *

[5] § 16-1613(3) (2009).

[6] § 20-511A (Supp. 2014). 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).

[7] § 20-520.

[8] Idaho Juvenile Rule 19 allows the court to convene screening teams with state agencies (eg: the Department of Health and Welfare and the Department of Juvenile Corrections), and local entities (eg: 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[9] or by filing a verified complaint naming a defendant who is the alleged father of the child.[10]

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."[11] In *Johnson v. Studley-Preston*,[12] 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.[13] 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 considered a parent through its provisions regarding who must consent to and/or receive notice of an adoption.

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[9] § 7-1111(1) (2010); see also § 7-1106 (governing voluntary acknowledgments of paternity which are discussed later in this section).
[10] *Id*.
[11] § 7-1103(4).
[12] 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. In *Doe I 2005*, 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.
[13] *Id*. at 1057, 1218.

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**."[14] 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.[15] 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." [16]

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."[17] 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*,[18] 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.

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.[19] Pursuant to this provision, any man who obtains a timely adjudication of paternity must consent to a subsequent adoption of the child.[20]

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[14] § 16-1504(1)(b) (Supp. 2014).
[15] § 16-1505(1)(f) (2009).
[16] § 16-2002(12) (Supp. 2014), discussed later in this Chapter.
[17] § 7-1106(1) (2010).
[18] 119 Idaho 1055, 812 P. 2d 1216 (1991)
[19] § 16-1504(1)(d) (Supp. 2014).
[20] 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." § 7-1111(1) (2010)(emphasis added).

iii. **An unmarried biological father who has filed a voluntary acknowledgement of paternity** pursuant to the paternity statute.[21] The paternity statute provides that an appropriately executed, notarized voluntary acknowledgement of paternity filed with the Department "shall constitute a legal finding of paternity."[22] 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.[23]

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.[24] Pursuant to the adoption statute, the unmarried biological father must fall within one of these three categories:[25]

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;
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 section 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 section 16-1513 provides that the required notice and filing of

[21] § 16-1504(1)(i)(Supp. 2014).
[22] § 7-1106(1) (2010).
[23] *Id*.
[24] § 16-1504(1)(e) (Supp. 2014).
[25] These provisions are all set forth in § 16-1504(2).

paternity proceedings must be filed prior to the placement of the child for adoption.[26]

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.[27] 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*[28] 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.[29] 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 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.[30] 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"[31] of the child).

The Court recently affirmed the reasoning of *Doe I 2005* in *Department of Health & Welfare v. Doe* (hereinafter *Doe II 2010*).[32] The Court 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.

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[26] § 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).
[27] § 16-1504(8).
[28] *Doe I 2005*, 142 Idaho 202, 127 P. 3d 105.
[29] *See* Idaho Code section 16-2007, cross-referencing and incorporating the adoption notice provisions in Idaho Code section 16-1505. Section 16-1505, the adoption notice provision, cross-references and incorporates the adoption consent provision, section 16-1504.
[30] *Doe I 2005*, 142 Idaho at 205, 127 P. 3d at 108.
[31] 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." § 16-2002(12).
[32] Dep't. of Health & Welfare. v. Doe (In the interest of Doe), 150 Idaho 88, 244 P. 3d 232 (2010)(Doe II 2010)

v. *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."[33] 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.[34]
- 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.[35]
- 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.[36]

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 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. 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 would 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 section 16-1504, Idaho Code.[37]

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[33] § 16-1505(9) (2009).
[34] § 16-1505(1)(d).
[35] § 16-1505(1)(e).
[36] § 16-1505(1)(f).
[37] § 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

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."[38] 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."[39]

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 16-1505(1), Idaho Code*."[40] 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*,[41] and through *Lehr v. Robinson*,[42] 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

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Acknowledgement of Paternity Application" and who was subsequently listed as the father on the child's birth certificate was an "unmarried biological father" under § 16-2002(p) (Supp. 2014). This section has been amended and is now section 16-2002(11).

[38] § 16-2002(12).

[39] § 16-2002(15).

[40] § 16-2007(5).

[41] 405 U.S. 645 (1972).

[42] 463 U.S. 248 (1983).

scheme assumed that "an unwed father is not a 'parent' whose existing relationship with his children must be considered."[43]

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.[44]

The *Stanley* reasoning was extended by the U. S. Supreme Court in *Quilloin v. Wolcott*[45] and *Caban v. Mohammed*.[46] In both of these cases, stepfathers sought to adopt stepchildren over the objections of the children's biological fathers. As in 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.[47] 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.

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[43] *Stanley*, 405 U.S. at 649-50.
[44] *Id.*
[45] 434 U.S. 246 (1978).
[46] 441 U.S. 380 (1979).
[47] *Quilloin*, 434 U.S. at 256.

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.[48]

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.

This latter situation was addressed in *Lehr v. Robinson*.[49] 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."[50]

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.*[51] The Court held that California's conclusive presumption that the man married to the mother at the time of

[48] *Caban*, 441 U.S. at 385.
[49] 463 U.S. 248 (1983).
[50] *Lehr*, 463 U.S. at 262.
[51] 491 U.S. 110 (1989).

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.

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.*[52] 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.[53] 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.[54] At the time, efforts were being made to provide the father with notice by publication (based on the mother's

[52] 112 Idaho 22, 730 P. 2d 732 (1986).
[53] The statutory scheme in existence at the time of the *Steve B.D.* decision was completely revised in 2000.
[54] *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).

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 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*.[55] 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)*,[56] 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 section 16-2007) required then, and still requires today, that notice be provided to any person included in the adoption notice provision – Idaho Code section 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 section 16-1513.

In *Doe I 2005*,[57] 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 birth certificate and thereafter held himself out and functioned as

[55] 119 Idaho 1055, 812 P. 2d 1216 (1991).
[56] Roe Family Services v. Doe (In re Baby Boy Doe), 139 Idaho 930, 88 P. 3d 749 (2004)(*Doe 2004*).
[57] 142 Idaho 202, 127 P. 3d 105 (2005).

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…."[58] 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.[59] 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*,[60] 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 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

[58] *Id*. at 204, 127 P. 3d at 107

[59] 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.

[60] 150 Idaho 88, 244 P. 3d 232 (2010).

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*),[61] 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 section 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."[62]

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. 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 harmonizes the disparate provisions of the statutes discussed above, is made because such individuals may become integral to the case at any of its

[61] Dep't. of Health & Welvare v. Doe (In re Doe),150 Idaho 195, 245 P. 3d 506 (App. 2010) (Doe III 2010).
[62] *Id*. at 200, 245 P. 3d at 511.

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.

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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.[63] 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. [64] 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.[65] If a custodial parent leaves a child at a safe haven, the parent is not subject to prosecution for abandonment.[66]

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, or emergency medical personnel responding to a "911" call from a custodial parent.[67]

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."[68] The safe haven also is required to "provide notice of the abandonment to a peace officer or other person appointed by the court."[69]

The safe haven may not "inquire as to the identity of the custodial parent."[70] Moreover, if the identity of the parent is known to the safe haven, it must "keep all information as to the identity

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[63] *See* Child Welfare Information Gateway, *Infant Safe Haven Laws: Summary of State Laws*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm (2010).
[64] IDAHO CODE § 39-8203(1)(b)(2011)(specifying that the child must be delivered by the custodial parent) and § 39-8202(1)(defining the term custodial parent).
[65] § 39-8203(1)(a).
[66] § 39-8203(5).
[67] § 39-8202(2).
[68] § 39-8203(2)(a).
[69] § 39-8203(2)(b).
[70] § 39-8203(3).

confidential."[71] 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.[72] 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.[73]

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.[74]

Once the child is delivered to the Department, the Department must "place the abandoned child with a potential adoptive parent as soon as possible."[75]

The Safe Haven Act provides that a shelter care hearing must be held pursuant to Idaho Code section 16-1615, and that the *Department* must file a "petition for adjudicatory hearing pursuant to Idaho Code section 16-1621."[76] The process envisioned by these provisions is ambiguous. Idaho Code section 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 section 16-1621 regarding the filing of a petition and the adjudicatory hearing. 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 – section 16-1610 – and/or the provisions of the CPA regarding the adjudicatory hearing – section 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.[77] The best practice is for the Department to consult

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[71] *Id*.
[72] *Id*.
[73] § 39-8203(4).
[74] § 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." § 39-8204(3).
[75] § 39-8204(2).
[76] § 39-8205.
[77] § 16-1610(1)(a).

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 section 16-1619 and section 16-1621.[78] 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[79] and may, if ordered by the court, initiate a child protective or criminal investigation if a claim of parental rights has been made.[80] In addition, the Department must conduct the investigations required by the CPA.[81]

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.[82]

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 the ICWA are not complied with. Chapter 11 of this manual contains a detailed discussion of the 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 the federal requirements of

[78] § 39-8205(4).
[79] § 39-8205(3).
[80] § 39-8205(2).
[81] § 16-1616(1) (2009).
[82] § 39-8205(5) (2011).

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."[83]

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.[84] 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."[85] 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.[86]

The Safe Haven Act specifically provides that registration of notice of the commencement of paternity proceedings pursuant to Idaho Code section 16-1513 does not satisfy the requirements of the Safe Haven Act.[87] 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 section 16-1513, but did not file a claim of parental rights of an abandoned child pursuant to the Safe Haven Act, might nonetheless 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.

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[83] § 39-8205(3).
[84] § 39-8206(1). This provision also establishes procedural requirements for the registry and for the filing of claims.
[85] § 39-8306(1).
[86] § 39-8306(2) and (4).
[87] § 39-8206(1).

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 section 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.[88]

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 section 16-2008.[89]

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.[90] 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.[91]

* * *

[88] § 39-8206(3).
[89] § 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. § 16-2008.
[90] § 39-8206(3)(c).
[91] § 39-6307(3)(d).

12.5 DEFACTO CUSTODIANS AND CHILD PROTECTIVE ACT PROCEEDINGS

In 2009, the Idaho Legislature enacted the *De Facto* Custodian Act.[92] 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.[93] 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.[94] 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.[95] 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.[96]

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[92] IDAHO CODE §§ 32-1701 – 32-1705 (Supp. 2014).
[93] § 16-1602(12) 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, § 16-1610(2)(d), is to be notified of the CPA proceeding in the Summons, section 16-1611(3), and must receive notice of the shelter care hearing, section 16-1615(2). *See* §§ 16-1602(12) (Supp. 2014), 16-1610(2)(d), and 16-1611(3)(2009).
[94] § 32-1703(4)(a) (Supp. 2014).
[95] § 16-1603(1) (2009).
[96] IDAHO R. CIV. 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[97]
3. Orders of removal[98]
4. Orders that continue shelter care hearings to another date[99]
5. Orders issued at shelter care hearings that place the children in shelter care, based on the stipulation of the parties[100]
6. Orders issued at shelter care hearings that place the children in shelter care, based upon the evidence presented[101]
7. Orders issued at adjudicatory hearings that place the children in the custody of the IDHW, based upon the stipulation of the parties[102]
8. Orders issued at adjudicatory hearings that place the children in the custody of IDHW, based upon the evidence presented at the adjudicatory hearing[103]
9. Orders issued at a redisposition hearing (for example, a child is removed from home after having been placed in the home under protective supervision)[104] or
10. Orders issued at a review hearing[105] or a 12-month permanency hearing,[106] if the child is removed from the home at that time.

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[97] IDAHO JUV. R. 16.
[98] IDAHO CODE ANN. § 16-1611(4)(2009).
[99] § 16-1615.
[100] *Id*.
[101] *Id*.
[102] § 16-1619 (Supp. 2014).
[103] *Id*.
[104] § 16-1623.
[105] § 16-1622.
[106] § 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."[107]

2. Timing

Federal law requires this finding to be made in the first order pertaining to the removal of the child from the home.[108] Idaho Code section 16-1615(5)(d) requires that the "contrary to the welfare finding" be made at the shelter care hearing and Idaho Code section 16-1619(6)(a-c) 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.[109]

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.[110] Additionally, the child will also likely be ineligible for federal adoption assistance payments.

If the "contrary to the welfare" finding was made at the shelter care 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.[111]

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 his/her home.[112]

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

[107] 42 U.S.C. § 672(a)(2)(A)(ii) (2012); §§ 16-1615(5)(d) (2009), 16-1619(6)(a-c) (Supp. 2014).
[108] 45 C.F.R. § 1356.21(c) (2011).
[109] *Id*.
[110] *Id*.
[111] 45 C.F.R. § 1356.21(d)(1).
[112] 42 U.S.C. § 671(A)(15)(B)(1).

legal custody in the Department, at the adjudicatory hearing as well.[113] The adjudicatory hearing may not be continued to a date more than 60 days from the date of removal unless the court has a made case specific, written, reasonable efforts to prevent removal finding.[114]

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."[115]

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 redisposition hearing.[116]

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 re-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.[117]

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[113] 45 C.F.R. § 1356.21(b)(1)(i) and (ii); § 16-1615(5)(b) (2009), § 16-1619(6)(a-c) (Supp. 2014).
[114] IDAHO JUV. R. 41(b).
[115] 45 C.F.R. § 1356.21(b)(1)(i) and (ii) (2011).
[116] §§ 16-1623 (Supp. 2014), 16-1619; 42 U.S.C. § 672(a)(2)(B) (2012) and 45 C.F.R. § 1356.21(g)(3).
[117] 45 C.F.R. § 1356.21(c).

If the "contrary to the welfare" finding was made at the re-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.[118]

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.[119]

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 re-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.[120]

If the "contrary to the welfare" finding was made at the re-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.[121]

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

[118] 45 C.F.R. § 1356.21(d)(1) (2011).
[119] 45 C.F.R. § 1356.21(e).
[120] 45 C.F.R. § 1356.21(c).
[121] 45 C.F.R. § 1356.21(d)(1).

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*.[122] 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."[123]

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.[124]

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.[125]

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 remains ineligible unless such a determination is subsequently made. The eligibility re-commences the first day of the month the finding is eventually made.[126]

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[122] 45 C.F.R. § 1356.21(b)(a)(i) and (ii).
[123] § 16-1622(2)(b) (Supp. 2014); IDAHO JUV. R. 46(c).
[124] 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i) and (ii).
[125] § 16-1622(2)(b).
[126] 45 C.F.R. § 1356.21(b)(2)(ii).

3. Corrective Action

1. Problem: Twelve (12) month permanency plan hearing not held on time.

   Action: Schedule and hold the permanency review hearing at the earliest possible date.

2. 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.[127] 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.[128]

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.[129] 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.[130]

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[127] 42 U.S.C. § 672(a)(15)(B).
[128] 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 May 11, 2015).
[129] 45 C.F.R. § 1356.21(g) (3).
[130] 42 U.S.C. § 672(a)(2)(B); 45 C.F.R. § 1356.21(g)(3).

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.[131]

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.[132] 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.[133] 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"[134] 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:

- The efforts to place the youth permanently with a parent, relative, or in a guardianship or adoptive placement.[135]
- 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, safety and best interests while at the same time encouraging a child's emotional and developmental growth.[136]
- The child has regular opportunities to engage in "age or developmentally appropriate activities." "Age and developmentally appropriate activities" are 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.[137]

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[131] 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, 2015).
[132] Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub.L. No. 113-183 Sept. 29, 2014, 128 Stat. 1919 (West) (to be codified at 42 U.S.C. §675 (effective September 29, 2015)).
[133] Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub.L. No.113-183, Title I, § 113(a), (f), Sept. 29, 2014, 128 Stat. 1928, 1929 (West) (to be codified at 42 U.S.C. § 675(5)(C)(i) and § 675A (effective September 29, 2015)).
[134] 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, 2015).
[135] Preventing Sex Trafficking Act, *supra* note 133, at § 675A(a)(1).
[136] *Id*. at § 675(10)(A).
[137] *Id*. at § 675(11)(A).

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.[138]

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.[139]

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[138] *Id*. at 675A(a)(2)(B).
[139] *Id*. at §§ 675(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[140] (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.[141] 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.[142]

B. Goals of the ICPC

1. Safety

The ICPC provides the sending agency[143] the opportunity to obtain home studies in the receiving state prior to placement of the child. Originally, prospective receiving state were asked to ensure

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[140] 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 IDAHO CODE §§ 16-2101 – 16-2107 (2009).

[141] 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).

[142] 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).

[143] § 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.") .

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.[144] 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.[145]

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.[146]

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.
- 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.[147]

[144] § 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.") .
[145] § 16-2102, Art. V.
[146] § 16-2102, Art. III(a).
[147] § 16-2102, Art. VI.

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."[148]

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."[149] 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.[150]

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.[151] 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.[152]

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.[153]

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.[154]

F. Special Cases

1. Regulation 1 – Intact Moves

a. Temporary moves

Regulation 1[155] of the ICPC applies when a child is placed with a family and the family plans to move to another state.[156] Pursuant to the regulation, the child may accompany the family to the

[148] § 16-2102, Art. II(d). This language, directly from the statute, does not reflect currently accepted vocabulary discussing children with special needs.
[149] § 16-2102, Art. III(b).
[150] *Id*.
[151] § 16-2102, Art. III(d).
[152] § 16-2102, Art. III(c).
[153] § 16-2102, Art. V(a).
[154] 42 U.S.C. § 671(a)(25)-(26) (2011).
[155] 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* § 16-

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.[157]

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 with the proposed placement.[158] Regulation 7 requires a court to make the specific finding just described in order to qualify for expedited handling.[159]

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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).

[156] 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).

[157] *Id*. at Reg. No. 1(5)-(6).

[158] *Id*. at Reg. No. 7(6)(a).

[159] *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 his or her 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.[160] 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.[161] This does not give foster parents, pre-adoptive parents, or relative placements the status of a party to the proceedings.[162] 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.[163] 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 his or her wishes and including the child's express wishes in the report to the court.[164]

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*,[165] 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,[166] 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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[160] William G. Jones, *Making Youth a Meaningful Part of the Court Process*, JUV. & FAM. JUSTICE TODAY 16 (Fall 2006).
[161] IDAHO JUV. R. 40(a),(b).
[162] IDAHO JUV. R. 40(a).
[163] *Id*.
[164] § 16-1633(2).
[165] 93 Idaho 893, 477 P.2d 834 (1970).
[166] "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.[167] 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.[168] 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.[169]

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 his/her life.

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[167] 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 25, 2015).
[168] Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, A.B.A. CHILD L. PRACTICE, Nov. 2007.
[169] *Id*.

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.[170]

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."[171] 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."[172]

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 by products 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.[173]

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[170] 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 29, 2015); 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).

[171] 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 29, 2015).

[172] MATTHEW E. MELMED, A CALL TO ACTION FOR INFANTS AND TODDLERS IN FOSTER CARE (2011) available at ZerotoThree.org, http://main.zerotothree.org/site/DocServer/Melmed_31-3_Jan_2011.pdf?docID=12201 (last visited April 29, 2015).

[173] 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.[174]

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.[175]

"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, 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."[176]

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.[177] (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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[174] COURTNEY, *supra* note 129 at 40, Tbl. 38.
[175] Young, *supra* note 130 at 4-5.
[176] 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).
[177] 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).[178] 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.[179]

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 the 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."[180]

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].[181]

Idaho statutes relating to education provide guidance on what constitutes a "proper education." For example, the state compulsory school attendance law provides:

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[178] McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11301 – 11432 (2012).
[179] 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 29, 2015).
[180] *Id*.
[181] § 16-1602(26) (Supp. 2014).

> 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 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.[182]

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"[183]

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.[184] 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:

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[182] § 33-202 (Supp. 2014).
[183] § 16-1621 (a) and (b).
[184] *See* THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-19 (2009)

1. How was the best interest determination made for the child's school selection?
2. Who made the best interest decision?
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?[185]

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."[186] 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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[185] *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 29, 2015).

[186] 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 29, 2015).

12.10 INDEPENDENT LIVING

On any given day, more than 463,000 children and youth are in out-of-home care across the United States.[187] Of these children, an estimated 39% were identified as being 13 years of age or older[188] 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.[189] 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.[190] 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.[191]

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.[192]
- 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 parent.[193]
- At the case plan and permanency hearings, the services to help youth transition to successful adulthood must be described.[194]

The goals of Idaho's Independent Living program are to achieve the goals of the Chafee Act:[195]

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[187] 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 April 29, 2015).
[188] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2007.
[189] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 2008.
[190] 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 April 29, 2015).
[191] 42 U.S.C. §§ 677(b)(2)(A), 677(a)(1)-(7) (2012).
[192] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113(a), (f), 128 Stat. 1928, 1929 (2014) (to be codified at 42 U.S.C. § 675A(1)(b), §675(I) effective September 29, 2015).
[193] *Id.* to be codified at § 675(1)(B), (5)(C)(iv).
[194] *Id.* to be codified at § 675(1)(D), (5)(C)(i).
[195] *Id.*

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.[196]

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 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
- resided in an eligible foster care setting for ninety cumulative days after the 15th 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 independent living.[197] Idaho law requires that at permanency hearings for youth who are 16 or older, a determination of the services needed to assist the youth to make the transition from foster care to independent living must be identified.[198]

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.

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[196] 42 U.S.C. § 677(a).
[197] § 16-1621(3)(d)(vi).
[198] § 16-1622(2)(e). Effective September 25, 2015, federal law requires this for youth age 14 and older. *See supra* note 194.

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. [199]

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.[200] 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.[201] 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
- 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

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[199] 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 April 29, 2015).
[200] 42 U.S.C. § 677.
[201] *Id*.

- Permanency Pact: Developed before the youth leaves care
- Education and Training Voucher (ETV) information
- State and regional resource guides, as available[202]

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.[203] 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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[202] CFSP Report, *supra* note 196, at 27.
[203] 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 April 29, 2015).

12.11 GUARDIANSHIPS

The CPA court has exclusive jurisdiction and venue over any guardianship proceeding involving a child who is the subject of a CPA proceeding, unless the court declines jurisdiction.[204] Best practice is for the court to ensure, through careful inquiry, that both the parents and the guardian understand that upon appointment, 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 guardians.

The statute provides that notice of any action regarding a guardianship arising under the CPA must be provided to IDHW, which has the right to appear and be heard in any hearing and which may intervene as a party in the action.[205] Under this provision, the guardian may not consent to adoption of the child without prior notice to the Department.[206] Finally, the guardianship statute limits the situations under which a CPA-connected guardianship may be modified or terminated or under which the guardian may be removed. The person who moves to terminate a guardianship or have a guardian removed in actions arising under the CPA 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.[207]

In limited circumstances, guardianship can have some advantages over termination of parental rights and adoption as a long-term permanency option:

- Guardianship does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, or Social Security.
- A guardianship is flexible. The order appointing the guardian can include whatever provisions are appropriate for the child to have continuing contact with either or both parents (to the extent that continuing contact is in the child's best interests)[208] and can readily be modified as circumstances change.
- A guardianship may offer the potential for an agreed-upon solution that has active support of all the parties and avoids contested and time-delaying termination proceedings.
- A parent might be threatened by the idea of having their parental rights terminated, yet at the same time be unable or unwilling to actually fulfill the role of a parent. If the threat of termination is removed, the parent may be supportive of an alternative arrangement for their child.
- A relative may be committed to providing the child with parental care through guardianship, but may not be willing to become an adoptive parent.
- The potential guardian may be 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.
- An older child may object to adoption but may accept the same placement if it is in the form of a guardianship.

[204] § 15-5-212A(1) (2009).
[205] § 15-5-212A(2) and (3).
[206] § 15-5-212A(4).
[207] § 15-5-212A(5) and (6).
[208] Bond v. Round (In re Doe), 157 Idaho 750, 339 P.3d 1154 (2014).

- For children in foster care, guardianship assistance may be available in specific circumstances:
    - *IV-E Guardianship Assistance.* Benefits may be provided 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 IDHW.
    - *State Guardianship Assistance.* Benefits may be provided 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.

Guardianship also has significant disadvantages:

- Despite provisions of Idaho law intended to make CPA-connected guardianships long term, such a guardianship may be modified or terminated under some circumstances during the child's minority.[209]
- Guardianships terminate when the children reaches majority.
- Guardianships are subject to ongoing monitoring until the guardianship is terminated by court order or the minor reaches the age of majority. The court is required to monitor the guardianship, but IDHW will not monitor the guardianship once the CP case has been closed.
- The adoption subsidies that are available to assist adoptive families and special needs children are not usually available in guardianships. In a limited number of cases, a child may qualify for guardianship assistance through the Department. Eligibility is based on the child's identified needs, legal termination of parental rights, and documentation of the unsuccessful efforts to place the child for adoption.[210]
- Many insurance policies that will cover a parent's biological or adoptive child, such as medical or life insurance policies, will not cover a child under guardianship.

The guardian is appointed in a proceeding separate from the child protection proceeding, and many of the protections available in CPA cases are not available in guardianship proceedings. The parents do not have the right to court-appointed counsel. The child does not have the right to a court-appointed guardian *ad litem*. However, Idaho Code section 15-5-207 states: "a 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…, 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 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.

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[209] *See* § 15-5-212A.
[210] Chapter 10 of this manual discusses the eligibility for adoption subsidies.

If the proposed permanent placement of the child is guardianship, the court should ask, and the participants should answer, the following questions:

- Why is a guardianship in the best interests of the child? What are the facts and circumstances showing that guardianship is a better option for the child than termination of parental rights and adoption?
- What are the facts and circumstances demonstrating that the individual or couple with whom the child is to be placed is the most appropriate to serve as a permanent family to the child?
- Is the child living with the proposed guardian? If not, why not?
- Has there been full disclosure to the proposed guardian of the child's circumstances and special needs?
- What is the detailed plan to ensure that this placement will be stable?
- What are the plans to continue any necessary services to the child or the child's guardian, and how will those services be funded after the guardianship is finalized?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members?
- What financial support will be provided by the birth parents?[211]

Because guardianship does not have the same permanency as termination of parental rights and adoption, the plan to ensure the stability of the placement is an important consideration in determining whether the placement is in the child's best interests. Similarly, because there are subsidies available to adoptive parents that are not available to guardians, the plan for post-guardianship services, including funding those services, is an important consideration in determining whether the placement is in the child's best interests.

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[211] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES-IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (Barbara Seibel, ed., 2000).