Washington State Juvenile Nonoffender Benchbook

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Thank you also to the authors and editors who created the 1997 Washington State Superior Court Juvenile Non-Offender Benchbook, on which the present benchbook was based in part.

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*Special thanks to Commissioner Thurman W. Lowans for providing these checklists.

Introduction

Justice Bobbe J. Bridge, ret.[1]

Welcome to the complex, heart-wrenching, ever-evolving world of child welfare, "Becca kids," and related proceedings—the nonoffender juvenile law in Washington.

Exercising judgment in these matters is among the most critically important tasks you will encounter as a judicial officer. The work is not for the faint of heart, nor is it for those with ambiguity-phobia. It is often difficult and messy. It involves intrusion into the most intimate parts of a family's life. The "answers" are rarely found unequivocally in statutes, rules, regulations, or prior precedent (though all are involved). Solutions often appear only after multiple disappointments and failures. Additionally, these cases offer complexity and challenge in areas of the law rarely brought together. In addition to those areas addressed in this bench book, aspects of social security, Medicare and health care, probate, education, and marital dissolution law, to name a few, are intertwined.

The methods you will employ in reaching your decisions in these areas of the law require skills beyond legal analysis and reasoning. You will be required to supplement your legal acumen with an understanding of a myriad of nonlegal factors bearing on your determination, e.g., child development, the cycle of domestic violence, addiction, mental illness, racial and ethnic disproportionality, and what we have now come to learn of complex trauma/adverse childhood experiences ("ACEs") . You will strive to ensure due process, to engage in neutral fact-finding, and to dispense fair and impartial justice but with a difference—new linkages, new technology, and new staffing to improve the effectiveness of court orders and sanctions.

Unlike many other areas of the law, judging in these matters presents an opportunity for the wise exercise of discretion and an opportunity for creativity. Unlike many of our legal structures, the structures established to resolve the issues that arise in this area of the law have been the subject of much change and experimentation in the search for best practices—practices that may vary from the typical adversarial process but which look to resolve problems often in a collaborative decision-making or problem-solving setting.

This is an area of the law that demands judicial leadership. The "players" look to the judicial officer not only for good decisions and resolution of conflict but also for accountability. The courts are mandated by the legislature with an ever-broadening responsibility to ensure that all the "players" that intervene with children and families are doing so consistent with statutory mandates and good practice. The public demands effective outcomes and efficient use of resources.

Be critical; do not be satisfied with the status quo. You have the obligation to protect the safety and well-being of these children and to oversee the best plans for keeping them on or returning them to a path toward successful adulthood. Know the systems that are at work in these children's lives and how they interact or fail to interact; know those resources reasonably available in your community that provide interventions proven to be effective and those that do not. These differences are crucial to meeting your obligations to the families who appear before you. As the presiding jurist you have the power to receive and compile information from the multitude of sources impacting the family's life and making sense of it.

This compendium is an invaluable resource for judicial officers presiding over cases involving nonoffender children and youth. At the same time, it is only a start. Much more research and outreach is required to manage these cases well. But the satisfaction you will receive from developing the skills to work in this area are beyond those of the norm—you will earn a sense that you are making a difference in the lives of some of the most vulnerable members of our community and accepting an opportunity for leadership.

[1] Justice Bobbe J. Bridge, ret., is the Founding President and Chief Executive Officer of the Center for Children & Youth Justice (CCYJ) which she founded in 2006. She served on the Washington State Supreme Court from 1999 to 2007 before retiring to lead CCYJ full-time in January 2008. She was a King County Superior Court judge from 1989 to 1999, served as Presiding Judge of the 51-member Superior Court for two years, and was the Chief Judge of King County Juvenile Court from 1994 to 1997. Before joining the bench, Justice Bridge was the first female partner at the Seattle law firm Garvey Schubert Barer. Recognized statewide and nationally as a leading advocate for foster care reform, domestic violence victims, truancy prevention, juvenile justice reform, and a host of other issues, Justice Bridge also serves the community as a dedicated volunteer and philanthropist. She has been a member of the boards of many nonprofit organizations, including YouthCare and the YWCA. In 1999, she helped establish and fund the Pacific Northwest's first court-based child care center at the Regional Justice Center in Kent, offering a safe place for parents and guardians with business before the court to leave young children. Among her many awards as both a judge and an advocate for Washington's children are the Passing the Torch Award from Washington Women Lawyers, the Seattle Civil Rights Champion Award from Lambda Legal, the Distinguished Alumna Award from the University of Washington School of Law, and the Judge of the Year Award from the King County Bar Association.

"Our kids deserve a fighting chance to become strong, self-sufficient and thriving members of the community," Justice Bridge says. "More unified, better informed child welfare and juvenile justice systems will give them that chance."

Chapter 1

The Influence of Federal Law on State Child Welfare Proceedings

Sheila Malloy Huber[1]

The federal government's entry into the child welfare field is relatively recent. It has only been during the past 35 years that Congress has addressed child welfare issues (although it provided assistance to children living in poverty before then). Since the mid-1970s, through a number of federal funding statutes, Congress has shaped the public policy of the child welfare system and has established the parameters of juvenile dependency and termination law in all 50 states. As a result, the delivery of child welfare services—which includes child protective services, family support services, foster care, kinship care, dependency and termination proceedings, guardianships, adoptions and adoption support—involves a complex interweaving of federal and state laws. This section is intended to provide a brief overview of the relevant federal laws.

Federal statutes affecting the child welfare system fall into two basic categories: (1) funding statutes (those statutes that condition child welfare funding on the state's compliance with federal mandates) and (2) substantive or mandatory law.

§ 1.1 Funding Legislation

The federal government supports states' various child welfare services, administrative support, foster care maintenance, medical services, and adoption support services. In order to receive federal funds, the state, including the Department of Social and Health Services (DSHS), service providers, and the courts, must follow federal law and guidelines. The following statutes are the primary sources of federal funds for child welfare cases.

§ 1.1a Social Security Act Title IV

Title IV of the Social Security Act, particularly Parts IV-B and IV-E, establishes the conditions for states participating in federal funding of child welfare programs. When Congress passes a new bill affecting child welfare, the bill generally amends Title IV of the act. The following acts amend different sections of Parts IV-B and IV-E. These Acts, such as the Adam Walsh Act and the Adoption and Safe Families Act of 1997 (ASFA), often are referred to separately. However, they are contained within Title IV-B or IV-E.

Adoption Assistance and Child Welfare Act of 1980: This law (P.L. 96-272) requires that states that receive federal foster care and adoption support funds must provide "reasonable efforts" to keep families together and to reunite them when children are placed out of home. It requires the state to have an approved plan for providing foster children with individual case planning, permanency planning, and, when appropriate, placement with relatives. It also establishes the federal adoption support program.

Adoption and Safe Families Act of 1997 (ASFA): ASFA (P.L. 105-89) amended the Adoption Assistance and Child Welfare Act (Title IV-E). It changed the primary focus of child welfare programs from family preservation and reunification to safety of the child and, in order to provide stability and permanency for children, limited the time for parents to correct the deficiencies that resulted in out-of-home placement.

1 Sheila Malloy Huber is an Assistant Attorney General and Senior Counsel with the Olympia Social and Health Services Division, representing the Children's Administration. She also serves as the appellate advisor for the Social and Health Services Division in Olympia. After graduating from law school in 1977, she was in private practice in Spokane for 13 years, emphasizing adoption, family and juvenile law, as well as appellate practice. During that time Ms. Huber also taught legal research and writing at Gonzaga University School of Law. From 1991 to1999, she worked as a law clerk for Chief Justice James Andersen and, later, for Chief Justice Richard Guy, of the Washington State Supreme Court. She joined the Attorney General's Office in 1999.

The ASFA amendments

- Require that a child's safety must be the paramount consideration when family preservation or family reunification is the goal;
- Provide certain exceptions to the reasonable efforts requirements of the Adoption Assistance and Child Welfare Act, short timelines, and less stringent conditions for seeking termination of parental rights;
- Require a 12-month time frame for permanency hearings and a definitive permanent plan for the child;
- Require background checks for all prospective foster and adoptive parents; and
- Require reasonable efforts be made to place children in a timely manner when adoption is the permanent plan.

Title IV-E has specific requirements impacting juvenile courts. These requirements relate to findings that must be made in the first order authorizing the removal of the child from the parent's care and the state's compliance with the reasonable efforts mandate. The chart following this chapter illustrates the impact of failure to meet Title IV-E mandates.

Family Preservation and Family Support Program (Promoting Safe and Stable Families): First passed in 1993 (P.L. 103-66) and then reauthorized in 1997 as part of the Adoption and Safe Families Act of 1997, this law provides funding for family preservation and community-based family support services.

Adam Walsh Child Protection and Safety Act: Passed in 2006 and effective in Washington in July 2007 (P.L. 109-248), this law amends Title IV-E to require additional criminal and child abuse/neglect background checks of prospective foster, relative, and adoptive parents, as well as of adults living in the homes of those persons.

Safe and Timely Interstate Placement of Foster Children Act of 2006: This Act (P.L. 109-239) amends Titles IV-B and IV-E and sets a 60-day time frame for completing interstate home studies; gives foster caregivers a right to notice and an opportunity to be heard in juvenile court proceedings regarding a child in their care; and requires medical and education records be provided to foster caregivers and to youths who exit foster care at age 18.

§ 1.1b Child Abuse Prevention and Treatment Act (CAPTA)

First passed in 1974 to provide funding to assist states in developing Child Protective Services (CPS) systems, CAPTA was amended in 1996 (PL. 104-235) to require states to develop and implement procedures for reporting suspected child abuse and neglect, for investigating such reports, and for taking steps to protect children found to be at risk of harm.

§ 1.1c Multiethnic Placement Act (MEPA) and Interethnic Placement Act (IEPA)

Together these two laws prohibit agencies that receive federal funding under Titles IV-B and IV-E of the Social Security Act from delaying or denying a child's foster or adoptive placement on the basis of a child's or the prospective foster or adoptive parent's race, color, or national origin.

§ 1.1d Foster Care Independence Act of 1999 (Chafee Act)

This law requires states to provide transition services to youths, ages 18 to 21, who were formerly in foster care. The services are intended to aid the youths in achieving independence and may include education, employment-related training or services, personal and emotional support services, and financial assistance and housing.

§ 1.1e Social Security Act Title XIX (Medicaid)

All children in foster care and on adoption support are eligible for medical financial assistance through Medicaid. The program pays for necessary medical care to providers who agree to participate in the program.

§ 1.1f Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, also known as the Welfare Reform Act)

Although not a child welfare law, this act amends the Social Security Act and impacts children in the child welfare system by significantly limiting the federal funds available to non-documented aliens and by limiting the Temporary Assistance for Needy Families (TANF) grants available to parents and relatives.

§ 1.2 Substantive Legislation

In addition to laws conditioning funding on compliance with certain standards or requirements, the U.S. Congress has passed substantive laws that impact the child welfare system. The most important are the following.

§ 1.2a Indian Child Welfare Act (ICWA)

Enacted in 1978 (P.L. 95-608) this law recognizes the importance of maintaining a child's connections with his or her Indian tribe and its cultural heritage when an Indian child is involved in the provision of foster care and adoption services. The law sets standards for the removal of Indian children, as defined in the act, from their families and sets standards establishing priorities for placement of Indian children in foster or adoptive homes. It also requires notice of juvenile dependency

and termination proceedings to the tribe of an Indian child. Washington implemented the Washington State Indian Child Welfare Act (WSICWA) in 2011, which works in tandem with ICWA.

§ 1.2b Fostering Connections to Success and Increasing Adoptions Act

Enacted in 2008, this law increased incentives for and the ability for relatives to care for children in foster care, and it extended federal support for youth to age 21. Washington adopted legislation in 2011 implementing the federal law by permitting foster youth to stay in foster care to continue their education efforts provided that the youth is enrolled and participating in a secondary education program or working toward a GED, a post-secondary or vocational educational program, a program or activity designed to promote or remove barriers to employment, or who are either employed for 80 or more hours per month or incapable of engaging in any of the aforementioned activities because of a medical condition that is supported by regularly updated information.

§ 1.2c Immigration Laws (Special Immigrant Juvenile Status)

Part of the immigration statute, this law provides an avenue for undocumented children who are dependent because of abuse, neglect, or abandonment and who are likely to remain in long-term care to obtain a permanent residency permit to remain in the United States. The status must be sought (and granted) while the child is "dependent." Although the status is obtained through immigration proceedings, the juvenile court must enter an order establishing that the child is dependent because of abuse, neglect, or abandonment, that the child is likely to remain in long-term care, and that it is in the child's best interest to remain in the United States.

§ 1.2d Conventions and Treaties

The United States is also a signatory to a number of agreements with other nations. These agreement, treaties, or conventions address numerous legal issues that range from service of process to provision of services and approval of caretakers that may arise when children who are citizens of other countries are involved in legal proceedings in the United States and when U.S. children are being placed for adoption or foster care in other countries.

Title IV-E Findings

FEDERAL REQUIREMENTS Title IV-E of the Social Security Act, 42 U.S.C. § 670, *et seq*.		**RESULT IF NO FINDINGS ARE ENTERED**
First Order Authorizing Removal of the Child From the Home		
Court must make a finding that "continuance in the home of the parent or legal guardian would be contrary to the child's welfare." 42 U.S.C. § 672(a)(1). This finding must be made at the time of the first court ruling authorizing removal of the child from the home. 45 C.F.R. § 1356.21(c). This includes cases that begin as Child in Need of Services (CHINS) proceedings and cases in which a child is first removed as an offender and placed in detention.		The state is **never** eligible for Title IV-E funding. This includes both foster care and adoption assistance. 45 C.F.R. § 1356.21(c).
Court must order that "placement and care are the responsibility of the state agency or any other public agency with whom the responsible state agency has an agreement." 42 U.S.C. § 672(a)(2); 45 C.F.R. § 1356.71(d)(1)(iii).		The state receives **no funding** until the findings are made.
Court must make a finding that "reasonable efforts have been made to prevent or eliminate need for removal." 42 U.S.C. §§ 671(a)(15), 672 (a)(1); 45 C.F.R. § 1356.21(b)(1). This finding must be made within 60 days of the date of removal. 45 C.F.R. § 1356.21(b)(1).		The state is **never** eligible for Title IV-E funding and this includes both foster care and adoption assistance. 45 C.F.R. § 1356.21(b)(1)(ii).

Case Review/Status Review Hearings		
Court must review the child's status and safety no less frequently than once every six months from **the date the child entered foster care,** in order to make the recommended legal findings as set forth on side two, sections II and IV. 42 U.S.C. §§ 671(a)(16), 675(5)(B); 45 C.F.R. §§ 1355.20, 1355.34(c)(2)(ii).		Failure to make these findings causes financial consequences due to noncompliance with the state plan.
Permanent Plan Hearings		
Court must hold a permanency hearing to select a permanent plan no later than 12 months from **the date the child entered foster care,** and must hold subsequent permanency plan hearings every 12 months thereafter. 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i); 42 U.S.C. § 675(5)(C), (F). For a case in which no reunification services are offered, the permanency hearing must be held within 30 days of disposition. 45 C.F.R. § 1356.21(h)(2).		State funding stops unless these findings are made.

Additional explanations of Title IV-E are in the Child Welfare Policy Manual.[1]

1 Admin. for Children & Families, U.S. Dep't of Health & Human Services, Child Welfare Policy Manual (2008), *available at* http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=8.

Chapter 2

State Legislation Affecting Child Welfare

Sheila Malloy Huber[1]

There are many Washington statutes that affect children involved in the child welfare system both directly and indirectly. These statutes include titles on mental health, state Medicaid, services for persons with developmental disabilities, education, and juvenile dependency and termination. Select statutes are discussed below.

§ 2.1 RCW Title 13

Title 13 of the Revised Code of Washington contains laws affecting juveniles and juvenile courts. The chapters which most often affect children involved in the child welfare system are the following:

- **RCW 13.04** is the Basic Juvenile Court Act. It contains some definitions used throughout Title 13, including the definition of "juvenile court" and describes juvenile court jurisdiction, administration, and other relevant features. It also contains some general provisions regarding juvenile offenders.

- **RCW 13.32A** is the Family Reconciliation Act (also known as the Becca Bill). This chapter governs At-Risk Youth (ARY) and Child in Need of Services (CHINS) proceedings. For more information concerning the Family Reconciliation Act, please refer to Chapter 24. More on ARY petitions can be found in Chapter 25, and more on CHINS proceedings can be found in Chapter 26.

- **RCW 13.34** is the dependency and termination statute. It governs dependency actions from shelter care through termination or guardianship. Termination is covered in this benchbook in greater detail in Chapter 21.

- **RCW 13.36** governs guardianships flowing from dependency cases. Dependency guardianships previously established under RCW 13.34 remain in effect, but may be converted to a Title 13.36 guardianship. As of 2010, guardianships established under Title 13.36 have the effect of resulting in dismissal of the dependency.

- **RCW 13.40** is the Juvenile Justice Act and governs offender actions against juveniles.

- **RCW 13.50** governs the disclosure of confidential child and family records created and maintained by juvenile justice or care agencies, including the Department of Social and Health Services (DSHS) and the juvenile court. (There are a number of other statutes that require confidentiality for certain kinds of records, such as those relating to medical or drug/alcohol treatment. Consequently, the court should be aware that RCW 13.50 is not comprehensive with respect to child and family records.)

- **RCW 13.64** is the emancipation of minors statute. Emancipation is addressed in Chapter 32.

§ 2.2 RCW Title 9A

Certain laws within the criminal code, specifically within Title 9A, relate to juvenile court proceedings. They include the following:

- **RCW 9A.16.100** sets the parameters of the "reasonable force" defense to a crime of assault against a child.

- **RCW 9A.44.120** is the child hearsay statute applicable to sexual abuse cases in criminal and dependency/termination proceedings.

- **RCW 9A.64.020** is the incest statute.

- **RCW 9A.64.030** prohibits buying and selling children.

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§ 2.3 RCW Title 26

Title 26 is entitled "Domestic Relations" and contains Washington's family law statutes. Many of these statutes require that pattern forms be used. The forms (and instructions for using them) for parenting plans and third-party custody actions are available online, on the Washington State Courts' Web site at http://www.courts.wa.gov/forms/.

- **RCW 26.09** is the marriage dissolution chapter. It contains provisions governing parenting obligations and parenting plans.
- **RCW 26.10** is the third-party (nonparent) custody statute.
- **RCW 26.26** is the Uniform Parentage Act (UPA) and is used to establish or disestablish an alleged or presumed father's paternity. For more in-depth information concerning the UPA, refer to Chapter 33.
- **RCW 26.27** is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and governs disputes over which court has jurisdiction (or which is the most appropriate forum) to hear an action in which a child's custody is at issue.
- **RCW 26.33** is the Adoption Statute. In addition to governing the process for adoption, this statute governs relinquishments (voluntary termination of parental rights), disclosure of the birth family's medical and social history to adoptive parents, and open adoption agreements.
- **RCW 26.34** is the Interstate Compact on Placement of Children (ICPC); this law must be followed to ensure cooperation between states when a state agency or court participates in placing a child in another state. For more in-depth information concerning the ICPC, refer to Chapter 28.
- **RCW 26.44** is Washington's statute concerning abuse of children. It contains the mandatory child abuse and neglect reporting requirements, and it sets out the responsibilities and authority of law enforcement and DSHS in investigating child abuse and neglect allegations. See Chapters 13–15 for more information concerning abuse and neglect.

§ 2.4 RCW Title 74

Title 74 creates and governs all public assistance programs, including DSHS programs relating to child welfare services. The most important chapters relating to child welfare are the following:

- **RCW 74.04.060** prohibits disclosure of records and files of applicants and recipients of public assistance benefits, except where disclosure is directly connected with the administration of a public assistance program.
- **RCW 74.13** establishes the nature and scope of child welfare services in Washington and defines the authority of DSHS in delivering those services. The chapter includes general provisions, as well as provisions relating to foster care, the adoption support program, disclosure of child fatality records, and independent living services program.
- **RCW 74.14A, .14B, and .14C** establish various programs for providing services to children and their families.
- **RCW 74.15** is the statute authorizing and directing DSHS to license foster homes and those agencies that receive children for care, control, or maintenance outside their own homes, or which arrange, place, or assist in the placement of children in foster or adoptive homes. This statute also establishes which relatives are not agencies (and therefore are not subject to licensing).

§2.5 E.S.S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 309

In 2011 the Washington legislature passed a comprehensive Washington State Indian Child Welfare Act (WSICWA). The new law codifies the main provisions of the federal Indian Child Welfare Act (ICWA). Also, it clarifies how the federal law is to be implemented and its protections even expanded. For example, WSICWA now defines terms such as "active efforts," "best interests," and "qualified expert witnesses." WSICWA also has revised procedures for identifying Indian children, including recognizing tribal decisions on citizenship as conclusive.

§ 2.6 Department of Social and Health Services Rules (WAC Title 388)

The DSHS regulations are contained in Title 388 of the Washington Administrative Code (WAC). Some of the chapters that are applicable to children's cases include the following:

- WAC 388-01 – DSHS organization and disclosure of public records
- WAC 388-02 – Rules governing administrative hearings
- WAC 388-03 – Rules governing use of interpreters

- WAC 388-06 – Criminal background checks
- WAC 388-15 – Investigation of child abuse and neglect allegations (CAPTA rules)
- WAC 388-25 – Rules relating to foster care placement and payment, relative placement, and the foster parent liability fund
- WAC 388-27 – Rules governing adoptions and adoption support
- WAC 388-148 – Minimum licensing standards for foster homes, group homes, child placing agencies, and adoption agencies

Chapter 3

Judicial Leadership in Dependency Cases

Judge Patricia Clark[1]

"Judges hold an ethical obligation to ensure effective administration of justice. They must require that their orders are carried out and that effective treatment will be provided" to the children and families they serve.[2]

The goals of the Juvenile Court in dependency cases are multifaceted. The court strives to protect children, provide due process to parents, monitor the actions of the agency, provide permanency for children, ensure that parents have a fair opportunity to reunify with their child, ensure child well being, and to permit everyone to be heard. All of these goals must be accomplished within prescribed timelines. This article will discuss the role of judicial leadership in a court that deals effectively with child welfare cases.

§ 3.1 Statutory Mandates

§ 3.1a Federal Law

The Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272) changed the child welfare system in the United States. The law made juvenile court judges and their findings essential in order for child welfare agencies to receive federal monies. PL 96-272 forced the court and child welfare agencies into what Judge Leonard Edwards aptly terms a "shotgun wedding."[3] The legislation requires the court to make "reasonable efforts findings" at critical points in the life of the case. The legislation also requires the following:

1. The State must provide services to prevent children's removal from their home in order to be eligible for federal foster care funds;

2. In order to qualify for those federal monies the juvenile court must make "reasonable efforts" findings that the state has in fact provided services to enable children to remain safely at home before they are placed in foster care;

3. The juvenile court must also determine whether the State has made "reasonable efforts" to reunite foster children with their biological parents;

4. The juvenile court must determine that there is a case plan developed to ensure placement in "the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child;"[4] and

5. The juvenile court must ensure that the status of every foster child is regularly reviewed and that a child is given a timely permanent placement, preferably in an adoptive setting, if return to the biological parents is not possible.

Neither the agencies nor the courts actively sought this relationship. From the courts' perspective, they were given the responsibility of oversight but without any additional funding to absorb the impact.

To compound the problem faced by courts, the Adoption and Safe Families Act (Public Law 105-89) was signed into law in

1 In 1987, the Honorable Judge Patricia Clark obtained a Juris Doctor degree and a Masters in Public Administration from the University of Washington. Before being appointed to the bench, she worked as a prosecutor, an educator, and a constitutional commissioner where she focused on at-risk youth. Since she was elected to the bench in 1998, Judge Clark has used the power and the possibility of the judicial system to improve the lives of children, adolescents, and their families. Judge Clark has served as the chief judge for the Juvenile Division of the King County Superior Court since November of 2002. She chairs the Juvenile Disproportionality Committee and the Dependency Disproportionality Committee, and has been foremost in the implementation of Reclaiming Futures Treatment Court, Family Treatment Court, and Systems Integration. She also serves as a member of Superior Court Judges' Association and Superior Court Judges' Association Family Juvenile Law Committee. Judge Clark is also involved in developing the Operational Master Plan for Juvenile Court in the 21st Century.

Judge Clark has been a strong supporter of prevention programs that help keep young people out of the detention and foster care systems. She was honored with a 2003 Vanguard Award from the King County Washington Women Lawyers, a 2005 Voices for Children Award from the Washington State Children's Alliance.

2 Robert Wood Johnson Found., Reclaiming Futures: A Model for Judicial Leadership 4 (2006) [hereinafter Reclaiming Futures].

3 Judge Leonard Edwards, ret., Address at the 2008 Oregon Child Advocacy Project Conference: Putting the Puzzle Together (Apr. 5, 2008), http://www.law.uoregon.edu/org/child/2008conference.php).

4 42 U.S.C. § 675(5)(A) (1980).

1997 and set specific timelines for each stage of the case in an effort to move children more quickly out of foster care and into "permanent placements." Again legislators looked to the courts to ensure that those timelines were being met by the agency. Both sides continue to struggle with the terms of this marriage. Although the courts have made considerable strides over the past 28 years in developing "best practices" (we in fact have a good sense of what works and what does not work), the courts have not uniformly accepted or implemented these practices.

To further develop a system which effectively implements "best practices" in your own court, consider the range of roles which a Juvenile Court Judge should play, as expressed by Judge Edwards:

> Juvenile and family court judges can be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families. Judges can be active in the development of policies laws, rules and standards by which the courts and their allied agencies and systems function….The very nature of the office mandates that the judge act as advocate and convener to assure that needed services for children and families are available and accessible.[5]

§ 3.1b State Law

In the state of Washington, the Basic Juvenile Court Act, RCW 13.04, gives the Juvenile Court exclusive original jurisdiction over all proceedings

1. Related to children alleged or found to be dependant as provided in RCW 26.44 and 13.34.030 through 13.34.170;

2. Relating to the termination of a parent and child relationship as provided in RCW 13.34.180 through 13.34.210; and

3. To approve or disapprove out of home placement as provided in RCW 13.32A.170.[6]

Case law affirms this: "[M]atters of dependency should be handled exclusively and originally by the juvenile court."[7]

The legislature sets out the judicial oversight role throughout RCW 13.34. The court is charged with overseeing the actions of the Department of Social and Health Services (DSHS) to ensure that two primary concerns are addressed: first, that DSHS's actions are in the best interest of the child, and second, that the parents have the opportunity to cure their deficiencies and reunify with their children.

Much of that oversight is conducted through the requirement that the court make findings at critical stages of the case that the agency has made "reasonable efforts" across the spectrum of its dealings with the family. This includes efforts to prevent removal, efforts to provide the parents with notice, and efforts to provide the parents with remedial services.

The effective judge must also be prepared to hold all participants accountable for fulfilling their roles in the court process and the delivery of services.[8] "[D]ependency proceedings are designed to protect children, to help parents alleviate problems, and, where appropriate, to reunite families."[9] Once dependency is established, RCW 13.34.130 gives the court the authority to order a variety of things to ensure this occurs including services to prevent removal, services designed to alleviate the reasons for removal, placement with the agency or relatives, and sibling visits. The same oversight responsibilities are replicated in the RCWs dealing with termination of parental rights.

§ 3.2 Leadership and Collaboration

The child welfare system, much like the families it serves, is a complex constellation of stakeholders, including but not limited to, mental health treatment providers, drug alcohol treatment providers, mandatory reporters, schools, law enforcement, hospitals, social workers, government (local, state, and federal), family members, and tribes. The judiciary is uniquely positioned to observe the operation of each of the stakeholders and to observe the interaction between them. That position allows the judge to identify resource needs across systems, to identify gaps in the service delivery system, and to monitor the efficiencies and inefficiencies in the system. Effective judges identify the issue or problem, convene the stakeholders, and use that convening to educate and then to motivate the system's stakeholders to resolve the identified issues.

Much of what an effective juvenile court judge needs to accomplish requires collaboration across a broad spectrum of stakeholders, each with their own needs and agendas. "In assembling any collaborative to improve the administration of justice, it is imperative to ensure balance of representation…."[10] All parts of the system must be represented and their opinions heard and taken into consideration.

Unlike with their typical role in the courtroom, a judge who is effective at leading a collaborative court will often develop a wide range of skills beyond the norm. (For example, the judge

5 Nat'l Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 18 (1995), *available at* http://www.ncjfcj.org/content/blogcategory/369/438/ [hereinafter Resource Guidelines].

6 RCW 13.04.030.

7 *Perry v. Perry*, 31 Wn. App. 604, 608, 644 P.2d 142 (1982).

8 *See* Resource Guidelines at 19.

9 *In re K.R.*, 75 Wn. App. 781, 791, 880 P.2d 88 (1994).

10 Reclaiming Futures at 8.

must lead without dominating the decision making process.)

A judge in an effective collaboration is skillful at allowing decisions to be made by the group rather than coming as a result of the court's normal role of "ordering" actions and outcomes. The judge must become adept at leading from the "back of the train." Moreover, as these skills are developed, the group will look to the judge to make sure that all participants are heard and their opinions valued. In addition the judge will need to periodically refocus the group to prevent some from wandering away from the issues at hand.[11]

With all of this in mind, the judge must also avoid becoming aligned with one faction or another in the group. Collaboration in all of its permutations is a critical part of the juvenile court judge's skill set. But it is worth noting once again that this skill set is not reflected in the traditional judicial role. It must be developed and nurtured in those who wish to successfully address the myriad issues facing juvenile and family courts.

§ 3.3 Case Management

> The court must demonstrate an unmistakably strong commitment to timely decisions in child abuse and neglect cases. It must communicate to its own employees, the attorneys practicing before it, and the child welfare agency that timely decisions are a top priority. It must conduct and participate in educational programs concerning the elimination of delays. The court also must make necessary organizational adjustments related to delays, in cooperation with court and agency staff. The court must design explicit processes to ensure timely hearings and must make sure they are implemented by all judges and administrative staff.[12]

In order to create and operate an effective child welfare court system, the judge must collaborate across the totality of the systems involved in the court. The judge must facilitate the development of case management systems and methods for monitoring the performance of that system. To fulfill all the tasks that have been given to the court, Juvenile Court Judges require education on a wide range of issues affecting children and families. In addition, the judge needs to understand collaboration, the dynamics of organizational change, lobbying legislative bodies, and communicating with the media and the wider public.

> The only institution that can reasonably exercise leadership on behalf of the society and the children is the juvenile court The reason is simply that no other institution can claim to have an equally broad view of all the interests at stake, to have as wide a range of action, or to be able to make decisions that are designed to reflect the values of society as expressed in its laws and constitution.[13]

11 *See id.*

12 Resource Guidelines at 20.

13 Mark Harrison Moore, From Children to Citizens: The Mandate for Juvenile Justice 176 (1987).

Chapter 4

Children and Youth in the Courtroom

Kimberly Ambrose[1]

§ 4.1 Making Dependency Hearings More Meaningful for Children and Youth Who Attend Court

Regardless of a judicial officer's position concerning children's presence and involvement in the court during the dependency process, if children do attend court, certain steps can be taken to ensure that they have a positive experience and the judicial process can proceed effectively. Court is an unfamiliar and often frightening place for children and youth. Many children are concerned that being in court means that they are in trouble. Children and youth who are the subject of dependency proceedings have often been traumatized by a history of abuse, neglect, and instability. The following actions can help minimize the negative effects on children and youth of appearing in court:

- Appoint an attorney or advocate for the child who can prepare them for court, support them during court proceedings, and explain to them after the hearing what occurred.[2]
- Acknowledge a child's presence at the beginning of the hearing and thank the child for coming.
- Use plain language that is understandable. Avoid acronyms, abbreviations, and difficult legal terms.
- Refer to the child by name.
- Start with the positive. Although there may be difficult issues regarding a youth's family or behavior which need to be addressed, if the court familiarizes itself with the youth's circumstances prior to the hearing and begins by acknowledging something positive about the youth, it will increase the likelihood that the youth will stay engaged during the hearing.
- Allow children or youth to leave the courtroom if the hearing addresses information which might be emotionally harmful.

§ 4.2 Child Witnesses[3]

§ 4.2a Competency to Testify

Washington law does not set a presumptive age of testimonial competency. All witnesses, including children, are presumed to be competent to testify.[4] Children may be found incompetent if they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."[5] The party challenging the child's ability to testify bears the burden of establishing that the child witness is incompetent.[6] Unless the court is making a finding of witness unavailability for purposes of RCW 9A.44.120 (see § 4.2c(iii) below) the court is not under an obligation to make a competency determination absent the request of a party.[7] If the issue of competency is raised, a child witness may be found competent by

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2 The Department of Social and Health Services (DSHS) or supervising agency and the guardian ad litem (GAL) are required to notify youth 12 and older of their right to request appointment of legal counsel. RCW 13.34.100(6)(a). However, the court can and should take a proactive role to ensure that children appearing before it understand their rights and have their rights adequately protected.

3 The principles discussed in this section (child witnesses) apply in both the offender and nonoffender settings.

4 *State v. S.J.W.*, 170 Wn.2d 92,100, 239 P.3d 568, 572 (2010).

5 RCW 5.60.050(2).

6 *State v. S.J.W.* at 101.

7 *State v. C.M.B.,* 130 Wn. App. 841, 125 P.3d 211 (2005).

the court to testify if the child

1) understands the obligation to speak the truth on the witness stand;

2) has the mental capacity at the time of the occurrence concerning which he or she is to testify to receive an accurate impression of it;

3) has a memory sufficient to retain an independent recollection of the occurrence;

4) has the capacity to express in words his or her memory of the occurrence; and

5) has the capacity to understand simple questions about the occurrence.[8]

Written findings of competency are encouraged by the Washington Supreme Court but not required.[9] The trial court's determination of a child witness's competency will not be overturned absent a manifest abuse of discretion.[10]

§ 4.2b Protections for the Child Witness in Dependency Proceedings

There is no statutory provision for protecting children in dependency or termination trials from testifying directly in front of an alleged perpetrator through means such as closed circuit television.[11]

§ 4.2c Child Hearsay Statute

i. General Requirements

Washington's child hearsay statute creates an exception to the hearsay rule in dependency and termination trials for a child's statements describing sexual or physical abuse.[12] In order for a child's hearsay statements to be admissible under RCW 9A.44.120, the proponent of the statement must give the adverse party adequate notice of intent to introduce the statement, and the statement must meet the following requirements:

1) It must be made by a child under the age of 10;

2) It must describe an act of sexual or attempted sexual contact performed with or on the child by another, or describe an act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110;

3) It must be found by the court to have "sufficient indicia reliability;" and

4) Either the child testifies at the proceedings, or the child is unavailable as a witness. If the child is unavailable as a witness there must also be corroborative evidence of the act.[13]

ii. Sufficient Indicia of Reliability – the *Ryan* Factors

To determine whether a child's statements are sufficiently reliable to be admissible under the child hearsay statute, the court must consider the nine factors set forth in *State v. Ryan*:

1) Whether the child had an apparent motive to lie;

2) The child's general character;

3) Whether more than one person heard the statements;

4) The spontaneity of the statements;

5) Whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness;

6) Whether the statements contained express assertions of past fact;

7) Whether the child's lack of knowledge could be established through cross-examination;

8) The remoteness of the possibility of the child's recollection being faulty; and

9) Whether the surrounding circumstances suggested the child misrepresented the defendant's involvement.[14]

Not every factor must be satisfied so long as the factors "substantially" establish the reliability of the child's out-of-court statements.[15]

8 *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).
9 *See In re A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998).
10 *State v. Woods,* 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).
11 *Cf.* RCW 9A.44.150 (allowing for child testimony through closed circuit television in criminal proceedings).
12 RCW 9A.44.120.
13 *See id*. Although the U.S. Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), bars the use of testimonial out-of-court statements in criminal matters unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness, the ruling does not apply to civil dependency proceedings.
14 *State v. Ryan,* 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984).
15 *State v. Woods*, 154 Wn.2d 613, 625, 114 P.3d 1174 (2005).

iii. Unavailability of Child Witness

If the child does not testify, the child must be found unavailable in order for the statements to be admissible under the child hearsay statute.[16] The statute does not define "unavailable," but case law establishes that it is defined according to ER 804.[17] If unavailability is based on the child witness's lack of competence, a competency hearing is required whether or not it is requested by the parties.[18]
The parties may not stipulate to a child's incompetence for purposes of the child hearsay statute.[19]

iv. Corroboration

If the child is unavailable to testify, the child's out-of-court statement is only admissible under the child hearsay statute if there is corroborating evidence of the sexual or physical abuse.[20] Corroboration is determined by looking at all of the possible corroborating evidence, such as physical or medical evidence, other testimonial evidence, and evidence of the child's precocious sexual knowledge.[21] Indirect evidence may provide corroboration; however, it must "still "support a logical and reasonable inference that the act of abuse described in the hearsay statement occurred.""[22]

§ 4.3 Children as Direct Participants in Their Own Dependency Hearings

§ 4.3a Age Considerations

No age is set by statute or court rule for when children should participate in their dependency hearings; however, the legislature has acknowledged that youth 12 and older have an interest in direct participation in their dependency proceedings by providing that they have the right to notice of the filing of a dependency petition, are summoned to appear personally at the dependency fact-finding, and have the right to request appointment of counsel.[23]

Other statutory provisions concerning age may be found as well. For example, children 12 and older may also petition the court to reinstate the parental rights of their previously terminated parents.[24] Children 14 and older are required by statute to consent to their own adoption.[25] Children 16 and older may petition to be emancipated.[26]

§ 4.3b When a Child's Presence is Required

Children 12 and older who are the subject of a dependency petition must be summoned by the clerk to appear personally "before the court at the time fixed to hear the petition."[27] The court may also "endorse upon the summons an order directing any parent, guardian, or custodian having the custody or control of the child to bring the child to the hearing."[28] Developmentally disabled children are not required to appear unless requested by the court.[29]

A child is not required to appear for presentation of a stipulated or agreed order of dependency; however, the attorney, guardian ad litem (GAL) or court-appointed special advocate (CASA) for the child, if any, must sign the agreed order.[30] Further, children are generally not required by statute to appear or receive notice of shelter care, review, permanency planning, or termination hearings.[31]

Regardless of the requirements concerning children's presence, the law does not clearly establish whether children are parties to their own dependency and termination proceedings.[32] Additionally, the Washington State Juvenile Court Rules do give all "parties" the right to be present and heard at review and other hearings.[33]

If a child is a party to his or her dependency proceeding, the

16 RCW 9A.44.120(2).
17 *See State v. Hirschfield*, 99 Wn. App. 1, 987 P.2d 99 (1999).
18 *State v. Hopkins,* 137 Wn. App. 441, 451, 154 P.3d 250 (2007).
19 *Id.*
20 RCW 9A.44.120(2)(b).
21 *See State v. Swan*, 114 Wn.2d 613, 640–641, 790 P.2d 610 (1990).
22 *In re A.E.P.*, 135 Wn.2d at 232 (*quoting Swan,* 114 Wn.2d at 622).
23 *See* RCW 13.34.070 (notice and summons required); RCW 13.34.100 (right to request counsel); JuCR 3.4.
24 RCW 13.34.215.
25 RCW 26.33.160(1)(a).
26 RCW 13.64.050.
27 RCW 13.34.070(1).
28 *Id.* at (5).
29 *Id.* at (1).
30 RCW 13.34.110(3)(a).
31 *But see, e.g.,* E.S.S.B. 6792, 60th Leg., 2008 Reg. Sess. (Wash. 2008) (creating a pilot project to notify youth of their right to appear in all dependency hearings in four pilot counties.). A report of the findings of the pilot was released in December 2010. Washington State Center for Court Research, Dependent Youth Interviews Pilot Program (2010), *available at* http://www.courts.wa.gov/wsccr/pubs/DYIReport.pdf.
32 *See* RCW 13.34.070(1) (requiring summons to be served on children 12 and older and "such other persons as appear to the court to be proper or necessary parties"); RCW 13.34.070(8) (using the language "If a party other than the child . . ."). While there is not case law directly on point, courts have ruled that dependent children can be held in inherent contempt (which would indicate they are parties), and dependent children can appeal their dependency orders (also making them party-like). Although this lack of clarity is a significant issue, there are definitely strong arguments that youth aged 12 years and older are parties. These arguments are less strong for children under the age of 12. Courts should be aware that if dependent children are made parties, their procedural due process rights are potentially implicated.
33 *See* JuCR 3.9; JuCR 3.10.

child has the right to be present at dependency review hearings, the right to receive notice of termination proceedings, and the right to receive notice of motions to modify or vacate guardianships.[34]

§ 4.3c More General Considerations

While nothing in the dependency statutes or court rules prohibits children and youth from attending their dependency court hearings, there are different opinions about whether children and youth *should* appear and participate in court. There is a growing movement by policy makers, practitioners and scholars toward encouraging greater direct participation by children and youth in court.[35]

Some argue that a youth's presence at their own dependency hearing can be beneficial for judicial decision-making and for the youth who is at the center of the proceedings.[36] Additionally, the American Bar Association adopted *The Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings* which provides that each child subject to dependency proceedings has the right to attend and participate in all hearings related to his or her case[37] The National Association of Counsel for Children also supports children being in the court room, at least for the initial hearings.[38]

However, court can also be confusing, frightening, emotionally damaging, and/or boring for children and youth.[39] Another concern about children attending dependency hearings is the possibility that they will have to appear alone if they lack legal counsel. In many jurisdictions in Washington, children and youth do not have an attorney or lay representative such as a GAL or CASA.[40] Appearing alone in court without representation can be intimidating for a child and can have other risks, such as self-incrimination.

§ 4.3d In-Chambers Interviews of Children

Unlike family custody proceedings under RCW 26, there is no statutory provision for in-chamber interviews of children in dependency and termination proceedings.[41]

However, case law is clear: if an in-chambers interview of a child is conducted during termination proceedings, excluding parents and parents' counsel from that interview constitutes error.[42] This reasoning is explained in part by the fact that, absent clear statutory authority, judicial interviews of children in dependency proceedings outside the presence of the other parties could raise due process concerns.

In all proceedings under RCW 13.34, parties have the right to introduce evidence, examine witnesses, receive a decision based solely on evidence adduced at the hearing, and to an unbiased fact-finder.[43] These due process protections have been held to apply to permanency planning and dependency review hearings.[44]

§ 4.3e Determining the Child's Position

If dependent children attend their court proceedings, judicial officers can attempt to assess the child's position or preferences through direct questioning. However, a child's position should also be reported to the court by the child's GAL or attorney-GAL.[45] If the child is represented by an attorney, the attorney is required by the Rules of Professional Conduct to advocate for that child's stated position.[46]

34 JuCR 3.9 (parties' rights in dependency review hearings); RCW 13.34.180(1) (parties' right to notice in termination hearings); RCW 13.34.232 (parties' rights to notice in guardianship proceedings).

35 *See, e.g.,* Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (2011) [hereinafter Model Act], *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1312821730101a.pdf. "Each child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case." *Id.* at §9(a)*; Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham,* 6 Nev. L.J. 592 (2006), *available at* http://rcif.law.unlv.edu/.

36 *See* Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings,* 6 Nev. L.J. 1302 (2006).

37 Model Act; *see also* Am. Bar Ass'n, Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases 11 (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf.

38 Nat'l Ass'n of Counsel for Children, NACC Recommendations for Representation of Children in Abuse and Neglect Cases 8 (2001) *available at* http://www.naccchildlaw.org/?page=PracticeStandards.

39 Emily Buss, "*You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles,* 64 Fordham L. Rev. 1699, 1760 (1996).

40 *See* RCW 13.34.100(1) (allowing the court to find "good cause" for not appointing a GAL). See Chapter 8 for more information concerning CASAs and GALs.

41 *But see* E.S.S.B. 6792, 60th Leg., 2008 Reg. Sess. (Wash. 2008) (creating a pilot project which allows in chambers interviews in four pilot counties in 2008). *See supra* note 31.

42 *In re McGee*, 36 Wn. App. 660, 679 P.2d 933 (1984).

43 RCW 13.34.090.

44 *In re H.W.,* 123 Wn. App. 237, 98 P.3d 81 (2004) (Court's refusal to allow mother to call expert witnesses in a permanency planning hearing violated her due process rights); *In re R.L.,* 123 Wn. App. 215, 98 P.3d 75 (2004) (Court's refusal to allow father to present lay testimony in an emergency dependency review hearing violated father's due process rights).

45 RCW 13.34.105(1)(b) (it is a duty of the GAL "[t]o meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court.").

46 RPC 1.2(2).

Washington statutes and court rules do not address the issue of judicial questioning of children regarding their position in dependency proceedings. Additionally, there is little research regarding the value of judicial questioning of children in abuse and neglect proceedings. However, several scholars have considered the issue in the context of family custody proceedings.[47] In the family custody context, there are varying opinions regarding what the scope of the judicial officer's inquiry should be and what weight should be given to the child's preference.[48]

47 *See, e.g.,* Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Ariz. L. Rev. 629 (2003); Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel,* 2003 Wis. L. Rev. 115 (2003).

48 *See e.g.* Am. Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.08(1)(b)(2002) (recommending that a court follow a child's wishes only if the child has attained a mature age specified under state law and when the child's wishes are "firm and reasonable"); Nat'l Interdisciplinary Colloquium on Child Custody, Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges 298 (Robert J. Levy ed., 1998) (discouraging judges from directly questioning children on their custody preferences because "not only will this cause an internal agony of conflict for the child, the answer is unlikely to be based on anything the court would consider valid reasons"); Barbara Bennett Woodhouse, *Talking About Children's Rights In Judicial Custody and Visitation Decision-Making,* 36 Fam. L.Q. 105, 125–6 (2002) (advocating for a child's right to be heard in custody proceedings in a way that accommodates their special needs).

Chapter 5

Counsel for Children

Jill Malat[1]

The court may appoint an attorney to represent the child's position if the child requests legal counsel and is age 12 or older, or if the guardian ad litem (GAL) or the court determines that the child needs to be independently represented by counsel.[2]

§ 5.2 Appointment of Counsel

RCW 13.34.090(1) states that any party has the right to be represented by an attorney.[3] After a petition has been filed to initiate a dependency proceeding, notice must be sent to the juvenile and the juvenile's parent, custodian, or guardian containing an advisement of the right to a lawyer.[4] The notice must specifically state the following:

1. You have the right to talk to a lawyer if you desire and, if you cannot afford a lawyer, one will be appointed for you.

2. A lawyer can look at the social and legal files in your case, talk to the caseworker, tell you about the law, help you understand your rights, and help you at trial.[5]

The court must also inquire into the need for appointment of a GAL or an attorney at the shelter care hearing.[6] Children are also entitled to the appointment of an attorney when facing contempt proceedings because such proceedings may result in jail time.

Juvenile Court Rule (JuCR) 9.2, entitled Additional Right to Representation by Lawyer, provides for an attorney to be appointed to a child at public expense:

a. Retained Lawyer. Any party may be represented by a retained lawyer in any proceedings before the juvenile court.

b. Child in Need of Services Proceedings. The court shall appoint a lawyer for indigent parents of a juvenile in a child in need of services proceeding.

c. Dependency and Termination Proceedings. The court shall provide a lawyer at public expense in a dependency or termination proceeding as follows:

> 1. Upon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family. The ability to pay part of the cost of a lawyer shall not preclude assignment. A juvenile shall not be deprived of a lawyer because a parent, guardian, or custodian refuses to pay for a lawyer for the juvenile. If the court has appointed a guardian ad litem for the juvenile, the court may, but need not, appoint a lawyer for the juvenile.

Both the American Bar Association (ABA) and The National Association of Counsel for Children (NACC) support legal representation for children subject to court proceedings involving allegations of child abuse and neglect for the duration of the period the court has jurisdiction over the matter.[7]

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2 RCW 13.34.100(6).

3 Case law does not clearly establish whether children are parties to their own dependency or termination proceeding. For more on this subject, please refer to Chapter 4, § 4.3.

4 RCW 13.34.070; RCW 13.34.100; JuCR 3.4.

5 JuCR 3.4(b)(1)–(2).

6 RCW 13.34.065(4)(g).

7 *See generally* Nat'l Ass'n of Counsel for Children, American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, NACC

§ 5.3 Costs of Counsel

Counties are responsible for the cost of appointed counsel for juveniles in dependency matters.[8]

§ 5.4 Non-GAL Attorney versus Attorney GAL versus CASA

A non-GAL attorney is appointed to represent the child's stated interest. What results is a client-directed model of advocacy. This model does not prohibit the attorney from acting in his or her capacity as counselor for the child. GALs are appointed by the court to represent the best interest of the child.[9]

GALs bear certain responsibilities including the requirement to report to the court the child's views and positions after interviewing and observing the child. The attorney-GAL advocates for a result which they believe is in the best interest of the child. Thus, the resulting relationship is not a client-directed form of representation, and in fact the attorney-GAL's judgment as to what is in the child's best interest takes precedence over the client's wishes.

A Court-Appointed Special Advocate (CASA) is usually a non-professional volunteer who advocates for what he or she believes is in the child's best interest. The CASA may be represented by an attorney in the proceedings. It is very important for the court to specify whether an attorney is being appointed to act as a GAL to represent the child's best interest, or as a traditional lawyer appointed to represent the stated interest of the child. Because the roles can be very different, the appointed attorney needs clarification from the bench so that he or she can know and understand the nature of the representation.

§ 5.5 Counsel for Child with GAL

RCW 13.34.100 allows for the appointment of a GAL or an attorney to represent the child's stated position. The appointment of one does not preclude appointment of the other, and in fact it may be appropriate to have both a GAL and an attorney assigned to the same child. For example, it is appropriate to appoint both when a child turns 12 and requests that an attorney be appointed to represent him or her. If there has already been a GAL/CASA on the case who has established a relationship with the youth it may be harmful to the child to take that GAL/CASA off of the case.

§ 5.6 Duties of Counsel

Attorneys assigned to represent children have the following duties:

1) Obtain copies of all pleadings and relevant notices;

2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;

3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;

4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;

5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;

6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and

7) Identify appropriate family and professional resources for the child.[10]

§ 5.7 Notification of Right to Counsel to Children and Youth in Dependency Proceedings

On June 10, 2010, H.B. 2735 codified in part at RCW 13.34.100(6) went into effect.[11] It requires DSHS or the relevant supervising agency and the child's GAL to notify a child of his or her right to request counsel and to ask the child whether he or she wishes to have counsel appointed. This inquiry must be made immediately upon the child's twelfth birthday, or if the child is 12, when the case is filed.[12] DSHS or the supervising agency and the GAL must repeat the notification at least annually upon the filing of any motion or petition affecting the child's placement, services, or familial relationships.[13] Both DSHS or the supervising agency and the GAL must make a note in their reports that they have fulfilled this obligation.[14]

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revised version, (1996), *available at* http://www.naccchildlaw.org/?page=PracticeStandards [hereinafter Standards of Practice]; Marvin Ventrell, Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice (1999), *available at* http://www.naccchildlaw.org/?page=PracticeStandards.

8 *See generally* RCW 10.101.030; RCW 26.09.110; *In re J.D.*, 112 Wn.2d 164, 769 P.2d 291 (1989).

9 RCW 13.34.030(9).

10 Standards of Practice 3–4.

11 H.B. 2735, 61st Legis., Reg. Sess. (Wash. 2010); Laws of 2010, ch. 180.

12 RCW 13.34.100(6)(a)(i)–(ii).

13 *Id.* at (6)(b).

14 *Id.* at (6)(d).

The court is also required to inquire as to whether the child has received notice of his or her right to counsel.[15]

§ 5.8 Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System

The Statewide Children's Representation Workgroup, which was appointed by the Washington Supreme Court Commission on Children in Foster Care, released a publication addressing standards of practice, voluntary training and caseload limits in response to H.B. 2735.[16] This publication is available through the Administrative Office of the Courts and the Court Improvement Training Academy (CITA). Judges are encouraged to obtain a copy of it and review it to make sure that best practices are being followed.

15 *Id.*

16 Statewide Children's Representation Workgroup, *Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System: Standards of Practice, Voluntary Training, and Caseload Limits in Response to H.B. 2735* (2010), http://www.naccchildlaw.org/resource/resmgr/news_items/meaningful_legal_representat.pdf.

Chapter 6

Parent Representation in Child Welfare Proceedings

Patrick Dowd[1]
2011 Updates by Amelia Watson and Brett Ballew

§ 6.1 Statutory Right to Counsel

RCW 13.34 creates a statutory right to counsel for a child's parents, guardian, or legal custodian involved in dependency or termination proceedings and provides that if indigent, counsel shall be appointed by the court.[2] The United States Supreme Court has held that the federal constitution provides an indigent person with an absolute right to counsel only when faced with the deprivation of physical liberty, and it employed a presumption against the right of a parent to appointed counsel in a parental termination proceeding.[3] However, Washington State case law recognizes that an indigent parent's right to counsel derives from the due process guaranties of article 1, section 3, of the Washington Constitution as well as the Fourteenth Amendment.[4] The right to counsel applies not only to indigent parents, but also to a child's guardians or legal custodians. For example, a person having legal custody of the child through a permanent or temporary nonparental custody order is a party to the dependency proceeding and, if indigent, has a right to counsel at public expense.[5]

In addition to dependency and termination of parental rights actions under RCW 13.34, state law provides for a parent's right to counsel in other child welfare proceedings. Specifically, an indigent parent or alleged father has the right to a court-appointed attorney in a contested action to terminate parental rights filed under RCW 26.33.[6] The right to counsel also

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2 RCW 13.34.090(2) states

> At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

3 *Lassiter v. Dep't of Soc. & Health Serv.*, 452 U.S. 18 (1981); *In re Hall,* 99 Wn.2d 242, 664 P.2d 1245 (1983).

4 *In re J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (citing *In re Grove*, 127 Wn.2d 221, 232, 897 P.2d. 1252 (1995)); *In re Myricks*, 85 Wn.2d 252, 254–55, 533 P.2d 841 (1975).

5 *See In re J.W.H.,* 147 Wn.2d 687, 57 P.3d 266 (2002) (Children's aunt and uncle obtained temporary nonparental custody order prior to filing of dependency petition and were therefore caregivers with party status in the dependency proceeding).

6 RCW 26.33.110(3)(b). *But see In re King,* 162 Wn.2d 378, 174 P.3d 659 (2007) (An indigent parent does not have a constitutional right to counsel at public expense in a dissolution/child custody proceeding as a contested parenting plan does not involve the deprivation of fundamental parental rights that would warrant full proce-

applies to indigent parents involved in Child in Need of Services (CHINS) proceedings.[7] Also, where a non-parental custody action is inextricably linked to a dependency action due to the family court having to consider the return home of the child, the parents may be entitled counsel at public expense because it is considered a stage of the dependency proceeding.[8]

§ 6.2 Indigency Screening and Appointment of Counsel

When a parent, guardian, or legal custodian appears in a dependency or any other case where the right to counsel attaches, the trial court must determine if the person is indigent and eligible for an attorney at public expense.[9] In general, a person is "indigent" if he or she (1) receives public assistance; (2) is involuntarily committed to a public mental health facility; (3) receives an annual income, after taxes, of 125 percent or less of the federal poverty level;[10] or (4) is unable to pay the "anticipated cost of counsel" because his or her available funds are insufficient to pay any amount for the retention of private counsel.[11]

§ 6.2a Guidelines for Determining Indigency

In determining indigency, the trial court must take into consideration the indigency guidelines described in RCW 10.101, as well as the length and complexity of the proceedings, the usual and customary fees of attorneys in the community for similar matters, the availability and convertibility of any personal or real property owned, outstanding debts and liabilities, the person's past and present financial records, earning capacity and living expenses, credit standing in the community, family independence, and any other circumstances which may impair or enhance the ability to advance or secure such attorney's fees as would ordinarily be required to retain competent counsel.[12] The court may not deny appointment of counsel due to financial resources of the applicant's family or friends, but the court may take into consideration the resources of the applicant's spouse.[13]

In the context of a dependency proceeding, the screener should therefore consider that the proceeding may continue for several years and could involve a multitude of legal issues for the parent such as family law, child custody, or criminal liability issues. Additionally, the parent may be assessed for the cost of the out-of-home care and support of the child during the dependency. This factor should also be taken into account when determining the parent's ability to pay the anticipated cost of counsel. Even if a parent's income exceeds 125 percent of the federal poverty level, the parent may be "indigent" if he or she is unable to pay the anticipated cost of counsel and cannot retain private counsel.

§ 6.2b Indigency Screening Practices

Courts employ various procedures to screen individuals requesting public defense representation. In the majority of counties, eligibility screening is conducted directly by the judicial officer and/or a combination of judicial officer and court staff. These screeners take information regarding the applicant's financial resources and eligibility for an attorney at public expense. In a significant number of counties the trial judge is the person who gathers this information. In many but not all counties, screeners themselves are authorized to determine if the applicant qualifies for an attorney at public expense. These employees fill out the indigency paperwork with the applicants, verify the supporting documentation, and decide whether the applicants are indigent under the statute.[14] If the screener concludes the applicant is indigent, a public defender is appointed. The Washington State Office of Public Defense (OPD) has developed an Indigency Screening Form for the courts use which may be adapted to meet the needs of each individual county.[15]

§ 6.2c Provisional Appointment of Counsel

The determination of indigency must be made upon the person's initial contact with the court or at the earliest time circumstances permit.[16] In a dependency action this will usually occur at the 72-hour shelter care hearing. If a determination of eligibility cannot be made before the applicant's initial contact with the court, the statute requires immediate appointment of a provisional attorney. Thus, provisional counsel must be appointed by the time of the 72-hour shelter care hearing if the court has not yet been able to obtain sufficient information to determine indigency.[17] Local practice should ensure that public defender attorneys are present and available to provide representation at 72-hour shelter care hearings.

§ 6.2d Indigent but Able to Contribute

The statute also provides that applicants who have some assets but not enough to pay for private counsel may be found "indi

dural due process protections.).
7 RCW 13.32A.160(1)(b).
8 *In re E.H.,* 158 Wn. App. 757, 243 P.3d 160 (2010).
9 RCW 10.101.020(1).
10 Appendix A.
11 RCW 10.101.010(1).
12 See *Morgan v. Rhay*, 78 Wn.2d 116, 119–20, 470 P.2d 180 (1970).
13 RCW 10.101.020(2). However, the financial resources of a spouse may not be considered if the spouse was the victim of an alleged crime committed by the applicant.
14 RCW 10.101.020(1) states "The court or its designee shall determine whether the person is indigent pursuant to the standards set forth in this chapter."
15 Appendix B.
16 RCW 10.101.020(3).
17 *Id.* at (4).

gent but able to contribute" and ordered by the court to pay a portion of their defense costs. These individuals may have non-liquid assets or be employed but earn less than enough to fully pay for counsel. A person who is indigent and able to contribute is defined as one "who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost."[18]

If applicants are found to be indigent but able to contribute to the cost of their defense, judicial officers are authorized to order them to sign promissory notes requiring either a lump sum or periodic payments.[19]

§ 6.2e Verification of Indigency

Courts use various verification and documentation methods to investigate indigency status. The indigency statute does not require that all financial information be verified, but rather establishes that the applicant's financial information is "subject to verification."[20] The methods used differ depending on the size of the jurisdiction, the cost of verification versus the cost-savings that may be generated, and other county resource issues.

§ 6.2f Indigency and the Right to Counsel on Appeal

An indigent parent's statutory right to counsel at all stages of a dependency and/or termination of parental rights proceeding includes representation on an appeal of right as well as discretionary review, and public payment of expenses and fees necessary to provide an adequate record to the appellate court and to present the appeal.[21] Before a parent, guardian, or legal custodian is entitled to appointed counsel to assist with his or her appeal, indigency must be determined by the superior court judge.

Upon filing a notice of appeal, the parent's attorney also files a Motion and Order of Indigency and an affidavit describing the parent's financial information, which is evaluated by the trial judge. The Motion and Order of Indigency is granted if "the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses of appellate review."[22] The appellate courts, rather than the trial courts, appoint counsel for appeals.[23]

18 *Id.* at (2).
19 RCW 10.101.020(5).
20 *Id.* at (6).
21 *In re Grove,* 127 Wn.2d 221, 897 P.2d 1252 (1995).
22 R.A.P. 15.2(b)(1).
23 *Id.* at (g).

§ 6.3 Implementing the Right to Counsel in Dependency and Termination of Parental Rights Proceedings

Before 1977, the responsibility for providing defense attorneys for indigent parents, guardians, and legal custodians was assumed by the counties. With the passage of The Juvenile Justice Act of 1977,[24] the State assumed the obligation of prosecuting dependency and termination cases, which are handled by the Washington State Office of the Attorney General. However, indigent parent representation remained the responsibility of the counties. Over the years, each county has developed its own methods for appointing counsel at public expense in dependency and termination of parental rights proceedings, including county public defender agencies, contract attorneys, and panel attorney case appointments.

§ 6.3a Standards for Public Defense Services

Each county is required to adopt standards for the delivery of public defense services addressing compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.[25] The standards endorsed by the Washington State Bar Association[26] for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.

§ 6.3b Attorney Qualifications

WSBA standards require that each attorney representing a client in a dependency matter meet the following requirements: satisfy the minimum requirements for practicing law; be familiar with the statutes, court rules, constitutional provisions, and case law relevant to child welfare; be familiar with any collateral consequences of a founded allegation of child abuse or neglect, establishment of dependency and termination of parental rights; be familiar with mental health issues and be able to identify the need to obtain expert services; and complete seven hours of continuing legal education each year in courses relating to child welfare. Additionally, attorneys should be familiar with expert services and treatment resources for substance abuse. Attorneys handling termination hearings shall have six

24 RCW 13.34.
25 RCW 10.101.030.
26 WSBA Council On Pub. Def., Wash. State Bar Ass'n, Standards for Indigent Defense Services (2011), *available at* http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Council-on-Public-Defense.

months dependency experience or have significant experience in handling complex litigation.[27]

§ 6.3c Attorney Caseloads and Compensation

WSBA standards recognize a full time dependency caseload as 80 open cases.[28] Public defense attorneys should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys in prosecutorial/attorney general offices in the area.[29]

§ 6.3d Office of Public Defense Parents Representation Program Background

A 1999 study[30] completed by the Washington State Office of Public Defense (OPD) found that payment for parent representation was inequitable from county to county and that state resources dedicated to prosecuting these cases far outpaced county funds available for parent representation. Similarly, parents lacked the case resources (such as paralegals, social workers, investigators, and expert services) that were available to the state. Based on these findings, the report recommended that Washington State fund parent representation and professional standards for representation be implemented.

In 2000, the Legislature directed OPD to create a state-funded enhanced parent representation pilot program in the Benton-Franklin and Pierce county juvenile courts. The Legislature established five program goals to enhance the quality of defense representation in dependency and termination hearings:

1. Reduce the number of continuances requested by attorneys, including those based on their unavailability;

2. Set maximum caseload requirements per fulltime attorney;

3. Enhance defense attorneys' practice standards, including reasonable time for case preparation and the delivery of adequate client advice;

4. Support the use of investigative and expert services in dependency cases; and

5. Ensure implementation of indigency screenings of parents, guardians, and legal custodians.

To achieve these goals, program implementation included financial support to reduce attorney caseloads, access to independent social worker staff, expert services, periodic attorney trainings, and oversight of attorneys' performance. OPD contracts with local attorneys to provide representation under this program. Indigency screening and case appointments are conducted at the county level.

Since 2000, the program has been continuously re-funded by the Legislature and the OPD Parents Representation Program is currently established in the following 25 counties: Benton, Chelan, Clallam, Clark, Cowlitz, Ferry, Franklin, Grant, Grays Harbor, Jefferson, Klickitat, Kitsap, Kittitas, Mason, Pacific, Pend Oreille, Pierce, Skagit, Skamania, Snohomish, Spokane, Stevens, Thurston, Wahkiakum, and Yakima counties.

§ 6.4 Role of Parent's Attorney

§ 6.4a General Duties and Responsibilities of Parents' Attorneys

Counsel for parents in dependency and termination of parental rights proceedings are bound by the professional and ethical duties described in the Rules of Professional Conduct (RPC). Professional standards of representation for attorneys representing parents in child welfare proceedings have recently been developed and describe in greater details counsel's role and responsibilities.[31]

§ 6.4b Case Conflicts

Conflicts of interest may arise in an attorney's representation of a parent, and courts should be aware of these situations.[32] In particular, courts should avoid circumstances in which one attorney is appointed to represent both parents. In the rare case in which an attorney, after careful consideration of potential conflicts, may represent both parents, it should only be with their informed consent. The judicial officer confronted with this situation should inquire of the parents' attorney whether pursuing one client's objectives will adversely impact or limit the lawyer's representation of another client and whether confidentiality may be compromised.

Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds, requiring the attorney to withdraw from representing one or both parents. In the event this occurs, the court must inquire

27 *Id.* at Standard 14.
28 *Id.* at Standard 3.
29 *Id.* at Standard 1.
30 Wash. State Office of Pub. Def., Costs of Defense and Children's Representation in Dependency and Termination Cases (1999), *available at* http://www.opd.wa.gov/Reports/DT-Reports.htm.
31 *See* Am. Bar Ass'n, Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (1996) *available at* http://www.abanet.org/child/clp/ParentStds.pdf.
32 *See* RPC 1.7.

as to whether the attorney has obtained confidential information from each client or if other circumstances exist that would require the attorney's complete withdrawal and the appointment of new counsel for each parent.

§ 6.5 Ineffective Assistance of Counsel

In every case, both criminal and civil, in which the right to counsel attaches, legal representation means effective representation.[33] A parent faced with the prospect of termination of parental rights to his or her child is entitled to a meaningful hearing, and that includes effective representation of counsel, as the rights at stake are both fundamental and constitutional. Determining the role and responsibilities of the trial court under these circumstances can be complex, and a decision as to the court's response in the event it believes ineffective assistance is a risk is a subject best considered with guidance from the Judicial Ethics Opinions at http://www.courts.wa.gov/programs_orgs/pos_ethics/.

§ 6.6 Scope of Representation

Counsel for a parent is responsible for providing effective representation at each stage of the dependency or termination of parental rights proceeding. However, every event related to the dependency or termination action is not necessarily a stage of the proceeding. For example, parents do not have a right to counsel at a psychological evaluation as the evaluation is a dispositional service and not a "proceeding" or "stage" of the proceeding.[34]

§ 6.6a Ancillary Civil Matters

A parent may also face legal matters such as housing and eviction issues, protection orders, or family court proceedings that are relevant to the dependency or termination case but clearly are not a stage of the proceeding. Civil legal aid resources are limited, and assigned counsel in dependency and termination cases often assist their clients with these ancillary matters but are not required to do so.

§ 6.6b Agreed Nonparental Custody Actions and Agreed Parenting Plans

Parents involved in dependency proceedings often have related family law matters such as paternity actions, dissolutions, parenting plans or child support proceedings. Generally, the parent's appointed dependency attorney does not represent the parent in these ancillary family law proceedings, as an indigent parent does not have a right to counsel at public expense in a dissolution or child custody matter.[35]

However, in limited circumstances, state law provides a juvenile court hearing a dependency case with concurrent original jurisdiction with family court to enter agreed non-parental custody orders, agreed parenting plans or agreed residential schedules.[36] Such orders must be necessary to implement a permanent plan for the child and the child's parents must agree to entry of the order.[37] The parent's attorney would represent the parent in these matters as they are heard by the juvenile court in the course of the dependency proceeding. When agreed parenting plans or residential schedules are entered in a dependency proceeding, the moving party is required to file the parenting plan in the corresponding dissolution or paternity proceeding in family court.[38] In many cases, this requires the parent to initiate a separate family court action. The parent's dependency attorney would not represent the parent in the family court action.

Additionally, in the course of hearing a dependency, juvenile court may inquire into the ability of a parent to pay child support and enter an order of child support; if the parent fails to comply, a judgment may be entered against such parent.[39] In these matters that are heard by the juvenile court in the course of the dependency proceeding, the parent's attorney would represent the parent on these issues.

§ 6.6c Contested Parenting Plans

While the entry or modification of a parenting plan is often seen as beneficial for a dependent child, state law does not provide concurrent jurisdiction for a juvenile court to adjudicate contested child custody issues in the course of hearing a dependency. In a contested dissolution, non-parental custody action or parenting plan that is a separate action from the dependency proceeding, a parent's attorney may lack the time, resources, or expertise to provide representation. Moreover, such representation is beyond the scope of the right to counsel in a dependency or termination proceeding. As previously noted, an indigent parent does not have a right to counsel at

33 RCW 10.101.005 states "The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches."

34 *In re J.R.U.-S.*, 126 Wn. App. 786, 110 P.3d 773 (2005); *see also In re Kistenmacher,* 134 Wn. App. 72, 138 P.3d 648 (2006). *But see* CR 35(a)(2) ("The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination.").

35 *In re King*, 162 Wn.2d 378, 174 P.3d 659 (2007).

36 RCW 13.04.030.

37 RCW 13.34.155.

38 *Id.*

39 RCW 13.34.160; RCW 13.34.161.

public expense in a dissolution or child custody matter. In these cases, the parent's court appointed attorney would refer the parent to a family court facilitator and or to any existing pro bono resources.

§ 6.7 Withdrawal and Termination of Representation

§ 6.7a Withdrawal upon Resolution of Case

Counsel should close cases and withdraw from representation in a timely manner when a final resolution of the case has been achieved and counsel's responsibilities to the client have been completed. Whenever possible, the appointing authority should be able to access case information systems and verify that an attorney's open and active cases are within reasonable caseload standards.

§ 6.7b Withdrawal Prior to Resolution of Case

If, prior to resolution of the case, the circumstances necessitate counsel's withdrawal due to a conflict of interest, counsel is required to obtain a court order allowing withdrawal and substitution of attorney. Conflicts most frequently arise when the representation of a client may be materially limited by the lawyer's responsibilities to another client or when there is a breakdown in the attorney-client relationship. The court should inquire as to the basis for the motion for withdrawal and substitution but should be aware that the attorney may not be permitted to disclose his or her reasons for withdrawal in detail in order to preserve client confidentiality.

Where a right to counsel exists, a client does not have a right to choose a particular advocate.[40] A parent who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. Whether a client's dissatisfaction with his court-appointed counsel justifies the appointment of new counsel is a matter within the trial court's discretion, and attorney-client conflicts justify the grant of a substitution motion only when counsel and client are so at odds as to prevent presentation of an adequate defense.

Case law cited below, arising from a criminal defendant's right to counsel, provides guidance on this issue. Before ruling on a motion to substitute counsel, the court must examine both the extent and nature of the breakdown in communication between the attorney and client and the breakdown's effect on the client's representation.[41] The general loss of confidence or trust alone is insufficient to substitute new counsel. The court's inquiry must be such "as might ease the defendant's dissatisfaction, distrust, and concern."[42] The court's inquiry must also provide a sufficient basis for reaching an informed decision. Factors to be considered when determining whether or not to appoint substitute counsel include the reasons given for the dissatisfaction, the court's own evaluation of counsel, and the effect of any substitution upon the scheduled proceedings.[43]

Counsel must serve the client and all parties with notice of intent to withdraw and date and time of the motion.[44] Ideally, the attorney should alert the appointing authority of the potential need for new counsel prior to the hearing so that the substituting attorney can be identified as soon as possible. If the motion to withdraw is granted, counsel shall take reasonable steps to protect the client's interests and arrange for the orderly transfer of the client's file and discovery to substituting counsel. The court should bear in mind that continuance of a fact-finding or contested hearing may be necessary when a new attorney is appointed to represent a parent in a pending case as the substituting attorney will need a reasonable amount of time to become familiar with the case history and adequately prepare for the proceeding.

If it appears to the court that the attorney has gone for a prolonged period without client contact, the court may recommend that counsel should seek to withdraw once the court has confirmed that the client's whereabouts are unknown, reasonable efforts to locate and contact the client have been unsuccessful, counsel lacks specific direction from the client, or counsel is unable to represent the client's interest.

§ 6.8 Waiver and Forfeiture of Right to Counsel

There are three ways an indigent parent may waive his or her right to counsel. A parent may (1) voluntarily relinquish the right; (2) waive it by conduct; or (3) forfeit the right to counsel through "extremely dilatory conduct."[45]

§ 6.8a Waiver by Voluntary Relinquishment

Because RCW 13.34.090 mandates the appointment of counsel when a child's indigent parents appear in a dependency or termination of parental rights proceeding, a waiver of the right to counsel must be expressed on the record and knowingly and voluntarily made.[46] Voluntary relinquishment of the right to counsel is usually indicated by an affirmative, verbal request and evidence of the intent to proceed pro se. For the request

40 *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).
41 *Stenson,* 132 Wn.2d at 724.
42 *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991)).
43 *State v. Stark*, 48 Wn. App. 245, 253, 738 P.2d 684 (1987).
44 CR 71.
45 *In re G.E.,* 116 Wn. App. 326, 334, 65 P.3d 1219 (2003) (citing *City of Tacoma v. Bishop,* 82 Wn. App. 850, 859, 920 P.2d 214 (1996) and *United States v. Goldberg,* 67 F.3d 1092, 1099–1102 (3d Cir. 1995)).
46 *In re G.E.,* 116 Wn. App. at 333.

to be valid, the court must ensure that the parent is aware of the risks and disadvantages of self-representation and the waiver must appear on the court record.[47] Failure to create a record documenting that the waiver of counsel was knowingly and voluntarily made may result in reversal on appeal.[48] An example of questions that the court might ask inquiring into a parent's request to waive the right to counsel is contained in Appendix C.

§ 6.8b Waiver by Conduct

A parent may also waive their right to counsel through their conduct. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel. However, there can be no valid waiver unless the person has been previously warned of the risk of losing the right to counsel.[49] See Appendix C for a list of questions the court should ask a parent prior to determining that the parent has waived the right to counsel by their conduct.

§ 6.8c Forfeiture of the Right to Counsel

Parents may also forfeit their right to counsel, irrespective of their knowledge of the consequences of their conduct and their intent to be represented. Forfeiture of the right to counsel lies at the opposite end of the spectrum from the voluntary relinquishment of this right because a defendant does not need to make the waiver knowingly. Consequently, a defendant's conduct resulting in forfeiture must be more severe than conduct sufficient to warrant waiver by conduct. A defendant's conduct must be "extremely dilatory" to result in forfeiture.[50] For example, a defendant who is abusive towards his attorney, threatens to sue him, and demands that he engage in unethical conduct may forfeit his right to counsel.[51]

In dependency and termination of parental rights proceedings, the forfeiture of the right to an attorney based on extremely dilatory conduct may also occur when a parent's failure to attend court proceedings and communicate with his or her attorney rises to a level at which the attorney cannot effectively or ethically represent the parent's interest.[52] However, the parent's failure to appear for trial or last minute request for counsel necessitating a continuance does not warrant forfeiture of the right to counsel.[53] Forcing a newly appointed attorney to proceed to termination of parental rights trial without adequate opportunity to prepare a defense would result in ineffective assistance of counsel.[54]

47 *Id.* at 334.
48 *See id*.
49 *Goldberg*, 67 F.3d at 1100.
50 *Bishop*, 82 Wn. App. at 859.
51 *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995).
52 *See In re E.P.*, 136 Wn. App. 401, 149 P.3d 440 (2006) (Mother did not consistently attend court hearings and failed to communicate with her attorney. Under the circumstances, the appellate court found that the mother's failure to act was extremely dilatory and sufficient to justify the forfeiture of her right to counsel.); *In re A.G.,* 93 Wn. App. 268, 968 P.2d 424 (1998) (Mother forfeited her right to counsel when she made no effort to appear for hearings, including the termination trial, and her whereabouts were unknown. She had not been in contact with her lawyer or DSHS's Division of Child and Family Services for many months before it filed the termination action. Due to the mother's own inaction, the court noted that the lawyer could not effectively or ethically represent her through the termination trial.).
53 *See In re V.R.R.,* 134 Wn. App. 573, 141 P.3d 85 (2006) (Trial court abused its discretion by denying a request for a continuance and proceeding with the termination of a father's rights. The court of appeals held that the father did not forfeit his right to counsel by failing to appear at trial or by failing to seek an earlier appointment of counsel.).
54 *Id.*

APPENDIX A

2011 Health and Human Services Poverty Guidelines[1]

Persons in Family or Household	48 Contiguous States and D.C.	Alaska	Hawaii
1	$10,890	$13,600	$12,540
2	$14,710	$18,380	$16,930
3	$18,530	$23,160	$21,320
4	$22,350	$27,940	$25,710
5	$26,170	$32,720	$30,100
6	$29,990	$37,500	$34,490
7	$33,810	$42,280	$38,880
8	$37,630	$47,060	$43,270
For each additional person, add the following:	$3,820	$4,780	$4,390

1 76 C.F.R. § 13 (2011); U.S. Dep't of Health & Human Services, The 2011 HHS Poverty Guidelines (2011), *available at* http://aspe.hhs.gov/poverty/11poverty.shtml.

APPENDIX B

INDIGENCY SCREENING FORM

CONFIDENTIAL

[Per RCW 10.101.020(3)]

Name_____

Address_____

City_____State_____Zip_____

1. Place an "x" next to any of the following types of assistance you receive:

_____Welfare **_____Poverty Related Veterans' Benefits**
_____Food Stamps **_____Temporary Assistance for Needy Families**
_____SSI **_____Refugee Settlement Benefits**
_____Medicaid _____Disability Lifeline Benefits
_____Other – Please Describe_____

{If you marked an "x" by any of the above, please stop here and sign at # 15 below.}

2. Do you work or have a job? _____yes _____no. If so, take-home pay: $_____
Occupation: _____ Employer's name & phone #:_____

3. Do you have a spouse or state registered domestic partner who lives with you? ___yes ___no Does she/he work? _____yes _____no If so, take-home pay: $_____
Employer's name: _____

4. Do you and/or your spouse or state registered domestic partner receive unemployment, Social Security, a pension, or workers' compensation? _____yes _____no
If so, which one? _____ Amount: $_____

5. Do you receive money from any other source? ___ yes _____no If so, how much? $_____

6. Do you have children residing with you? _____ yes _____no. If so, how many? _____

7. Including yourself, how many people in your household do you support? _____

8. Do you own a home? ___yes ___no. If so, value: $_____ Amount owed: $_____

9. Do you own a vehicle(s)? ___yes ___no. If so, year(s) and model(s) of your vehicle(s):_____
Amount owed: $_____

10. How much money do you have in checking/saving account(s)? $_____

11. How much money do you have in stocks, bonds, or other investments? $_____

12. How much are your routine living expenses (rent, food, utilities, transportation) $_____

13. Other than routine living expenses such as rent, utilities, food, etc., do you have other expenses such as **child support** payments, **court-ordered** fines or **medical** bills, etc.? If so, describe: _____
_____

14. Do you have money available to hire a private attorney? _____yes _____no

15. ***Please read and sign the following***:

I understand the court may ask for verification of the information provided above.
I agree to immediately report any change in my financial status to the court.

"I certify under penalty of perjury under Washington State law that the above is true and correct. (Perjury is a criminal offense-see Chapter 9A.72 RCW)

_____

Signature Date

_____

City State

FOR COURT USE ONLY - DETERMINATION OF INDIGENCY

_____ Eligible for a public defender at no expense
_____ Eligible for a public defender but must contribute $_____
_____ Re-screen in future regarding change of income (e.g. defendant works seasonally)
_____ Not eligible for a public defender

_____
JUDGE

APPENDIX C

INQUIRY REGARDING PARENT'S WAIVER OF RIGHT TO COUNSEL

1. Do you understand that you have a statutory right to the assistance of counsel, as well as the right to represent yourself?

2. Do you understand that by having an attorney represent you, your attorney can (1) present to the court facts which may be helpful to you in this dependency and/or termination of parental rights case, such as facts about your ability to parent and care for your child(ren), the need for services, placement of your child(ren), and parent-child visits; and (2) correct any errors or mistakes in reports submitted to the court?

3. Do you understand that an attorney could advise you of potential defenses, legal strategies, court procedures, and evidentiary rules and protect your rights? Do you understand that you may not understand or be aware of these issues without the assistance of an attorney?

4. Do you understand that an attorney can advocate for you by filing motions and presenting argument on your behalf at court hearings? Do you also understand that an attorney can advocate for you outside of court and represent you during case conferences, team decision-making meetings, and other case staffing?

5. Do you understand that if you choose to proceed without an attorney, you may not be aware of or know all of the rules governing hearings, trials, the admission of evidence, and civil procedure?

6. Do you understand that your failure to comply with the rules governing hearings, trials, the admission of evidence, and civil procedure may impair your ability to present a defense in this case and can jeopardize your rights as a parent and could even result in the termination of your parental rights?

7. Do you understand that the court will appoint an attorney to represent you if you cannot afford to hire an attorney, but you are not asking the court to appoint an attorney to represent you?

8. Do you believe that you possess the intelligence and capacity to understand and appreciate the consequences of the decision to represent yourself?

   a. What is the highest level of education you have completed?

   b. Can you read and understand the English language?

   c. Are you physically and mentally able to represent yourself in this case?

   d. Are you under the influence of any drugs, alcohol, or medication that impairs your physical or mental abilities?

   e. Do you understand that you will be expected to comply with all of the rules governing every stage of a dependency and/or termination of parental rights proceeding?

   f. Do you understand that the Department of Social and Health Services (DSHS) has filed a petition for dependency and/or termination of parental rights and that you have the right to a trial (fact finding) to determine if DSHS can prove the allegations stated in the petition?

9. Do you understand that if counsel is appointed to represent you

   a. You cannot force your attorney to file motions, argue a position, or take action that he/she believes to be frivolous; and

   b. If you continue to insist that frivolous motions be filed, frivolous positions argued, or frivolous action taken and subsequent counsel is removed from the case, then you may be required to represent yourself; and

c. Because of the multiple dangers and disadvantages involved in self-representation at a trial, the choice to represent oneself cannot be undertaken lightly?

10. Do you understand the information we have just discussed, and do you understand the risks of representing yourself?

11. Do you have any questions?

12. Do you want to speak with an attorney before you decide whether to represent yourself in this case?

13. Are you now knowingly, voluntarily, and intelligently giving up your right to counsel and requesting that you be allowed to represent yourself?

Date: _____

Parent: _____

Case Number: _____

Chapter 7

Department of Social and Health Services & Children's Administration[1]

The Washington State Department of Social and Health Services (DSHS)[2] administers several divisions of services to vulnerable populations. These populations include the elderly, children, the indigent, and the disabled. DSHS is one department: the administrations and divisions share one vision, one mission, one set of core values.

Vision: Safe, healthy individuals, families, and communities.

Mission: To improve the safety and health of individual, families and communities, by providing leadership and establishing and participating in partnerships.

Values:

- Excellence
  - Child-driven
  - Community focused
  - Family centered
  - Solution-based Techniques
- Respect
- Collaboration
- Partnership
- Diversity
- Accountability

The Secretary of DSHS is a member of the Governor's cabinet and is an appointed position. The Secretary serves at the pleasure of the Governor.

The Secretary appoints the Assistant Secretary of Children's Administration (CA). CA has field offices within local communities working with children and families to assess safety, identify their needs related to child safety, and when needed, develop a case plan which supports families and creates safety and well-being for children. These services are designed to prevent future child abuse and neglect find safe alternatives to out-of-home placement, and create safety and permanency for children in care. Services to support families who are in crisis and at risk of disruption and services to care for children in placement are provided primarily by contracted community agencies and foster parents.

Through solution-based casework, family team decision-making, motivational interviewing, wraparound principles,[3] safety frameworks, evidence-based practice and performance-based contracting, CA is able to support and carry forward the vision, mission and values of DSHS.

1 Contacts: Collette McCully, Child Protective Services (CPS); Carrie Kendig, Child and Family Welfare Services (CFWS); Pam Kramer, Adoption; and Jim Pritchard, Adolescent Services.

2 http://www1.dshs.wa.gov/.

3 "Wraparound" principles are designed to coordinate services across multiple agencies and create a single plan of care to address the needs of a child.

There are three regions in Washington and they are divided as follows:

Region	Counties
1 North	Pend Oreille, Spokane, Whitman, Adams, Grant, Douglas, Chelan, Okanogan, Ferry, Lincoln, Stevens
1 South	Asotin, Benton, Columbia, Franklin, Garfield, Kittitas, Klickitat, Walla Walla, Yakima
2 North	Whatcom, Skagit, Snohomish, Island
2 South	King
3 North	Pierce and Kitsap
3 South	Thurston, Lewis, Skamania, Klickitat, Clark, Cowlitz, Wahkiakum, Pacific, Grays Harbor, Mason, Jefferson, Clallam

CA headquarters are located in Olympia. Directors of the agency manage divisions within CA and are located at headquarters.

Each region is managed by a Regional Administrator who has the overall responsibility for the field offices located within their region. CA delivers child welfare programs to families referred to the agency usually due to allegations of child abuse and neglect.

Programs administered by CA include the following:

Program	Duties/Role
Intake	Receives reports of child abuse and neglect and requests for voluntary services.
Child Protective Services (CPS)	Conducts investigations of child abuse and neglect. Through the life of the case, CA, using the safety framework, gathers information, assesses present and impending danger, analyzes need for in- or out-of-home placement, and implements plans to increase child safety.
Family Voluntary Services (FVS)	Delivers services to families willing to work voluntarily with CA on issues and concerns related to child abuse and neglect. Services are designed to reduce the re-occurrence of risk of child abuse and neglect.
Child and Family Welfare Services (CFWS)	Court-supervised cases of pre-dependent and dependent children and their families. The goal of CFWS is to deliver services to facilitate the permanent plan.
Family Reconciliation Services (FRS)	FRS is a voluntary program serving runaway adolescents, and youth 13–17, in conflict with their families. FRS services are meant to resolve crisis situations and prevent unnecessary out-of-home placement. FRS services may include, but are not limited to, short-term family counseling, referrals for substance abuse treatment and/or counseling, referrals for mental health services, short-term placement, family assessments in conjunction with juvenile court services.

Family Preservation Services (FPS)	FPS are available to families whose children face substantial likelihood of being placed outside of the home or are intended to reunify a child with their family from out-of-home care. FPS are available to families within 48 hours of referral and is offered for a maximum of six months by a contracted service provider. FPS are designed to support families by strengthening their relationships with a variety of community resources.
Adoptions	The purpose of the adoption program is to meet the permanency needs of children who are in the care and custody of CA. CA strives to find safe and stable families that can best meet the needs of the child. Facilitates adoptions for legally-free, dependent children through CA staff efforts and contracted services.
Adolescent Services	Adolescent Services support youth in transitioning to adulthood. These services include the following programs/services Independent Living, Foster Care to 21, Educational Advocacy, Extended Foster Care, Transitional Living, Educational and Training Vouchers, and Responsible Living Skills.

Chapter 8

Court-Appointed Special Advocates (CASA) and Guardians ad Litem (GAL)[1]

Ryan Murrey[2]

Both federal and state law require that all abused and neglected children have someone to represent their best interests in court.[3] In Washington, Court-Appointed Special Advocates (CASAs) or Guardians ad Litem (GALs) fill that role.

1 Last revised in Fall 2009.

2 Ryan Murrey is the Program Services Director for Washington State Court-Appointed Special Advocates (CASA) in Seattle, an agency he has been with for nine years and a CASA volunteer with Pierce County. Prior to his employment with Washington State CASA, he worked for the Guernsey County Department of Human Services, a substitute teacher and the Guernsey County Job Training Partnership Act in their Community Youth department. Ryan graduated from the College of Wooster in his native state of Ohio with a Bachelor of Arts in Geology and a minor in Chemistry. Ryan would like to thank Lori Irwin of King County Dependency CASA and Kati Ortiz of Washington State CASA for their assistance in editing and compiling the chapter on CASA.

3 *See, e.g.*, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006); RCW 13.34.100(1).

§ 8.1 Why the CASA Program Exists

In 1976, King County Judge David Soukup faced the same fundamental issue you will face in your role as a judicial officer hearing dependency cases: how to have the most information available to make the best possible decisions for the abused and/or neglected children before you in court. "I was consumed by the fact that I didn't have enough information about each child, and I just didn't know if I had done the very best job I could," he later stated.[4]

Soukup's solution was to invite members of the community to serve as volunteer GALs (later called CASAs) to advocate for the best interests of the children who were the subjects of dependency proceedings. The idea took hold, and today there are over 900 CASA programs nationwide, including programs in 35 of Washington's 39 counties. In 2007, over 2,200 CASA volunteers advocated for 6,900 dependent children in Washington State alone.

The longevity and success of the CASA program can in large part be attributed to the uniqueness of what CASA volunteers (or Volunteer GALs (VGALs), as they are still referred to in some jurisdictions) bring to the dependency process:

1. Time spent on the case. Volunteers spend an average of 10–20 hours per month on their most active cases.

2. A history of the case. The typical volunteer remains active with the program for 30 months. While social workers come and go, volunteers generally remain on a case from shelter care until permanency is achieved.

3. A first hand understanding of the child's life. Volunteers are typically only assigned one or two cases/sibling groups at a time. This allows for a more intimate understanding of the child's life.

§ 8.2 Definitions

CASA volunteers – CASA volunteers are guardians ad litem.

Staff GALs – Staff GALs are generally employees of a court or a nonprofit who carry a GAL caseload. Depending on the local program's structure, some might also supervise volunteers.

Contract GALs – In jurisdictions with CASA programs, these are usually attorneys who are compensated for their service as a GAL. Contract GALS are usually assigned to handle "overflow" cases when there are not enough CASA volunteers available at that time.

4 Elizabeth Mehren, *A Lifetime of Difference, One Child at a Time*, L.A. Times, Mar. 3, 1995, at E1.

§ 8.3 Types of CASA and GAL Programs in Washington

Washington counties and tribes operate their programs in a variety of ways. There are three Tribal CASA programs in Washington, all of which began (or restarted, as in Spokane Tribe's case) in July of 2007: Kalispell Tribe, Spokane Tribe, and Yakama Nation.

Seven programs function as either stand alone nonprofits or programs that operate under the umbrella of a nonprofit agency: Clark, Cowlitz, Chelan/Douglas, Ferry, Kittitas, Asotin/Garfield, and Grays Harbor. Nonprofits generally have a contract with the court to provide CASA representation to dependent children in their area.

The remaining 23 programs are court-based. Five counties do not have CASA programs: Skagit, Pacific, Wahkiakum, Adams, and Lincoln.

Additionally, there are a variety of representation models among Washington's 33 dependency court CASA programs.

Pure CASA. These programs only use volunteers to represent children. The programs falling under this model are Chelan/Douglas, Clallam, Island, Jefferson, Kittitas, Lewis, Okanogan, San Juan, and Whitman.

Staff GAL/CASA mix. These programs generally try to appoint a CASA when available, but assign the overflow to paid staff GALs. Programs under this model include Benton/Franklin, Clark, Cowlitz, Ferry, Grant, Kitsap, Klickitat, Mason, Pend Oreille, Pierce, Skamania, Spokane, Stevens, Walla Walla, and Yakima.

Attorney GAL/CASA mix. These programs generally have age cutoffs for the children they serve, and for most of these programs, CASAs or staff GALs are assigned to kids under a certain age (12 years old, unless otherwise noted). Children over certain ages receive GAL services from attorneys or contract GALs. Programs falling under this model include Benton/Franklin (age 9), Clark (age 13), Grays Harbor, King, Pend Oreille, Snohomish, Spokane, and Thurston.

CASA programs with attorneys. There are currently five programs with either full-time or contract attorneys who provide legal counsel to the program and volunteers. These programs include King (3.5 Full Time Equivalencies (FTE)), Spokane (1.0 FTE), Snohomish (1.0 FTE), Pierce (0.5 FTE), and Clark (0.125 FTE).

Please refer to the chart, "Overview of Child Representation 2007," that follows this chapter for a more comprehensive look at how children are represented in Washington.

§ 8.4 Training Requirements

Learning objectives for training GALs have been developed by the Administrative Office of the Courts (AOC) as required by the Washington State legislature.[5] The National CASA Core Curriculum has been approved by the AOC as an alternate curriculum to that developed by AOC.

§ 8.4a Core Training

The core CASA volunteer training develops volunteers who are knowledgeable, culturally sensitive, and able to exercise the good judgment necessary for the highest quality representation of the best interests of the children they are appointed to serve. It provides a consistent foundation in the law and legal process, ethics, investigation and interviewing skills, child physical and sexual abuse, neglect, child development, family dynamics, and cultural awareness. Volunteers in training must also learn about issues specific to abused and neglected children, including mental health, drug and alcohol abuse, and domestic violence. In addition, familiarity with social service agencies and local community resources is an integral part of the training. Personal safety is also included in the initial training.

Generally the training is conducted in a face-to-face, group format. The initial core training requires a minimum of 28 hours with an additional five hours or more of supervised practicum once the training has been completed. In most counties, the training is completed over a three-to-four week period with several eight hour days and shorter training sessions in the evenings.

§ 8.4b Ongoing Training

In addition to the initial core training, CASA volunteers are encouraged to complete a minimum of 10 hours of ongoing training per year. Program managers are responsible for creating an in-service training program in their area. These ongoing trainings cover a broad spectrum of topics such as education advocacy, fetal alcohol syndrome, permanency planning, effects of domestic violence on children, effective communication with DSHS and other community members, specific child mental health disorders, methamphetamine abuse, and teens "aging out" of care.

§ 8.5 Background File

As directed in RCW 13.34.100(3), the CASA program maintains a background information record for each CASA/GAL in the program. As a condition of appointment, the CASAs/GALs background information record must be made available to the court upon request. The background file must include, but is not limited to, the following information:

5 RCW 2.56.030(15).

a) Level of formal education;
b) Training related to the CASA's/GAL's duties;
c) Number of years experience as a CASA/GAL;
d) Number of appointments as a CASA/GAL and the county or counties of appointment;
e) The names of any counties in which the person was removed from a CASA/GAL registry pursuant to a grievance action, and the name of the court and the cause number of any case in which the court has removed the person for cause; and
f) Criminal history, as defined in RCW 9.94A.030.

§ 8.6 Appointment

When a CASA/GAL is requested on a case, the program shall give the court the name of the person it recommends, and the appointment shall be effective immediately.[6] The court shall appoint the person recommended by the program. If a party in a case reasonably believes the CASA/GAL is inappropriate or unqualified, the party may request a review of the appointment by the program. The program must complete the review within five judicial days and remove any appointee for good cause. If the party seeking the review is not satisfied with the outcome of the review, the party may file a motion for removal with the court on the grounds that the advocate volunteer is inappropriate or unqualified.[7]

Appointment of the CASA/GAL remains in effect until the court discharges the appointment or it no longer has jurisdiction, whichever comes first. The CASA/GAL may also be discharged upon entry of an order of guardianship.[8]

§ 8.6a When Good Cause Exists for Not Appointing a CASA/GAL

Washington is the only state in the country with a statutory good cause exception. The "good cause" exception means that despite the state's mandate to appoint a CASA/GAL for each child in the dependency system, if good cause is shown that appointment would be unnecessary, no CASA/GAL need be appointed.[9] Notably, this is in direct conflict with the federal Child Abuse Prevention and Treatment Act (CAPTA) law requiring that

> in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings.[10]

§ 8.7 Authority and Rights

§ 8.7a Access to Information

The table below summarizes what information CASA/GALs are authorized to have access to. Of common concern is what right the CASA/GAL has to reports from the parents' service providers. Many jurisdictions handle this by filing orders requiring that the parents sign releases to allow their providers to speak to social workers and CASA/GALs.

The legislature has indicated that communication needs to go both ways:

> Recent analysis of the child dependency system following the death of Zy'Nyia Nobles indicated poor communication of relevant information from the courts, to the department, within programs between caseworkers, between divisions, among specialists, caregivers, and family. Appropriate service delivery necessitates communication of relevant information. Barriers to appropriate communication must be eliminated.[11]

6 RCW 13.34.100(8).
7 *Id.*
8 *Id.* at (4).
9 *See* RCW 13.34.100(1); *In re O.J.*, 87 Wn. App. 1108, 947 P.2d 252 (1998).
10 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006).
11 RCW 13.34.350.

Right	Statute or Court Rule
Except for information or records specified in RCW 13.50.100(7), the CASA/GAL shall have access to all information available to the state or agency on the case.	RCW 13.34.105(3); GALR 4(g)
Upon presentation of the order of appointment by the CASA/GAL, any agency, hospital, school organization, division or department of the state, doctor, nurse, or other health care provider, psychologist, psychiatrist, police department, or mental health clinic shall permit the CASA/GAL to inspect and copy any records relating to the child or children involved in the case, without the consent of the parent or guardian of the child, or of the child if the child is under the age of thirteen years, unless such access is otherwise specifically prohibited by law.	RCW 13.34.105(3); GALR 4(f)
The CASA/GAL shall have access to the persons for whom a CASA/GAL is appointed and to all information relevant to the issues for which a CASA/GAL was appointed.	GALR 4(a)

§ 8.7b Rights Regarding Court Participation

The rights and duties of the CASA/GAL are outlined statutorily and in the GALR court rules.[1]

Right	Statute or Court Rule
The CASA/GAL shall be deemed an officer of the court for the purpose of immunity from civil liability.	RCW 13.34.105(2)
The CASA/GAL has the right to present evidence, examine, and cross examine witness through counsel or otherwise authorized by the court.	RCW 13.34.100(5); GALR 4(h)(3)
The CASA/GAL has the right to be present at all hearings and proceedings.	RCW 13.34.100(5); GALR 4(e); GALR 2(l)
The CASA/GAL shall receive copies of all pleadings and other documents filed or submitted to the court.	RCW 13.34.100(5); GALR 4(b)
The CASA/GAL shall receive notice of all hearings and all notice contemplated for a parent or other party in all proceedings under chapter 13.34.	RCW 13.34.100(5); GALR 4(c)
Except for information or records specified in RCW 13.50.100(7), the CASA/GAL shall have access to all information available to the state or agency on the case.	RCW 13.34.105(3); GALR 4(g)
If the CASA/GAL determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position.	RCW 13.34.200(6)
The CASA/GAL shall make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties.	RCW 13.34.105(1)(e)
Any stipulated or agreed order of dependency or disposition must be signed by the CASA/GAL.	RCW 13.34.110(3)(a)
The CASA/GAL shall have access to the persons for whom they are appointed and to all information relevant to the issues for which they were appointed.	GALR 4(a)

1 A few of these rules can be problematic in that they may result in a CASA/GAL engaging in the unlawful practice of law. Some courts interpret these rules to mean that the CASA/GAL should have an attorney to file pleadings and motions on their behalf, examine witnesses, and engage in discovery.

The CASA/GAL shall be given notice of, and an opportunity to indicate his or her agreement or objection to, any proposed agreed order of the parties governing issues substantially related to their duties.	GALR 4(d)
The CASA/GAL shall have the right to file pleadings, motions, notices memoranda, briefs, and other documents, and may, subject to the trial court's discretion, engage in and respond to discovery.	GALR 4(h)(1)
The CASA/GAL shall have the right to note motions and request hearings before the court as appropriate in the best interests of the person(s)for whom they were appointed.	GALR 4(h)(2)
The CASA/GAL may introduce exhibits, subpoena and examine witnesses, and appeal.	GALR 4(h)(3)
The CASA/GAL shall have the right to fully participate in the proceedings through submission of written reports, and may, with the consent of the trial court, present oral argument.	GALR 4(h)(4)
The CASA/GAL may recommend that the court seal their report or a portion of their report to preserve the privacy, confidentiality, or safety of the parties or the person for whom they were appointed.	GALR 2(n)
The CASA/GAL may request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.	GALR 2(o)

§ 8.8 Duties and Responsibilities of a CASA/GAL

Under RCW 13.34.105, the CASA/GAL is to investigate the case and report on the best interests of the child, meet and interview or observe the child, monitor court orders, bring changes in circumstances to the court's attention, and report on the status of the child's membership in any Indian tribe or band. In 2008, the statute was amended, directing CASAs/GALs, whether paid or volunteer, to report to the court any views or opinions expressed by the child pertaining to issues pending before the court.

The following table lists some of the more common issues the court or parties may raise with CASAs/GALs. In general, activities that a CASA/GAL cannot engage in have to do with either liability issues, improper credentials, or erosion of the CASA's/GAL's impartiality to parties in the case.

	CASA/GAL Should	**CASA/GAL May**	**CASA/GAL Should Never**
Advocacy:	Inform individuals about the CASA's/GAL's role in case. Under GALR 2(k), a CASA/GAL shall identify him or herself as a CASA/GAL when contacting individuals in the course of a particular case and inform those individuals about the role of a CASA/GAL at the earliest practicable time.	Ask the court to appoint counsel on behalf of the child.	Create in the mind of a reasonable person the appearance of repre-senting that party as an attorney. GALR 2(a).

	Maintain privacy of parties. GALR 2(n).	Remain on the case if the child receives an attorney.	Discuss the case with the media unless so instructed by the court.
	Report on the Native American heritage of each child they advocate for.	Contact potential tribes and encourage the agency social worker to notify potential tribes.	Ignore or overlook a child's potential Native American heritage.
	Ask parents and relatives if the child may have Native American heritage.		
	Bring changes in circumstances to the court's attention so that appropriate services and orders are in place.	File motions and request relief on behalf of the child.	
	Get to know the child in his or her environment.	Visit the child at the placement, school, or daycare.	Rely on the reports of others regarding the child's circumstances.
Services:	Advocate for services for the parents and children.	Research appropriate services available in the community and share that information with the parents and social worker.	Act as the direct service provider for the parents or children on their case.
	Advocate for transportation resources for the child.	Refer/coordinate transportation with DSHS.	Transport the child themselves.
	Encourage visitation between parents and children and between siblings when it is not contrary to the best interests of the child.		Supervise visits.
Investigation:	Conduct an independent investigation of the facts of the case and the child's situation.		Engage in ex parte communication. RCW 13.34.107; GALR 2(m).
	Visit the child in his or her home and meet the child's caretakers.	Observe the child in a variety of environments and speak with the child.	
	See the child at least every month and prior to court hearings if possible.	Request a courtesy CASA/ GAL or co-CASA/ GAL appointment for children placed far away.	Rely solely on caretaker reports of the child's wellbeing.
	When first appointed to the case, the CASA/GAL should seek approval from the parent's attorney prior to interviewing the parent.	Interview the parent with the attorney present or alone with the attorney's approval.	Interview a represented party without first obtaining approval from the party's attorney.

	Observe visits between the child and parents and siblings.	Ask the parent for time before or after the visit to talk about the case.	Intrude on the child's time with the parent or interfere with activities.
	Gather information from a variety of sources and familiarize him or herself with relevant facts about the child and family.	Request a courtesy CASA/ GAL for children placed out of the county.	Rely solely on the reports of the state and other parties to the case.
Recommendations:	Make recommendations for services and evaluations of the parties. GALR 2(h).	Make referrals to agencies such as Treehouse, Friends of CASA, or other service organizations for procurement of services and supplies for the child.	Buy the child gifts.
	Submit written reports to the court no later than 10 days prior to a hearing for which a report is required. The report should include a written list of documents considered and persons interviewed during the course of the investigation. GALR 2(i).	File addendums to reports with information developed just prior to the hearing.	
Agency relations:	Adhere to the policies sets forth in the memorandum of understanding between CASA and DSHS.	Attend visits and other information gathering activities with the agency social worker.	Rely totally on the agency social worker to gather the facts in the case.

§ 8.9 Grievance Procedure

GALR 7 sets forth a requirement that each court shall promulgate rules that set out or refer to policies and procedures establishing and governing the filing, investigating, and adjudicating grievances made by or against GALs.

§ 8.10 Additional Resources

Washington State CASA Organization
http://www.washingtonstatecasa.org/

National CASA Organization
http://www.nationalcasa.org/

Overview of Child Representation 2007
Prepared by Washington State CASA, May 2008

	Dependent Children, 2007	% Rep. by a CASA	% Rep. by Staff	% Rep. by Other*	% With no Rep.	Notes
Adams/Lincoln	***28***	*No Data*	*No Data*	*100%*	*No Data*	*Two attorneys serve all children*
Asotin/Garfield	**60**	80%	< 5%	--	20%	Not currently serving Garfield County
Benton-Franklin	**459**	50%	15%	35%	--	Children nine and over appointed a public defender
Chelan Douglas	**191**	95%	5%	--	--	
Clallam	**190**	95%	5%	--	--	
Clark	**754**	85%	15%	--	--	Only staff assigned to children over 13
Cowlitz	**341**	50%	50%	--	--	
Ferry	**19**	35%	65%	--	--	
Grant	**228**	5%	95%	--	--	
Grays Harbor	**298**	20%	--	80%	--	CASA only assigned at judicial request
Island	**119**	95%	5%	--	--	
Jefferson	**38**	90%	10%	--	--	
King	**2537**	60%	--	40%	--	Children over 12 assigned a public defender
Kitsap	**506**	30%	70%	--	--	
Kittitas	**65**	100%	--	--	--	
Klickitat	**47**	15%	85%	--	--	
Lewis	**236**	95%	--	> 5%	--	If public defender appointed for child, CASA withdraws
Mason	**154**	< 5%	99%	--	--	
Okanogan	**54**	100%	*	--	--	Assigned CASA and staff GAL concurrently
Pacific/Wahkiakum	***85***	--	--	*100%*	--	*Four POs assigned to all children*
Pend Oreille	**45**	25%	50%	25%	--	
Pierce	**1457**	65%	30%	5%	--	Program withdraws from guardianships
San Juan	**9**	100%	--	--	--	
Skagit	***318***	--	--	*100%*	--	*Five paid GALs assigned to all cases*
Skamania	**15**	50%	50%	--	--	
Snohomish	**1504**	40%	--	15%	55%	
Spokane	**1466**	45%	40%	15%	--	Children over 12 assigned public defender
Stevens	**133**	70%	30%	--	--	
Thurston	**362**	60%	--	40%	--	Paid GAL handles program overflow
Walla Walla	**143**	75%	25%	--	--	
Whatcom	***331***	--	--	*100%*	--	*CASA Program started in March 2008*
Whitman	**31**	100%	< 5%	--	--	
Yakima	**675**	35%	65%	--	--	
Statewide	**12,912**	**55%**	**25%**	**5%**	**15%**	

* % rep by other – For Grays Harbor, Thurston, Skagit, and Whatcom this represents representation by contract/paid GALs. For the remaining, this represents child representation by public defenders.
Sources: Dependent children data from DSHS; remaining data from local CASA programs

Attorney Representation for Children 12+

	Automatically Assigned?	Children informed of right to counsel?	Who notifies child of right to counsel?	Dual CASA/ Attorney appointment?	Offender attorney same as dependency attorney?	Notes
Adams/Lincoln	***No Data***	---	---	---	---	
Asotin/Garfield	**No**	Most of the time	Court	Yes	Very Rarely	
Benton-Franklin	**Yes**	Yes	Social Worker (SW)	Sometimes	Never	Attorneys for all children ages eight +
Chelan Douglas	**No**	Yes	CASA	Almost Always	Never	
Clallam	**No**	No	--	Always	Not usually	
Clark	**Yes**	Not	--	Sometimes	No	Attorneys for all children ages 13+; OPD handles contract
Cowlitz	**No**	Not always	CASA/SW?	Yes	Never	
Ferry	**No**	No	CASA	Yes	Never	
Grant	**No**	Yes	CASA/GAL	Yes	Never	
Grays Harbor	**No**	Not always	CASA/SW?	Yes	Yes	
Island	**No**	Yes	CASA	Always	Sometimes (see notes)	Ideally – it is a calendaring issue
Jefferson	**No**	No	--	Always	Yes	
King	**Yes**	Yes	Court		Never	Attorneys for all children ages 12+
Kitsap	**No**					
Kittitas	**No**	Yes	SW	Always	Sometimes	
Klickitat	**Yes**	Yes	CASA Staff	Frequently	Frequently	
Lewis	**No**	?	SW?	Always	Not usually	
Mason	**No**			No		
Okanogan	**No**	No	--	Yes	No	
Pacific/Wahkiakum						
Pend Oreille	**No**	Yes	SW	Yes		
Pierce	**No**	No	SW/CASA/Parent	Sometimes	Very Rarely	
San Juan	**No**			No	Yes	
Skagit						
Skamania						
Snohomish	**No**	Yes	CASA/SW/Court	Yes	Rarely	
Spokane	**Yes**	Yes	Court	Up to CASA	Usually	
Stevens	**No**	Yes	SW/CASA	Yes	Not usually	
Thurston	**No**	No	CASA	Yes	No	
Walla Walla	**No**	No	CASA/SW	Yes	Never	Only one case ever with an attorney
Whatcom	***No***	*Yes*	*Court/GAL*	*Yes*	*Rarely if ever*	
Whitman	**No**	No			Yes	
Yakima	**No**	Yes	SW/CASA/Court	Usually not	No	

Chapter 9

Records and Privacy[1]

Timothy M. Jaasko-Fisher[2]

RCW 13.50 governs the maintenance and release of a number of records including the official juvenile court file, the social file, and records of juvenile justice and care agencies (JJCAs).[3]

1 Last revised in Fall 2009.

2 Timothy M. Jaasko-Fisher is Director of the Court Improvement Training Academy (CITA) at the University of Washington, School of Law's Child and Youth Advocacy Clinic. Prior to becoming the director of CITA in September 2007, Tim was an Assistant Attorney General for 11 years, representing the Washington State Department of Social and Health Services Children's Administration. He conducts training on a variety of topics relating to child welfare law and litigation of child abuse and neglect cases. He has presented at the Washington State Children's Justice Conference, the Washington State Children's Administration Social Work Academy, and the Washington State Judicial Conference. He has trained on a wide range of topics including legal issues relating to chronic neglect, criminal records checks in child welfare, and the Interstate Compact on the Placement of Children. He was awarded his Bachelor of Arts in Government from New Mexico State University in 1993 and his Juris Doctor from Seattle University School of Law in 1996.

3 RCW 13.50.010(1)(c). "Juvenile justice or care agency" includes police, diversion units, court, prosecuting attorney, defense attorney, detention center, attorney general, the legislative children's oversight committee, the office of family and children's ombudsman, the Department of Social and Health Services (DSHS) and its contracting agencies, schools, persons or public or private agencies having children committed to their custody, and any placement oversight committee created under RCW 72.05.415. *Id.* at (a).

§ 9.1 Accuracy of Records

JJCAs, such as the Department of Social and Health Services (DSHS) and law enforcement, have a statutory duty to maintain accurate records. Agencies must take reasonable steps to secure records and to ensure their completeness, including actions taken by other agencies with respect to matters in the file. In particular, in cases where DSHS has filed a petition pursuant to RCW 13.34, DSHS is specifically directed by statute to "correct or expunge" any information in its records found by a court to be false or inaccurate.

Any person who has reasonable cause to believe that inaccurate information concerning that person has been included in JJCA records may make a motion to the court to have the information corrected or destroyed. The statute does not specify in what action the motion should be brought, nor does it provide any further guidance as to what standards the court should apply in these cases or who has the burden of proof. Presumably, the agency must provide the court with its rationale for including the information in the record at which point the court must decide whether the information is accurate applying a preponderance of the evidence standard as in any civil case.

§ 9.2 Release of Records

Additionally, these records are confidential and may be released only pursuant to RCW 13.50.010 and RCW 13.50.100.[4]

§ 9.2a Release to Person Identified in the Records

Any person who has reasonable cause to believe information concerning them is included in the records of a JJCA and who has been denied access to those records by the agency may make a motion to the court for an order authorizing access.[5] Reasonable notice of the motion must be served upon all parties to the "original action"[6] and to the agency whose records will be affected by the motion.[7]

The statute does not address in what type of underlying action such a motion should be brought.

The court shall grant the motion to examine the records unless it finds that in the interest of justice or in the best interest of the juvenile the records or parts thereof should remain confidential.[8]

Although RCW 13.50.100 declares that all information covered by the statute is confidential and releasable only pursu

4 RCW 13.50.100(2).

5 RCW 13.50.010(5).

6 The statute is silent as to what "original action" is referenced here.

7 RCW 13.50.010(5).

8 *Id.*

ant to that statute, an adult who is the subject of such records is not precluded from obtaining and disseminating his or her own medical or health records contained as part of the file.[9] It appears that the court may, however, impose reasonable limitations on the dissemination of records pertaining to juveniles under its jurisdiction so long as it applies the least restrictive means available to achieve the goal of protecting the child.[10]

§ 9.2b Release to a Juvenile, Parent(s), or Attorneys

A juvenile, his or her parent, or an attorney for the juvenile or parent shall, upon request, be given access to all records and information collected or retained by a JJCA and which pertain to the juvenile with the following exceptions:[11]

a. The agency need not release information it determines is likely to cause severe psychological or physical harm to the juvenile or his or her parents absent a court order directing release.[12] If a court determines that limited release of the information is appropriate, the court may specify terms and conditions for the release.[13]

b. If (1) the records pertain to the provision of counseling, psychological, psychiatric or medical services to the juvenile; (2) the services were voluntarily sought by the juvenile; and (3) the juvenile has a legal right to receive those services without the consent of any other person or agency, then the information may not be disclosed without the juvenile's informed consent. [14]

The name and identifying information of any person or organization who has reported child abuse or neglect may be redacted.[15] Redacting "identifying information" is contextual in nature, and should meet the primary goal of maintaining the anonymity of the referent. This protection may be extended even after dependency proceedings are initiated. For example in *In re H.W*, 70 Wn. App. 552, 854 P.2d 1100 (1993), the court held that DSHS was not required to release the names or identifying information of informants in a police report at the shelter care hearing. Stating that "disclosure of sensitive information at this early stage of the proceeding would likely have the unwanted effect of discouraging individuals from reporting," the court ruled that the parent's due process rights were not violated by the redaction. The court did, however, note that once DSHS "has had an opportunity to conduct an independent investigation … there should be less reason to withhold the information "and the father "would be entitled to additional due process protections."[16]

A juvenile or parent denied access to records under RCW 13.50.100(7) may file a motion in juvenile court seeking access to the records.[17] A person making such motion must give reasonable notice to all parties and to any agency whose records would be affected by the motion.[18] The court must grant the motion for access to the records unless it finds access may not be permitted pursuant to RCW 13.50.100(7)(a) or (b).[19]

§ 9.2c Release to Guardian ad Litem

Except for information exempt from disclosure under RCW 13.50.100(7), the guardian ad litem in a dependency case is permitted access to all information available to the state or supervising agency on the case. In addition, the guardian ad litem may inspect and copy any records pertaining to the child or children involved in a case maintained by any agency, school organization, division or department of the state, doctor, nurse, or other health care provider, psychologist, psychiatrist, police department, or mental health clinic without the consent of the parent, guardian, or child if the child is under age 13, unless such access is specifically prohibited by law.[20] This information may only be subsequently released pursuant to RCW 13.50.100.[21]

§ 9.2d Release to Clinic, Hospital, or Agency that has the Subject Person under Care or Treatment

The court may permit inspection of records by or release of information to, any clinic, hospital, or agency which has the subject person under care or treatment. For children who are the subject of dependency proceedings, DSHS must release all records relevant to the child's treatment to the child's treating physician upon request when the child is not old enough to consent to treatment, lacks capacity to consent, or is being involuntarily treated under RCW 13.34.320.[22]

§ 9.2e Release to Other Juvenile Justice or Care Agencies

Records retained or produced by JJCAs may be released to other JJCAs if one of two conditions is met:

1. The agency receiving the records is pursuing a case or investigation involving the juvenile; or

9 *In re T.L.G.*, 139 Wn. App. 1, 20, 156 P.3d 222 (2007).
10 *Id.*
11 RCW 13.50.100(7).
12 *Id.* at (7)(a).
13 *Id.*
14 *Id.* at (7)(b).
15 *Id.* at (7)(c).
16 *In re H.W.*, 70 Wn. App. 552, 556–57, 854 P.2d 1100 (1993).
17 RCW 13.50.100(8).
18 *Id.* at (9).
19 *Id.* at (8).
20 RCW 13.34.105(3).
21 *Id.* at (5).
22 RCW 13.34.340.

2. The agency receiving the records has the responsibility of supervising the juvenile.[23]

If a JJCA meets one of the above requirements for sharing information, the scope of the information to be shared may include sensitive material such as sexually aggressive youth evaluations, other evaluations, and treatment information.[24] However, it is important to note that disclosure under this section is permissive rather than required and is at the discretion of the agency maintaining the record.[25]

§ 9.2f Release for Legitimate Research for Educational, Scientific, or Public Purposes

The court may permit inspection by or release to individuals or agencies engaged in legitimate research for educational, scientific, or public purposes. This statute permits release for purposes of newspaper journalism under certain limited circumstances.[26]

The researcher seeking release of the records has the burden to show that the research qualifies under the statute.[27] Such a showing should include a "detailed description of the proposed statement of the information required and the purpose for which the project requires the information" as well as a description of the methodology to be used including a detailed plan as to how the anonymity of those mentioned in the record will be maintained.[28] Notice to the subjects of the records is not required.[29] If the research is not conducted in the manner described in the application to the court, the court may terminate access or impose other restrictions.[30]

§ 9.2g Public Disclosure

JJCA records, as defined in RCW 13.50, may be accessed exclusively via the procedures set out in RCW 13.50.[31] As such, the substantive provisions and remedies available under the Public Disclosure Act do not apply to requests for access to JJCA records.[32]

§ 9.3 Disclosure/Discovery During a Dependency Case

§ 9.3a Release under RCW 13.34

Legible copies of DSHS records to which a parent, guardian or legal custodian are entitled to under RCW 13.50 (see § 4.2 above) must be provided to the parent, guardian, or legal custodian within a reasonable time prior to the shelter care hearing at no cost.[33] In addition to the automatic provision of these records prior to the shelter care hearing, a parent, guardian, or legal custodian may make a written request for such records.[34] In the case of a written request, records must be provided within 15 days at no cost.[35]

RCW 13.34.174 specifically permits the release of substance abuse evaluations and treatment status reports to the person evaluated, their counsel, the DSHS caseworker, and the guardian ad litem in cases where the court has ordered the evaluation.[36]

RCW 13.50.100 provides that "subject to the rules of discovery in civil cases," any party to a dependency or termination proceeding shall have access to the records of any natural or adoptive child of the parent, subject to the limitations of RCW 13.50.100(7). A party denied access may request judicial review, and if the party prevails, the court must award attorneys fees, costs, and an amount of not less than five and not more than 100 dollars per day the records were denied.[37]

§ 9.3b Release of Information Concerning Mental Health Treatment for Minors

Although typically confidential, Washington law expressly permits the release of information pertaining to a minor's mental health treatment in the course of a dependency proceeding.[38]

§ 9.3c Discovery Requests

Cases adjudicated under RCW 13.34 are civil in nature; as such, the rules of civil procedure governing discovery apply in addition to those specific rules mentioned above.

23 RCW 13.50.100(3).
24 *In re Q.L.M.*, 105 Wn. App. 532, 541, 20 P.3d 465 (2001).
25 *Id.*
26 *Seattle Times v. Benton County*, 99 Wn.2d 251, 661 P.2d 964 (1983).
27 *Id.* at 258.
28 *Id.* at 258–9.
29 *Id.* at 262.
30 *Id.* at 258.
31 *Deer v. Dep't of Soc. & Health Serv.*, 122 Wn. App. 84, 94, 93P.3d 195 (2004).
32 *Id.* at 94.
33 RCW 13.34.090(4).
34 *Id.*
35 *Id.*
36 RCW 13.34.174.
37 RCW 13.50.100(10).
38 RCW 71.34.340(2).

Chapter 10

Use of Contempt in Nonoffender Juvenile Court Proceedings[1]

Patrick Dowd[2]

Every court of justice has the power to preserve and enforce order in its immediate presence, to enforce order in the proceedings before it, and to compel obedience to its judgments, decrees, orders, and process in a proceeding before the court.[3]

For the effectual exercise of these powers, the court may punish contempt as provided for by law.[4] "Contempt of Court" is defined as

- Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;
- Disobedience of any lawful judgment, decree, order, or process of the court;
- Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or
- Refusal, without lawful authority, to produce a record, document, or other object.[5]

Contempt may be direct, occurring in the court's presence, or indirect, occurring outside of court. A contempt proceeding may be civil or criminal depending on the purpose and nature of the sanction imposed.[6] A remedial sanction intended to coerce compliance with the court's order and that is within the contemnor's control is civil in nature, while a criminal contempt sanction is intended to punish a contemnor for past conduct for the purpose of upholding the courts authority.[7] Due process requirements vary depending on whether the sanctions imposed are remedial or punitive.

In addition to the statutory civil and criminal contempt procedures set forth in RCW 7.21, the court also retains inherent contempt authority to impose punitive or remedial sanctions for contempt of court. However, before exercising that power, the court must specifically find that all statutory contempt remedies are inadequate.[8]

§ 10.1 Civil Contempt of Court in At-Risk Youth (ARY), Child in Need of Services (CHINS), Dependency, and Truancy Proceedings

Failure of a party to comply with a court order in an At-Risk Youth (ARY), Child in Need of Services (CHINS), truancy, or dependency proceeding is civil contempt of court as provided in RCW 7.21.030.[9] The legislative intent underlying this stat

1 Last revised in Fall 2009.

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3 *See* RCW 2.28.010.

4 RCW 2.28.020.

5 RCW 7.21.010(1).

6 *See generally* RCW 7.21.

7 RCW 7.21.010(2)–(3).

8 *See In re A.K.*, 162 Wn.2d 632, 652–653, 174 P.3d 11 (2007).

9 *See* RCW 13.32A.250 (ARY and CHINS); RCW 13.34.165 (Dependency); RCW 28A.225.090 (Truancy).

ute is to provide the court with remedial means to compel a child's compliance with the court's order and further the education and protection of the child, without resorting to the filing of criminal contempt charges.[10]

§ 10.1a Initiation of a Civil Contempt Proceeding

The court on its own motion or on the motion of a person aggrieved by a contempt of court may initiate a proceeding to impose a remedial sanction.[11] Due process requires adequate notice and the opportunity to be heard to answer allegations of contempt. In all ARY and CHINS proceedings, the court must verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to this chapter. The court must treat the parents and the child equally for the purposes of applying contempt of court processes and penalties.[12]

§ 10.1b Civil Contempt Sanctions

If, after notice and a hearing, the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose remedial sanctions. Sanctions authorized by RCW 7.21.030 include the following:

- Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b)–(d). The imprisonment may extend only so long as it serves a coercive purpose. In ARY, CHINS, dependency, and truancy cases, commitment to juvenile detention cannot exceed seven days;[13]

- A forfeiture not to exceed $2,000.00 for each day the contempt of court continues;

- An order designed to ensure compliance with a prior order of the court; and

- Any other remedial sanction if the court expressly finds that the sanctions described above would be ineffectual to terminate a continuing contempt of court.

In truancy cases, RCW 28A.225.090 provides remedial sanctions additional to the sanctions authorized in RCW 7.21.030. For example, the court may impose alternatives to detention for a child such as community restitution.

RCW 28A.225.090 also provides that a parent in contempt shall be fined not more than $25.00 for each day of the child's unexcused absence from school. The court may order the parent to provide community restitution instead of imposing a fine. The statute also recognizes an affirmative defense if a parent shows that he or she exercised reasonable diligence in attempting to cause a child in his or her custody to attend school or that the child's school did not perform its duties.[14]

§ 10.1c Limitations on Civil Sanctions

Opportunity to Purge

Juvenile courts may impose detention as a remedial sanction for contempt so long as a proper purge condition provides the juvenile with the "keys" to his or her release. If there is no opportunity to purge, the detention is punitive rather than remedial.[15] Ordinarily, a child's promise to comply with the court's original order will purge an initial contempt. However, where such a promise is demonstrably unreliable, the court is entitled to reject the bare promise as insufficient and impose a purge condition aimed at reassuring the court that the child will indeed comply with the court order.[16] Any purge condition that would satisfy the court of the juvenile's future compliance is permitted so long as the purge condition (1) serves remedial aims; (2) can be fulfilled by the child; (3) is reasonably related to the cause or nature of the contempt; and (4) is within the contemnor's capacity to complete at the time the sanction is imposed.[17] A detained juvenile contemnor should have the opportunity to fulfill a purge condition by the next available hearing day so as to present a request for release to the court at the earliest time.

Detention Cannot Exceed Seven Days

A child cannot be detained beyond seven days for civil contempt, even if the purge condition has not been met. The court cannot aggregate detention sanctions for multiple violations of a dispositional order.[18]

Remedial Sanction Must Retain its Coercive Effect

A coercive sanction is justified only on the theory that it will

10 RCW 7.21.030 (findings).

11 In CHINS, ARY, and dependency cases, the statute states "A motion for contempt may be made by a parent, a child, juvenile court personnel, or by any public agency, organization, or person having custody of the child. . . ." RCW 13.32A.250(5); RCW 13.34.165(4).

12 RCW 13.32A.250(1).

13 RCW 7.21.030(2)(e).

14 RCW 28A.225.090.

15 *See In re M.B.*, 101 Wn. App. 425, 3 P.3d 780 (2000).

16 *Id.*

17 *In re J.L.,* 140 Wn. App. 438, 448, 166 P.3d 776 (2007). *See also In re M.B.*, 101 Wn. App. at 451 (One permissible purge condition requires the juvenile to write a substantial paper with subject matter reasonably related to the nature and cause of the contempt; conversely, requiring the child to enter therapeutic foster care as soon as placement becomes available is inappropriate because it is contingent on factors beyond the child's control.).

18 *In re N.M.*, 102 Wn. App. 537, 7 P.3d 878 (2000).

induce a specific act that the court has the right to coerce. Should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears. Further detention can be justified as a punishment for disobeying the court's orders, but only after a criminal proceeding.[19]

§ 10.2 Criminal Contempt of Court in At-Risk Youth (ARY), Child in Need of Services (CHINS), Dependency, and Truancy Proceedings

In juvenile nonoffender court proceedings, the statutory scheme addressing contempt of court focuses exclusively on civil contempt proceedings with remedial sanctions intended to assure compliance with the court's order. The legislative intent behind contempt statutes addressing ARY, CHINS, dependency, and truancy proceedings is to avoid the bringing of criminal charges against youth who need the guidance of the court rather than its punishment . . . [and] authorize a limited sanction of time in juvenile detention independent of Chapter 7.21 RCW for failure to comply with court orders in truancy, child in need of services, at-risk youth and dependency cases for the sole purpose of providing the courts with the tools necessary to enforce orders in these limited types of cases. . . .[20]

The Washington State Supreme Court, however, concluded that in dependency cases, courts may utilize punitive or criminal contempt as well as civil contempt to address a child's failure to comply with its order.[21] The court reasoned that the legislature did not expressly designate civil contempt as the sole remedy in these cases and in fact, civil contempt "may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter."[22] The court concluded that by amending the dependency contempt statute, the legislature did not intend to exclude the availability of criminal contempt sanctions in dependency cases, but instead, intended to merely create a new alternative sanction.[23] In *In re Silva*, No. 81573-9 (Wash. S. Ct. May 7, 2009), the State Supreme Court determined that in rare circumstances, criminal contempt can also be imposed in ARY proceedings.

The court noted that ARY statutes were intended to provide counseling, treatment, and available state resources to aid and protect at-risk youth, not to punish and jail them....[W]here statutory provisions are intended to treat and rehabilitate children, the last option a judge should consider is jail, where few, if any, legislatively created programs do exist to help at-risk youth....[O]nly in the rarest of situations should incarcera tion as punishment be considered an option.[24] When criminal contempt sanctions are imposed in juvenile nonoffender court proceedings, the child is entitled to the same due process rights afforded other criminal defendants. These due process rights include the initiation of a criminal action by filing of charges by the prosecutor, assistance of counsel, production of witnesses, the privilege against self-incrimination, a presumption of innocence, and proof beyond a reasonable doubt.[25]

§ 10.2a Criminal Contempt Procedures

An action to impose a punitive sanction for contempt of court must be initiated by a complaint or information, supported by probable cause, filed by the prosecuting attorney charging a person with contempt of court, and stating the punitive sanction sought to be imposed. A judge may request that the prosecuting attorney commence an action for criminal contempt. Courts, however, are not constrained to wait for a prosecutor to decide to take action and may appoint a special counsel to prosecute the action if required for the administration of justice.[26] A judge requesting that a prosecutor or special counsel commence a criminal contempt action is disqualified from presiding in the case. Similarly, if the alleged contempt involves disrespect to or criticism of a judge, that judge is also disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.[27]

§ 10.2b Criminal Contempt Sanctions

If an adult defendant is found guilty of criminal contempt of court, for each separate count of contempt of court the court may impose a fine of not more than $5,000.00 or imprisonment in the county jail for not more than one year, or both.[28]

When a juvenile defendant is found guilty of a nonenumerated offense equivalent to an adult gross misdemeanor such as contempt,[29] the conviction is classified as a category D juvenile offense.[30] As a category D offense, each count of criminal contempt is punishable by confinement in a juvenile detention facility for up to 30 days, up to 12 months community supervision, up to 150 hours community restitution, and/or a fine up to $500.00.[31]

19 *In re M.B.,* 101 Wn. App. 425.
20 RCW 7.21.030 (findings).
21 *See In re A.K.,* 162 Wn.2d 632
22 RCW 7.21.030(2)(e).
23 *In re A.K.,* 162 Wn.2d at 652–53.
24 *In re Silva*, No. 81573-9 (Wash. S. Ct. May 7, 2009).
25 *In re M.B.*, 101 Wn. App. at 440.
26 RCW 7.21.040(2)(c).
27 RCW 7.21.040.
28 *Id.* at (5).
29 *See* RCW 9A.20.010(2)(b); RCW 9A.20.021(2).
30 RCW 13.40.0357.
31 *Id.*

§ 10.2c Sanctions for Contempt Committed in the Presence of the Court

When contempt of court occurs within the courtroom, a judge may summarily impose either a remedial or punitive sanction if the judge certifies that he or she saw or heard the contempt.[32] The sanctions must be imposed either immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the court's authority and dignity.[33] The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. For each separate contempt of court, the judge may impose a punitive sanction of a fine of not more than $500.00 or imprisonment for not more than 30 days, or both, or a remedial sanction set forth in RCW 7.21.030(2).[34]

§ 10.3 Inherent Contempt Power of the Juvenile Court

In addition to the statutorily created civil and criminal contempt powers, courts are vested with an inherent contempt authority, as a power necessary to the exercise of all others. As a division of the superior court, the inherent contempt power also extends to the juvenile court.[35]

§ 10.3a Limitations on the Use of Inherent Contempt Use of the court's inherent contempt power is only appropriate in limited situations. While the legislature may not limit or deprive the court of this authority, courts may only exercise their inherent contempt power when the statutory contempt powers are specifically found inadequate.[36] "Only under the most egregious circumstances should the juvenile court exercise its contempt power to incarcerate a status offender in a secure facility. If such action is necessary, the record should demonstrate that all less restrictive alternatives have failed."[37]

Therefore, before resorting to its inherent contempt powers, the court must first find that statutory civil and criminal contempt sanctions are inadequate. The court should also examine the individual needs and circumstances of the child and consider less restrictive alternatives to detention before relying on contempt sanctions. For example, the court should consider whether the child is in need of mental health or chemical dependency services, including involuntary evaluation and treatment in secure facilities that are available under RCW 70.96A.140 and RCW 70.96A.245 (chemical dependency treatment) and RCW 71.34.600 (parent initiated mental health treatment).[38]

Cases involving the juvenile court's use of its inherent contempt power often involve the court's attempt to protect the child from harmful influences. Division I of the Court of Appeals warned against "the desire to protect a juvenile from the risks of the street by locking him up" and determined that this is not an appropriate rationale for invoking inherent authority to punish for contempt. Rather it is up to the legislature and executive branches "to decide whether to develop an expensive program of involuntary confinement to address alcoholism, drug abuse, and other self-destructive behavior by juveniles."[39]

§ 10.3b Due Process

Due process requirements depend on the nature of the sanctions imposed. If the sanctions are punitive and there is no opportunity for the child to purge the contempt, then the proceeding is criminal in nature and the child must be afforded criminal due process rights.

§ 10.3c Notice

Due process requires notice that is reasonably calculated to apprise a party of the proceedings that affect him or her. A child must be served with a motion seeking punitive sanctions under the juvenile court's inherent contempt authority and informing the child of the alleged contempt and potential sanctions, including the maximum penalty that could be imposed. However, an inherent contempt proceeding is not subject to the criminal contempt statute's specific requirement that the proceeding be initiated by a criminal information filed by the prosecuting attorney.

§ 10.3d Trial Rights and Waiver of Rights

A child facing punitive contempt sanctions has the rights to counsel, a speedy trial, call witnesses, cross examine witnesses, testify on his or her own behalf or remain silent, proof beyond a reasonable doubt, and appeal. Any stipulation to the alleged

32 RCW 7.21.050(1).
33 *Id.*
34 *Id.* at (2).
35 *See In re Silva*, No. 81573-9; *In re A.K.,* 162 Wn.2d 632.
36 *Id.*
37 *Id.* at 647 (citing *State v. Norlund*, 31 Wn. App. 725, 644 P.2d 724 (1982).

38 *Id.* at 656 (Madsen, J., concurring):
> Detention should not be used as a substitute for access to basic services, treatment, and care. The repeated use of contempt proceedings is often ineffective and offers little opportunity to address the underlying problems that result in runaway behavior. In contempt proceedings, the focus is on deterring the child's misbehavior rather than ensuring the State is upholding its responsibility to provide an individualized response to the runaway behavior. . . . Children in foster care who suffer from mental health disorders present difficult challenges. However, incarceration in a locked detention facility punishes rather than rehabilitates these children.

39 *In re Mowery*, 141 Wn. App. 263, 285–286, 169 P.3d 835 (2007).

violations is, in effect, a guilty plea.[40] To comport with due process, a guilty plea must be made intelligently and voluntarily. The court must confirm that the child has been advised of and understands his or her due process rights. Without a colloquy to determine whether the child understands the rights he or she is waiving, a stipulation to violation of the court's orders cannot be held to be knowing and voluntary.[41]

§ 10.3e Sanctions

As previously discussed, the court's inherent contempt power allows the court to impose sanctions beyond those prescribed by statute when the court finds that the statutory contempt provisions are inadequate. However, the sanction must be reasonable and related to the purpose of the juvenile court proceeding and the terms of the order violated. The appellate courts review these matters for an abuse of discretion, subject to constitutional prohibitions against cruel and unusual punishment.[42]

40 *See M.B.*, 101 Wn. App. at 439–40.
41 *State v. S.M.,* 100 Wn. App. 401, 413, 996 P.2d 1111 (2000).
42 *Keller v. Keller*, 52 Wn.2d 84, 90, 323 P.2d 231 (1958); *Shafer v. Bloomer*, 94 Wn. App. 246, 973 P.2d 1062 (1999).

Chapter 11

Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Youth in Foster Care[1]

Research compiled by the American Bar Association's Opening Doors Project shows that lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth[2] in foster care are disadvantaged for many reasons, and judges and lawyers can help them. For example research statistics indicate that

- 70 percent of LGBTQ youth in group homes reported violence based on LGBTQ status.
- 100 percent of LGBTQ youth in group homes reported verbal harassment.
- 78 percent of youth were removed or ran away from placement because of hostility to LGBTQ status.
- Between 4 and 10 percent of youth in state care identified as LGBTQ.
- 30 percent of LGBTQ youth reported physical violence by their family after coming out.
- 80 percent of LGBTQ students reported verbal harassment at school (70 percent feel unsafe; 28 percent dropped out).

Research also demonstrates that LGBTQ youth are

- Punished for expressing LGBTQ status;
- Not allowed to participate in programming;
- Told "you are going to hell;" and
- Not allowed to dress or groom as they prefer.

The staff from the Opening Doors Project traveled to five cities (Denver, Colorado; Jacksonville, Florida; Nashville, Tennessee; New York City, New York; and Seattle, Washington) to conduct listening forums with LGBTQ youth who were in or recently out of foster care, and judges and lawyers from those cities. The following are things heard by the staff as they talked with participants at the listening forums:

- We met a transgender young woman who felt safer at school than in her "temporary" shelter that she had been in for months.
- We talked to a young man who had been in 37 homes and was told he was gay before he even knew what the word meant.
- We met young people who felt disrespected by the judges who heard their cases and youth who questioned why professionals in the child welfare system did not treat kids well.
- We also met a lesbian young woman whose lawyer was her best friend and the person she trusted the most.

Judges and lawyers expressed the following:

- "Ignorance can only be remedied with knowledge. The system is broken; the only way to change it is through advocacy." [3]
- "I have gender-neutral language when asking my clients about their dating life."[4]

1 The information in this chapter consists of excerpts from *Opening Doors for LGBTQ Youth in Foster Care: A Guide for Lawyers and Judges*, published by the American Bar Association's Center on Children and the Law. Mimi Laver & Andrea Khoury, Opening Doors for LGBTQ Youth in Foster Care: A Guide for Lawyers and Judges (2008), *available at* http://www.abanet.org/child/lgbtq.shtml. Special thanks go to Tricia S. Boerger of the Attorney General's office, Cynthia Buhr of The Law Offices of Cynthia F. Buhr PLLC, and QLAW, the GLBT Bar Association of Washington, for their editorial assistance with this chapter.

2 These terms and others are defined at the end of this chapter.

3 Judge statement, Opening Doors Project listening forum, Jacksonville, FL, October 12, 2006.

4 Lawyer statement, Opening Doors Project listening forum, Denver, CO, July 28, 2006.

- "I have a folder on my bench with resources for different issues (e.g., domestic violence). If I had resources for LGBTQ youth, I would include them and give them to people that need it."[5]

§ 11.1 The Role of the Court in Protecting LGBTQ

- Some studies suggest that LGBTQ youth are two times more likely to attempt suicide than their heterosexual peers.[6]
- Between 11 percent and 40 percent of homeless youth are LGBTQ.[7] Over half of homeless youth have spent some time in foster care.[8]
- LGBTQ youth are two times as likely to be threatened or injured with a weapon at school and two times as likely to skip school because they feel unsafe.[9] Sixty-nine percent of LGBTQ youth reported experiencing some form of harassment or violence.[10]

The reality is that the statistics and stories are mostly grim for LGBTQ youth in foster care. Whether they enter foster care because their parents reject them due to their LGBTQ status or they disclose their LGBTQ status while in foster care, these youth face discrimination, harassment, and violence because of their sexuality or gender identity.

Lawyers and judges can help change these statistics. Lawyers who develop relationships with LGBTQ clients and provide appropriate representation can make a difference for these youth. Judges who ask the right questions and insist on appropriate services and fair and respectful treatment can protect this vulnerable population and help them become successful adults. This chapter discusses the risks facing LGBTQ youth in foster care. It also describes the roles judges and lawyers must play in these young people's lives to protect them from these risks and help them succeed.

5 *Id.*

6 Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study*, 91 Am. J. of Pub. Health 1276 (2001).

7 Joseph J. Wardenski, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 Journal of Criminal L. & Criminology 1363 (2005).

8 Gerald P. Mallon, We Don't Exactly Get the Welcome Wagon: The Experience of Gay and Lesbian Adolescents in Child Welfare Systems (1998) [hereinafter Welcome Wagon].

9 Massachusetts Dep't of Educ., 2001 Massachusetts Youth Risk Behavior Survey Results (2002), available at http://www.doe.mass.edu/cnp/hprograms/yrbs/01/results.pdf.

10 Joseph G. Kosciw, Ph.D., Gay, Lesbian and Straight Educ. Network (GLSEN), The 2003 National School Climate Survey: The School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgendered Youth (2004), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF.

§ 11.2 A Life of Risks

LGBTQ youth have special risks related to their sexual orientation and gender identity that set them apart from non-LGBTQ youth in foster care. The social stigma attached to LGBTQ people causes these youth to hide their identities, fear for their safety, and often turn to drugs to cope. Higher suicide rates and violence in schools are two of the many risk factors to be aware of when working with LGBTQ youth in foster care.

§ 11.2a Suicide

Studies show LGBTQ youth are twice as likely as non-LGBTQ youth to attempt suicide. Others put the number closer to four times as likely.[11] Aside from typical adolescent turmoil, LGBTQ youth face significantly greater conflict due to their sexual orientation or gender identity. They do not have the same feelings as their peers about sexual attraction or sense of identity. During adolescence, youth explore their identities and find where they fit. LGBTQ youth struggle with loneliness and feeling different. As expressed by one youth, "I knew that I was different, no one ever told me, but I just knew."[12] This feeling, coupled with being in foster care and having limited support, makes some youth think they have no way out. One youth explains, "As I got older through high school, it started to get even worse because I attempted suicide many times. It was too much. It was like at first I did it because I wanted people to say hey look, you know, look at me, pay attention to me. But after that I was placed at St. Jude's, and that's when I started to realize and accept that I was gay."[13]

§ 11.2b Homelessness

When youth disclose their LGBTQ status to their parents or foster parents, the result is sometimes devastating. They are often rejected by people they rely upon for housing, food, and unconditional love and acceptance. Some youth voluntarily leave to escape the harassment or violence they experience at home. Some youth are forced to leave because the family does not accept their LGBTQ status: "One day my father heard me [a male] talking on the telephone to a guy who I had met. When I got off the phone he just went crazy on me....He told me to get out and literally threw me out the front door. I was devastated and didn't know where to go."[14] Some youth travel from sofa to shelter to street corner. They often have no permanent place to call home. On the streets they are more susceptible to violence and crime.

11 Patrick Healy, *Suicides in State Top Homicides*, Boston Globe, Feb. 28, 2001, at B1.

12 Welcome Wagon at 22.

13 *Id.* at 28.

14 *Id.* at 50.

§ 11.2c School

Youth spend the majority of time at school. It is supposed to be a place to feel safe and accepted. Yet according to Karey Scheyd, Deputy Director of Parent Recruitment for the New York Administration for Children's Services, "[s]afety holds different meaning for LGBTQ kids: School is hard. Any situation can mean danger. Just because they are in stable placement doesn't mean they are safe. We are quick to assume that the world likes gay people. [The] simple fact of being queer puts people at risk (physically and mentally). Judges and lawyers should start with these understandings and then take the step to question safety."

School is the place where youth learn to interact with peers and form trusting relationships that often last into adulthood. LGBTQ youth in foster care have the added burden of moving from placement to placement and changing schools. They experience harassment and rejection through multiple school placements. They often do not have supportive teachers or counselors to turn to for help. Many end up dropping out or doing poorly in their studies.

§ 11.2d Prejudicial Treatment

Seventy-four percent of LGBTQ youth in foster care believe they experience prejudicial treatment by service providers because of their sexual orientation or gender identity.[15] Youth often believe professionals accept people regardless of their differences. Sometimes they are wrong. Many youth in foster care find the professionals who work with them are just as harmful as the parents who abused them or the peers who harassed them. This realization is harmful because youth feel they have nowhere to go for support. The people who are supposed to support, care, and provide treatment for them are often the perpetrators of the harassment, intolerance, and sometimes violence.

One LGBTQ youth reported that he was in a religious foster home where it was not okay for him to be gay: "I had my own lock box with my stuff in it. They broke into it one day while I was at school. When I got home, they had me all packed up, because I was gay. I left town."[16] Another youth reported, "When I was in a group home, I was assaulted because I'm gay. I didn't appreciate that I had to take it. The staff knew what was going on but they didn't do anything to stop it."[17]

Still another youth reported that although most staff did not say anything to his face, he overheard staff saying things like "That new fag kid that just came in. [*sic*.] Why do they make us put up with these gay children? Why do they ship them here? No wonder their parents get rid of them."[18]

§ 11.2e Substance Abuse

LGBTQ youth are twice as likely as heterosexual youth to abuse alcohol and eight times as likely to use cocaine/crack.[19] Using and abusing illegal substances is a common way that youth escape their troubles. LGBTQ youth in foster care have especially high rates of substance abuse due to their circumstances. Isolation, rejection, harassment, and violence can all be forgotten by getting high. "[P]ot, acid, ecstasy, speed...I did it all. I just wanted to kill the loneliness I felt inside. I really didn't care if I lived or died. Trying to deal with my identity was a really difficult time for me."[20] They have limited exposure to positive coping tools and turn to substances to deal with the problems in their life.

By becoming aware of the risks associated with LGBTQ youth in foster care, lawyers and judges can take steps to address these issues. The fact that a youth is LGBTQ should factor into placement, permanency, services, advocacy, and court rulings.

§ 11.3 Interacting With Youth

Judges and lawyers need to closely watch how they interact with LGBTQ youth. The following list is not exhaustive and should be supplemented based on your comfort level and knowledge of LGBTQ issues.

§ 11.3a Attitudes

Whether known or not, lawyers and judges have preconceived notions when representing a child client or presiding over a dependency case. Some are appropriate. For example

- Children shouldn't live in unsafe homes.
- Youth are generally better off in family-like settings.
- Children need stability and permanency in their lives.

These notions are based on knowledge of the child welfare field, child development, and the best interests of children.

15 Shannon Wilbur et al., CWLA Best Practices Guidelines: Serving LGBT Youth in Out-of-Home Care 6 (2006).

16 Youth statement, Opening Doors Project listening forum, Jacksonville, FL, October 12, 2006.

17 Child Welfare League of Am. & Lambda Legal Def. Educ. Fund, Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care 22 (2006).

18 Welcome Wagon at 62.

19 Child Welfare League of Am. & Lambda Legal Def. Educ. Fund, Fostering Transitions: CWLA/Lambda Joint Initiative to Support Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Youth and Adults Involved with the Child Welfare System (2007), *available at* http://www.lambdalegals.org/take-action/tool-kits/getting-down-to-basics/risk-data.html.

20 Welcome Wagon at 30.

Some preconceived notions, however, can harm a youth and/or family. Some can be based on a lack of understanding and information. Judges must understand their own beliefs about sexual orientation and gender identity when presiding over dependency cases. They must also learn the issues facing LGBTQ youth in foster care. Remaining objective does not require a judge to be free of these beliefs; it requires a judge to recognize them and to make rulings without imposing them on children and families. For example, a judge may feel uncomfortable with gender nonconforming behavior but have to remain objective when determining how to keep a transgender girl safe in a group home.

§ 11.3b Confidentiality

Children's lives in dependency cases are often publicized for many to examine. The social worker knows about the youth's home life, school progress, doctor appointments, test results, friends and social activities, and frequency of therapy appointments. Foster parents get reports about youth before they come into their homes. These reports are filled with details about the youth and the birth family. One youth reported that his foster parents were given a report when he was placed in their home at age six stating that he was gay. He expressed dismay because at six years old he did not know what being "gay" meant.[21] The lawyers know most things that the social worker knows and have read and discussed the results of health professionals' reports. The judge hears it all. Although hearings may be closed, inevitably people who do not know the youth hear the most intimate details of the youth's life.

Sexual orientation and gender identity are intimate issues. Heterosexual youth have trouble discussing these issues, but for LGBTQ youth, the situation is worse. Because stigma is often attached to LGBTQ people, youth may not disclose their status for fear of others finding out. Constantly living under this fear can spiral into any number of common risks facing LGBTQ youth. Lawyers and judges can help lift the fear and stigma by keeping communications confidential.

When representing a youth, the lawyer should explain that all communications between the youth and lawyer (except under a few circumstances) are confidential and that the youth should feel comfortable telling the lawyer anything. The lawyer must stick to that promise. Many times lawyers with good intentions disclose information to social workers, foster parents, the judge, and others because they think it is in the best interests of the child. If youth are promised confidentiality, they may be more likely to disclose their LGBTQ status. The lawyer and the youth can then work together to decide if and when the youth should tell others.

21 Youth statement, Opening Doors Project listening forum, Denver, CO, July 28, 2006.

If a youth is represented by a GAL or CASA, there is no confidentiality requirement. The GAL or CASA must discuss confidentiality with the youth and explain what communications will and will not be shared.

§ 11.4 Defining Terms

§ 11.4a Lesbian

A lesbian is a female whose primary sexual and romantic attractions are to other females. Some lesbians have romantic attractions to males and some do not. It is important to note that some females who have sexual or romantic attractions with other females, sometimes exclusively, may not call themselves lesbians.

§ 11.4b Gay

A gay male is a male whose primary sexual and romantic attraction is to other males. He may have sexual and romantic attractions to males currently or has in the past. Some gay males may never have had sexual or romantic attractions to other males for a host of reasons (e.g., age, societal pressures, lack of opportunity, fear of discrimination) but nonetheless realize that their sexual and romantic attraction is mainly to other males. Some gay males have sexual and romantic attractions with females and some do not. Note that some males who have sexual and romantic attractions with other males, sometimes exclusively, may not call themselves gay.

"Gay" is also used as an inclusive term encompassing gay males, lesbians, bisexual people, and sometimes even transgender people. The term is still often used in the broader sense in spoken shorthand as in "The Gay Pride Parade is at the end of June."

§ 11.4c Bisexual

Bisexual males and females have sexual and romantic attractions to both males and females. Depending upon the person, his or her attraction may be stronger to females or to males, or they may be equal. Some people who have sexual and romantic attractions to both males and females do not consider themselves bisexual. Bisexuals are also referred to as "bi."

§ 11.4d Transgender

People who identify more strongly with the other gender than the one to which they were assigned (e.g., females who feel like males, or males who feel like females) are called "transgendered." Some transgendered people may "cross-dress" or "do drag" regularly or for fun (and many of these people are comfortable in their assigned gender). Other transgendered people may take hormones of the opposite gender and/or have

surgery in order to change their bodies to reflect how they feel inside. These people may also be called "transsexual." Transgendered people may identify as heterosexual, homosexual, or bisexual.

§ 11.4e Genderqueer/Intergender

Genderqueer and intergender are catchall terms for gender identities other than man and woman. People who identify as genderqueer may think of themselves as being both male and female, as being neither male nor female, or as falling completely outside the gender binary. Some wish to have certain features of the opposite sex and not all characteristics; others want it all.

Some genderqueer people see their identity as one of many possible genders other than male or female, while others see "genderqueer" as an umbrella term that encompasses all of those possible genders. Some see "genderqueer" as a third gender to complement the traditional two, while others identify as genderless. Genderqueer people are united by their rejection of the notion that there are only two genders. The term "genderqueer" can also be used as an adjective to refer to any people who transgress gender, regardless of their self-defined gender identity.

§ 11.4f Questioning

Refers to a person for whom a fixed sexual orientation and/or gender identity is not clear. Some questioning individuals may ultimately "come out" as LGBT, whereas others may be seeking additional resources to help address their internal questions. It is not developmentally uncommon for adolescents to question their sexual orientation or gender identity.

§ 11.4g Queer

Some LGBT people, particularly young people, use the term "queer" to encompass the entire LGBT community. For these people, the term "queer" is positive and empowering. Other LGBT people find this term degrading.

§ 11.5 Additional Resources

National Organizations and Research

1. ABA Center on Children and the Law, Opening Doors Project; Opening Doors for LGBTQ Youth in Foster Care: A Guide for Lawyers and Judges

http://www.ct.gov/shp/lib/shp/pdf/aba-_opening_doors.pdf

2. It's Your Life: Improving the Legal System's Approach to LGBTQ Youth in Foster Care.

http://www.americanbar.org/groups/child_law/projects_initiatives/itsyourlife.html

3. The Kids Are Listening (Social Media Project)

http://www.thekidsarelistening.org/

4. Legal Services for Children/National Center for Lesbian Rights Model Standards Project; Model Standards Project LGBTQ Practice Guide

http://www.lsc-sf.org

5. National Center for Lesbian Rights

http://www.nclrights.org

6. Breaking the Silence: LGBTQ Foster Youth Tell Their Stories: DVD and Resource CD

http://www.nclrights.org/site/DocServer/NCLR_DVDorderform.pdf?docID=1701

7. LGBTQ Youth in Foster Care System Fact Sheet

http://www.nclrights.org/site/DocServer/LGBTQ_Youth_In_Foster_Care_System.pdf?docID=1341

8. Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts

http://www.lsc-sf.org/wp-content/uploads/hidden-injustice-low-res-final.pdf

9. Child Welfare League of America; Out of the Margins: A Report on Regional Listening Forums Highlighting the Experience of LGBTQ Youth in Care

http://www.cwla.org/programs/culture/glbtq.htm

10. The National Gay and Lesbian Task Force; Foster Care Laws and Regulations in U.S.

http://www.thetaskforce.org/reports_and_research/foster_care_regulations

11. ABA Child Law Practice; Representing Transgender Youth: Learning from Mae's Journey

http://apps.americanbar.org/child/clp/archives/vol29/jan11.pdf

12. American Bar Association, Litigation Section, Children's Rights Litigation; What Lawyers Need to Know About Representing LGBTQ Youth [Videos 1–4]

http://apps.americanbar.org/litigation/committees/childrights/video/1004-video-LGBT-video01.html

13. Sylvia Rivera Project; Know Your Rights: Transgender Youth in Foster Care

http://srlp.org/files/kyr%20foster%20care%20eng-.pdf

14. National CASA Association, The Connection; Addressing the Needs of LGBTQ Youth in Foster Care

http://nc.casaforchildren.org/files/public/site/publications/TheConnection/Fall2009/Cover_Story.pdf

15. American Bar Association, Children's Rights Litigation Committee; Providing High-Quality Representation for LGBTQ Youth in Foster Care

http://apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_winter2009.pdf

Local Organizations

A comprehensive list of local, state, and national LGBTQ organizations has been compiled by Safe Schools Coalition, an organization dedicated to helping schools become safe places for all children to learn, regardless of gender or sexual orientation. Safe Schools Coalition has a list of resources for every county in Washington State that can be found at: http://www.safeschoolscoalition.org/blackboard-washington.html.

Chapter 12

The Educational Needs of Children in Foster Care[1]

Introduction by Janet Skreen[2]

§ 12.1 Washington Courts' Approach to Improving Education for Dependent Children and Youth

In recent years, Washington courts have focused on the need for improvement in the educational success of dependent children and youth. For example, at a macro-organizational level, the Washington Supreme Court Commission on Children in Foster Care cosponsors an annual Foster Youth and Alumni Leadership Summit, which emphasizes education challenges and opportunities. Additionally, sessions on the educational needs of dependent children and youth have been offered at Superior Court Judges' Association Spring Programs. Courts have worked collaboratively with the Department of Social and Health Services (DSHS) Children's Administration, the Attorney General's Office, parents' and youths' counsel, and the school system to improve juvenile court dependency hearings so that courts inquire and are informed about children's educational progress. The judicial branch is also represented as part of the interested stakeholders group for the Building Bridges Program, a collaborative dropout prevention, intervention, and retrieval system housed at the Office of the Superintendent for Public Instruction.

In a more day-to-day way, Washington State's judicial officers are also working with stakeholders to improve court orders for dependency proceedings to ensure the regular tracking of children's educational progress and to timely address any identified problems. One example in particular of a method to improve this tracking is utilization of unified family courts. Unified family courts are structured so that judicial officers may be informed of all of the issues in cases concerning families, including dependencies, Becca cases (truancy, CHINS, and at-risk-youth petitions), and family law actions.

Further, the Washington State Family and Juvenile Court Improvement Plan, developed in 2008, works on a local level to improve dependency case outcomes including addressing the educational needs of children. Washington sends a delegation to the national conference, "Child Welfare, Education and the Courts Summit," sponsored by the Children's Bureau. Wash

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1 This chapter is excerpted from the Technical Assistance Brief entitled "Asking the Right Questions II: Judicial Checklists to Meet the Educational Needs of Children and Youth in Foster Care." Sophia I. Gatowski, Tracy Medina, & Megan Warren, Nat'l Council of Juvenile and Family Court Judges, Asking the Right Questions: Judicial Checklists to Meet the Educational Needs of Children and Youth In Foster (2008) [hereinafter Asking the Right Questions II]. The Technical Assistance Brief on which the current brief was based was first released in 2005. For more information on this technical assistance brief or to obtain a full copy, write to the following address:

Permanency Planning for Children Department
National Council of Juvenile and Family Court Judges
P.O. Box 8970
Reno, NV 89507

Copies may also be requested from pppcd@ncjfcj.org or downloaded from the Web site http://www.ncjfcj.org.

2 Janet Skreen is a Senior Court Program Analyst with the Administrative Office of the Courts. Ms. Skreen staffs the Superior Court Judges' Association Family and Juvenile Law Committee and works with courts and stakeholders on juvenile and family law issues. Ms. Skreen received her B.A. in secondary education in 1975 from Eastern Oregon State College and a J.D. in 1988 from the University of Puget Sound School of Law.

ington was selected as a participating state in the Three-Branch Institute in 2011, which focused on reducing the number of adolescents in foster care and improving their outcomes, including education. Finally, Children's Administration released "An Education Success Strategy for Washington State's Youth Care and Alumni" in March 2011. The report highlights the accomplishments of a workgroup created at the request of the Assistant Secretary, Denise Revels Robinson to draft recommendations for a state education framework. A copy of the report can be found on the Court Improvement Training Academy (CITA) Web site at http://www.uwcita.org/.

With this framework in place, Washington's Dependent Child's Education Judicial Checklist was developed through cooperation with and assistance from the National Council of Juvenile and Family Court Judges, Children's Administration, the Office of the Superintendent of Public Instruction, Casey Family Programs, and TeamChild. The Washington checklist has been on the bench of every juvenile court for the past several years. Hard copies are provided to the courts at no cost upon request to the Administrative Office of the Courts through the Court Improvement Program. The checklist is available as Appendix A to this chapter.

§ 12.2 The Educational Needs of Children in Foster Care

Studies have shown that education is a significant factor in determining the success of children and youth as they exit the foster care system. Yet research measuring educational, social, and vocational outcomes for children and youth in foster care indicate that the majority of children who enter the protection of child welfare agencies do poorly in school. They are significantly under-represented in post-secondary programs and are over-represented in special education programs. This is not surprising given the instability many young people experience in foster care—both in terms of changes in placements and changes in schools. The importance of stability for foster youth was recently demonstrated in a study of more than 1,000 alumni of foster care which found that youth who had one fewer home placements per year were twice as likely to graduate from high school before leaving care.[3] In Washington, foster care students scored 16 to 20 points below their fellow students in state-wide standardized tests.[4]

Concrete, practical interventions are needed to ensure that children and youth who are placed in foster care, or who are living with parents under the supervision of child protective services, will be as successful in school and prepared for the future as their peers. New collaborations among child welfare, educational systems, and juvenile and family courts are also needed to improve educational outcomes for children and youth in foster care. Decisions made by juvenile and family court judges set standards within the community and in the systems connected to the court, the families, and the children.[5] The juvenile court judge, who inquires about the educational needs of children and youth in foster care from the bench, is setting expectations and standards for practice which may have a significant impact on how social workers, educators, and other service providers respond to young people in the future.

While the majority of Model Court judges[6] interviewed in a survey conducted by the Permanency Planning for Children Department (PPCD) believed that judges play a distinct role in ensuring that the educational needs of youth in care are met, many reported that they had few resources to assist them in exercising this role.[7] Clearly, there is a great need for practical and effective tools to address this issue. This *Technical Assistance Brief* presents such a tool—a field-tested checklist that judges can use to make inquiries about the educational needs of children and youth under their jurisdiction, with the goal of positively impacting their educational outcomes and preparing them for successful adulthood.

§ 12.3 A Brief History of the Checklist Project

In December 2002, TeamChild,[8] with support from Casey Family Programs,[9] developed an education checklist for use

3 P.J. Pecora et al., Assessing the Effects of Foster Care: Early Results from the Casey National Alumni Study (2003).

4 M. Burley & M. Halpern, Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care (2001).

5 Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 Juv. & Fam. Ct. J. 25 (1992).

6 As of 2005, there were 28 model court jurisdictions currently participating in the Child Victims Act Model Court (VAMC) Project. This project is funded by the U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, with some model courts funded by local state court improvement programs. Each model court is focused on collaborative systems change in child abuse and neglect case practice and serves as a "laboratory" for the study of such change. For more information about the VACM Project, see Nat'l Council of Juvenile and Family Court Judges, Child Victims Act Model Courts Project Status Reports (1997–2003). The survey of Model Court Lead Judges regarding the educational outcomes of youth in foster care was completed in December 2001 with funding from the Marguerite Casey Foundation.

7 Melissa Litchfield et al., Improving Educational Outcomes for Care: Perspectives from Judges and Program Specialists (2002).

8 TeamChild is a non-profit legal services organization with five offices located throughout Washington State. Begun in 1995, the program has been recognized nationally as an innovative leader in successful work with young people who might otherwise fall through the cracks. For more information about TeamChild, please visit their Web site at http://www.teamchild.org.

9 Casey Family Programs, established by United Parcel Service founder Jim Casey, is a Seattle-based national operating foundation that has served children, youth, and families in the child welfare system

by judges within the state of Washington.[10] The Casey Family Programs then provided the PPCD of the National Council of Juvenile and Family Court Judges (NCJFCJ) with funding to seek the input, testing, and evaluation of the Checklist by Model Court judges. This testing process aimed at ensuring the Checklist's applicability as a resource for courts around the country, ensuring its efficacy as a tool to help different system stakeholders to collaborate and improve educational outcomes for foster youth, and ensuring that educational issues within the courtroom and beyond are prioritized. In addition, feedback was obtained from young adults who were a part of the foster care system in order to strengthen the Checklist. Since the release of the first Checklist, NCJFCJ reports "a changed court culture that now includes a focus on education."[11]

§ 12.4 Questions to Ensure that the Educational Needs of Children and Youth in Foster Care are Being Addressed

Once feedback on the original Team Child/Casey Checklist was provided by the PPCD Advisory Committee, Model Court Lead Judges, filed-test judges, and the YACC focus group, recommendations were incorporated into a new, nationally applicable education checklist. Areas of focus, or critical issues addressed by the Checklist, are briefly discussed below.

§ 12.4a Enrollment

If a child or youth has a change in placement which also requires a change in schools, it is critical to expedite the enrollment process. A child or youth cannot begin school until they are successfully enrolled. In order to do this, it is important to determine that children and youth have all of the necessary information or records to enroll in school (e.g., proof of immunization to enroll). A birth certificate might also be required for firsts-time enrollment in a public school. Children and youth in foster care may experience delays in school enrollment when they move from placement to placement. Judges in the filed-test study of the Checklist reported that delays were often the result of transferring records. Children and youth in foster care should have documents that detail health and educational history. Asking schools to expedite transfer of records for children and youth in care can reduce delays in enrollment.

Homelessness should not be a barrier to enrollment. Schools can

a. Waive requirements for parental signature;
b. Arrange for vaccinations at community clinics;
c. Enroll a homeless child or youth without proof of legal residence; and
d. Allow a homeless child or youth to stay in his or her school or assist with transportation to a new school.

§ 12.4b Provision of Supplies and Transportation

A child's or youth's success in school may be dependent on the resources provided to that young person. Provision of the appropriate school supplies (e.g., books, music instruments, uniforms), and transportation to and from school, can greatly impact the child's educational success. Lack of reliable transportation is often a barrier to a child attending school regularly. If the child or youth is homeless (which includes awaiting foster care placement) or has needs for specialized transportation because of a disability, the school district may be responsible for providing door-to-door transportation.[12]

§ 12.4c Attendance and Performance Level

Attendance records and reports on academic performance can provide beneficial information to the court. Also, schools might not be aware that a child or youth is missing school because of juvenile or family court matters. Children or youth experiencing multiple moves during a school year may also be struggling academically and lose incentive to attend. Lack of attendance may be symptomatic of other problems and indicate to the court that more information about underlying issues may be important to obtain. Through collaboration, courts and schools have been able to successfully tailor and implement interventions to prevent a school from filing a truancy petition on a child or youth in foster care.

§ 12.5 Tracking Educational Information

Initially, judges field-testing the original Checklist not only experienced hesitancy and disbelief from stakeholders when they asked for educational information, but they also found that stakeholders did not know who should provide the court with such information. It is important to identify one key individual to be responsible for collecting information, tracking information, and reporting information to the court. Most educational rights flow through the natural parents or guardians of a child

since 1966. Its mission is to provide and improve—and ultimately to prevent the need for—foster care. Casey provides direct services, promotes advances in child welfare practice and policy, and collaborates with counties, states, and American Indian and Alaska Native tribes to improve services and outcomes for the more than 500,000 young people in out-of-home care across the U.S. For additional information, please visit their Web site at http://www.casey.org.

10 The current version of this checklist can be found following this chapter.

11 Asking the Right Questions II at 4.

12 The federal McKinney-Vento Homelessness Assistance Act is designed to help youth and their families who are experiencing homelessness and to protect the right of homeless youth to attend school. It is intended to enable homeless youth (including those awaiting foster care placement) to remain in their school of origin if they wish, and it requires school districts to provide transportation to that school if needed. For more information, visit http://www.nlchp.org.

or youth. If a child or youth is involved in a dependency or in a parenting or domestic relations matter, the court may need to designation a person responsible for educational decision-making, at least on a temporary basis. This responsible adult can help follow through on basic tasks necessary for enrollment, transportation and monitoring the progress of a child or youth. Ensuring that the designated person has authority to act can improve stability and success in school.

§ 12.6 Change in Placement/Change in School

School stability should be a central consideration anytime a placement change is being made. A change in schools can have a dramatic impact on a child or youth. Young people spend a majority of their day in a school setting, establishing friendships, bonding with teacher/mentors, and participating in any extracurricular activities that they may enjoy. It is crucial that all stakeholders involved in a case are sensitive to the fact that a disruption in schools may be just as damaging to a child or youth as a change in home-setting.

§ 12.7 Health Factors Impacting Education

Early identification and intervention for potential learning and behavioral problems can prevent major difficulties when a child or youth enters school. Young people with physical, emotion

al, or mental heal issues may be entitled to early intervention programs, special education, and related services through the public schools. (Special education services are available from birth to age 21.)

§ 12.7a Physical Health, Mental Health, and Emotional Issues

Children and youth eligible for special education services under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973 (Section 504) should have a written plan that describes the individualized instruction relating to the child's or youth's needs. Education plans should be reviewed at least annually. At any time, schools may convene meetings to review the child's or youth's progress, repair or adjust a deficient plan, or reexamine the workings of a poorly implemented plan. Individualized plans should be developed by a team that includes a school administrator, special education and regular education teachers, someone who can interpret evaluation data, a parent, a person meeting the definition of parent under IDEA or a surrogate parent, and the child or youth if appropriate. A child's or youth's needs must be re-evaluated at least once every three years. Re-evaluations could occur more frequently if necessary to adjust a child's or youth's educational program.

Children and youth should receive evaluations in *all* areas of suspected disability. Providing relevant information about a child or youth helps define the scope and focus of the special education evaluation. If unique needs exist, schools may need to pay for an outside evaluator with special training and expertise (e.g., an expert in learning disabilities, mental retardation, emotional disabilities, or attention deficit disorder). Before undertaking an evaluation, schools require consent from a parent, guardian, or someone with legal authority to make decisions about education. If a birth parent is unknown or cannot be located, or if the child or youth is a dependent of the state, the court may need to designate and give authority to someone to give consent and follow-up on the evaluation and planning processes. Pursuant to amendments enacted in 2004, IDEA now explicitly permits judges, in addition to the Local Education Agency (LEA) to appoint surrogate parents. Further, these 2004 amendments to the IDEA (effective July 1, 2005) contain specific provisions that allow the judge to appoint an individual to consent to the initial evaluation when a child is a "ward of the state" and other criteria are met.[13]

§ 12.8 Extracurricular Activities and Talents

A conscious effort needs to be made to ensure that the focus of questioning about education is not always negative. Educational questioning can allow for praise and encouragement and should focus as much as possible on the strengths of a young person. Youth focus group participants expressed a concern that negative stereotypes are associated with youth in foster care with respect to education, and as a consequence, expectations for achievement may be set far too low. Former foster youth reported that inquiry into their education typically arose when they were having problems at school (e.g., behavioral issues, slipping grades). Focus group participants stressed that they want to make sure that the youth who are doing good in school are not forgotten. Ask about what the young person is involved in because sometimes their success is not reflected in their extracurricular activities or community work. What are some of the child's gifts? What extracurricular activities is the young person involved in that encourages development of these gifts or special talents?

§ 12.9 Transitioning

Pursuant to the federal Chafee Foster Care Independence Program, young people likely to remain in foster care until age 18 should have a personalized independent living plan. The law requires young people themselves to participate in designing and carrying out their own plan. In addition, all youth on an Individualized Education Plan (IEP) who are over age 16 are required by IDEA to have a transition plan for post-

13 P.L. 108-446, Section 614(a)(1)(D)(3) is effective July 1, 2005. For more information on IDEA amendments and regulatory changes, see http://www.abanet.org/child/rclji/education.

secondary education, employment, and independent living. The plan should incorporate the student's goals and objectives and address vocational and independent living needs. Also, the juvenile court may appoint or designate an adult to thoroughly review and explain the independent living plan or special education plan to the youth.

Some of the judges that filed tested the Checklist reported that they used the Checklist in combination with information about the Chafee Foster Care Independence Program.[14] "I talk a lot in court about [Chafee] and I think that everyone finally knows about it," one judge explained. Judges also stressed the importance of passing along information about this Act directly to youth in care. "If a child has an interest in going on with any other post-secondary education—be it community college, university, or the school of beauty—they need to know

what is out there to help them. Judges need to know about the local pots of money to ensure that children in foster care can get to it," a judge commented. A new source of financial help for youth aging out of foster care was created in February 2003, when Congress appropriated over $41 million for Education and Training Vouchers (ETVs) as part of the Chafee Foster Care Independence Program. States were first able to access these funds in 2004 to provide up to $5,000 per year to youth who have aged-out of foster care and are enrolled in a post-secondary education program.[15]

In 2011, Washington passed legislation[16] implementing the federal Fostering Connections to Success and Increasing Adoptions Act of 2008[17]. In brief, the new laws provide that foster youth may elect to stay in foster care to continue their education efforts provided that the youth is enrolled and participating in a secondary education program or working toward a GED, a post-secondary or vocational educational program, a program or activity designed to promote or remove barriers to employment, or who are either employed for 80 or more hours per month or incapable of engaging in any of the aforementioned activities because of a medical condition that is supported by regularly updated information.

14 *See generally* K. Carroll, The Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program (2002); *see also* S.H. Badeau, Frequently Asked Questions II about The Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program (2000), *available at* http://www.natlfostercare.org.

15 Information on ETVs can be found at http://www.nrcys.ou.edu/yd/resources/publications.html.

16 S.S.H.B. 1128, 62nd Legis., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 330.

17 Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 403, 122 Stat. 3949 (2008) (codified as amended at 42 U.S.C. § 1305 (2008)).

§ 12.10 Other Issues to Consider

Although efforts were aimed at creating an all-inclusive education checklist, below are a few additional education issues that judges and former foster youth suggested would be important to address.

§ 12.10a Length of Education Time per Day

Because of homebound educational practices put in place as a result of behavioral issues at
school, as well as the increasing popularity of home-schooling, judges should be mindful of the amount of time that a young person is receiving educational services per day and who is providing these services. Judges also reported that, under certain circumstances, inadequate time allocated to a child's education may ultimately require an out-of-home placement in the best interests of the child.

§ 12.10b Age-Specific Questioning

When asking questions about the education of dependent children, it is necessary to consider the age of the child or youth. For example, when asking whether or not the young person has the appropriate supplies for school, consider that higher cost amounts for participation in sports, clubs, etc., may be associated for those individuals in junior high and high school. Also, when asking about absences from school, consider that absences of youth in high school can directly impact credits toward high school graduation.

§ 12.10c Preparing Infants and Toddlers for School

Judges need to take the lead in making sure that infants and toddlers in the child welfare
system are also prepared to enter the educational system. One judge shared, "We [judges] need to take the lead by supporting efforts to create more opportunities for Head Start and Early Head Start[18] programs in order for these children to get the educational start that they need—otherwise, they will arrive at kindergarten with one hand already tied behind their backs." Infants and toddlers (birth to three years) with suspected speech, cognitive, or motor delays or attention or behavioral difficulties, may also be eligible for special education or related services.[19]

18 *See generally* http://www.nhsa.org; http://www.acf.hhs.gov/programs/ohs/; http://www.naeyc.org.

19 *See generally* J.D. Osofsky et al., Questions Every Judge Should Ask about Infants and Toddlers in the Child Welfare System (2002).

§ 12.10d Directly Addressing and Involving Youth during Educational Questioning

When the former foster youth were asked if they felt that they were given enough opportunity to bring their educational needs to the attention of the court, most replied that they *did not*. Reasons given for why they felt this way include the following:

- "The courts were not asking."
- "I didn't know that the court had anything to do with my education."
- "They didn't give me a lot of opportunities to talk about my education—my court dates were during school."
- "I never went to court. I didn't know that they could help."
- "I didn't know that the court's purpose was anything other than to listen to the caseworker and take their side as the truth—so, why speak up or come to court?"

The former foster youth also reported that they were unclear about the role their caseworker played in their education. Half of the youth focus group participants shared that they *did not* feel that they were given enough opportunity to bring their educational needs to the attention of their caseworker. One youth explained, "My caseworker lacked the knowledge and training to help me [with my education]. I was telling her what to do on my case." Another youth added, "My casework was only trying to hear about my placement and if I was doing bad in school."

Methods recommended by former foster care youth with respect to how judges could have helped address their educational needs include the following:

- "He/she could have talked to me in chambers."[20]
- "The judge could have requested that I come to court in order to hear about it from me."
- "He/she could have addressed me like I am a human being and not a docket number. A simple, "How are your grades?" would have done it."
- "Judges could try to listen to us and hear our side of the issues—even if we have already been stereotyped for being in foster care and think that we will not do good in school or will drop out."

Additional questions recommended by youth focus group participants to be asked *directly of the youth by the judge* are as follows:

- How has being moved from your parents' home affected your education?
- Is your current living environment encouraging and helpful to your educational needs?
- Is there anything that courts can do to help you in school?
- Do you plan to go to college? If so, do you feel prepared?
- Do you like your current school?
- How do you feel when your caseworker attends your school? Do you like it?
- Are you getting all of the help that you need for school?
- Do you understand why you are in Special Education? Do you feel that you belong in Special Education?

What else can the court do to ensure a child's educational stability and success?

- Keep asking key questions about a child's education.
- Plan regular court review of the child's enrollment, attendance, and progress in school.
- Designated a responsible adult to ensure that services are requested an in place.
- Anticipate potential disruption to a child's education. Planning for change is the best way to reduce education instability and can take place prior to moving a child in or out of a placement or transitioning out of foster care altogether.

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20 Washington conducted a pilot program in 2008–2010, giving foster youth ages 12 and older the opportunity to speak with their judicial officer in chambers with their counsel present if they desired. A report of the findings of the pilot was released in December 2010. Washington State Center for Court Research, Dependent Youth Interviews Pilot Program (2010), *available at* http://www.courts.wa.gov/wsccr/pubs/DYIReport.pdf. Of eligible youth who came to their hearings, 33 percent took part in the interview. Most youth were glad they came to court and gave a generally positive report about their experience in court. Forty percent of the interviewed youth brought up school as a topic of discussion with the judicial officer. Over 90 percent of the participating youth agreed that the judge talked to and listened to them. *Id.*

- Suggest that the child remaining in his or her current school despite a change in residence.

- Ask a parent, CASA, state social worker, or other responsible adult to request records and assist in passing them on to a child's new school. Children in foster care experience delays in school enrollment when they move in and out of placement, usually because of delays in transferring records.

- Ensure that court hearings or orders do not impair the ability of a child to enroll or attend school. For example, a no contact order between students or between a teacher and student can be a barrier to a child's return to school. Include language in the order that allows the child to attend school with supervision and support or which allows contact necessary to pursue re-admission or alternative school placement.[21]

Additional steps include the following:

- Inquire as to a young person's progress in school during each hearing.

- Encourage the child welfare agency to maintain the young person's school placement, despite moves in care.

- Work with each system to develop formal protocols regarding confidentiality and the sharing of information about educational needs.

- Hold regular meetings with decision-makers anon the Board of Education.

- Involved educational representatives in court improvement efforts and include them in court improvement committee membership.

- Give children and youth a voice in the process.

- Elevate the importance of education for youth in care with policymakers and other community stakeholders to inform key decisions.

- Facilitate the development of collaborative structures and strategies to improve educational outcomes such as the following:

    - Create a memorandum of agreement and understanding among school, social services agencies, and the courts to share information;

    - Train judicial officers and other key stakeholders on educational issues;

    - Provide educational advocates or liaisons to ensure that the educational needs of children and youth are me;

    - Participate in reciprocal training with child welfare agencies and school districts;

    - Convene joint committees;

    - Provide more information about state and federal laws on the educational rights of children;

    - Develop enforcement tools for judges to ensure that school districts are meeting the educational needs of children and youth in foster care;

    - Offer cross-training for all court participants on educational issues for children and youth in foster care;

    - Address confidentiality barriers (fact or fiction) that can create and perpetuate a lack of understanding among agencies, schools, and courts; and

    - Include foster parents in collaborative efforts.

21 TeamChild, Critical Questions and Strategies for Meeting the Educational Needs of Children and Youth in Juvenile and Family Court: Information for Judges (2002).

APPENDIX A

DEPENDENT CHILD'S EDUCATION JUDICIAL CHECKLIST

May 9, 2006 Edition

A more comprehensive checklist and accompanying technical brief are available at www.ncjfcj.org

1. Enrollment and Attendance

- ☐ Is the child enrolled and attending school?
- ☐ Have efforts been made so the child can remain at the same school?
- ☐ Has there been a **change of school** since the last hearing? If so, **why?**
- ☐ Who is responsible for getting the child to school?
- ☐ Has the child been truant, suspended, or expelled?

2. Child's Progress

- ☐ Is the child making academic progress?
- ☐ Is the child passing the WASL?
- ☐ Is the child making social/emotional progress?
- ☐ Does the child have physical, emotional, or mental health issues that adversely affect the child's progress at school?
- ☐ Are any assessments needed?
- ☐ Does the child have special education needs?
- ☐ Does the child have an IEP or a Section 504 Plan?
- ☐ For age 14+: is there an independent living skills/transition plan (ILS)?
- ☐ For grades 9 –12: is there preparation for post-secondary education?

3. Education Decision Making Responsibility

- ☐ Who will collect and communicate child's educational history and needs?
- ☐ Who will be responsible for regular, day-to-day decision-making?
- ☐ Who will be responsible for special education needs decision-making?
- ☐ Who will monitor the child's educational progress on an on-going basis?

4. When did the Social Worker Last See the Child?

5. What can the court do to ensure the child's educational stability and success?

The Administrative Office of the Courts gratefully acknowledges the work done by the National Council of Juvenile and Family Court Judges, Casey Family Programs, and TeamChild. This checklist was developed from NCJFCJ's Technical Assistance Brief "Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed" (April 2005), in collaboration with Children's Administration, OSPI, Casey Family Programs, and TeamChild.

Chapter 13

Dependency Pre-Filing Requirements[1]

Carrie Hoon[2]

§ 13.1 Referral

§ 13.1a Mandatory Reporters

When any one of the following people has reasonable cause to believe that a child has suffered abuse or neglect, he or she is required to make sure that a report is made to the proper law enforcement agency or to the Department of Social and Health Services (DSHS):[3]

- Health services practitioners
- County coroners or medical examiners
- Professional school personnel
- Social service counselors
- Psychologists
- Pharmacists
- Responsible living skills program staff
- Persons with supervisory capacity over a person with unsupervised access to a child as part of their employment, contract, or voluntary service
- Law enforcement officers
- Juvenile probation officers
- Placement and liaison specialists
- DSHS employees
- Registered or licensed nurses
- Employees of the Department of Early Learning
- Licensed or certified child care providers or their employees
- State family and children's ombudsmen and any volunteers in the ombudsman's office
- HOPE center staff[4]

Courts have found that the mandatory reporting requirements of this statute trump statutory privileges such as the counselor-patient privilege.[5]

§ 13.1b When a Report Must be Made

The report of abuse or neglect must be made at the first opportunity, but in no case longer than 48 hours after there is reasonable cause to believe that the child has suffered abuse or neglect. Identity of the accused, if known, must also be reported.[6]

§ 13.1c Other Reporters

Anyone, not just those listed above, with reasonable cause to

1 Last revised in Fall 2009.

2 Carrie Hoon is an Assistant Attorney General with the Washington State Attorney General's Office. She advises Children's Administration Headquarters, coordinates legal training of social workers, represents Children's Administration in appeals, and provides practice advice to Assistant Attorneys General state-wide. Ms. Hoon graduated from the University of Washington in 1998, and from the UW School of Law in 2001. She thereafter joined the Attorney General's Office, initially representing the Department of Labor and Industries, and soon also representing the Department of Social and Health Services. Ms. Hoon represented DSHS in child welfare cases in Clark, Cowlitz, Skamania, and Pierce Counties. She also participates in training of Assistant Attorneys General and social workers, as well as mentoring new juvenile litigation attorneys.

3 RCW 26.44.030(1).

4 A "HOPE center" is an agency licensed by the secretary to provide temporary residential placement and other services to street youth. RCW 74.15.020(1)(g).

5 *See, e.g., In re J.F.*, 109 Wn.App. 718, 731–32, 37 P.3d 1227 (2001).

6 RCW 26.44.030(1)(e).

believe that a child has suffered abuse or neglect may report such an incident to the proper law enforcement agency or to DSHS.[7]

§ 13.1d Protections and Prohibitions Regarding Reporters

Any person who in good faith reports abuse or neglect or testifies concerning alleged child abuse or neglect in a judicial proceeding is immune from any liability arising out of such reporting or testifying.[8] A person who, intentionally and in bad faith, knowingly makes a false report of alleged abuse or neglect shall be guilty of a misdemeanor.[9]

§ 13.2 DSHS Response to Referral

§ 13.2a DSHS's Obligations Upon Receiving a Report of Abuse

DSHS is required to investigate complaints of child abuse or neglect, and, on the basis of its findings, offer child welfare services to the child's parents.[10] DSHS is also required to offer, on a voluntary basis, family reconciliation services to families that are in conflict.[11]

§ 13.2b Offer Voluntary Services

When DSHS determines that a child has been subject to negligent treatment or maltreatment, it may offer services to the child's parents, guardians, or legal custodians to ameliorate the conditions that endangered the welfare of the child, or address or treat the effects of mistreatment or neglect on the child.[12]

§ 13.2c Report to Law Enforcement

When DSHS receives a report of alleged abuse or neglect involving a child who has died, has had nonaccidental physical injury inflicted upon him or her, or has been subjected to alleged sexual abuse, it must report such incident to the proper law enforcement agency.[13]

§ 13.2d When DSHS Receives a Report from a Physician

When a physician refers a case to DSHS on the basis of an expert medical opinion that child abuse, neglect, or sexual assault has occurred and that the child's safety will be seriously endangered if he or she is returned home, DSHS is required to file a dependency petition unless a second licensed physician of the parents' choice believes that such expert medical opinion is incorrect.[14]

§ 13.2e Information Sharing

DSHS may exchange client information when it conducts ongoing case planning with mandatory reporters, DSHS consultants, and tribal representatives when doing so is pertinent to cases currently receiving child protection services.[15]

§ 13.2f Interview of a Child

If DSHS receives reports of alleged abuse or neglect, it is permitted to interview children outside the presence of their parents.[16]

§ 13.2g Access to Records

If DSHS receives reports of alleged abuse or neglect, it shall have access to all relevant records of the child in the possession of mandatory reporters and their employees.[17]

§ 13.2h Background Checks

In investigating and responding to allegations of child abuse and neglect, DSHS may conduct background checks as authorized by state and federal law.[18]

§ 13.2i Photographing the Child

DSHS is authorized to photograph a child for the purpose of providing documentary evidence of the child's physical condition.[19]

§ 13.3 Jurisdiction

When a petition is filed alleging that a dependent child is located or resides within the county, the juvenile court of that county has exclusive original jurisdiction over the child.[20]

§ 13.3a Parties Defined

- "Juvenile" means any individual under the age of 18.[21]

7 *Id*. at (3).
8 RCW 26.44.060(1).
9 *Id*. at (4).
10 RCW 74.13.031(3).
11 *Id*. at (4). See Chapter 22 for more information concerning family reconciliation services.
12 RCW 26.44.195(1).
13 RCW 26.44.030(4).
14 *Id*. at (8).
15 *Id*. at (7).
16 *Id*. at (10).
17 *Id*. at (11).
18 *Id*. at (12).
19 RCW 26.44.050.
20 *See* RCW 13.04.030; RCW 13.34.040. *See also In re Key*, 119 Wn.2d 600, 836 P.2d 200 (1992); *In re Hansen,* 24 Wn. App. 27, 599 P.2d 1304 (1979).
21 RCW 13.04.011.

- "Parent" as used in RCW Chapter 13.34 includes biological and adoptive parents whose rights have not been terminated.[22]

- "Custodian" means that person who has the legal right to custody of the child.[23] Where a custodian has at least temporary legal custody of a child, he or she is a party to the dependency, and a properly entered dependency order must include a finding of dependency as to the custodian.[24]

§ 13.3b Who May File

Any person can file a dependency petition with the clerk of the superior court. Counties are not permitted to charge a fee for filing such petitions.[25]

22 *Id.*
23 *Id.*
24 *In re J.W.H.*, 147 Wn.2d 687, 57 P.3d 266 (2002).
25 *See* RCW 13.34.040(1); JuCR 3.2(a).

Chapter 14

Definition of Dependency[1]

Carrie Hoon[2]

§ 14.1 Statutory Elements of a Dependency

A dependent child is defined as any child who

a) Has been abandoned;

b) Is abused or neglected by a person legally responsible for the care of the child; or

c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.[3]

§ 14.2 Abandonment

A child is "abandoned" when the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities. If the court finds that the petitioner has exercised due diligence in attempting to locate the parent, no contact between the child and the child's parent, guardian, or other custodian for a period of three months creates a rebuttable presumption of abandonment, even if there is no expressed intent to abandon.[4]

§ 14.3 Abuse or Neglect Generally

§ 14.3a General Definition

""Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety … or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child."[5]

Actual harm need not be proved to establish dependency based on abuse or neglect.[6] A child may be found to face clear and present danger of suffering abuse when a sibling is found to have suffered abuse[7] or when a parent fails to protect their child from the danger of harm.[8]

§ 14.3b Physical Abuse

""Physical abuse" means the non-accidental infliction of physical injury or physical mistreatment on a child."[9] Physical abuse includes, but is not limited to, actions such as throwing, kicking, burning, or cutting a child; striking a child with a closed fist; shaking a child under age three; interfering with a child's breathing; threatening a child with a deadly weapon; or doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare, and safety.[10] Force used to touch or strike a child is considered physical abuse when it is unreasonable or immoderate.[11]

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1 Last revised in Fall 2009.

2 Carrie Hoon is an Assistant Attorney General with the Washington State Attorney General's Office. She advises Children's Administration Headquarters, coordinates legal training of social workers, represents Children's Administration in appeals, and provides practice advice to Assistant Attorneys General state-wide. Ms. Hoon graduated from the University of Washington in 1998, and from the UW School of Law in 2001. She thereafter joined the Attorney General's Office, initially representing the Department of Labor and Industries, and soon also representing the Department of Social and Health Services. Ms. Hoon represented DSHS in child welfare cases in Clark, Cowlitz, Skamania, and Pierce Counties. She also participates in training of Assistant Attorneys General and social workers, as well as mentoring new juvenile litigation attorneys.

3 RCW 13.34.030(5)(a)–(c).

4 *Id.* at (1). *See also* WAC 388-15-011.

5 RCW 26.44.020(12).

6 *See In re J.F.*, 109 Wn. App. 718,731, 37 P.3d 1227 (2001).

7 *See In re Frederiksen*, 25 Wn. App. 726, 733, 610 P.2d 371 (1979).

8 *See In re J.F.,* 109 Wn. App. at 731.

9 WAC 388-15-009(1).

10 *Id.*

11 *See* RCW 9A.16.100; *State v. Russell*, 69 Wn. App. 237, 246–247, 848 P.2d 743 (1993).

§ 14.3c Sexual Abuse

"Sexual abuse" means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. This includes the intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis.[12]

§ 14.3d Sexual Exploitation

Sexual exploitation includes allowing, permitting, or encouraging a child to engage in prostitution or engaging in the obscene or pornographic photographing, filming, or depicting of a child.[13]

§ 14.3e Negligent Treatment or Maltreatment

""Negligent treatment or maltreatment" means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety."[14]

A dependency finding does not require proof of actual harm. Rather, all that must be proven is that a clear and present danger to the child's health, welfare, and safety exists.[15]

A parent's failure to provide emotional nurturing, stability, and permanence can be as harmful to a child's well-being as physical abuse or failure to provide food, shelter, and clothing. As a result, failing to provide emotional nurturing, stability, and permanence may constitute neglect.[16]

§ 14.3f Other Considerations

When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment must be given great weight by the court.[17] However, poverty, homelessness, or exposure to domestic violence that is perpetrated against some one other than the child does not constitute negligent treatment or maltreatment in and of itself.[18]

A court may also consider the parent's noncompliance with voluntary services designed to ameliorate child neglect where the Department of Social and Health Services (DSHS) has offered appropriate and reasonable services, but the parent refuses to accept or fails to obtain available and appropriate treatment or services, or is unable or unwilling to participate in or successfully and substantially complete the treatment or services.[19]

§ 14.4 "No Parent Capable"

A dependency on grounds that there is no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to his psychological or physical development, does not turn on parental "unfitness" in the usual sense; rather, it allows consideration of both a child's special needs and any limitations or other circumstances which affect a parent's ability to respond to those needs.[20]

The existing ability or capacity of parents to adequately and properly to care for their children is inconsistent with status of dependency.[21] Further, poverty of the parent, in and of itself, does not make children dependent children within the meaning of the statute unless that poverty renders the children destitute of a suitable home.[22]

12 WAC 388-15-009(3).
13 RCW 26.44.020(14). *See also* WAC 388-15-009(4).
14 RCW 26.44.020(15).
15 *See In re J.F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001).
16 *In re Dodge*, 29 Wn. App. 486, 628 P.2d 1343 (1981).
17 RCW 26.44.020(15).
18 *Id.*; s*ee also* WAC 388-15-009(5).
19 *See* RCW 26.44.195(4).
20 *In re Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007).
21 *In re Walker*, 43 Wn.2d 710, 715, 263 P.2d 956 (1953).
22 *In re Warren*, 40 Wn.2d 342, 345, 243 P.2d 632 (1952).

Chapter 15

Emergency Orders[1]

Carrie Hoon[2]

§ 15.1 Legal Authority to Remove a Child from Parents' Care

§ 15.1a Court Order

The court may enter an ex parte order directing a law enforcement officer, probation counselor, or child protective services official to take a child into custody under the following conditions:

a) A petition is filed with the juvenile court alleging that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if the child is not taken into custody;
b) An affidavit or declaration is filed by the Department of Social and Health Services (DSHS) in support of the petition setting forth specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if he or she is not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child; and
c) The court finds reasonable grounds to believe the child is dependent and that the child's health, safety, and welfare will be seriously endangered if the child is not taken into custody.[3]

A request for an order pursuant to RCW 13.34.050 shall be made by motion and supported by an affidavit or declaration supporting the petition.

For purposes of RCW 13.34.050, "imminent harm" includes, but is not limited to, circumstances of sexual abuse, sexual exploitation as defined in RCW 26.44.020, and a parent's failure to perform basic parental functions, obligations, and duties as the result of substance abuse.[4]

Courts have broad discretion in placement decisions under the dependency statute and are allowed considerable flexibility to receive and evaluate all relevant evidence in order to reach a decision recognizing both the welfare of the child and parental rights.[5]

§ 15.1b Administrative Hold

An administrator of a hospital or similar institution or any physician may detain a child without the consent of a person legally responsible for the child whether or not medical treatment is required, when the detaining individual has reasonable cause to believe that permitting the child to continue in his or her place of residence or in the care and custody of the parent, guardian, custodian, or other person legally responsible for the child's care would present an imminent danger to that child's safety.[6]

When detaining a child in this manner, the administrator or physician is required to notify the appropriate law enforcement agency or child protective services as soon as possible and in no case longer than 72 hours.[7]

Child protective services may detain the child until the court assumes custody, but in no case longer than 72 hours, excluding Saturdays, Sundays, and holidays.[8]

§ 15.1c Protective Custody

A law enforcement officer may take, or cause to be taken, a

1 Last revised in Fall 2009.

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3 RCW 13.34.050(1).

4 *Id.*

5 *In re J.S.*, 111 Wn. App. 796, 46 P.3d 273 (2002).

6 RCW 26.44.056(1).

7 *Id.*

8 *Id.*

child into "protective custody" without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.[9]

§ 15.2 Legal Requirements After Children are Removed from their Parents' Care

§ 15.2a Notice to Parents

The petition and supporting documents must be served on the parent or with the entity with custody other than the parent.[10] Failure to effect service does not invalidate the petition if service was attempted and the parent could not be found.[11]

§ 15.2b First Deprivation Hearing

When a child is taken into custody, the court is required to hold a shelter care hearing within 72 hours, excluding Saturdays, Sundays, and holidays.[12] The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.[13] See Chapter 16 for more information concerning this topic.

9 RCW 26.44.050.
10 *See* RCW 13.34.050; RCW 13.34.062.
11 RCW 13.34.050.
12 RCW 13.34.065(1)(a).
13 *Id.*

Chapter 16

Shelter Care

Shawn Crowley[1]

1 Shawn Crowley was an attorney with The Defender Association in Seattle for 19 years. His practice has included misdemeanor and felony defense, involuntary mental health commitments, sexually violent predator commitments, and dependency cases. He served as supervisor of the Defender Association's Sex Offender Commitment division. He is now in private practice with an emphasis on criminal and dependency cases.

Shawn received his Juris Doctor from the University of Washington in 1989. As a law student he worked as a research assistant for Professor John Junker, researching search and seizure issues. Prior to law school, Shawn was a biologist, receiving his Ph.D. in 1986 from the University of New Mexico. His research and publications were concerned with the evolution of thermal physiology in cold-blooded animals. He earned a B.S. in biology from the University of Washington in 1977. He taught in the biology departments at the University of Washington and the University of New Mexico.

§ 16.1 Filing a Dependency Petition

Any person can file a petition with the clerk of the superior court showing that a dependent child is "within the county" or resides in the county.[2] Counties are not permitted to charge a fee for filing such petitions.[3]

A petition may be amended at any time. The court shall grant additional time if necessary to ensure a full and fair hearing on any new allegations in an amended petition.[4]

§ 16.2 Jurisdiction and Venue

A child is "within the county" for purposes of jurisdiction in a dependency proceeding when he is physically within the county, regardless of the parents' residence. The convenience of a forum other than the child's county of residence or the county in which they are physically located is a consideration which relates to venue, but not jurisdiction. A child may be considered within the county of a particular superior court even though the child, who had been living in the county, spends brief periods of time with relatives in another county as result of need for emergency care.[5]

Juvenile courts have exclusive original jurisdiction over all proceedings relating to children alleged or found to be dependent, but jurisdiction continues only until the dependency action is terminated or the court determines that the child is no longer dependent.[6]

The family court shall have concurrent original jurisdiction with the juvenile court over all proceedings under this section if the superior court judges of a county authorize concurrent jurisdiction as provided in RCW 26.12.010.[7] However, continued juvenile court jurisdiction shall not be a barrier to the entry of an order establishing a legal guardianship or permanent legal custody when (a) the court has ordered implementation of a permanency plan that includes legal guardianship or permanent legal custody, and (b) the party pursuing the legal guardianship or permanent legal custody is the party identified in the permanency plan as the prospective legal guardian or custodian.[8]

2 *See* JuCR 3.2(b); *See In re Gibson*, 4 Wn.App. 372, 483 P.2d 131 (1971).
3 *See* RCW 13.34.040(1); JuCR 3.2(a).
4 JuCR 3.5.
5 *See In re Gibson*, 4 Wn. App. 372, 483 P.2d 131 (1971).
6 RCW 13.04.030(1); *In re the Marriage of Rich*, 80 Wn. App. 252, 907 P.2d 1234 (1996).
7 RCW 13.04.030(2).
8 RCW 13.34.145(8)–(9).

§ 16.3 Notice of Removal - Allegations - Report

Whenever a child is taken into custody pursuant to RCW 13.34.050, RCW 26.44.050, or RCW 26.44.056, Child Protective Services (CPS) is required to make reasonable efforts as soon as possible to inform the parents, guardian, or legal custodian of the reasons why the child has been taken into custody. Notice to the parent, guardian, or legal custodian must be provided not later than 24 hours after the child is taken into custody or 24 hours after CPS is notified of the child being taken into custody.[9]

Notice may be given in writing, by telephone, or in person. However, if notice is provided by a means other than written means, reasonable efforts must be made to give notice in writing as well.[10]

Notice must be provided in an understandable manner, taking into account the parent's, guardian's, or legal custodian's primary language, level of education, and cultural background.[11]

The content of the required notice shall be substantially in the form specified in RCW 13.34.062(2)(b). (Refer to the forms section at the end of this benchbook.) The Office of the Administrator of the Courts has developed pattern forms for use in dependency and termination cases. These can be found at the Web site http://www.courts.wa.gov/forms/.

The 2011 legislature adopted a state version of the federal Indian Child Welfare Act (ICWA). The Washington State Indian Child Welfare Act (WSICWA)[12] amends numerous sections of RCW 13.34. Every dependency petition filed must contain a statement alleging whether the child is or may be an Indian child as defined in section 4 of the new act. A finding that the child is an Indian child triggers additional notice and evidentiary requirements. See the chapter on ICWA and WSICWA, *infra.*

If, after reasonable efforts to provide notice, the parents, guardian, or legal custodian cannot be located, notice shall be made to the last known address of the parent, guardian, or legal custodian.[13] Reasonable efforts shall, at a minimum, include investigation into the whereabouts of the parent, guardian, or legal custodian.[14]

If reasonable efforts at notification are not successful, or the parents, guardian, or legal custodian do not appear at the shelter care hearing, the petitioner shall testify at the shelter care hearing, or state in a declaration (1) what efforts were made to notify the parent, guardian, or legal custodian of the hearing and (2) whether actual notice was made, to whom it was made, and the manner of notice, including the substance of any oral communications. Copies of any written material used to give notice should also be provided.[15]

In the context of a dependency proceeding, due process requires that parents have notice, opportunity to be heard and defend, and right to assistance of counsel.[16]

Whenever the CPS worker is required to notify parents and children of their basic rights and other specific information, the CPS worker shall also make a reasonable effort to notify the noncustodial parent of the same information in a timely manner.[17] Further, if the petitioner knows or has reason to know that the juvenile is an Indian child as defined by WSICWA, the petitioner must also notify the child's tribe in the manner required by RCW 13.34.070(10)[18] and section 7 of the WSICWA[19]

§ 16.4 Definitions of Dependency

"Dependent child" means any child who

a) Has been abandoned;
b) Is abused or neglected as defined in Chapter 26.44 RCW by a person legally responsible for the care of the child; or
c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.[20]

If the parents have an existing ability or capacity to adequately and properly care for their children, that ability is inconsistent with the status of dependency under subsection (5)(c).[21]

In 2007, the Washington State Supreme Court held that a dependency under RCW 13.34.030(5) does not require a finding of parental unfitness, although a parenting deficiency must be shown to exist. RCW 13.34.030(5)(c) encompasses situations where the parents are incapable of caring for their child because of the child's extraordinary needs and the parents' own

9 RCW 13.34.062(1)(b).
10 *Id.* at (2)(a); RCW 26.44.115.
11 RCW 13.34.062(1)(a).
12 E.S.S.B. 5656, 62nd Legis., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 309.
13 RCW 13.34.062(2)(b).
14 *Id.* at (4).
15 *Id.*
16 *See In re H.W.*, 70 Wn. App. 552, 854 P.2d 1100 (1993).
17 RCW 26.44.120.
18 JuCR 2.3(d).
19 E.S.S.B. 5656, sect. 7.
20 RCW 13.34.030(5).
21 *See In re Warren*, 40 Wn.2d 342, 243 P.2d 632 (1952).

deficiencies. In such circumstance, the parents can petition for dependency even over the objection of the Department of Social and Health Services (DSHS).[22] However, the court may not order DSHS to supervise the placement of the child or to provide services to the parents and the child unless DSHS agrees.[23]

Dependency can also be alleged prior to the manifestation of the feared harm to a child. For example, one court has found that where a newborn child faced clear and present danger of suffering the same damage to her health and welfare as had already been suffered by her brother and sister, DSHS did not need to wait until the newborn was abused or neglected prior to intervening to protect the child.[24]

§ 16.5 Content of Petition

A dependency petition must state the child's county of residence; the names and addresses of the child's parents, guardian, or custodian; and the allegations which might lead the court to find that the child is dependent.[25]

Pursuant to JuCR 3.3, a dependency petition must also include the following:

a) The name, age, sex, and residence of the juvenile so far as is known to the petitioner;
b) The name, marital status, and residence of the parent, guardian, or custodian, or person with whom the juvenile is residing, so far as is known to the petitioner. If any of this information is unknown, the petition shall so state;
c) If the petitioner knows or has reason to know that the juvenile is an Indian child as defined by ICWA, the petition shall so state and shall name the tribe, if known, to which the juvenile belongs;
d) A statement of the statutory provisions which give the court jurisdiction over the proceeding;
e) A statement of the facts which give the court jurisdiction over the juvenile and over the subject matter of the proceedings, stated in plain language and with reasonable definiteness and particularity;
f) A request that the court inquire into the matter and enter an order that the court shall find to be in the best interests of the juvenile and justice; and
g) Any other information required by court rule or statute.

§ 16.6 Affidavit/Declaration Supporting Petition

When a dependency petition is filed accompanied by an affidavit or declaration filed by DSHS in support of the petition setting forth specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if the child is not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child, then the court may enter an order directing law enforcement or CPS to take the child into custody on the basis of the petition and accompanying affidavit. "Imminent harm" includes, but is not limited to, circumstances of sexual abuse or sexual exploitation.[26]

If a petition is filed without the necessary affidavit or declaration or the affidavit or declaration is insufficient, the parents of the child must be provided with notice and an opportunity to be heard before an order removing the child can be entered.[27]

§ 16.7 Service of Petition

The petition and supporting documentation must be served on the parent, and if the child is in custody at the time the child is removed, on the entity with custody other than the parent. Failure to effect service does not invalidate the petition if service was attempted and the parent could not be found.[28]

§ 16.8 Shelter Care Placement

No child may be held longer than 72 hours, excluding Saturdays, Sundays, and holidays, unless a court order has been entered for continued shelter care.[29] The statute fails to specify the remedy if no petition is filed within the statutory 72-hour period. However, JuCr 2.2 states that a juvenile taken into shelter care "shall be released" if an order for continued shelter care is not entered within the statutory 72-hour period. Neither the statute nor the court rule specifies a release procedure in the event of a late petition.

The only case addressing petitions filed outside the 72-hour period is *In re Brown*, 29 Wn. App. 744, 631 P.2d 1 (1981). *Brown* held that a writ of habeas corpus or mandamus was the appropriate remedy. Specifically,

> Mrs. Brown had a right to custody of the children after the 72-hour period and until the petition was filed if demand for the girls' release had been made. Once the petition was filed, jurisdiction attached and the matter must be heard. Dismissal of the action is not the appropriate remedy.[30]

A child taken into custody pursuant to RCW 13.34.050 or

22 *See In re Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007).
23 RCW 13.34.110(2)(a).
24 *See In re Frederiksen*, 25 Wn. App. 726, 610 P.2d 3371 (1979).
25 RCW 13.34.040(2).
26 RCW 13.34.050; JuCR 2.1(b)(1).
27 RCW 13.34.050(2).
28 *Id.* at (3).
29 RCW 13.34.060(1); JuCR 2.2.
30 *In re Brown*, 29 Wn. App. 744, 747, 631 P.2d 1 (1984).

26.44.050 shall be immediately placed in shelter care. ""Shelter care" means temporary physical care in a facility licensed pursuant to RCW 74.15.030 or in a home not required to be licensed pursuant to RCW 74.15.030."[31]

Unless there is reasonable cause to believe that the health, safety, or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered, priority placement for a child in shelter care shall be with a relative, as described in RCW 74.15.020(2)(a)[32] or other suitable person as described in RCW 13.34.130(1)(b).[33] The court must also determine whether the placement is in the best interests of the child.[34]

The person with whom the child is placed must be willing and available to care for the child and be able to meet any special needs of the child. The person must also be willing to facilitate the child's visitation with siblings, if such visitation is part of the supervising agency's plan or is ordered by the court. If a child is not initially placed with a relative or other suitable person, the supervising agency shall make an effort within available resources to place the child with a relative or other suitable person on the next business day after the child is taken into custody. The supervising agency shall document its effort to place the child with a relative.[35]

"If a relative or other suitable person is not available, the court shall order continued shelter care or order placement with another suitable person, and the court shall set forth its reasons for the order."[36]

Eligible persons for placement pursuant to RCW 74.15.020(2)(a) include the following:

- Any blood relative, including those of half-blood, and including first and second cousins, nephews, nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;
- The child's stepfather, stepmother, stepbrother, or stepsister;
- A person who legally adopts the child or the child's parent, as well as the natural and other legally adopted children of such persons;
- Other relatives of the adoptive parents in accordance with state law;
- Spouses of any persons named above, even if the marriage is terminated;
- Relatives (as named in the bullets above) of any half sibling of the child; and
- Extended family members, as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, a person who has reached the age of 18 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 who provides care in the family abode on a 24-hour basis to an Indian child as defined in 25 U.S.C. § 1903(4).

Additionally, the court, in considering shelter care placement, "shall weigh the child's length of stay and attachment to the current provider in determining what is in the best interest of the child."[37]

The 2011 legislature added a new section, RCW 13.34.130(1)(b)(iii), that allows DSHS to consider placement with a person who has adopted or is caring for the child's sibling or half-sibling. This placement is subject to court review and approval. The potential placement must pass a criminal background check and appear to be competent to care for the child.

The statutory preference for relative placement remains intact. The added requirement, however, to consider attachment to the current care provider, allows the court to maintain an existing placement in preference to a new relative placement.

Uncertainty by a parent, guardian, custodian, relative or other suitable person that an alleged abuser has in fact abused a child shall not, alone, be a basis to preclude placement with a relative or other suitable person.[38]

When a child is taken into custody and placed in shelter care, the supervising agency may authorize evaluations of the child's physical or emotional condition, routine medical and dental examination and care, and all necessary emergency care.[39]

"In no case may a child taken into custody pursuant to RCW 13.34.055, 13.34.050 or 26.44.050 be detained in a secure detention facility."[40]

§ 16.9 Disclosure/Discovery

Copies of DSHS or supervising agency records to which par

31 RCW 13.34.030(13); JuCR 2.1(a)–(b).
32 RCW 13.34.060(2).
33 RCW 13.34.065(5)(b).
34 *Id.*
35 RCW 13.34.060(2).
36 RCW 13.34.065(5)(d).
37 RCW 13.34.062(3)(c)
38 RCW 13.34.065(5)(f).
39 RCW 13.34.060(3).
40 *Id.* at (1).

ents have legal access in accordance with Chapter 13.50 RCW shall be given to the child's parent, guardian, legal custodian, or his or her legal counsel prior to any shelter care hearing and within 15 days after DSHS or the supervising agency receives a written request for such records from the parent, guardian, legal custodian, or his or her legal counsel. DSHS shall provide these records prior to the shelter care hearing in order to allow an opportunity to review the records. These records shall be legible and provided at no expense to the person making the request. When the records are served on legal counsel, legal counsel shall have the opportunity to review the records with the parents and shall review the records with the parents prior to the shelter care hearing.[41]

In the majority of cases, appointed counsel will receive a copy of the petition on the day of the hearing or, perhaps, the day prior. Initial contact with the client usually takes place at court on the hearing date. This leaves very little opportunity to review the allegations with the client and prepare for the shelter-care hearing. The best practice is for the filing social worker to appear prior to the start of the calendar with a copy of discovery for each litigant's counsel. This allows counsel to immediately review discovery and begin preparation. Parents are often dismayed to discover that their attorney has little knowledge of their case. Early provision of discovery can give the parent's attorney time to understand the allegations and establish a viable working relationship with the client.

In considering the scope of discovery in shelter care proceedings, courts have noted the preliminary nature of a shelter care hearing and that less process is required in proceedings which do not result in permanent deprivation of parental rights. For example,

> A dependency proceeding and a termination proceed ing have different objectives, statutory requirements, and safeguards….The key difference in the dependency hearing is "a preliminary, remedial, nonadver sary proceeding" that does not permanently deprive a parent of any rights….A finding of dependency does not inevitably lead to a termination of parental rights. A shelter care hearing is preliminary even to a depen dency proceeding.[42]

§ 16.10 Timing of the Shelter Care Hearing

The court is required to hold a shelter care hearing within 72 hours after the child is taken into custody, excluding Saturdays, Sundays, and holidays.[43]

If a parent, guardian, or legal custodian cannot attend the ini tial shelter care hearing and they have good cause for their inability to attend, they may request that a subsequent shelter care hearing be scheduled. To do this, they must contact the clerk of the court where the petition is filed prior to the initial shelter care hearing. The hearing must be held within 72 hours of the request, excluding Saturdays, Sundays, and holidays. The clerk shall notify all other parties of the new hearing date by any reasonable means.[44]

The court may continue the shelter care hearing if the parties have been unable to retain a lawyer or have been unable to have a lawyer appointed for them.[45]

§ 16.11 Waiver of the Hearing

If a parent, guardian, or legal custodian desires to waive the shelter care hearing, the court shall determine, on the record and with the parties present, that such waiver is knowing and voluntary.[46] As part of this inquiry, the court should advise the parent, guardian, or legal custodian of the nature of the shelter care hearing, the proceedings to follow the hearing, and the rights associated with a contested hearing.

§ 16.12 Advice of Rights

If the hearing is not waived, the court must advise the parties of their basic rights at the commencement of the hearing. These rights are as follows:

- To be represented by an attorney in all dependency proceedings, and, if indigent, to have counsel appointed for him or her by the court;
- To introduce evidence;
- To be heard in his or her own behalf;
- To examine witnesses;
- To receive a decision based solely on the evidence adduced at the hearing; and
- To receive an unbiased fact-finder.[47]

§ 16.13 Appointed Counsel[48]

Also at the commencement of the shelter care hearing, the court must appoint counsel if counsel has not been retained by the parent or guardian and the parent or guardian is indigent, unless the court finds that the right to counsel has been expressly and voluntarily waived. Appointed counsel will be retained at public expense. Indigency includes the inability

41 *Id.* at (4).
42 *In re H.W.*, 70 Wn. App. 552, 556, 854 P.2d 1100 (1993) (quoting *In re Key*, 119 Wn.2d 600, 611, 836 P.2d 200 (1992).
43 JuCR 2.3(b).
44 RCW 13.34.065(1)(b).
45 JuCR 2.4(a).
46 JuCR 2.3(b).
47 *See* RCW 13.34.062(2)(b)(2); RCW 13.34.090; JuCR 2.4(a).
48 JuCR 2.4(a). Please refer to Chapter 6 for more concerning indigent defense.

to obtain a lawyer without causing substantial financial hardship to himself or herself or the juvenile's family.[49] As stated previously, the hearing may be continued until the parties have counsel appointed.

§ 16.14 Who May be Present at the Shelter Care Hearing

All hearings shall be public and can be conducted at any time or place within the limits of the court, except if the court finds that excluding the public is in the best interests of the child.[50] Whether courtroom proceedings should be closed to the public requires the court to make an individualized determination based upon the five factors articulated in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982):

1. The proponent of closure must make some showing of the need to do so, and the need involves a serious and imminent risk;

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;

3. The proposed method for curtailing open access must be the least restrictive means available to protect the threatened interest;

4. The court must weigh the competing interest of the closure proponent and the public; and

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Either parent, or the child's attorney or guardian ad litem (GAL), may move to close a hearing at any time.[51]

If the public is excluded from the hearing, the following people may nonetheless attend the closed hearing unless the court finds it is not in the best interests of the child: the child's relatives, the child's foster parents if the child resides in foster care, and any person requested by the parent.[52]

§ 16.15 Procedures at the Shelter Care Hearing

"The primary purpose of the shelter care hearing is to determine whether the child can immediately and safely be returned home while the adjudication of the dependency is pending."[53]

Rules of evidence do not apply in the shelter care hearing.[54] The court reviews evidence at the shelter care hearing under a "reasonable cause" standard.[55] Reasonable cause is not defined in the statute. Some cases, however, have used "probable cause" as an equivalent standard.[56]

Hearsay evidence regarding the need or lack of need for shelter care must be supported by sworn testimony, affidavit, or declaration of the person offering such evidence.[57] The law of privileges, however, remains in effect at shelter care hearings.[58]

The court shall hear evidence regarding efforts to notify the parent, guardian, or legal custodian, including any actual notice given, and shall examine the need for shelter care.[59] The court is then required to make an express finding as to whether notice requirements were met pursuant to RCW 13.34.060(2) and RCW 13.34.062(1)–(2).[60]

Additionally, the court must inquire whether there is a need for appointment of a GAL or attorney for the child.[61] Local court rules may apply in determining who is appointed in these circumstances.

If the dependency petition or other information alleges homelessness or lack of suitable housing as a significant factor in the removal of the child, the court shall inquire as to whether housing assistance was provided to the family to prevent or eliminate the need for removal.[62]

The court must also inquire whether the child is or might be an Indian child as defined in WSICWA, whether the WSICWA applies, and if so, whether there has been compliance with WSICWA, including notice of the hearing to the child's tribe.[63]

The hearing must also include evidence regarding the efforts made to place the child with a relative. The 2009 amendments to RCW 13.34.065 include a new requirement that the court "ask the parents whether the department discussed with them the placement of the child with a relative or other suitable person…" The court must allow determine what efforts have been made toward such a placement.[64]

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49 *See* RCW 13.34.090(2); JuCR 9.2(c)(2); *In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995).
50 RCW 13.34.115(1).
51 *Id.* at (2).
52 *Id.* at (3).
53 RCW 13.34.065(1)(a).
54 *See In re H.W.*, 70 Wn. App. 552, 854 P.2d 1100 (1993); *In re Brown*, 29 Wn. App. 744. *See also* ER 110(c)(3).
55 RCW 13.34.060(2).
56 *See, e.g.*, *In re Brown*, 29 Wn. App. 744.
57 RCW 13.34.065(2)(b).
58 ER 1101(b).
59 RCW 13.34.065(4); JuCR 2.4(b).
60 RCW 13.34.065(4).
61 *Id.* at (4)(g).
62 *Id.* at (4)(d).
63 *Id.* at (4)(h).
64 RCW 13.34.065(4)(c).

Visitation with parents, siblings, and other relatives must also be considered. For specifics concerning visitation, see § 16.16 of this chapter.

The court must take great care in safeguarding a parent's due process rights by allowing witnesses to be examined.[65] All parties have the right to present testimony to the court regarding the need or lack of need for shelter care.[66]

Courts may wonder whether a parent, guardian, or legal custodian may be compelled to testify at a shelter care hearing. Civil Rule 43(f) governs the taking of testimony from an "adverse party:" "Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays)."

It could be argued that CR 43(f) only concerns compelling the attendance of a parent and does not prohibit taking testimony from a parent already present at a shelter care hearing. There does not appear to be any case law directly on point. Compelling parental testimony at the 72-hour hearing would seem to raise some of the same concerns about notice and due process discussed by the court in *In re R.H.*, 129 Wn. App. 83, 117 P.3d 1179 (2005) (see below). Compelled testimony could also raise issues for appointed counsel who often have had little time to meet with parents prior to a contested shelter care hearing and who often will lack complete discovery.

Petitions for shelter care may contain allegations of criminal conduct by a parent. Compelled testimony at a shelter care hearing would raise Fifth Amendment issues. Although a parent could invoke a Fifth Amendment privilege and refuse to answer some questions, counsel for the parent could then also move to stay the shelter care hearing pending the outcome of a criminal investigation.[67]

In determining whether there is reasonable cause for the child's continued removal from the home, the court shall inquire as to whether there is a need for any immediate examinations, evaluations, or services for the child or the parents. However, the court may not order any parent to undergo examinations, evaluations or services unless the parent consents.[68]

If DSHS filed the petition, it shall submit a recommendation to the court as to further need for shelter care. Although statute provides that if DSHS is not the petitioner, the juvenile court probation counselor shall submit a recommendation as to the further need for shelter care, this process is not available in all counties.[69] Consult local court rules for each county's practice.

In cases where the court does not find reasonable cause for shelter care, the child must be returned home pending adjudication of the dependency hearing. Dismissal of the petition is, however, not a remedy available to the court at a shelter care hearing without the agreement of the petitioner.[70] The *R.H.* court explained its reasoning as follows:

> Clearly this time frame offers no opportunity for a respondent to give proper notice of a motion to dismiss. It also precludes a thorough presentation of the merits of the dependency petition. Further, the child is entitled to appointment of a guardian ad litem to protect his interests. No guardian ad litem can be appointed within 72 hours of filing a petition, much less act to protect the child's interests. A 72-hour shelter care hearing is thus not a proper venue for a contested motion to dismiss.[71]

The court also noted Respondent's ability to pursue dismissal by way of CR 56 or CR 12(b)(6). CR 56 and CR 12(b)(6) have notice requirements such that they would rarely be available during the initial shelter care hearing.

§ 16.16 Visitation

At the shelter care hearing the court must also inquire about the "terms and conditions for parental, sibling, and family visitation."[72]

Under RCW 13.34.136(2)(b)(ii), as amended in 2004, visitation is a right of the family. The legislature requires DSHS to encourage maximum family contact when it is in a child's best interests and prohibits courts from using visitation as a sanction for a parent's failure to comply with court orders or required services. The 2004 amendments also prohibit a court from limiting or denying visitation without a showing of risk of harm to the child.[73]

In situations where there are nondependent siblings, the court does not have the authority to order visitation with these sib

65 *See In re R.L.*, 123 Wn. App. 215, 98 P.3d 75 (2004).
66 *See* RCW 13.34.065(2)(b); RCW 13.34.090(1).
67 *See King v. Olympic Pipeline*, 104 Wn. App. 338, 16 P.3d 45 (2000). In most cases, the court will make a decision at the shelter care hearing, and if there is any delay of the proceedings, it would occur with respect to the dependency trial/hearing.
68 RCW 13.34.065(4)(j).
69 *Id.* at (2)(a); *In re Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007).
70 *See In re R.H.,* 129 Wn. App. 83, 89, 117 P.3d 1179 (2005) (holding that the civil rules requiring notice and an opportunity to be heard preclude a contested motion to dismiss at a 72-hour shelter care hearing).
71 *Id.*
72 RCW 13.34.065(4)(k).
73 *See In re T.L.G.*, 139 Wn. App. 1, 156 P.3d 222 (2007).

lings as the court lacks jurisdiction over them.[74]

§ 16.17 Shelter Care Order

The court must consider the specific services that have been provided by DSHS and determine whether reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and made it possible for the child to return home. Following this, the court shall release the child alleged to be dependent to the care, custody, and control of the child's parent, guardian, or legal custodian unless the court finds there is reasonable cause to believe the following:

- The child has no parent, guardian, or legal custodian to provide supervision and care for such child;
- The release of the child would present a serious threat of substantial harm to the child; or
- The parent, guardian or custodian to whom the child could be released is alleged to have committed custodial interference as defined by either RCW 9A.40.060 or 9A.40.070.[75]

The court may release the juvenile to the parents on conditions it deems appropriate. The conditions may be modified upon notice to the parties given in accordance with JuCR 11.2 and after a hearing.[76]

An order releasing the child to the parents on any specific conditions may be amended at any time, with notice and hearing, if the parties have failed to conform to the conditions originally imposed.[77] The court must consider whether nonconformance with any conditions resulted from circumstances beyond the control of the parent and give weight to that fact before ordering return of the child to shelter care.[78] Although a shelter care order may be amended at any time with notice and a hearing, the shelter care placement decision "shall be modified only upon a showing of change in circumstances."[79]

If the court does not release the child to his or her parent, guardian or legal custodian, and the child was initially placed with a relative or other suitable person, the court shall order continued placement with the relative or other suitable person as defined in RCW 13.34.130(1)(b) unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized. If the child was not initially placed with a relative or other suitable person the supervising agency must make reasonable efforts to locate a relative or other suitable person[80]

If a relative or other suitable person is not available for placement, the court must order continued shelter care or order

placement with another suitable person, and the court shall set forth its reasons for the order.[81]

If actual notice was not given to the parent, guardian, or legal custodian and the whereabouts of such person is known or can be ascertained, the court must order the supervising agency or DSHS to make reasonable efforts to advise the parent, guardian, or legal custodian of the status of the case, including the date and time of any subsequent hearings and their rights under RCW 13.34.090.[82]

If appointment of a GAL or attorney for the child is needed, the appointment can be included in the shelter care order.[83] Visitation should also be addressed in the shelter care order.

§ 16.18 Restraining Orders

The Washington State Legislature has intended to minimize trauma to a child involved in an allegation of sexual or physical abuse. However, it recognizes that removing a child from the home often has the effect of further traumatizing the child. As a result, courts are permitted to order removal of the alleged offender rather than the child. This should be done at the earliest possible point of intervention.[84]

In any judicial proceeding in which it is alleged that a child has been subjected to sexual or physical abuse, if the court finds reasonable grounds to believe that an incident of sexual or physical abuse has occurred, the court may, on its own motion or on the motion of the GAL or other parties, issue a temporary restraining order or preliminary injunction restraining or enjoining the person accused of committing the abuse from the following:

- Molesting or disturbing the peace of the alleged victim;
- Entering the family home of the alleged victim except as specifically authorized by the court;
- Having any contact with the alleged victim, except as specifically authorized by the court; or
- Knowingly coming within, or knowingly remaining within, a specified distance of a specified location.[85]

In issuing a temporary restraining order or preliminary injunction, the court has the discretion to impose any additional restrictions that it determines are necessary to protect the child

74 *In re M.J.L.*, 124 Wn. App. 36, 45, 96 P.3d 996 (2004).
75 RCW 13.34.065(5)(a).
76 JuCR 2.4(c).
77 RCW 13.34.065(7)(b)(i).
78 *Id.* at (7)(b)(ii).
79 *Id.* at (7)(a).
80 *Id.* at (5)(c).
81 *Id.* at (5)(d).
82 *Id.* at (4)(a).
83 *Id.* at (4)(g).
84 RCW 26.44.063(1). *See generally* RCW 10.31.100; RCW 26.44.130.
85 RCW 26.44.063(2).

from further abuse or emotional trauma pending final resolution of the abuse allegations.[86]

The court shall issue a temporary restraining order prohibiting a person from entering the family home if the court finds that the order (1) would eliminate the need for out-of-home placement to protect the child's right to nurturance, health, and safety, and (2) is sufficient to protect the child from further sexual or physical abuse or coercion.[87]

The court may issue a temporary restraining order without requiring notice to the party to be restrained or other parties only if it finds on the basis of the moving affidavit or other evidence that irreparable injury could result if an order is not issued until the time for responding has elapsed.[88]

A temporary restraining order or preliminary injunction does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding. Also, the order may be revoked or modified.[89]

If an injunction is entered, the person with physical custody of the child has an affirmative duty to assist in the enforcement of the restraining order including but not limited to the following:

- a duty to notify the court as soon as practicable of any violation of the order;
- a duty to request the assistance of law enforcement officers to enforce the order; and
- a duty to notify DSHS of any violation of the order as soon as practicable if DSHS is a party to the action.

Failure by the custodial party to discharge these affirmative duties shall subject the custodial party to contempt proceedings.[90]

Willful violation of a court order entered under RCW 26.44.063 is a misdemeanor. A written order shall contain the court's directive and shall bear the legend: "Violation of this order with actual notice of its terms is a criminal offense under Chapter 26.44 RCW, is also subject to contempt proceedings, and will subject a violator to arrest."[91]

§ 16.19 Services Ordered for Non-Party

Treatment and education requirements necessary to protect the child from further abuse shall be ordered for an individual who, while acting in a parental role, has physically or sexually abused a child and has been removed from the home pursuant to a court order issued in a proceeding under Chapter 13.34

RCW. These requirements must be met prior to the individual being permitted to reside in the home where the child resides. DSHS is required to make recommendations to the court regarding proper treatment and education. It must also provide referrals to the individual and monitor and assess the individual's progress. The court may require the individual to continue treatment as a condition for remaining in the home where the child resides.[92]

86 *Id.* at (4).
87 *Id.* at (5).
88 *Id.* at (6).
89 *Id.* at (7).
90 *Id.* at (8).
91 *Id.* at (9). Please refer to Chapter 10 for more concerning contempt.
92 RCW 26.44.140.

Chapter 17

Fact-Finding Hearing

Judge Kitty-Ann van Doorninck[1]
2011 Updates by Commissioner Michelle Ressa Weber

The fact-finding hearing is a trial to determine whether (1) the State may intervene over the objections of the family and (2) the child should be declared dependent.[2] Only after a finding of dependency may the court order remedial measures to alleviate the problems that prompted the State's initial intervention.[3]

§ 17.1 Timing

As a procedural note, if a parent has been accused of abuse or neglect, Child Protective Services (CPS) will conduct an investigation and enter a finding of founded or unfounded.. This decision can be appealed through an administrative proceeding known as a CAPTA[4] hearing. DSHS may also file a dependency petition with the superior court alleging abuse or neglect separate from the administrative hearing. If this occurs, "the administrative hearing must be stayed (postponed) until the superior court has entered an order and findings regarding the dependency petition."[5]

The fact finding hearing shall be held *no later than 75 days* after the filing of the petition. The 75-day mandate gives dependency trials precedence over other civil trials. A continuance should only be granted if "exceptional circumstances" are found.[6] The party requesting the continuance has the burden of proving by a preponderance of the evidence that exceptional circumstances exist.[7] Failure to hold the fact-finding within 75 days is not a basis for dismissal of the dependency petition; sanctions or other remedies may be appropriate.

It is important to note that parents do not have unlimited time to engage in services and correct the parenting deficiencies that resulted in the filing of a dependency petition. If the child has been placed out of home for 15 of the past 22 months the

1 Judge Kitty-Ann van Doorninck was appointed to the Pierce County Superior Court in October, 1998, and she is currently Pierce County Juvenile Court Presiding Judge. She serves on numerous Pierce County Superior Court committees. Between September 2003 and December 2007, Judge van Doorninck was the Family Court Judge, handling high conflict custody matters and emphasizing non-adversarial resolutions. Prior to her appointment to the bench, she was a Pierce County Deputy Prosecuting Attorney litigating both criminal and civil cases, as well as acting as Administrative Deputy from 1989–1996. She is a past trustee of the Superior Court Judges' Association, past trustee of the Tacoma-Pierce County Bar Association, and past member of the YWCA Women's Shelter Fundraising Committee. In addition to other community work, Judge van Doorninck is on the Board of Trustees for the Safe Streets Campaign and is actively involved in the American Leadership Forum. Judge van Doorninck has also served as Chair of the Superior Court Judges' Association Family and Juvenile Law Committee and in that capacity served on several other statewide committees.

Michelle Ressa Weber was appointed to the Spokane County Superior Court bench in May 2007. Before that, she spent a year as the Superior Court Commissioner in Grant County. Michelle was born and raised in Spokane and graduated from the University of Washington in 1992 with a degree in Political Science. She graduated, cum laude, in 1996 from Gonzaga University School of Law. Michelle has spent her entire legal career working in the field of child welfare. Appointed in 1996 by then-Attorney General Christine Gregoire, Michelle represented the Department of Social and Health Services (DSHS) in dependency, termination, and licensing actions in Thurston, Lewis, and Mason Counties. Michelle also represented DSHS in King County for several years before taking a position representing Children's Administration headquarters in 2002. Michelle also represented DSHS in civil tort cases for two years before her appointment to the bench. Michelle has conducted numerous hours of training for the courts, DSHS, the Attorney General's office and the child welfare community. She has consistently showed her dedication and passion for children and families navigating their way through a complicated, emotional, and financially challenging legal system.

2 Generally the Department of Social and Health Services (DSHS) is the petitioner in a dependency action, but "any person" may file a dependency petition. RCW 13.34.040(1). The burden of proof falls on the petitioner (again, in most cases DSHS), but where DSHS is not the petitioner, it is not necessarily involved in the case. *See* RCW 13.34.110(1) (petitioner has burden); RCW 13.34.110(2)(a) (if DSHS is not the petitioner and is required by a court order to supervise the placement, it must agree to and sign the order).

3 Remedial services are defined as "those services defined in the federal adoption and safe families act as time-limited family reunification services. Remedial services include individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of the above services and activities." RCW 13.34.025(2)(a).

4 CAPTA stands for the Child Abuse and Prevention Treatment Act (CAPTA).

5 WAC 388-15-113(1).

6 *Id.* However, JuCR 3.4(c) allows for continuance for "good cause."

7 *Id.*

court is *required* to order a termination petition be filed unless the court makes a good cause exception as to why the filing of a termination of parental rights petition is not appropriate. The "good cause exception" includes but is not limited to the following: The child is being cared for by a relative; the department has not provided to the child's family such services as the court and the department have deemed necessary for the child's safe return home; or the department has documented in the case plan a compelling reason for determining that filing a petition to terminate parental rights would not be in the child's best interests.[8] Additionally, the child has a right to a speedy resolution of the dependency proceedings.[9]

§ 17.2 Parties Present and Notice

Upon filing of the petition, notice of the fact finding hearing must be sent to the following parties:

1. Parents, including putative fathers;
2. The child, if the child is 12 years old or older;[10]
3. Attorney for parents (usually parents will have separate attorneys as potential for conflict is high);
4. Assigned caseworker;
5. Attorney for the DSHS (i.e., counsel from the Attorney General's Office (AGO));
6. Legal advocate for the child, and/or Guardian ad Litem (GAL)/Court-Appointed Special Advocate (CASA); and
7. Tribe if the state and/or federal Indian Child Welfare Acts apply.

In most counties, the petitioner generally bears the responsibility of providing notice; however, in some counties, the clerk of the court will send notice. Consult local rules to verify the practices of each county.

§ 17.3 Content of Hearing/Trial

All hearings shall be public and can be conducted at any time or place within the limits of the court, except if the court finds that excluding the public is in the best interests of the child.[11] Whether courtroom proceedings should be closed to the public requires the court to make an individualized determination based upon the five factors articulated in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982):

1. The proponent of closure must make some showing of the need to do so, and the need involves a serious and imminent risk;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;
3. The proposed method for curtailing open access must be the least restrictive means available to protect the threatened interest;
4. The court must weigh the competing interest of the closure proponent and the public; and
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Either parent, or the child's attorney or the GAL, may move to close a hearing at any time.[12] The statute is silent as to whether DSHS or the AGO can seek closure.

The Rules of Evidence apply.[13] The petitioner is required to prove the allegations in the petition for dependency by a preponderance of the evidence.[14]

Specifically, the petitioner must establish that the child meets one of the statutory definitions of "Dependent Child" under RCW 13.34.030(5). A dependent child is one who

a) has been abandoned;[15]

b) is abused or neglected by a person legally responsible for care of the child;[16] or

8 RCW 13.34.145(3)(b)(vi).
9 RCW 13.34.020.
10 RCW 13.34.070.
11 RCW 13.34.115(1).
12 *Id*. at (2).
13 RCW 13.34.110(1); JuCR 3.7(b).
14 RCW 13.34.110(1); JuCR 3.7(c); *In re Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007); *In re Chubb*, 46 Wn. App. 530, 731 P.2d 537 (1987).
15 A child is "abandoned" when the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities. If the court finds that the petitioner has exercised due diligence in attempting to locate the parent, no contact between the child and the child's parent, guardian, or other custodian for a period of three months creates a rebuttable presumption of abandonment, even if there is no expressed intent to abandon. RCW 13.34.030(1). *See also* WAC 388-15-011.
16 ""Physical abuse" means the non-accidental infliction of physical injury or physical mistreatment on a child." WAC 388-15-009(1). Physical abuse includes, but is not limited to, actions such as throwing, kicking, burning, or cutting a child; striking a child with a closed fist; shaking a child under age three; interfering with a child's breathing; threatening a child with a deadly weapon; or doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the

c) has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.[17]

If the petitioner does not meet its burden of proof, the petition is dismissed and the child is returned to the custody of the parent.

§ 17.4 Findings of Fact and Conclusions of Law

If the petitioner does meet its burden of proof, the court must enter written findings of fact and conclusions of law. These findings form the basis for the case plan (services, placement and visitation) and are therefore extremely important for case review.. The findings are critical for determining what steps need to be taken before a child may safely return home. Absent an appeal, the findings cannot be challenged and thus become verities for a termination of parental rights trial.

The content of the findings should accurately reflect the bases for finding the child dependent under RCW 13.34.030(5) and the reasons for State intervention in sufficient detail to justify choices for treatment and services.

Finally, the findings should always include the date and time of the next hearing. (This hearing will most likely be the disposition hearing or the first review hearing.)

child's health, welfare, and safety. *Id.*

"Sexual abuse" means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. The intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis. WAC 388-15-009(3).

""Negligent treatment or maltreatment" means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety." RCW 26.44.020(15).

17 The Washington Supreme Court has determined the special needs of the child could be considered in determining whether the parent had the capability of adequately caring for the child. *In re Schermer*, 161 Wn.2d 927. Even in that case, where the focus was largely on the problems of the child, a parenting deficiency had to be present before the court could find the child dependent.

§ 17.5 Agreed Orders or Settlements

Most petitions are resolved by agreement. Any agreement by the parties to the entry of a dependency order is subject to approval of the court.[18] Because the findings of fact and conclusions of law are so critical in case planning and judicial review, the court must carefully review proposed stipulated findings.

As a preliminary matter, RCW 13.34.110(3)(b) requires that the court review a social study (i.e., an Individual Service and Safety Plan (ISSP)) before entering a stipulated or agreed order. This social study cannot be reviewed *prior* to the fact finding hearing.

To approve an agreed order, the court must determine whether the parent knowingly and willingly agreed to and signed the order without duress and without misrepresentation or fraud by any other party.[19]

The court can enter into a colloquy with each parent to inquire whether they understand the following:

1. The terms of the order;

2. That entry of the order starts the process that could result in the filing of a petition to terminate parental rights;

3. That entry of the order is an admission that the child is dependent; and

4. That in any future proceeding the parent shall not have the right to challenge or dispute the fact that the child was found dependent.[20]

Most courts accept a written stipulation/waiver signed by the parent. The waiver should include affirmative statements that the parent understands the terms of the order and the consequences of their waiver.

The Administrative Office of the Courts (AOC) has developed user-friendly form pleadings, including a waiver. These forms can be found at http://www.courts.wa.gov/forms/. In each county, the AGO has also developed forms that may be used.

18 *Id.* at (3)(b).

19 *Id.* at (3)(c)(iv).

20 RCW 13.34.110(3)(c)(i–iii).

Chapter 18

Disposition Hearing

Commissioner Thurman W. Lowans[1]

§ 18.1 Purpose Statement

Similar to the shelter care process, safety of the child remains a primary focus at the disposition hearing. The disposition order directs a program designed to alleviate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future.[2] The disposition order should direct the following: a service plan for parents and the child, the placement of the child, the health and education of the child, a visitation plan for child and his or her parent(s) and for the child and his or her siblings, and eventually a permanent plan for the child.

The disposition hearing effectively sets benchmarks and expectations for the parties as they move forward into services. It is important that parents understand the services in the plan as well as the time requirements of the plan. The first 90-day review hearing following disposition will provide a type of "report card" on compliance and progress issues, as well as serve to further refine services as needed.

§ 18.2 Timing

The disposition hearing must be held immediately after the fact-finding hearing if dependency is established; however it may be continued to a date certain for up to 14 days.[3] For good cause, a period longer than 14 days may be set.

There is an inherent conflict between the timing requirement for a disposition hearing immediately or within 14 days and RCW 13.34.120(1) which requires 10 working days advance notice by mail to parents and counsel of the social study and proposed individual service and safety plan (ISSP). If a disagreement concerning the ISSP arises, parents and counsel shall submit their objections in writing at least 24 hours before the hearing and have the right to submit oral arguments at the time of the hearing.[4]

The Guardian ad Litem (GAL)/Court-Appointed Special Advocate (CASA) shall file their report with both the court and the parties prior to the hearing in accordance with local court rules (which do not specify a time component). The rules specifying time deadlines are, at times, in conflict.

It is important that all parties make themselves aware of the positions and requests of others and that all parties be afforded a meaningful opportunity to be heard on the dispositional plan.

1 Commissioner Thurman W. Lowans was appointed to the Kitsap County Superior Court in 1993 and is responsible for the Paternity calendar, Dependency calendar, Family Law motions calendar, Mental Commitment calendar, Domestic Violence calendar, Adoption calendar, Civil Contempt calendar, and the Ex Parte calendar. He established the position of Courthouse Facilitator for the Superior Court in 1993, and in 2001 he established a juvenile diversion program known as Youth Court where teens serve as judge, advocate, and jury in diversion cases. Commissioner Lowans graduated cum laude from Dartmouth College in 1972 and received his J.D. from Boston University School of Law in 1975. In 1996 he retired as a Commander with the JAG Corps of the U.S. Navy following 22 years of service in the Reserves. Commissioner Lowans was in private practice in Bremerton with Soriano, Soriano and Lowans for 15 years before his appointment to the Bench. His trial practice included felony defense, juvenile offenders and dependencies, domestic relations, real estate and probate. He served as Land Hearing Examiner for Kitsap County in 1992–1993 and as President of the Kitsap County Bar Association in 1993. Commissioner Lowans served on the Faculty of the Washington State Judicial College (2002–2007 and 2009–2011) as instructor concerning Dependencies, and served as the judicial representative to the Board of Directors of Washington State Court-Appointed Special Advocates (2002–2005).

2 RCW 13.34.130(1)(a).
3 *See* RCW 13.34.110(4).
4 *See* RCW 13.34.120(1).

§ 18.3 Parties Present

All dependency hearings must be public, unless the judge finds that it is in the best interests of the child to exclude the public.[5] Either parent, the child's attorney, or the GAL/CASA may move the court to exclude the public. It is important to note that the Department of Social and Health Services (DSHS) may *not* seek to exclude the public.

Any party shall have the right to be heard at the disposition hearing.[6] Geography and other logistics may dictate many practical considerations in conducting a disposition hearing. Consequently, parents and others may appear by telephone, particularly when they are out of state or incarcerated. The dependency courtroom should always have a speaker phone with the technical ability to have multiple parties on the line during the hearing.

RCW 13.34.110(3) provides that the parties need not appear at the disposition hearing if all parties, counsel, and the GAL/CASA are in agreement. However, given the gravity of the issues present at a disposition hearing and the schedule of services and hearings which will result, it is difficult to imagine conducting such a hearing without substantial appearance by counsel and other parties.

(1). Persons Who Should Always Be Present:

- Judge or Court Commissioner
- Parents, including putative fathers, whose rights have not been terminated
- Custodial Adults and Relatives with legal standing
- Assigned Caseworker
- Agency Attorney
- Attorney or Attorneys for Parent(s)
- GAL/CASA
- Attorney for Child (if appointed)
- Tribal Representative if it is an ICWA case
- Security personnel

(2) Persons Who May Also Be Needed:

- Age appropriate children[7]
- Extended family members and relatives
- Foster Parents - Relative placement[8]
- An Interpreter
- Judicial case management staff
- Therapists, Counselors, and other service providers
- Domestic Violence Advocate
- Adult or Juvenile probation or parole officer
- Law Enforcement Officers
- Other witnesses as may be identified

§ 18.4 Consideration of Social Studies

The rules of evidence *do not apply* at the disposition hearing, and the court must consider the social file, social study, GAL/CASA report, reports filed by a party, evidence produced at the fact finding, and the ISSP.[9] Any social file, social study, or predisposition study shall be made available for inspection by a party or their attorney at a reasonable time prior to the disposition hearing.[10]

Stipulated or agreed disposition orders are not binding on the court, but rather are subject to approval by the court which must receive and review a social study and consider whether the order is consistent with the allegations of the dependency and the problems that necessitated the child's placement out-of-home.[11]

§ 18.5 DSHS's Individual Service and Safety Plan (ISSP)

DSHS must prepare and then mail its proposed ISSP to the parent(s) and their attorney(s) at least 10 working days before the disposition hearing. The ISSP must be in writing or in a form understandable to the parents or custodians. If a parent disagrees with the ISSP, they shall submit their alternative plan in writing or signed statement at least 24 hours before the disposition hearing. Oral arguments from the parent(s) are permitted at the time of the disposition hearing.[12]

Reports of the GAL/CASA are also to be filed prior to the disposition hearing in accordance with court rules. It is probable that no such written report will have been made at the time of disposition as there will have been little if any time in which the GAL/CASA can review and respond to the DSHS's ISSP and the facts presented. Best practice would indicate written reports from all parties, but a disposition hearing is often the subject of considerable oral supplementation to the reports and recommendations with opportunity for all to be heard and to meaningfully respond.

If the DSHS's ISSP is not filed and submitted in a timely manner, it shall be filed and distributed within 30 days of the disposition hearing.[13] It is, however, difficult to envision how a meaningful and substantive disposition hearing could be con

5 RCW 13.34.115(1).
6 JuCR 3.8(c).
7 There is no hard and fast age specified by statute (although during the 2008 session the Legislature considered making it mandatory). Each case is unique, and the court must make a judgment call.
8 This point indicates foster parents and relatives with whom the child is temporarily placed.
9 *See* RCW 13.34.120(1).
10 JuCR 3.8(c).
11 RCW 13.34.110(2)(b).
12 RCW 13.34.120(1). JuCR 3.8(c).
13 JuCR 3.8(d).

ducted without benefit of an ISSP. The importance of the ISSP is to afford all parties written notice and opportunity to be heard on services for the ensuing 90 days—services which will form the basis for future permanent planning decisions and hopefully are clearly stated and understood.[14] Services should be tailored to meet each individual parent's needs in a timely manner. Dispositional hearings are often continued because of the absence of an ISSP. Second continuances are rare, and such an event could result in the imposition of terms against DSHS and the caseworker.

§ 18.6 Placement with a Parent or Parents

RCW 13.34.130(1)(a) provides for a disposition "other than removal of the child" from the home if the disposition includes a program designed to alleviate immediate danger to the child, mitigate or cure damage already suffered, and aid the parents so that the child will not be endangered in the future. Safety for the child remains the primary factor and may nonetheless require placement outside the home if the health, safety, or welfare of the child is jeopardized in the home. The court should be aware that when a child is returned home with a parent and future facts demand the second removal of the child, immediate and specific actions are authorized so as to effect prompt permanency for the child.

A parent's criminal history does not automatically disqualify that parent from placement, but it is relevant as to placement decisions concerning parental fitness and the child's welfare.[15] Placement with a parent who has a criminal history and resides outside of Washington State may be problematic, as their criminal history may result in a disqualification for placement under that state's Interstate Compact on the Placement of Children (ICPC) regulations. See Chapter 26 for more concerning ICPC.

§ 18.7 Reasonable Efforts

Before out-of-home placement may be ordered, the court must find that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home. The services that have been provided to the child and the parent(s), guardian, or legal custodian should be specified. The court must also find that preventative services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home, and

a. There is no parent or guardian available to care for such child;
b. The parent, guardian, or legal custodian is not willing to take custody of the child; or
c. The court finds, by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home and an order under RCW 26.44.063 would not protect the child from danger.[16]

In cases in which aggravated circumstances have been established by clear, cogent, and convincing evidence, reasonable efforts to unify the family are not required unless such efforts are determined to be in the best interests of the child.[17] If reasonable efforts are not required, the court shall set a permanency planning hearing within 30 days of the disposition hearing.[18]

Note that in cases involving an Indian child, the provisions of the Indian Child Welfare Act (ICWA) apply. ICWA cases require active efforts rather than reasonable efforts.[19] The status of whether or not a child is in fact an Indian child for purposes of ICWA may, for practical reasons, take considerable time to resolve. See Chapter 27 for more concerning ICWA.

§ 18.8 Placement of the Child in the Disposition Order

In the event reunifying the family is not in the best interests of the child, RCW 13.34.130 directs placement of a child in either an in-home dependency or an out-of-home placement during the dependency. Out-of-home placement may be with a relative, a foster family or group home, or the home of a suitable person if the child or family has a preexisting relationship with the person (also known as "fictive kin").[20]A criminal history background check is required before the child is placed with an unlicensed person; that person must also be suitable and competent to provide care for the child.[21] Parental authority is appropriate in areas that are not connected with abuse or neglect which resulted in the dependency. Balancing the inherent intrusion into the lives of foster care families and the goal of maintaining parental authority where appropriate, absent good cause, DSHS shall follow the wishes of the natural parent concerning out-of-home placement of the child.[22]

In matching children to foster homes, the court should consider family constellation, sibling relationships, ethnicity, and religious practice or preference. Contact between the foster parent and the birth parents is to be encouraged, including assistance

14 *In re S.J.*, No. 26179-4-III, (Wn. App. Aug., 2, 2011).
15 *In re J.B.S.*, 123 Wn.2d 1, 863 P.2d 1344 (1993); *In re A.C.*, 74 Wn. App. 271, 873 P.2d 535 (1994).
16 RCW 13.34.130(2).
17 RCW 13.34.132(4).
18 RCW 13.34.134.
19 25 U.S.C. § 1912(d).
20 The suitability of a person for out-of-home placement is a judgment call left to the decision of the court. *See generally* RCW 13.34.130(6).
21 RCW 13.34.130(1)(b).
22 *Id.*; RCW 13.34.260.

in understanding the needs of the child, participation in educational activities, and transportation for visitation.[23] Candidly, however, the reality is often that there are very limited choices by reason of practical limitations in the supply of foster homes and the capacities of those homes. Additionally, safety of the child must be the paramount concern of the court.[24]

§ 18.9 Effect of Placement Outside the Home

An immediate consequence of out-of-home placement is the need to address visitation, both between parent and child and between siblings if they are in different placements. Considerable energy, resourcefulness, and innovativeness is often needed in addressing the challenges of providing appropriate visitation. Visitation between parent and child and between siblings is not a service capable of correcting parental deficiencies; rather, it is the right of the family, including the child and the parent.[25] Maximum contact between parent and child and among siblings should be encouraged. Visitation shall not be limited as a sanction for a parent's failure to comply with court orders or service. Visitation may only be limited or denied if deemed necessary to protect the child's health, safety or welfare.

Whenever a child is placed in out-of-home care under the supervision of DSHS, DSHS must conduct a social study prior to such placement.[26] Good practice dictates that out-of-home placement with unlicensed relatives or fictive kin should be accompanied by a supplemental order signed by the placement relative or fictive kin by which they agree and submit to the jurisdiction and authority of the court, including all future orders. Absent clear direction and guidance from the court, relatives may become vested in their own positions to the detriment of a child and/or one or both of the parents.

§ 18.10 Placement with Relative

Placement with a relative shall be given preference by the court.[27] Persons related to the child are broadly defined under RCW 74.15.020(2)(a) as

i. Any blood relative, including those of half-blood, first and second cousins, nephews, nieces, and persons of preceding generations prefixed with grand or great-grand;
ii. Stepfather, stepmother, stepbrother, or stepsister;
iii. A person who has legally adopted the child, as well as the natural or other legally adopted children of such persons, and other relatives of the adoptive parents;
iv. Spouses of any of the aforementioned relatives, even after marriage is terminated;
v. Relatives of any of the aforementioned relatives; and
vi. Extended family members as defined by the law or custom of the Indian child's tribe.

If there is insufficient information at the time of the disposition hearing upon which to base a placement determination with a relative, the court may direct DSHS to conduct a background investigation as provided in RCW Chapter 74.15 and to report the results to the court within 30 days. The court has the authority to make such relative placement without the background check if the relative appears otherwise suitable and competent to provide care and treatment, provided that the background check is provided as soon as possible after placement. Any placement with relatives is expressly contingent upon cooperation by the relative with the agency case plan and compliance with court orders related to contacts and any other conditions imposed by the court. Noncompliance with the case plan or court order is grounds for removal of the child from the relative's home.[28] Best practice would indicate that the court issue a separate or supplemental order concerning the relative placement; this order should include a recital that the relative submits to the jurisdiction and authority of the court, and the relative with whom the child is placed should sign and acknowledge the order.

§ 18.11 Unlicensed Placement Possibilities

Subject to review and approval by the court, DSHS has authority to place a child in the home of "another suitable person" if (a) the child or family have a preexisting relationship with that person; (b) that person has completed all required criminal history background checks; and (c) that person appears to be suitable and competent to provide care for the child.[29] Placement with "fictive kin" shall only take place if the court finds that such placement is in the best interests of the child.

§ 18.12 American Indian Children

Foster care placement for an Indian Child is to be given preference as follows:

1) Relatives;
2) An Indian family or same tribe as the child;
3) An Indian family or a Washington Indian tribe of a similar culture to that Tribe; then
4) Any other family which can provide a suitable home for an Indian Child. Such suitability is to be determined through consultation with a local Indian Child Welfare Advisory Committee.[30]

23 RCW 13.34.260.
24 RCW 13.34.020.
25 *See* RCW 13.34.136(2)(b)(ii); *In re T.L.G.*,139 Wn. App. 1, 156 P.3d 222 (2007).
26 RCW 74.13.065.
27 RCW 13.34.130(2).
28 RCW 13.34.130(6).
29 *Id.* at (1)(b)(iii).
30 RCW 13.34.250.

As stated above, the status of whether or not a child is in fact an Indian Child for purposes of ICWA may, for practical reasons, take considerable time to resolve. However, "[t]he tribal determination that a child is a member or eligible for membership in that tribe is *conclusive evidence* that a child is an "Indian child" under the ICWA."[31] The timely and proper determination of the Indian status of a child is critical. If the child is an Indian Child for purposes of ICWA, active efforts are required as opposed to reasonable efforts.[32] The Tribe involved may seek to exercise their right to intervene under 25 U.S.C. § 1911(c) and may even move to transfer the case to the jurisdiction of their tribal court under 25 U.S.C. § 1911(b). The burden of proof for termination of parental rights in an ICWA case is higher than the standard "beyond a reasonable doubt," and dependency orders and final judgments of termination which fail to comply with the requirements of ICWA may be invalidated.[33]

In addition to the requirements of ICWA, there are additional requirements under the Washington State Indian Child Welfare Act (WSICWA).[34] "Active efforts" are further defined under state statute to minimally include timely and diligent efforts to engage parents beyond simply providing referrals for services.[35] "In any foster care placement or termination of parental rights proceedings [absent] a statutory or contractual duty to directly provide services…"active efforts" means a documented, concerted, and good faith effort to facilitate the parent's or Indian custodian's receipt of and engagement in services…."[36] "An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of that tribe, unless the tribe has expressly declined to exercise its exclusive jurisdiction, or the state is exercising emergency jurisdiction" as defined by the statute.[37]

Consistent with ICWA, a written determination by an Indian tribe that a child is a member of or eligible for membership in that tribe, or is not a member or otherwise eligible, is deemed to be conclusive as to the Indian status of the child and that tribe.[38]

§ 18.13 Social Worker Immunity Regarding Placement Decisions

The state, DSHS, and its employees are not liable for civil damages resulting from any act or omission in the provision of services under this section, unless the act or omission constitutes gross negligence. RCW 13.34.215(14) does not impose any duty and shall not be construed to create a duty where none exists, nor does it create a cause of action against the state, DSHS, or its employees concerning the original termination.

Absolute Immunity	Social workers are not entitled to ab solute immunity for foster care place ment decisions.
Qualified Immunity	Social workers may be entitled to qualified immunity for foster care placement decisions if they are car rying out a statutory duty according to procedures dictated by statute and their superiors and are acting reasonably.
Quasi-Judicial Immunity	Social workers may not claim quasi-judicial immunity for actions taken before the issuance of a judicial order.[39]

§ 18.14 Foster Home Licensing

Agencies and DSHS cannot place a child in a home required to be licensed until the home is licensed.[40] It is, however, ultimately the court's responsibility to order placement in accordance with the statutory requirements.[41]

§ 18.15 Ability of a Parent to Pay for Placement

Foster care is costly and the State is entitled to seek reimbursement through the payment of child support by the parent(s). Upon commencement of an action for dependency, the court may inquire into the ability of the parent(s) to pay child support and may order child support as set forth in RCW Chapter 26.19. All such child support orders shall be in compliance with the provisions of RCW 26.23.050.[42] DSHS may also establish an administrative order of support through the Office of Support Enforcement.[43]

Orders of child support may be enforced through entry of judgment and enforcement upon the judgment according to law.[44]

31 *In re A.L.W.*, 108 Wn. App. 664, 672, 32 P.3d 297 (2001) (emphasis added).
32 25 U.S.C. § 1912(d).
33 25 U.S.C. § 1912(f); 25 U.S.C. § 1914.
34 E.S.S.B. 5656, 62nd Legis., Reg. Sess. (2011); Laws of 2011, ch. 309.
35 E.S.S.B. 5656, sect. 4(1).
36 *Id.* at 4(1)(b).
37 *Id.* at 6.
38 *Id.* at 7(3).
39 *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991).
40 RCW 74.15.040.
41 RCW 13.34.130.
42 RCW 13.34.160(1).
43 *Id.* at (3).
44 RCW 13.34.161.

§ 18.16 Parents of Unmarried Minor Parent Deemed Responsible

If a dependent child's parent is an unmarried minor parent or pregnant minor applicant, then the parent(s) of the minor shall also be deemed a parent(s) of the dependent child. However, liability for child support only exists if such parent(s) is/are provided the opportunity for a hearing on their ability to provide support. Any child support order entered pursuant to this process shall be effective only until the child reaches 18 years of age.[45] Such matters are often handled administratively rather than through the court process.

§ 18.17 Court-Ordered Termination Petition

Under very specific and limited circumstances, the court may order that DSHS file a petition for termination of the parent and child relationship during the disposition hearing. Those limited circumstances require that the court has (1) ordered removal of the child; (2) termination is recommended by DSHS; (3) the court finds that termination is in the best interests of the child; and (4) by clear, cogent, and convincing evidence the court finds aggravated circumstances exist.[46]

In finding aggravated circumstances by clear, cogent, and convincing evidence, the court shall consider one or more of the following:

- Conviction of the parent of rape of the child in the 1st, 2nd, or 3rd Degree;
- Conviction of the parent of criminal mistreatment of the child in the 1st or 2nd Degree;
- Conviction of the parent of one of the following assault crimes when the child is the victim: Assault in the 1st or 2nd Degree or Assault of a Child in the 1st or 2nd Degree;
- Conviction of the parent of murder, manslaughter, or homicide by abuse of the child's other parent, sibling, or another child;
- Conviction of the parent of attempting, soliciting, or conspiring to commit a crime as listed in (a), (b), (c), or (d) above;
- A finding by the court that a parent is a sexually violent predator as defined in RCW 71.09.020;
- Failure of the parent to complete available treatment ordered under this chapter or the equivalent laws of another state, where such failure has resulted in a prior termination of parental rights to another child and the parent has failed to effect significant change in the interim. In the case of a parent of an Indian Child as defined in the Indian Child Welfare Act, the court shall also consider tribal efforts to assist the parent in completing treatment and make it possible for the child to return home;
- The child is an infant under three years of age and has been abandoned; and
- Conviction of the parent, when a child has been born of the offense, of a sex offense under Chapter 9A.44 RCW or incest under RCW 9A.64.020.[47]

Note that each of the foregoing provisions with the exception of (d) provides for a link between the offense recited and the child of the dependency, as opposed to any child in general.

45 RCW 13.34.160(2).

46 RCW 13.34.130(5); RCW 13.34.132.

47 RCW 13.34.132.

Chapter 19

Review Hearing

Commissioner Thurman W. Lowans[1]

§ 19.1 Purpose Statement

Except for children whose cases are reviewed by a citizen review board under RCW Chapter 13.70, and except for dependency guardianships under RCW 13.34.235, the status of all children found to be dependent must be reviewed by the court at least every six months.[2]

At all review hearings, the court is required to make findings as to compliance and progress concerning the parents, the child, and the supervising agency with respect to the services and case plan. The continued placement of the child, visitation, identification, and availability of reasonable and necessary services, medical and dental care for the child, and educational services for the child are but a few of the issues which may be addressed at the review hearing. Upon leaving a review hearing, the parties should have a clear understanding as to their compliance and progress, or lack thereof, as well as the direction of efforts to be made prior to the next scheduled review hearing.

§ 19.2 Timing

A review hearing must be conducted by the court at least every six months from the beginning date of the placement episode or from the date the dependency was established, whichever is first.[3] The purpose of a review hearing is to review the progress of the parties and to determine whether court supervision should continue. It is important to note that following the establishment of a dependency, a case may not be dismissed unless the child has been returned home for at least six months.[4] There is nothing in the provisions of RCW Chapter 13.34 which precludes the court from scheduling review hearings on a schedule more frequently than every six months, and often the facts and circumstances
of a given case will so warrant.

Uniquely, Washington State has dependency guardianships (RCW 13.34.232) which are not subject to the six month review requirements of other dependencies, unless otherwise ordered by the court.[5] Although a six month review hearing is not required for a dependency guardianship, good practice would direct a periodic review as deemed appropriate by the court to ensure the continued safety and viability of the guardianship.

§ 19.3 Ninety Day Review Requirement

The initial court review must be an in-court review within six months from the beginning of the placement episode or no more than 90 days from the entry of the disposition order, whichever comes first.[6] The initial review may be designated as a permanent planning hearing when necessary to meet the time frames of RCW 13.34.145(1)(a) or RCW 13.34.134. The court has the authority to schedule review hearings more

1 Commissioner Thurman W. Lowans was appointed to the Kitsap County Superior Court in 1993 and is responsible for the Paternity calendar, Dependency calendar, Family Law motions calendar, Mental Commitment calendar, Domestic Violence calendar, Adoption calendar, Civil Contempt calendar, and the Ex Parte calendar. He established the position of Courthouse Facilitator for the Superior Court in 1993, and in 2001 he established a juvenile diversion program known as Youth Court where teens serve as judge, advocate, and jury in diversion cases. Commissioner Lowans graduated cum laude from Dartmouth College in 1972 and received his J.D. from Boston University School of Law in 1975. In 1996 he retired as a Commander with the JAG Corps of the U.S. Navy following 22 years of service in the Reserves. Commissioner Lowans was in private practice in Bremerton with Soriano, Soriano and Lowans for 15 years before his appointment to the Bench. His trial practice included felony defense, juvenile offenders and dependencies, domestic relations, real estate and probate. He served as Land Hearing Examiner for Kitsap County in 1992–1993 and as President of the Kitsap County Bar Association in 1993. Commissioner Lowans served on the Faculty of the Washington State Judicial College (2002–2007 and 2009–2011) as instructor concerning Dependencies, and served as the judicial representative to the Board of Directors of Washington State Court-Appointed Special Advocates (2002–2005).

2 *See* RCW 13.34.138.
3 RCW 13.34.138(1). *See also* RCW 13.34.145.
4 RCW 13.34.145(7).
5 RCW 13.34.235.
6 RCW 13.34.138(1)(a).

frequently than every six months, which may often be appropriate, depending on the facts and circumstances of the case. Generally speaking, completion of all services ordered at the disposition hearing within the first 90 days is impossible. Arguably, the 90-day review hearing is a "report card" concerning compliance and progress as to parents, the child, and the supervising agency, as well as a basis for further refinement or modification of services as needed. The 90 Day Review mark is in reality more generally at six months or more from the date of removal, and a thorough evaluation of services, compliance and progress is both necessary and appropriate.

§ 19.4 Parties Present

All dependency hearings shall be public, unless the judge finds that it is in the best interests of the child to exclude the public.[7] Either parent, the child's attorney or the Guardian ad Litem (GAL)/Court-Appointed Special Advocate (CASA) may move the court to exclude the public. The Department of Social and Health Services (DSHS), however, may not seek to exclude the public.

Any party has the right to be heard at the review hearing.[8] Geography and other logistics may dictate many practical considerations in conducting a review hearing. Consequently, parents and others may appear by telephone, particularly when they are out of state or incarcerated. The dependency courtroom should always have a speaker phone with the technical ability to have multiple parties on the line during the hearing.

1. Persons Who Should Always Be Present:

   - Judge or Court Commissioner
   - Parents, including putative fathers, whose rights have not been terminated
   - Custodial Adults and Relatives with legal standing
   - Assigned Caseworker
   - Agency Attorney
   - Attorney or Attorneys for Parent(s)
   - GAL/CASA
   - Attorney for Child (if appointed)
   - Tribal Representative if it is an ICWA case

2. Persons Who May Also Be Needed:

   - Age appropriate children[9]
   - Extended family members and relatives
   - Foster Parents - Relative placement[10]
   - An Interpreter
   - Judicial case management staff
   - Therapists, Counselors, and other service providers
   - Domestic Violence Advocate
   - Adult or Juvenile probation or parole officer
   - Law Enforcement Officers
   - Security personnel
   - Other witnesses as may be identified

§ 19.5 Notice to Parties

All parties must be given notice of the review hearing by any means reasonably certain of notifying the party, including but not limited to, notice in open court, mail, personal service, telephone, and telegraph.[11] All parties have the right to be present and heard at the review hearing.[12]

Notice of a review hearing concerning a child who has been found to be dependent and removed from the parental home must include an advisement that a petition to terminate the parent and child relationship may be filed.[13]

§ 19.6 Notice to Foster Parent, Pre-Adoptive Parent, or Relative

DSHS is required to provide to the child's foster parents, preadoptive parents, or other caregivers with notice of their right to be heard prior to each proceeding held with respect to a child in juvenile court. The rights to notice and to be heard apply only to persons with whom the child has been placed by DSHS and who are providing care to the child at the time of the hearing. Such persons are not granted party status solely by reason of the right of notice and to be heard.[14]

Information from such caregivers may prove highly valuable to the court in considering issues such as visitation, health care, and educational issues concerning a child. If they appear in court, they should be acknowledged and invited to provide any information they may have. If logistics or other events preclude a personal appearance, the caregivers should be encouraged to participate telephonically if possible or to submit a written update to the court.

§ 19.7 Findings

The court shall make findings concerning both compliance and progress by the parties concerning services, moving forward towards permanence and whether or not reasonable efforts are being made under the plan. Note that in cases involving an

7 RCW 13.34.115(1).

8 JuCR 3.9.

9 There is no hard and fast age specified by statute (although during the 2008 session the Legislature considered making it mandatory). Each case is unique, and the court must make a judgment call.

10 This point indicates foster parents and relatives with whom the child is temporarily placed.

11 JuCR 3.9; JuCR 11.2.

12 JuCR 3.9.

13 *Id.*

14 RCW 13.34.096; RCW 74.13.280.

Indian Child, the provisions of the Indian Child Welfare Act (ICWA) and the Washington State Indian Child Welfare Act (WSICWA) apply. Both statutes require *active efforts* rather than reasonable efforts, and active efforts are further defined within WSICWA.[15]

DSHS is required to conduct monthly visits with children and caregivers unless the child's placement is being supervised under a contract with a private agency accredited by a national child welfare accrediting entity. In that case, the private agency is required, within existing resources, to conduct the monthly visits with the child and caregiver and provide DSHS with a written report of the visits within 15 days of their occurrence. In cases where the monthly visits required are being conducted by a private agency, DSHS must conduct a face-to-face health and safety visit with the child at least once every 90 days.[16]

§ 19.8 Review Order When the Child is Returned Home

A child shall not be returned home unless the court finds that the reason for removal per RCW 13.34.130 no longer exists.[17] The inquiry by the court, in short, is whether the child will be safe and whether circumstances have become sufficiently stable to maintain safety and mitigate or cure any damage suffered. DSHS will not make a recommendation to return a child home without first having conducted a child protective team (CPT) staffing. The decision to return the child is within the sound discretion of the court after consideration of all facts and circumstances presented, including the CPT recommendation. However, the court need not wait for a CPT recommendation if the court determines that the child should be returned home.

Prior to a child returning home, DSHS must complete home and background checks on all adults residing in the home and identify any persons who may act as a caregiver to determine if such persons are themselves in need of any services so as to ensure the safety of the child.[18]

In any review hearing, whether the child is returned or not, the court is required to make findings as to *compliance* and *progress* by the parents, the child, and the supervising agency with the case plan and services specified in the plan. The court is also required to review the case plan and its services and make adjustments and modifications where appropriate given the facts and circumstances presented at the review hearing. (See § 19.9 below.) Services should be tailored to meet each individual parent's needs in a timely manner.[19]

Clearly, the return home of a child is always conditioned upon the continued safety and security of the child. RCW 13.34.138(3)(a) is clear that any return home of a child is expressly contingent upon the following:

1. Compliance by the parents with court orders relating to care and supervision of the child, including compliance with the case plan; and

2. Continued participation of the parents, if applicable, in available substance abuse or mental health treatment if substance abuse or mental illness was a contributing factor to the removal of the child.

A failure to comply and make progress with the agency case plan, including services for parents and the child, may result in the removal of the child.[20] RCW 13.34.138(3)(b) states that a child may be removed from the home for reason of any of the following:

1. Noncompliance by the parents with the agency case plan or court order;

2. The parent's inability, unwillingness, or failure to participate in available services or treatment for themselves or the child, including substance abuse treatment if parent's substance abuse was a contributing factor to the abuse or neglect; or

3. The failure of the parents to successfully and substantially complete available services or treatment for themselves or the child, including substance abuse treatment if a parent's substance abuse was a contributing factor to the abuse or neglect.

If a dependent child is returned home and that child is later removed from the home (i.e., a second removal takes place), the court must conduct a review hearing within 30 days from

15 25 U.S.C. § 1912(d); E.S.S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 309.

16 E.S.S.B. 6792, 60th Leg., Reg. Sess. (Wash. 2008).

17 RCW 13.34.138(2)(a).

18 *Id.* at (2)(b).

19 *In re S.J.*, No. 26179-4-III, (Wn. App. Aug. 2, 2011).

20 Safe and adequate housing is often at the center of dependencies, and in cases in which a lack of adequate housing is the primary factor in the out-of-home placement of the child, the court has the authority to order DSHS to provide housing assistance in some form to the child and family. The nature of such services is within the discretion of DSHS, subject to findings by the court as to their reasonableness and adequacy. *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 925, 949 P.2d 1291 (1997). Housing resources within a community will obviously vary widely across the state. Arguably, knowledge of those resources and being able to facilitate access to such resources is reasonable.

The Legislature has responded to the Supreme Court's mandate concerning housing by (1) limiting the court's authority to cases in which homelessness or lack of adequate and safe housing is the primary reason for out-of-home placement, and (2) subjecting that authority to the availability of funds appropriated for this specific purpose. RCW 13.34.138(4).

the date of removal to determine whether the permanency plan should be changed, a termination petition should be filed, or other action is warranted. The best interests of the child shall be the court's primary consideration.[21] It should be noted that the information available at such review hearings is often not substantially greater than was available when the dependent child was initially removed from the home, and therefore the scheduling of an early permanent plan hearing is appropriate.

§ 19.9 Review Order When the Child is Not Returned Home

A wide range of issues may arise at a review hearing, irrespective of whether the child is returned home or not. In addition to findings as to compliance and progress by the parents, the child, and the supervising agency, considerable time and energy may be expended to review, clarify, or modify services and visitation. It is important to afford all parties, including the GAL/CASA, foster parents, relative placements, and service providers, the opportunity to be heard.

If a child is not returned at the review hearing, the court is required to establish in writing the projected date by which the child will be returned home or some other permanent plan of care for the child will be implemented, and the following:

1. Whether reasonable efforts have been made to provide services to the family and eliminate the need for placement of the child;

2. Whether there has been compliance with the case plan by the child, the child's parents, and the agency supervising placement;

3. Whether progress has been made toward correcting the problems that necessitated placement out of the home;

4. Whether the services set forth in the plan and the responsibilities of the parties needs to be clarified or modified due to additional information or changed circumstances;

5. Whether there is a continuing need for placement;

6. Whether the child is in an appropriate placement which adequately meets all his or her physical, emotional, and educational needs;

7. Whether preference has been given to placement with the child's relatives;

8. Whether both in-state and, where appropriate, out-of-state placements have been considered;

9. Whether the parents have visited the child and any reasons why visitation has not occurred or has been infrequent;

10. Whether the terms of visitation need to be modified;

11. Whether the long term permanent plan for the child as approved by the court remains the best plan for the child; and

12. Whether any additional court orders are needed to move the case forward toward permanency.

If a written review order is not prepared at the time of the review hearing, ensure that one shall be presented on or before a date certain. Also be sure to set the next review or permanent planning hearing within at least six months and possibly sooner, depending on the facts of the case.

§ 19.10 Court-Ordered Termination Petition

The decision to order DSHS to file a petition for termination of the parent-child relationship is normally made at the time of a permanent planning hearing following entry of a judgment by clear, cogent, and convincing evidence that the permanent plan for the child requires termination of parental rights. When ordering that a petition for termination be filed, it is good practice to specify a date by which such a petition is to be filed.

While RCW 13.34.138(2)(d) grants the court authority to order DSHS to file a petition for termination at the time of a review hearing, the criteria for issuing such an order are not stated. Presumably such an order would arise from a case involving aggravated circumstances as stated in RCW 13.34.132. DSHS is not required to develop a plan for services for the parent(s) or to provide services to the parent(s) if the court orders a termination petition to be filed.[22] Please refer to Chapter 18, Section 17, concerning aggravated circumstances.

§ 19.11 Extended Jurisdiction and Services for Children in Foster Care[23]

A dependent child may remain subject to the court's jurisdiction beyond his or her 18th birthday if he or she is eligible[24] and elects to receive extended foster care services authorized

21 *Id.* at (3)(c).

22 RCW 13.34.136(2)(c).

23 *See generally* S.S.H.B. 1128, sec. 1, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 330, sec. 1.

24 The youth remains eligible for these services until the age of 21 and while the youth is enrolled in secondary education or its equivalent, post secondary education, vocational education, program or activity designed to promote or remove barriers to employment, or engagement by the youth in employment for 80 hours or more per month. S.S.H.B. 1128, sec. 8.

by RCW 74.13.031. Such jurisdiction may extend until the youth reaches the age of 21. The statute expressly provides that a youth 18 years or older shall not be deemed a child for any other purpose.

When a dependent child reaches the age of 18, the court shall postpone the dismissal of the dependency proceeding for six months if the youth is enrolled in a secondary education program or its equivalency on his or her 18th birthday. At the end of the six month period, the court shall dismiss the dependency if the youth has not requested extended foster care from DSHS. Parents are to be dismissed from the proceeding when the youth reaches age 18 as the youth is now otherwise an adult. Presumably, the GAL should also be dismissed as well on this basis. The court shall appoint an attorney for the youth, and review hearings must be conducted every six months concerning the continued safety, eligibility and overall progress of the youth in transitioning to full independence. The dependency is dismissed upon request of the youth or when the youth is no longer eligible for extended foster care services (i.e., the child turns 21 or ceases his or her enrollment in secondary education or its equivalent).[25]

Chapter 20

Permanency Planning

Jana Heyd[1]

§ 20.1 Purpose Statement

Washington's permanency planning statutes (RCW 13.34.136 and RCW 13.34.145) require timely resolution of dependency cases while promoting a child-centered decision making process for children in the child welfare system. Washington's law parallels federal funding statutes regarding permanency planning and requires that such planning begin very early in a dependency case.

§ 20.2 Timing

For children who have been removed from the home, the permanency planning laws require that the agency supervising the child's case develop a plan no more than 60 days from the time the agency assumes responsibility for providing services, including placing the child or at the time of a dispositional hearing under RCW 13.34.130, whichever occurs first.[2]

As an exception, if reasonable efforts to reunite the child and parent are deemed to be unnecessary, pursuant to RCW 13.34.132(4), due to the existence of "aggravating circumstances,"[3] the court is required to hold a permanency planning hearing within 30 days.[4]

Permanency planning goals should be achieved at the earliest possible date. If the child has been in out-of-home care for 15 of the most recent 22 months, the court requires the Department of Social and Health Services (DSHS), as supervising agency, to file a petition to seek termination of parental rights.[5]

In the alternative, the court can find a "good cause exception" that would alleviate DSHS's requirement to file a termination petition.[6] Good cause exceptions can include the child being

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2 RCW 13.34.136(1).

3 Aggravating circumstances include instances in which a parent has been convicted of certain crimes, is a sexually violent predator (as defined in RCW 71.09.020), has failed to complete treatment and there has been a prior termination of parental rights involving a previous child and the parent has not made significant changes in the interim, or has abandoned a child under the age of three. *Id.*

4 RCW 13.34.134.

5 RCW 13.34.145(3).

6 *Id.* at (3)(b).

cared for by a relative; DSHS failing to provide the child's family such services as the court and DSHS have deemed necessary for the child's safe return home; or DSHS documenting in the case plan a compelling reason for determining that filing a petition to terminate parental rights would not be in the child's best interest.[7] Additionally, a child age 14 or older must consent to his or her own adoption.[8] Practitioners have asserted that if the child is unwilling to be adopted, the court could find "good cause" not to require a termination petition.

§ 20.3 Reunification as a Permanent Plan

A parent has the right to request a permanent plan of "return home" at all stages of the dependency process. Further, the Washington legislature has declared that "the family unit is the fundamental resource of American life which should be nurtured. … [T]he family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized."[9]

Dependency proceedings are intended to protect children, help parents alleviate problems, and where appropriate, reunite families.[10] RCW 13.34.136(2)(a) provides that "return of the child to the home of the child's parent" can be a primary goal or may be an alternative goal. Unless the court has ordered that a termination petition be filed, a specific plan as to where the child shall be placed, what steps will be taken to return the child home, and what actions the agency will take to maintain parent-child ties are to be included in the permanent plan.[11] Additionally, the plan should specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody,[12] and a timeline for each service plan and parental requirement.[13]

§ 20.4 Concurrent or Alternative Planning

The Court may order a concurrent plan of return of the child to the home and another permanent plan.[14] In some jurisdictions (for example, California), it has been the practice of the child welfare authorities to assign two different caseworkers to a case, each charged with overseeing one of the plans, and avoiding an appearance of a conflict between the two positions.

§ 20.5 Permanency Options in Washington

State law provides for the following permanent plans: return home (which can include entry of a custody order by one or the other parent), guardianship, adoption, permanent legal custody, long term relative or foster care, and independent living.[15]

§ 20.6 Permanency Priorities

Best practice generally requires that the child be placed in the "most" permanent placement possible, as long as that option is in the child's best interest. Often the caregiver, the biological parent, the child, or the tribe may have a particular reason to request one plan over another. DSHS can provide a matrix or chart so that caregivers and families can identify which permanent option best suits their case. Financial support, religious, or family preferences may also influence which plan is selected.

If reunification is not successful, then adoption is likely to be viewed as the "most" permanent plan. For younger children, DSHS generally prefers that the permanent plan be adoption. Nonparental custody (permanent custody) is generally viewed by DSHS as an acceptable alternative to adoption if parental rights are not terminated. However, this plan may require the petitioner for custody to incur legal fees to pay for an attorney to file an RCW 26.10 action in family court. Some jurisdictions have local rules or procedures that create Unified Family Courts to facilitate a 26.10 action much easier. The dependency statute provides that the dependency court may assume concurrent jurisdiction, allowing the dependency judge to address the dependency and the non parental custody action in the same proceeding, provided all parties agree.[16] As of the 2009 legislative session, a parenting plan can be entered or modified

7 *Id.*
8 RCW 26.33.160(1)(a).
9 RCW 13.34.020.
10 *In re Schermer,* 161 Wn.2d 927, 942–43, 169 P.3d 452 (2007).
11 RCW 13.34.136(2)(b).
12 Services may include housing assistance if (1) the lack of housing is a significant factor delaying permanency for the child and housing assistance would aid the parent in providing an appropriate home for the child and (2) funding is available for this specific purpose; the court does not have authority to order the provision of such assistance to any person or family if the assistance or funding are unavailable or the child or family are not eligible for such assistance. RCW 13.34.138(4).
13 RCW 13.34.136(2)(b)(i).
14 *Id.* at (2)(a).
15 *Id.* Although the statute includes independent living as a permanency option, federal law and DSHS consider independent living or transition services as "services" offered to the youth. 42 U.S.C. §5714-(1)–(2). The following plans are considered Permanent Legal Arrangements, in order of preference: a) Return to home of a parent, guardian, or legal custodian, b) adoption, c) third party custody with someone other than the parent (permanent legal custody), and d) guardianship (including dependency guardianship). *Id.* A long term care agreement is another planned living arrangement and may be considered for a child age 14 or older, if the above permanency plans have been ruled out. A long term care agreement is an agreement between the parties and the caregiver with the intention of being stable and lasting until the child is age 18. Children's Admin., Dep't Soc. & Health Serv., Practices and Procedures Guide § 4305 (2010), *available at* http://www.dshs.wa.gov/ca/pubs/mnl_pnpg/chapter4_4300.asp [hereinafter Practices and Procedures Guide]. *See also* Practices and Procedures Guide at 4310.
16 RCW 13.34.155.

in the dependency action if the parents agree or if one parent's whereabouts are unknown.[17]

§ 20.7 Agreed Permanency Plans

In some cases, a parent may prefer to permanently place his or her child in out of home care. This can occur if a parent is facing incarceration for a lengthy period of time, defers to a child's or other family member's (or foster parent's) request, or for any other reason has determined not to pursue return home of the child.[18] The parent has several options in these circumstances, all of which require a court to find that the option is in the child's best interest.[19] DSHS may oppose a parent's request to relinquish his or her parental rights in some cases (for example, if another permanent home is not available or realistic for the child, if the parent is attempting to avoid payment of child support, or if the child objects).

§ 20.8 Parental Preference (Voluntary Adoption)

A parent may request to voluntarily relinquish his or her parental rights before DSHS files a termination petition. If so, the law indicates that the parent's preference *shall* be honored, as long as the proposed adoptive parents are qualified and the placement is in the child's best interest.[20] If the petition to terminate has been filed when the parent exercises his or her preference under this statute, DSHS is only required to *consider* the parent's preference, provided the proposed adoptive parents are qualified and the adoption is in the child's best interests.[21] Practitioners have mixed opinions about how effective this statute is, given that the court must still find that a parentally preferred adoption is in the child's best interest.

§ 20.9 Mediation and Permanency Planning

Some jurisdictions in Washington utilize settlement judges or other mediation options to work out agreed permanent plans for children. Model Court Programs and other community resources may be available to assist case participants in mediating dependency cases.

§ 20.10 Communication Agreements/Open Adoption

If a parent voluntarily relinquishes his or her parental rights, it is very common for the parent to also enter into a communication agreement (or open adoption) pursuant to RCW 26.33.295. This agreement is a legally enforceable contract between the prospective adoptive parent and the relinquishing parent if set forth in a written court order.[22] The court must determine if the agreement is in the child's best interest.[23] The agreement can provide for a range of contact including annual pictures and letters to visitation, phone contact, notification if the child becomes seriously ill or dies, or other contact as agreed upon by the parties.

The open communication statute limits the kinds of agreements that will be enforceable under Washington law. Agreements for contact or communication between the child and his or her siblings, grandparents, or other relatives are not legally enforceable under the statute. However, adoptive parents may agree to enter into and voluntarily comply with informal agreements for such ongoing post-adoption contacts. Pursuant to House Bill 1938 enacted during the 2009 legislative session, courts must inquire about post-adoption sibling contact if the siblings are not adopted into the same family. An agreement between the adoptive parent(s) and the birth parent(s) may now include a visitation provision for the siblings if set forth in the written court order.[24]

§ 20.11 When Return Home is not the Permanent Plan

Once the court determines that DSHS must file a termination petition, a trial to terminate parental rights is scheduled.[25] The trial date is scheduled approximately 120 days after the petition is filed. In some counties the termination case is a new cause of action. Parents have the right to counsel if they cannot afford counsel at this stage, as with all stages of a dependency case.[26] The children in a dependency case shall be appointed a guardian ad litem (GAL) unless the court finds good cause not to.[27] Generally a Court-Appointed Special Advocate (CASA) is assigned as the GAL. A child age 12 or older must be notified of their right to request counsel.[28] The GAL and DSHS are each responsible for notifying the youth of their right to counsel and inquiring as to whether they wish to have counsel.[29] The court shall ensure that the notification and inquiry has occurred.[30] DSHS and the GAL must complete this process annually once a child turns 12.[31] If a child 12 years or older requests an attorney, the court *may* appoint counsel.[32] Washington's law regarding appointment of an advocate for a child continues to have a gap in it, as a court can determine that there is good cause *not* to appoint either an attorney or a GAL, leaving the child with

17 *See id*. at (2).
18 *Id.* at (1).
19 *Id.*
20 RCW 13.34.125.
21 *Id.*
22 RCW 26.33.295(2)
23 *Id.*
24 RCW 26.33.295.
25 *See* RCW 13.34.132 (listing the requirements for filing a termination petition).
26 RCW 13.34.090.
27 RCW 13.34.100(1).
28 *Id. at* (6)(a).
29 *Id.*
30 *Id.* at (6)(e).
31 *Id.* at (6)(b).
32 *Id.* at (6)(f).

no representation at all.[33]

§ 20.12 Review Hearings When a Termination Trial is Pending

Even if a termination case is pending, the dependency case remains active and the case will still be regularly reviewed. The court is still required to hold permanency planning hearings at least once per year.[34] Additional permanency hearings can occur at any time as set by the court.[35] The court is required to address the permanent plan at *every* hearing once the child has been out of the home for 15 of the last 22 months.[36]

§ 20.13 Unsuccessful Return/Second Removal From Home

When a child is returned to the parent as part of a transition home under a permanent plan and the transition is not successful and the child is returned to foster care, the court is required to hold a review within 30 days from the date of removal to determine whether the permanency plan should be changed, a termination petition should be filed, or other action is warranted[37]

§ 20.14 The Permanency Planning Hearing

DSHS is required to provide the parties with a copy of its Individual Service and Safety Plan (ISSP) two weeks (10 working days) prior to the scheduled permanency planning hearing.[38] The hearing occurs in all cases in which the child has remained in out-of-home care for at least nine months and an adoption decree, guardianship order, or permanent custody order has not previously been entered.[39] The hearing shall take place no later than 12 months following commencement of the current placement episode.[40]

The court reviews the following issues at the hearing, as outlined in RCW 13.34.145(3): If a goal of long-term foster care or relative care has been achieved prior to the permanency planning hearing, the court shall review the child's status to determine whether the placement plan for the child's care remains appropriate. If the primary permanency planning goal has not been achieved, the court shall inquire into the reasons why not and determine what must be done in order to achieve this goal.[41] The court should also make explicit findings regarding the continuing necessity for and the safety and appropriateness of the placement; compliance with the agency, service providers, the parents, the child, and the child's guardian, if any; the extent of the efforts to involve appropriate service providers to meet

the needs of the child and the parents; whether conditions have been remedied such that the child could return home; and the proposed date that permanency could be achieved.[42]

§ 20.15 Participation in Permanency Planning Hearings

Dependency proceedings are no longer closed proceedings.[43] Anyone can attend hearings, unless the court excludes the public "in the best interest of the child."[44] Caregivers have a specific right to notice and an opportunity to be heard if the child has been placed by DSHS in that home.[45] Both federal and state law support increasing the caregiver's attendance and input into a permanency planning hearing.[46] Generally, the agency providing supervision of the case is the agency charged with notifying the caregiver of the hearing.[47] Caregivers should be made aware of the scope of the input which they may provide to the court. If a child has resided in the home of a foster parent or relative for more than six months prior to the permanency planning hearing, the court must make a finding regarding whether the foster parent or relative was informed of the hearing as required in RCW 74.13.280 and 13.34.096.

§ 20.16 Children in the Courtroom

Children's advocates have mixed opinions about having the child who is the subject of the dependency participate in permanency planning hearings (or any of the dependency proceedings). Anecdotally, children with appointed counsel are much more likely to attend court hearings. The child may or may not want to attend a hearing depending upon their level of involvement in the legal proceedings. The child should have the opportunity to provide input into his or her case in the manner that most effectively represents the child's position, while respecting the child's wishes about attending the hearing. Currently, the CASA or GAL must report the child's opinion about the issues involved in the proceeding and make recommendations based upon an independent investigation regarding the best interest of the child.[48] Several counties in Washington are now in the process of creating pilot projects to include children in the courtroom. See Chapter 5 for more information concerning this topic.

33 RCW 13.34.100.
34 RCW 13.34.145(5).
35 RCW 13.34.138(1).
36 RCW 13.34.145(3).
37 *Id.* at (3)(c).
38 RCW 13.34.145(2).
39 *Id.* at (1).
40 *Id.*
41 *Id.* at (3).
42 *Id.* at (3)(b)(i–vi).
43 RCW 13.34.115.
44 *Id.*
45 RCW 13.34.096.
46 RCW 13.34.136(6).
47 See, e.g., RCW 13.34.096.
48 RCW 13.34.105(1).

§ 20.17 Adolescent Children and Permanency Planning

RCW 13.34.145 has specific findings the court must make if "independent living" is identified as a goal in the permanent plan.[49] For children who are aging out of foster care, preparing the youth for adulthood and living on his or her own should be carefully planned to ensure that the youth has housing, job skills, and access to education along with any other skills or resources to insure that the youth can live successfully on his or her own.[50] A 2011 legislative act created "extended foster care services" such that support services offered to foster children may be extended until a youth turns 21.[51] Extended foster care services are defined as "residential and other support services [DSHS] is authorized to provide."[52] These include, but are not limited to, continued foster placement or independent living, medical assistance, counseling, and assistance in meeting basic needs.[53]

The youth may choose to remain a dependent until the age of 21, continuing as a party to the case.[54] The parent or guardian, however, is dismissed once the youth turns 18.[55] The court may postpone the dismissal of a dependency case for six months after the youth's 18th birthday if they are enrolled in a secondary education program or a secondary education equivalency program.[56] This allows time for the youth to request extended foster care services from DSHS.[57] The court will dismiss the dependency if, after six months, the youth has not requested these services.[58]

A 2004 report that was completed by the DSHS Children's Administration entitled "Foster Youth Transition to Independence Study" showed that for every independent living skill a youth was offered when transitioning to adulthood, the youth is less likely to be homeless, incarcerated, pregnant earlier than planned, or underemployed. It is very important that the youth graduate from high school before aging out of foster care if at all possible, and that the youth have copies of documents such as his or her birth certificate, social security card, transcripts, medical insurance information, and any other important documents.

The American Bar Association and the Center for Child and Youth Justice (CCYJ) are in the developmental stage of a program that would provide some legal assistance to foster youth who are aging out of care.[59] The Independent Youth Housing Program was enacted in 2009 to provide funding and additional support to youth older than 18 until they are 23 years old.[60]

§ 20.18 Dependency Guardianships

In 2010, the legislature modified the statutory scheme for guardianship proceedings which flow from dependency cases. Effective June 20, 2010, guardianship proceedings are initiated pursuant to the requirements of RCW 13.36 and are typically referred to as Title 13.36 guardianships. Dependency guardianships previously established under RCW 13.34 remain in effect, but may be converted to a Title 13.36 guardianship.[61] See Chapter 21 for more information concerning guardianships.

§ 20.19 Non Parental Custody Actions

Washington state law also recognizes Title 26.10 nonparental custody actions as permanent planning options for children. Practitioners consider these actions to be more permanent than guardianship actions, as generally they procedurally are more difficult to modify or vacate. The court that hears the dependency petition may also hear and determine issues related to Title 26.10 actions as necessary to facilitate a permanent plan for the child as part of the dependency disposition order, a dependency review order, or "as otherwise necessary to implement a permanency plan of care for a child."[62]

A court may determine that a non parental custody action is the best permanent plan for a child if there is a benefit in allowing the parents' rights and financial responsibility for the child to remain intact while still entering a permanent order. The statutory language in a non parental custody action generally requires a change in the custodian's circumstances (such as the custodian dying or becoming unfit to serve) in order to vacate the order. In a guardianship, the change of circumstance which would allow modification may be a change in the parent's circumstances (such as the parent completing drug treatment or another service which remedies parental unfitness). However, any modification in either a custody or guardianship order would have to be determined to be in the child's best interests.

49 The findings that the court is required to make are listed in RCW 13.34.145(3)(c)(i).
50 *See generally* S.S.H.B. 1128, sec. 1, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 330, sec. 1.
51 S.S.H.B. 1128, sec 3(2)(b).
52 *Id.* at sec. 4(13)
53 *Id.*
54 *Id.* at sec. 7(2)
55 *Id.*
56 *Id.* at sec. 7(1).
57 *Id.*
58 *Id.*
59 *See* The ABA Bar-Youth Empowerment Project, http://www.abanet.org/child/empowerment/home.html, for more information. Locally, the CCYJ (www.ccyj.org) administers the Lawyers Fostering Independence Project.
60 RCW 43.63A.305–315.
61 RCW 13.34.237.
62 RCW 13.34.155.

§ 20.20 Concurrent Jurisdiction with Family Court

Concurrent jurisdiction with the dependency court is generally required in order for a potential custodian to file a non parental custody order. To obtain concurrent jurisdiction, the dependency court must enter an order of concurrent jurisdiction.[63]

Once the non parental custody order has been entered, the dependency case can be dismissed. Generally, family members including step-parents are the persons most likely to file a non-parental custody action. This action can allow a step-parent, for example, to maintain placement of a nonbiological child and can often facilitate keeping siblings in the same permanent placement.

Nonparental custody orders can establish visitation and other conditions for contact between the biological parent(s) and the child. The biological parent(s) will likely be ordered to pay child support under a nonparental custody order. A parent would not be required to pay ongoing child support if the parent relinquishes parental rights, except for back child support. Payment of child support may be a determining factor when choosing between adoption and nonparental custody. Parents in a guardianship proceeding may also be required to pay ongoing child support.

§ 20.21 Emancipation

RCW 13.64 allows a youth to file an emancipation petition under certain circumstances if the youth is able to meet certain requirements. It is extremely rare for a dependent youth to file for emancipation. Any youth who is 16 years of age or older and who is a resident of the state may file an emancipation petition.[64] The youth must indicate he or she has the ability to manage his or her financial affairs, personal, social, education, and nonfinancial affairs.[65] If a youth has completed high school, is gainfully employed, has the ability to obtain his or her own residence, has medical insurance, and has access to necessary services, a court may agree that the youth is eligible for emancipation. Many older children in foster care express an interest in legally emancipating. As an example, a child entering the military prior to his or her 18th birthday may request to be emancipated in order to do so. Generally, practitioners encourage youth to remain in foster care until they reach the age of 18 and complete high school, especially if there are education, health, or housing benefits that the youth may be eligible for even after turning 18—emancipation would likely disqualify the youth for those benefits. For more detail concerning emancipation, refer to Chapter 32 of this bench book.

63 *Id.*
64 RCW 13.64.010.
65 RCW 13.64.020.

§ 20.22 Long Term Foster/Relative Care With Written Agreement

This alternative permanent living arrangement is used for youth who are in a stable foster or relative home, reunification is not feasible, and either the youth does not want to be in a guardianship or adopted, or the child needs significant ongoing services and support and the child's level of benefits would be reduced if those options are pursued. These children

continue to be dependent and in the custody of DSHS. The cases continue to be reviewed regularly, at least twice per year. This permanent plan is most commonly used for older children, although the statute does not preclude its use for younger children.[66]

§ 20.23 Independent Living

If the court has identified independent living as the permanency goal, the court must make a finding that the provision of services to assist the child in making a transition from foster care to independent living will allow the child to manage his or her financial, personal, social, educational, and nonfinancial affairs prior to approving independent living as a permanency planning of care.[67] The permanency plan must also identify services that will be provided to assist the child to make a successful transition from foster care to independent living.[68]

§ 20.24 Disproportionality

In 2004, the King County Racial Disproportionality Coalition completed a study regarding the length of time that children of color were remaining in foster care without a permanent plan.[69] Recently, Washington State also completed its study on the question of disproportionality in the state, and came to a similar conclusion: children of color continue to be overrepresented in the foster care system.[70] For Native American and African American children, the longer they remained in foster care, the less likely they would be placed in a permanent home; both of these groups remain over-represented in the foster care system. As a result of the Washington State report, a commission was established by the legislature to develop a plan to resolve this disproportionality—the initial recommendations of the plan are scheduled to be released in the Fall of

66 RCW 13.34.145(3)(a).
67 *Id.* at (3)(c)(i).
68 *Id.* at (3)(c)(ii).
69 King County Coalition on Racial Disproportionality, Racial Disproportionality in the Child Welfare System in King County, Washington (2004), *available at* http://www.chswa.org/KingCountyReportonRacialDisproportionality.pdf.
70 Washington State Racial Disproportionality Advisory Committee, Report on Racial Disproportionality in Washington's Child Welfare System, 2d edition (2008), *available at* http://www1.dshs.wa.gov/ca/pubs/disproportionReport.asp.

2008. Awareness of the effect of disproportionality can assist the court ensuring that children of color have more timely access to permanent placements.

§ 20.25 Siblings and Permanency

Washington's law supports the placement of siblings together and for siblings to have visitation and contact with each other if not placed together.[71] Specifically, the law presumes that sib

ling contact, including placement together, is in the siblings' best interest, provided that: (1) the court has jurisdiction over all of the siblings or the parents are willing to agree, and (2) there is no reasonable cause to believe that the health, safety or welfare of any child would be jeopardized, or parental visitation would be reduced.[72] However, selecting permanency plans for siblings when they are not placed together, or when placed temporarily together but in a home in which the caregiver does not wish to retain all of the siblings continues to be a difficult dilemma. Early planning and providing support to the caregivers will benefit the permanency planning process. The court should continuously review the issue of sibling contact especially when the siblings are not placed together.

RCW 13.34.136(6) requires that when adoption has been identified as the permanent plan, the issues of sibling contact and visitation must be planned for if the siblings do not reside together. The court is required to encourage the prospective adoptive parents, birth parents, foster parents, kinship caregivers, and DSHS or other supervising agency to seriously consider the long-term benefits to the child adoptee and his or her siblings of providing for and facilitating continuing post-adoption contact between the siblings. To the extent that it is feasible, and when it is in the best interests of the child adoptee and his or her siblings, contact between the siblings should be frequent and of a similar nature as that which existed prior to the adoption. If the child adoptee or his or her siblings are represented by an attorney or GAL in the dependency proceeding or in any other child custody proceeding, the court must inquire of each attorney and GAL regarding the potential benefits of continuing contact between the siblings and the potential detriments of severing contact. However, the law does not require DSHS to agree to any specific provisions in an open adoption agreement and does not create a new obligation for DSHS to provide supervision or transportation for visits between siblings separated by adoption from foster care.[73]

§ 20.26 Relative Placements

If the child is being cared for by a relative, the court should ensure that the relative is able to obtain appropriate benefits and support that will enable the relative to provide a stable and nurturing home for the child.[74] The court and parties should ensure that the relative caregiver has an opportunity to provide input to the court on the well-being of the child and should be included in case planning and permanency planning whenever possible.

§ 20.27 Well-Being and Permanency

In 2008, the legislature enacted ESSB 3205, an act relating to promoting the long-term well-being of children. The legislature found that meeting the needs of vulnerable children who enter the child welfare system includes protecting the child's right to a safe, stable, and permanent home where the child receives basic nurturing." The court is encouraged to promote child-centered decision making in dependency cases and is encouraged to place a greater focus on children's developmental needs." A stable and permanent home should also meet the child's basic educational, emotional, medical, and physical needs. Care should be taken to ensure that the child is in a nurturing and culturally appropriate home that also meets the child's religious preferences and, where possible and appropriate, connections with extended family and siblings.

71 RCW 13.34.130(3)(a).

72 *Id.* at (4)(a)(i)–(ii).

73 *Id.*

74 While it would be helpful for relatives to be given access to respite care, clothing resources, camp scholarships, and other resources, just as a licensed foster parent would be provided, DSHS is not statutorily required to provide these services.

Chapter 21

Guardianship

Jana Heyd,[1] Cheryl Wolfe,[2] and Pam Kramer[3]

In 2010, the legislature modified the statutory scheme for guardianship proceedings which flow from dependency cases. Effective June 20, 2010, guardianship proceedings are initiated pursuant to the requirements of RCW 13.36 and are typically referred to as Title 13.36 guardianships.[4] Dependency guardianships previously established under RCW 13.34 remain in effect, but may be converted to a Title 13.36 guardianship.[5] Title 13.36 was created in order to "create a separate guardianship chapter to establish permanency for children in foster care through the appointment of a guardian and dismissal of the dependency."[6]

§ 21.1 Title 13.36 Guardianships

Guardianships are recognized in Washington as a permanent plan available to dependent children and a child who cannot be safely reunified with his or her parents.[7] If a guardianship petition is filed, the petition may be granted if guardianship, rather than termination of parental rights or any further attempt at reunification, is in the child's best interests.[8] The guardian is granted full custody of the child with the right to make most decisions regarding the child's health, education and care until the child is 18 years old.[9] A petition for guardianship may not be filed until the child has been out of the parent's home pursuant to a finding of dependency for six months.[10]

Any party to a dependency proceeding may file a Title 13.36 guardianship petition.[11] A proposed guardian has the right to intervene in the proceedings.[12] The parties have the right to present the testimony of witnesses and the rules of evidence

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4 Title 13.34 statutes that established dependency guardianships (i.e., RCW 13.34.230, RCW 13.34.231, RCW 13.34.236, and RCW 13.34.238) were repealed. S.H.B. 2680, sec. 16, 61st Legis., Reg. Sess. (Wash. 2010); Laws of 2010, ch. 272, sec. 16. However, much of the language found in the repealed statutes under Title 13.34 is virtually identical to language adopted for Title 13.36 guardianships. Thus, existing case law interpreting those repealed statutes could still be considered persuasive and useful for understanding issues arising under Title 13.36.

5 RCW 13.34.237.

6 RCW 13.36.010.

7 *Id.*; *see also In re A.C.*, 123 Wn. App. 244, 251, 98. P.3d 89 (2004).

8 RCW 13.36.040(2)(a). Some of the factors that can be considered when assessing what is in the child's best interest include the qualifications of the proposed guardian(s); the strength and nature of the parent-child bond; the benefit of continued contact with the parent or the extended family; the need for continued state involvement and services; the likelihood the child would be adopted if parental rights were terminated; and any other case-specific factors relevant to the best interests of the child. *In re A.C.*, 123 Wn. App. at 254–255.

9 *See* RCW 13.36.050.

10 RCW 13.36.040(2)(c)(iii).

11 RCW 13.34.030(1).

12 *Id.*

apply to the proceedings.[13] The court must appoint a guardian ad litem (GAL) or attorney for the child in Title 13.36 guardianship proceedings.[14]

§ 21.2 Burden of Proof

A guardianship shall be established if the court finds by a preponderance of the evidence[15] that (a) it is in the child's best interests to establish a guardianship rather than terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent[16] and (b):

1. All parties agreed to entry of the guardianship order and the proposed guardian is qualified; *or*

2. (i) The child has been found to be a dependent child under RCW 13.34.030;

   (ii) A dispositional order has been entered pursuant to RCW 13.34.130;

   (iii) At the time of the hearing on the guardianship petition, the child has been removed from the custody of the parent for at least six consecutive months following a finding of dependency under RCW 13.34.030;

   (iv) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

   (v) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

   (vi) The proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the guardianship is a commitment to provide care for the child until the child reaches age 18.[17]

A guardianship may be established for a child who has no legal parent if, in addition to the above findings, the court determines that one or more exceptional circumstances exist and the benefits of a guardianship for the child outweigh any potential disadvantage of having no legal parent.[18]

Exceptional circumstances may include but are not limited to the following:

a) The child has special needs and a suitable guardian is willing to accept custody and able to meet the needs of the child to an extent unlikely to be achieved through adoption; or
b) The proposed guardian has demonstrated a commitment to provide for the long-term care of the child and (i) is a relative of the child; (ii) has been a long-term caregiver for the child and has acted as a parent figure to the child and is viewed by the child as a parent figure; or (iii) the child's family has identified the proposed guardian as the preferred guardian, and, if the child is age 12 years or older, the child also has identified the proposed guardian as the preferred guardian.[19]

If the above elements are established, an order must be entered appointing a guardian and the court shall issue a letter of guardianship.[20] If the guardian has not previously intervened, the guardian shall be made a party to the proceeding at the time the guardianship order is entered.[21]

§ 21.3 Qualifications to Serve as Guardian

To qualify as a guardian, the person must be over 21 years of age and meet the minimum requirements to care for children set forth in RCW 74.15.030.[22] Extended family members are likely the most common persons that offer to serve as a youth's guardian. A guardianship is entered into without terminating the parents' rights, although in some cases, children whose parental rights were previously terminated have been the subject of a dependency guardianship. In those cases (in which the parents' rights were previously terminated), the parent would not have any legal right to the child and would not be an ongoing party to the dependency case and would therefore not have the ability to seek to modify or vacate the guardianship order.[23]

Within available funds and DSHS rules, guardians may qualify for guardianship subsidies.[24]

13 RCW 13.36.040(1).
14 RCW 13.36.080.
15 The preponderance of the evidence standard satisfies due process requirements. *In re F.S.*, 81 Wn. App. 264, 268–269, 913 P.2d 844 (1996) (*see supra* note 4).
16 RCW 13.36.040(1).
17 *Id.* at (2).
18 *Id.* at (3).
19 *Id.*
20 RCW 13.36.050(1) and (6).
21 *Id.* at (1).
22 RCW 13.36.030(2).
23 *See* RCW 13.34.200.
24 *See* RCW 13.36.090. For example, if the guardian is a relative, state funds are available through the Relative Guardianship Assistance Program (RGAP). See Section 21.11 below for more information.

§ 21.4 Guardianship Order

The guardianship order must specify the guardian's rights and responsibilities concerning the care, custody and control of the child, the authority to receive and expend the child's property or funds, the frequency of contact between the child and parents and the child's siblings if applicable, and the need and scope of ongoing court oversight.[25] A list of rights and duties are set forth in RCW 13.36.050(2).

The order may not give the guardians the discretion to provide visitation. Rather, the statute has been interpreted to require the court to set the appropriate frequency of visitation.[26] The appropriate visitation may include no visitation at all. However, this is a decision to be made by the court.[27]

If the child has independent funds or valuable property other than routine benefits received from a public social service agency, the guardian must provide a written annual accounting with appropriate documentation to the court regarding the receipt and expenditure of the funds or property.[28]

Upon entry of the guardianship order, the court dismisses the dependency action.[29] The court may not order DSHS or another supervising agency to supervise or provide case management after the guardianship order is entered and the dependency is dismissed.

§ 21.5 Modification of the Guardianship

A guardian or parent of a child may petition the court to modify the visitation provision of the guardianship order.[30] This is done by filing a motion and affidavit supporting the requested modification.[31] Notice must be provided to the nonmoving parties and opposing affidavits may be filed.[32] The court may deny the motion in the absence of a showing of adequate cause for a hearing on the motion.[33] Where adequate cause is demonstrated, a hearing on an order to show cause why the requested modification should not be granted shall be scheduled.[34] Where the court finds that a motion to modify was brought in bad faith, the court may assess attorneys' fees and court costs against the moving party.[35]

25 RCW 13.36.050(1).
26 *In re R.V.*, 113 Wn. App. 716, 54 P.3d 716 (2002).
27 *Id.* at 721.
28 RCW 13.36.050(3).
29 RCW 13.34.237(3).
30 RCW 13.36.060(1).
31 *Id.* at (1)(a).
32 *Id.* at (1)(b).
33 *Id.* at (2).
34 *Id.*
35 *Id.* at (3).

§ 21.6 Termination or Expiration of the Guardianship

The guardianship remains in effect until the child is 18 years old or until the court terminates the guardianship, whichever occurs sooner.[36]

Any party may request termination of a guardianship by filing a petition and supporting affidavit alleging a substantial change in circumstances of the child or guardian and that termination is in the child's best interests.[37] The petition and affidavits must be served on the other parties to the guardianship and DSHS or other supervising agency.[38]

If the court finds that there has been a substantial change in the circumstances of the child or guardian and that termination is in the child's best interests, the finding must be based on facts that occurred subsequent to the entry of the guardianship order or that were unknown to the court when the guardianship was established.[39] A guardian's military service is not by itself a basis for termination of the guardianship.[40] A guardianship may be terminated on the agreement of the guardian, child if 12 or older, and a parent seeking to regain custody of a child if the court finds by a preponderance of the evidence that (i) the parent has successfully corrected his/her parenting deficiencies, (ii) returning the child to the parent's care no longer is a risk to the child's health, safety or welfare, and (iii) the relief requested is in the child's best interests.[41]

Upon entry of an order terminating a guardianship, the court may (i) grant the child's parent with legal and physical custody of the child; (ii) appoint a substitute guardian with physical and legal custody of the child; or (iii) direct the child to be temporarily placed in the custody of DSHS for placement and directing DSHS to file a dependency petition.[42]

§ 21.7 Existing Title 13.34 Guardianships (i.e., Dependency Guardianships)

Guardianships established under RCW 13.34 (i.e., all guardianships established prior to June 20, 2010), remain in effect unless terminated or converted to Title 13.36 guardianships.

§ 21.8 Modification or Termination of a Dependency Guardianship

Any party may request that a dependency guardianship order

36 *Id.* at (4).
37 RCW 13.36.070(2).
38 RCW 13.36.060(3).
39 RCW 13.36.070(2).
40 *Id.* at (1).
41 *Id.* at (3)(a)–(c).
42 *Id.* at (3)(c).

be modified or terminated.[43] Notice of such proceedings must be provided to all parties including DSHS.[44] The court may only modify or terminate a guardianship order if it finds by a preponderance of the evidence that there has been a substantial change in circumstances and that modification or termination is in the child's best interests.[45] Modifications or a termination can address changes that have occurred in the child's placement, changes in visitation with a parent, or changes in the circumstances of the guardian.

Once a dependency guardianship is terminated, the guardian is no longer a party to the proceedings and does not have any rights or responsibilities with respect to the child.[46] When the dependency guardianship is terminated the child may either be returned to a parent or ordered into an out of home placement.[47] The child may not be returned home unless the court finds that the reason(s) for removal no longer exist and that return home is in the child's best interests.[48] Review hearings, including permanency planning hearings, must resume.[49]

§ 21.9 Conversion of a Dependency Guardianship to a Title 13.36 Guardianship

Either a dependency guardian or DSHS may file a petition requesting the court to convert a dependency guardianship to a Title 13.36 guardianship.[50] The court should grant the petition if both DSHS and the dependency guardian agree and the court finds that conversion is in the child's best interests.[51] Upon entry of the Title 13.36 guardianship order, the dependency is dismissed.[52]

§ 21.10 Guardianship from the Practitioner's View

Guardianships may be an effective permanency planning option if the child is older, the child has a relationship with the parent and does not want the parent's rights terminated, and the caregiver is confident that the guardianship will provide the child with a stable placement. Practitioners have mixed sentiments about guardians, as there is some concern that the biological parent (whose parental rights are still intact) may frequently request a court hearing for modifying the guardianship, thereby not providing the child with a sense of stability especially if there is a possibility that the guardianship could be modified or set aside. The younger the child, the less likely DSHS will support a guardianship.

§ 21.11 Guardianships and Benefits

Some caregivers may be willing to enter into guardianship agreements but may have concerns about what changes, if any, could occur with the child's medical benefits, guardianship subsidy payments (if any), or any other benefits. When considering a guardianship action, the caregiver should be fully informed about what benefits the child may lose or gain because of the guardianship.

A dependency guardian who is a licensed foster parent at the time the guardianship is established and who has been the child's foster parent for at least six consecutive months preceding the entry of the guardianship order may be eligible for a guardianship subsidy on behalf of the child.[53]

Children's Administration (CA) provides an on-going monthly subsidy through the Relative Guardianship Assistance Program (R-GAP) for dependent youth. The R-GAP program provides a monthly cash payment and Medicaid. The RGAP benefit can be up to 90 percent of what would be paid if the child were in foster care. This program is available for youth and relatives that meet the following criteria:

The requirements of this program are as follows:

- Youth must be dependent, IV-E eligible, and placed with a licensed relative for a minimum of six consecutive months, and return home and adoption have already been determined to not be in the child's best interest.

- The relative must be a relative as defined in RCW 74.15.020 (2) and must be licensed for six consecutive months.

- CA staff must document case management and efforts prior to submitting a plan of guardianship as a permanency plan to the court, and have regional administrator or designee approval. (See attached Guardianship approval checklist.)

Persons **not** eligible for R-GAP subsidy can apply through the local Community Service Office (CSO) for a non-needy Temporary Assistance for Needy Families (TANF) grant, however beginning in November 2011, the income of the guardian will be considered as means-testing will apply.

The Medicaid is transferred from CA to the local CSO for medical.

43 RCW 13.34.233(1).
44 *Id.*
45 *Id.* at (2).
46 *Id.* at (3).
47 *Id.* at (4).
48 *Id.*
49 *Id.*
50 RCW 13.34.237(2).
51 *Id.*
52 *Id.* at (3).
53 RCW 13.34.234.

CHILDREN'S ADMINISTRATION

Guardianship Approval Checklist

CHILD'S NAME _____

DATE OF BIRTH _____

NAME OF PROPOSED GUARDIAN(S) _____

NAME OF SOCIAL WORKER _____

☐ A Shared Planning meeting has occurred which included the following participants as required:

- Child (when appropriate per age and developmental capacity)
- Potential Guardian
- Birth Parents (when appropriate and available)
- Current Caregivers (if different from potential Guardian)

☐ The child's/youth's opinions were considered in determining the Permanent Plan.

☐ The completed Shared Planning Meeting form and sign-in sheet are attached.

Options Considered:

☐ Adoption is not in the child's/youth's best interest because (explain briefly):

☐ Return Home is not in the child's/youth's best interest because (explain briefly):

☐ Alternate Permanent Plan is not in the child's/youth's best interest because (explain briefly):

☐ The current caregiver was asked about adopting the child.

The proposed guardian is a ☐ Relative ☐ Non-Related ☐ Foster Parent ☐ Other Suitable Person

☐ CA social worker has complied with all Federal Indian Child Welfare Act requirements with respect to the child.

Tribal or LICWAC decision ☐ supports or ☐ does not support a plan of guardianship.

☐ A thorough relative search has been conducted and documented.

☐ Placement with siblings was considered.

☐ The proposed guardian understands and is willing to accept their roles and responsibilities to be a guardian and has signed the Declaration of Proposed Guardian. (Please attach).

☐ The proposed guardian is informed about and is prepared to manage any court ordered visits with birth family members.

☐ CA has provided disclosure of information about the child to the proposed guardian, in order to ensure proper care for the child. (Court reports, child's medical, educational needs, evaluations, etc.)

☐ The proposed guardian has an approved home study. (Case Services Policy Manual Section 3240, Practices and Procedures Manual Section 4261, RCW 74.15.090).

☐ The proposed guardian meets the requirements of the R-GAP and will apply for a guardianship subsidy.

☐ Yes ☐ No

☐ The proposed guardian has been informed that s/he is not eligible for a guardianship subsidy through CA but may be eligible for assistance through the local Community Service Office.

COMMENTS:

I approve establishing a guardianship for this child. ☐ Yes ☐ No

SUPERVISOR SIGNATURE DATE

_____

I approve establishing a guardianship for this child. ☐ Yes ☐ No

AREA ADMINISTRATOR (OR DESIGNEE) SIGNATURE DATE

_____

I approve establishing a guardianship for this child. ☐ Yes ☐ No

REGIONAL ADMINISTRATOR (OR DESIGNEE) SIGNATURE DATE

_____

DSHS 15-321 (REV. 06/2010)

Permanency Planning Benefits & Limitations

Washington State Department of Social & Health Services
CA Children's Administration

	OBJECTIVE	LEGAL STATUS	LEGAL CUSTODY & CAREGIVER RESPONSIBILITY AFTER PERMANENT PLAN ACHIEVED	BIRTH/ ADOPTIVE PARENT RIGHTS/ RESPONSIBILITY	FINANCIAL SERVICES AVAILABLE/ MONTHLY SUBSIDY	MEDICAL	EDUCATIONAL SERVICES	SERVICES POST 18
Reunification Note: CA does not provide ongoing services or supervision.	Preferred option: When safety threats are mitigated or aggravated circumstances do not exist. Maintains family connections and provides permanency beyond age 18.	Parental rights remain with birth/ adoptive parent.	The dependency is dismissed and all care and custody is returned to the parents.	Full parental rights and responsibility.	May be eligible for services through DSHS agencies. Individuals must qualify for specific programs.	Responsibility of the family.	May be eligible for limited services dependent upon age youth returned home and individual program requirements.	N/A
Adoption Note: CA does not provide ongoing supervision. Post Adoption Services based upon child's need and family circumstances.	Provides permanency for a child by becoming a permanent and legal member of a family with all the legal rights of a birth child. Adoption is a lifelong legal relationship.	Provides permanency for a child by becoming a permanent and legal member of a family with all the legal rights of a birth child. Adoption is a lifelong legal relationship.	Upon entry of adoption decree, child becomes legal child of adoptive parents. The adoptive parents have all care, custody and legal rights to make decisions on the child's behalf. Child has inheritance rights.	Adoptive parents assume full parental rights. Birth parents have no parental rights after termination. Birth and adoptive parent may have ongoing contact under an open communication agreement.	Adoptive parents may apply for assistance through Adoption Support Program and the child may be eligible for a monthly subsidy, medical and counseling assistance as specified in the adoption support agreement.	Medical coverage as specified in the adoption support agreement.	Some youth may be eligible for additional post-high school grants and scholarships. Additional information can be found at: http://independence.wa.gov/	Adoption support benefits will auto-matically stop on the youth's 18th birthday. Adoption Support may continue if the youth meets eligibility requirements and the parent(s) have provided documentation of the youth's continuation in high school prior to the 18th birthday

Title 13 Guardianship Note: CA does not provide ongoing services or supervision. *Children in guardianships are not considered foster children.	Provides permanency for a child with an approved adult when return home and adoption has been determined not to be in the child's best interest. Legal relationship ends on the child's 18th birthday.	Parental rights are not required to be terminated. Although the parent continues to be the legal parent the guardian has full care, custody or control of the child. The dependency is dismissed.	The legal guardian maintains physical and legal custody with full responsibility for care, custody and the right to make decisions regarding the child. The guardian can choose whether or not to provide an inheritance to a child, it is not a right for the child.	The guardianship order may include visits. All visits are the responsibility of the guardian. The court may continue to order that the birth parent is still responsible for child support.	A subsidized Guardianship may be available to licensed relatives that meet the requirements of the Relative Guardianship Assistance Program. Or Guardians may apply for financial support through local community service office	Medical is provided through Medicaid Title XIX as specified in the RGAP agreement. Or Guardians may apply for medical through the local community service office or put on their own insurance.	Youth generally do not qualify for secondary education scholarships or grants that are designated for youth in foster care. Youth eligibility into post high school educational programs is dependent upon program requirements. Refer to Educational Resources. Additional information can be found at: http://independence.wa.gov/	Guardianship subsidy auto-matically ends on the youth's 18th birthday. If the guardianship was established after the youth's turned 16, is enrolled in high school or a GED program the subsidy may continue. Please check with your gatekeeper. A youth may apply for TANF or SFA if he/she is under age 19 and attending school (participating full time and progressing toward secondary education). WAC 388-404-005
Third Party Custody Note: CA does not provide ongoing services or supervision.	Provides permanency for a child with a court appointed non-parent custodian. Legal relationship ends on the child's 18th birthday.	Parental rights remain intact. Although the parent continues to be the legal parent the guardian has full care, custody or control of the child. Any dependency action will be dismissed.	The third party custodian becomes legal guardian with full responsibility for care, custody and the right to make decisions regarding the child.	Birth Parent remains the legal parent and is responsible for child support. Custody orders may include visits. Modification of custody orders may occur if a substantial change has occurred.	May apply for financial support through other DSHS agencies. Eligibility for medical, financial and food voucher programs is dependent upon program requirements.	May apply for medical through the local community service office.	Youth generally do not qualify for secondary education scholarships or grants designated for youth in foster care. However, if a youth was in foster care for at least 30 days after turning 15, youth may be eligible dependent upon program requirements.	A youth may apply for TANF or SFA if he/she is under age 19 and attending school (participating fulltime and progressing toward secondary education). WAC 388-404-0005.

DSHS 16-231(REV. 08/2011)

Note: As of November 1, 2011, means testing now applies in determining eligibility for the non-needy TANF grant. In other words, a person who becomes a guardian and applies for a child-only TANF grant will now have to include their (i.e., the guardian's) income to determine eligibility.

Chapter 22

Termination of Parental Rights/Adoption

Cheryl Wolfe[1]

Termination proceedings require the courts to engage in the difficult task of balancing two compelling interests: a parent's fundamental liberty interest in the care and custody of a child and the state's obligation to protect the health and safety of children.[2] A parent's fundamental interest in the care and custody of his or her children has been characterized as "more precious than any property right."[3] The goal of the dependency process is to reunite parents and children whenever reunification does not jeopardize the child's health and welfare.[4] However, "[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail."[5] The rights afforded a child include the right to a safe, suitable, and permanent home and a speedy resolution of any proceedings under the dependency statute.[6] A permanency plan must be developed for a child no longer than 60 days after a child is removed from the home.[7] The planning effort includes reasonable efforts to return the child home.[8] Permanency planning continues until the plan is achieved or the dependency is dismissed.[9] The permanency plan must identify a primary goal and may include alternative outcomes.[10] Permanency plan outcomes include the following: return home, adoption, guardianship, permanent legal custody, long-term relative or foster care, completion of a responsible living skills program, or independent living if the child is at least 16 years old.[11]

The Adoption and Safe Families Act (ASFA) requires a termi

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2 *In re C.B.*, 134 Wn. App. 942, 143 P.3d 846 (2006).
3 *Santosky v. Kramer*, 455 U.S. 745, 758–759 (1982).
4 RCW 13.34.020.
5 *Id.*
6 *Id.*
7 RCW 13.34.136(1).
8 *Id.*
9 *Id.*
10 RCW 13.34.136(2)(a).
11 *Id.*

nation petition to be filed after a child has resided in out of home care for 15 of the last 22 months absent the existence of a specific exception, i.e., placement with relatives, not in the child's best interests, or failure to make reasonable efforts to return home.[12] In accordance with ASFA, RCW 13.34.145(3)(b)(vi)(F) requires the court to order the Department of Social and Health Services (DSHS) to file a termination petition if the requirements set forth above exist.

§ 22.1 Termination of Parental Rights/Adoption

Two statutes authorize the involuntary termination of parental rights: RCW 13.34.190 and RCW 26.33.100. RCW 13.34 is the statute typically used to terminate the rights of parents in dependency proceedings when necessary. However, RCW 26.33.100 may be used for dependent children when one parent has relinquished his or her parental rights. The focus of this chapter will be on the statutory and case law requirements of RCW 13.34.

§ 22.2 Initiating the Action

A petition to terminate parental rights may be filed by any party to a dependency proceeding.[13] The petition must include a verified statement of the facts supporting termination of parental rights; the names and residence of the parents, guardian, or custodian of the child; and a statement alleging whether the child is or maybe an Indian Child as defined by the Indian Child Welfare Act (ICWA).[14] Termination of parental rights is a new action requiring original service of process.[15]

§ 22.3 Burden of Proof

RCW 13.34.180 and RCW 13.34.190 set forth a two-step process for termination of parental rights, and each step has its own burden of proof.[16] Under RCW 13.34.190 there are four different bases for which parental rights may be terminated. The first step of the process for each basis focuses on the alleged unfitness of the parent. Depending on the basis used for termination, unfitness must be established either by clear, cogent, and convincing evidence or beyond a reasonable doubt.[17] The second step of the termination process focuses on the best interests of the child and must be proven by a preponderance of the evidence.[18]

The most frequently used statutory basis for involuntary termination of parental rights is set forth in RCW 13.34.180(1). Under this set of criteria, parental rights may be terminated if the petitioner establishes the following by clear, cogent, and convincing evidence:

a) The child has been found to be a dependent child;
b) The court has entered a dispositional order pursuant to RCW 13.34.130;
c) The child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
d) The services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all services that are necessary, reasonably available, and capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
e) There is little likelihood that conditions will be remedied so that the child can be returned to his or her parent(s) in the near future; and
f) Continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.[19]

The clear, cogent, and convincing burden requires that the evidence is substantial enough to allow the court to conclude that the allegations are highly probable.[20] Termination may be ordered prior to the child being removed from the home for six months pursuant to a finding of dependency without a finding that all court ordered and necessary services have been offered as required by RCW 13.34.180(1)(d). This is permitted if the petitioner establishes beyond a reasonable doubt (1) the elements set forth in RCW 13.34.180(1)(a), (b), (e), and (f) (identified as (a), (b), (e), and (f) in the above list); or (2) that the child has been abandoned.[21]

Under alternative statutory criteria, parental rights may also be terminated if it is established beyond a reasonable doubt that the whereabouts of the child's parents are unknown and no person has acknowledged paternity or maternity and requested custody within two months of the child being found.[22] In addition, termination may be ordered if it is established beyond a reasonable doubt that the parent has been convicted of one of the crimes listed in RCW 13.34.180(3).[23]

12 42 U.S.C. § 675(5)(e) (2006).
13 RCW 13.34.180(1).
14 *Id.*; RCW 13.34.040.
15 RCW 13.34.070; RCW 13.34.180(4); RCW 13.50.010(2).
16 *In re A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010).
17 *See In re A.B.*, 168 Wn.2d at 925; *see also* RCW 13.34.190.
18 *In re A.B.*, 168 Wn.2d at 925.
19 RCW 13.34.190(1)(a). *See also* RCW 13.34.180.
20 *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991); *In re K.R.*, 128 Wn.2d 129, 141, 304 P.2d 1132 (1995).
21 RCW 13.34.190(1)(b).
22 *Id.* at (1)(c); RCW 13.34.180(3).
23 RCW 13.34.190(1)(d). The crimes listed are as follows: First degree murder, second degree murder, or homicide by abuse against another child of the parent; first or second degree manslaughter against another child of the parent; attempting, conspiring, or soliciting another to commit murder, homicide by abuse, or manslaughter against

As noted above, the court must always find that an order terminating parental rights is in the child's best interests regardless of which statutory basis is established for the termination.[24] This finding must be made by a preponderance of the evidence.[25] However, where the court relies on a finding of best interests to support one of the elements required to be proven by clear, cogent, and convincing evidence, the best interest criteria must be proven by clear, cogent, and convincing evidence as well.[26] The factors involved in determining "best interest" depend on the circumstances of each case.[27] The court has the discretion to deny termination where it is not in the child's best interests even though the petitioner has proven the other statutory elements.[28]

The "best interest of the child" is, however, an insufficient basis to terminate a parent's fundamental right in his or her children by itself.[29] DSHS is required to demonstrate that termination of parental rights is necessary to prevent harm or risk of harm to the child.[30]

A trial court has broad discretion to terminate parental rights when the requirements of RCW 13.34.180 and .190 have been met and termination is in the child's best interests.[31] The trial court may evaluate the evidence in light of the best interests of the child.[32] However, the court is required to make an explicit finding that the parent is currently unfit to parent the child.[33]

§ 22.4 RCW 13.34.180 Elements 1 and 2: Dependency and Disposition

The requirement set forth in RCW 13.34.180(1)(a) that the child has been found to be a dependent child does not require the petitioner to reprove the facts supporting dependency by clear, cogent, and convincing evidence. The petitioner is only required to prove that a dependency and disposition order has been entered.[34] The ". . . termination proceedings are not a relitigation of the dependency issues, and the accuracy of the facts underlying the original adjudication is not deemed critical."[35] "The [dependency] review process results in repeated, updated findings of dependency."[36]

The court must evaluate the claimed parental deficiencies at every hearing through the dependency and at termination.[37] Furthermore, the state is required to prove by clear, cogent, and convincing evidence that the child cannot be returned to the parent in the near future. This is the equivalent of reestablishing that the child id dependent.[38] Given that termination decisions are predicated upon present parental unfitness, "at the time of the termination hearing the accuracy of the facts underlying the original dependency adjudication is not critical, and the risk of error in finding the underlying facts at the termination hearing is not of central importance."[39]

Common methods of establishing this element include certified copies of court orders or submission of the orders pursuant to ER 904. The time to contest a finding of dependency and the supporting facts is on an appeal of the dependency order.[40] CR 12 provides that defenses related to lack of personal jurisdiction, improper venue, and insufficient process or service are waived if not timely made.[41] This rule is strictly applied to dependency and termination proceedings due to the importance of a speedy resolution of these proceedings.[42] A party has an obligation to advise the court of alleged errors as soon as possible so that lengthy delays in the resolution of proceedings do not occur.[43]

A dependency order signed by a judge pro tempore is void absent the consent of the parties. [44]This includes a dependency order obtained pursuant to a default since the defaulted party was not present to consent to entry of the order by a judge pro tempore.[45] Although not the preferred method for establishing the requirement for a dependency order, a finding of dependency at the termination trial may satisfy the requirement for entry of a dependency order under RCW 13.34.180(1)(a).[46]

§ 22.5 RCW 13.34.180 Element 3: Removal

The requirement set forth in RCW 13.34.180(1)(c) that the child has been removed from the custody of the parent for at least six months at the time of the hearing does not require an uninterrupted period of removal.[47] Rather, the statute has been interpreted to require removal for a *total* of six months.[48] It is also important to note that the statute requires removal for six

another child of the parent; or first or second degree assault against the surviving child or another child of the parent.

24 RCW 13.34.190(2).
25 *In re T.R.*, 108 Wn. App. 149, 166–167, 29 P.3d 1275 (2001).
26 *In re A.V.D.*, 62 Wn. App. at 571.
27 *Id.* at 572.
28 *Id.* at 571.
29 *In re Smith*, 137 Wn.2d 1, 969 P.2d (1998).
30 *Id.* at 18.
31 *In re C.L.*, 131 Wn. App. 274, 277, 126 P.3d 1285 (2006).
32 *In re Siegfried*, 42 Wn. App. 21, 27, 708 P.2d 402 (1985).
33 *In re A.B.*, 168 Wn.2d at 920.
34 *In re K.R.* 128 Wn.2d at 141–142.
35 *In re H.S.*, 94 Wn. App. 511, 523, 973 P.2d 474 (1999).
36 *Id.*
37 *In re S.G.*, 140 Wn. App. 461, 166 P.3d 802, 806 (2007).
38 *In re Krause*, 47 Wn. App. 734, 743, 737 P.2d 280 (1987).
39 *Id.*
40 *In re K.R.*, 128 Wn.2d at n.7; *In re T.H.*, 139 Wn. App. 784, 793, 162 P.3d 1141 (2007).
41 CR 12(h)(1).
42 *In re A.W.*, 53 Wn. App. 22, 26, 765, P.2d 307 (1988).
43 *Id.*
44 *In re K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011).
45 *Id.*
46 *Id.*
47 *In re C.A.*, 55 Wn. App. 638, 643–644, 779 P.2d 1155 (1989).
48 *Id.* at 644.

months "at the time of the hearing," not at the time the petition is filed.[49]

§ 22.6 RCW 13.34.180 Element 4: Services Offered or Provided

All court ordered and necessary services that are reasonably available and capable of correcting the parental deficiencies within the foreseeable future must be expressly and understandably offered or provided to the parents.[50] DSHS is not required to offer services to a parent if the court has ordered that a termination petition be filed pursuant to RCW 13.34.132 following a finding that reasonable efforts to reunify the family are not required.[51]

§ 22.6a What Services May the Court Consider?

In determining whether all necessary services have been offered, the court may consider any services offered prior to the termination proceedings, including predependency services.[52] The court may consider services received, from whatever source, that are relevant to the potential correction of parental deficiencies.[53]

§ 22.6b What Services Must Be Offered?

The state is obligated to provide necessary services for any identified condition or parenting deficiency which prevents a parent from caring for the child.[54] Giving the parent a referral list of agencies which provide the services may be sufficient.[55]. However, this is a minimal obligation that may not suffice in all instances.[56] While the court can consider services offered from any source, the state cannot rely on the efforts of others, if its own efforts may have been successful where others were not.[57] However, even where the state inexcusably fails to offer a service to a willing parent, termination is appropriate if the service would not have remedied the parent's deficiencies in the foreseeable future.[58] The unavailability of a single offered service does not preclude a finding that all necessary services have been offered or provided.[59] Only services which can correct a parent's deficiencies within the foreseeable future are required to be offered.[60] Speculation that a service may be helpful does not prevent a finding that all necessary services have been provided.[61]

If a parent is unable or fails to take advantage of services offered, the state is excused from offering additional, beneficial services to that parent.[62] However, DSHS cannot ignore a parent's request for a service that the parent has refused in the past.[63] The fact that a parent is hostile, difficult to work with, or resistant to services does not excuse DSHS from offering services when the parent demonstrates a desire to be reunified with his or her child.[64]

DSHS must offer services to address specifically identified parenting deficiencies. Services cannot be ordered to determine whether a parental deficiency might exist. In *In re S.G.*, a father was ordered to complete drug and alcohol treatment despite the absence of a factual basis for the father having a drug or alcohol problem. At termination, the state argued that the service was necessary to determine if the father had a chemical dependency problem. The court rejected the state's position and reversed the termination:

"A parent cannot be denied his right to parent his child on the off-chance that he may have a problem unknown to the state."[65] In other words, the court cannot determine whether necessary services have been offered if there is no identified deficiency.[66]

Visitation is not a service that must be provided under RCW 13.34.180(1)(d).[67] The appropriate forum to challenge a dependency order limiting visitation is through an appeal of that order. The termination proceeding is limited to analyzing whether the elements required for termination are met. A party to a termination proceeding may only argue improper denial of visitation in the dependency proceeding if it relates to one or more of the elements required for termination.[68] Placement with relatives is also not a service required by RCW 13.34.180(1)(d).[69]

49 RCW 13.34.180(1)(c).
50 *Id*. at (1)(d).
51 RCW 13.34.132(4).
52 *In re C.T.*, 59 Wn. App. 490, 496–97, 798 P. 2d 1170 (1990).
53 *In re D.A.*, 124 Wn. App. 651–52, 102 P.3d 847 (2004).
54 *In re C.S.,* 168 Wn.2d 51, 56, 225 P.3d 953 (2010).
55 *In re Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983).
56 In reality, trial courts typically expect that DSHS will do more than provide a list; however, it does not appear that this issue has been reviewed by an appellate court as of the time this chapter was written.
57 *In re D.A.*, 124 Wn. App. at 656.
58 *In re T.R.,* 108 Wn. App. at 164; *In re P.A.D.*, 58 Wn. App. at 26–27; *In re C.L.*, 131 Wn. App. at 277–278.
59 *In re H.S.*, 94 Wn. App. at 521–22.
60 *In re Hall*, 99 Wn. 2d at 851.
61 *In re A.W.*, 53 Wn.App. at 31–32.
62 *In re Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).
63 *In re D.A.*, 124 Wn. App. at 653–654.
64 *In re T.L.G.*, 126 Wn. App. 181, 202, 108 P.3d 156 (2005).
65 *In re S.G.*, 140 Wn. App. at 805.
66 *Id.* at 805–806, 166 P.3d 802 (2007); *In re T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005).
67 *In re T.H.*, 139 Wn. App. at 792; *In re Siegfried*, 42 Wn. App. at 27.
68 *In re T.H.*, 139 Wn. App. at 792–793.
69 *In re A.A.*, 105 Wn. App. at 609.

§ 22.6c What Constitutes the "Foreseeable" Future?

The period of time which constitutes the "foreseeable future" depends in part on the age of the child.[70] What may seem like a short time to an adult may be a long time from a child's perspective.[71] For example, a time-frame of six months to a year was held to be the "foreseeable future" for three siblings ranging in age from two to eight years old at the time of the termination hearing.[72]

§ 22.6d The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) requires the state to make reasonable accommodations to allow a disabled person to receive services or to participate in programs.[73] The requirements of the ADA are met where the state modifies a service to accommodate a parent's specific disability.[74] This includes instances when services are modified by individual providers to accommodate a parent's special needs.[75] The requirement to offer necessary services may require DSHS to refer a disabled parent to the Division of Developmental Disabilities for services.[76]

§ 22.7 RCW 13.34.180 Element 5: Little Likelihood that Conditions will be Remedied

The fifth element required by RCW 13.34.180(1) is that there is little likelihood that conditions will be remedied such that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within 12 months following entry of the dispositional order gives rise to a rebuttable presumption that this element exists. The petitioner must make a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided before the presumption arises.[77]

The court may consider the following nonexclusive factors in determining whether the conditions will be remedied:

1. Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and a documented unwillingness on the part of the parent to receive and complete treatment or documented multiple failed treatment attempts; or

2. Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness on the part of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future.[78]

The court may consider current, past, or the likelihood of future drug use in considering whether this factor applies.[79] The court is not limited to the conditions set forth in the original dependency in making this finding.[80] The statute contemplates that circumstances will evolve during the dependency.[81] The dependency court must evaluate a parent's deficiencies throughout the proceedings. Without identified deficiencies, it cannot be determined whether they will likely be remedied.[82] The statute requires a finding that the deficiencies will not be remedied in the "near future." The "foreseeable future" or "near future" must be viewed from the child's point of view.[83]What may not seem like a long time for an adult may seem like forever for a young child.[84] Common factors considered by the court in determining whether there is a likelihood of change in the near future include parental motivation, lack of insight, parenting history, criminal history, mental disorder, the child's needs, parental progress, and cultural issues. Each factor is discussed below in sections 22.7a–h.

§ 22.7a Parental Motivation

Good motives and being highly motivated to resume parental responsibility are not a determinative factor in assessing whether parental rights should be terminated.[85] Courts are al

70 *In re Hall*, 99 Wn. 2d at 851.
71 *Id*. *See In re A.W.*, 53 Wn. App. at 32 (one-to-three years was too long for a three-year-old); *In re Hall* 99 Wn.2d at 851 (eight months was not within the "foreseeable future" for a four-year-old); *In re P.A.D.*, 58 Wn. App. at 24 (six months was too long for a 15 month old); *In re T.R.*, 108 Wn. App. at 164–165 (one year was too long for a six year old); *In re D. A.,* 124 Wn. App. at 656–657 (one-to-two years was too long for a four year old).
72 *In re C.B.*, 134 Wn. App. 942 (2006).
73 *In re A.J.R.*, 78 Wn. App. 222, 229–230, 896 P.2d 1298 (1995).
74 *Id*.
75 *Id*.
76 *In re H.W.*, 92 Wn. App. 420, 961 P.2d 963 (1998).
77 RCW 13.34.180(1)(e).
78 *Id*. at (1)(e)(i)–(ii).
79 *In re J.C.*, 130 Wn. 2d at 428.
80 *In re H.S.*, 94 Wn. App. at 523.
81 *Id*.
82 *In re S.G.*, 140 Wn. App. 461, 805–806, 166 P.3d 802 (2007).
83 *See In re A.W.*, 53 Wn. App. at 32 (one-to-three years was too long for 3 year old); *In re Hall* 99 Wn.2d at 851 (eight months was not within the "foreseeable future" for a four-year-old); *In re P.A.D.*, 58 Wn. App. at 24 (six months was too long for a 15 month old); *In re T.R.*, 108 Wn. App. at 164–165 (one year too long for a six year old).
84 *In re A.W.*, 53 Wn. App. at 32.
85 *Id*.

ways reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent. . . .However, it is the court's duty to see that those rights yield, when to accord them dominance would be to ignore the needs of the child.[86] While the court may have sympathy for a parent based on his or her background or earnest desire to parent, "placement of children is not a bonus for good intentions, nor are children removed as punishment…."[87] Rather, the court must do what is in the best interests of the child.[88]

§ 22.7b Lack of Insight

A parent's lack of insight into or awareness of his or her own problems is a relevant consideration in determining whether the parent's problems are likely to reoccur and whether there is a likelihood that parental deficiencies will be remedied in the near future.[89]

§ 22.7c Parenting History

Additionally, the court may consider the entire parenting history.[90] This may include services that were offered prior to the dependency or in prior dependencies of other children.[91]

§ 22.7d Criminal History

Criminal history is also a relevant consideration by the court. Although imprisonment alone does not necessarily justify termination of parental rights, a parent's inability to perform his or her parental obligations because of incarceration; the nature of the crime committed; and the identity of the person against whom the crime was committed are relevant to the issue of parental fitness and the child's welfare.[92] The relevance of criminal history must be analyzed in light of a child's age, the remoteness of the criminal history, and the offender's recent behavior with the child. For example, a ten-year-old conviction for assault on an infant is an insufficient basis for a dependency finding where the offender had lived with the then-seven-year-old child for several years without incident.[93]

§ 22.7e Mental Disorder

In analyzing whether there is a likelihood of reunification in the near future, the specific diagnosis of a parent's mental disorder is not important.[94] Rather, the issue is the parent's behavior and how it affects his or her ability to care for the child in the near future.[95] The mere fact that a parent has a mental illness does not render the parent incapable of caring for the child—the court must examine the relationship between the mental condition and the parenting ability in determining current parental unfitness.[96] "A child should not be left in the care of a parent whose mental health issues render the parent unable to understand or meet the needs of the child."[97] Conflicting expert testimony about a parent's ability to remedy parenting deficiencies in the near future does not prohibit a finding by the court by clear, cogent, and convincing evidence that there is little likelihood for change in the near future.[98]

§ 22.7f Child's Needs

The ability of a parent to meet the special needs of the child is also a significant factor to be considered by the court. A parent must be offered the necessary training to be able to meet the child's needs.[99] Where a parent avails himself or herself of offered services and works to make changes, but continues to be unable to meet the special needs of the child, the requirements of RCW 13.34.180(1)(e) are met.[100]

§ 22.7g Parental Progress

The issue of parental progress is critical to the likelihood for change element. The court must determine whether the parent is capable of caring for the child (not simply having the child returned to his or her care) in the near future.[101] The theoretical possibility that a parent will improve is not sufficient to overcome a child's needs for permanency.[102] That is, what is perhaps eventually possible for the parent must yield to the child's present need for stability and permanence.[103]

However, when a parent has shown progress, even if progress was made only after the filing of the termination petition, the

86 *In re Aschauer*, 93 Wn.2d at 695. *See also In re A.W.*, 53 Wn. App. at 32–33.
87 *In re Young*, 24 Wn. App. 372, 397, 600 P.2d 1312 (1979).
88 *Id.*
89 *In re C.T.*, 59 Wn. App. at 499; *In re H. S.*, 94 Wn. App. at 528.
90 *In re J.C.*, 130 Wn.2d at 428; *In re Bennett*, 24 Wn. App. 398, 402, 600 P.2d 1308 (1979).
91 *In re P.A.D.*, 58 Wn. App. at 27–28.
92 *In re Sego*, 82 Wn.2d at 740; *In re Gillespie*, 14 Wn. App. at 518.
93 *In re M.S.D.,* No. 59291-2-I, Court of Appeals, Division I, Feb. 4, 2008.
94 *In re Aschauer*, 93 Wn.2d at 694; *In re C.T.*, 59 Wn. App. at 498; *In re H. S.*, 94 Wn. App. at 529.
95 *In re H. S.*, 94 Wn. App. at 528–29.
96 *In re T.L.G.*, 126 Wn. App. at 203.
97 *In re H.S.*, 94 Wn. App. at 528.
98 *In re K.R.*, 128 Wn.2d at 145; *Krause v. Catholic Community Svcs*, 47 Wn. App. 734, 747, 737 P.2d 280 (1987); *In re Sego*, 82 Wn. 2d at 743; *In re Hauser*, 15 Wn. App. 231, 234–235, 548 P.2d 333 (1976).
99 *In re C.S.*, 168 Wn.2d 51, 56, 225 P.3d 953 (2010).
100 *In re Siegfried*, 42 Wn. App. at 28.
101 *In re D.A.*, 124 Wn. App. at 656.
102 *In re T.R.*, 108 Wn. App. at 163.
103 *Id.* at 166.

state "may not rely solely on past performance to prove that it is highly probable that there is little likelihood that the parent will be reunited with her children in the near future."[104] Conflicting expert testimony regarding the likelihood of a parent's deficiencies does not preclude a finding that there is substantial evidence to support a finding of little likelihood for change.[105]

§ 22.7h Cultural Issues

Regardless of what culture a family is from, termination proceedings are focused on the best interests of the child. While some cultures may tolerate certain behavior (such as domestic violence) to a greater degree than others, the measure is what behavior is acceptable in the State of Washington.[106]

§ 22.8 RCW 13.34.180 Element 6: Permanent and Stable Home

The sixth element required under RCW 13.34.180(1) is a finding that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home."[107] The main focus of this element is "whether [the parent-child relationship] impedes the child's prospects for integration, not what constitutes a stable and permanent home."[108]

The petitioner does not have to establish that a stable and permanent home is available at the time of the termination.[109] If continuing the parent-child relationship is harmful to the child, the court may terminate parental rights regardless of the child's prospects for adoption.[110] Even if the court determines that contact between the child and parent would be beneficial to the child, the court may still terminate parental rights if continuance of the parent-child relationship would preclude adoption.[111] A finding as to this element "necessarily follows" from an adequate showing that there is little likelihood a parent will correct parental deficiencies in the near future.[112] Where the proof establishes that the child cannot be returned to the parent in the near future, this element has been proven.[113]

§ 22.9 Best Interests of the Child

Once the court finds a statutory basis for termination has been met, the court must also determine that termination of parental rights is in the child's best interests.[114] This finding must be made by a preponderance of the evidence.[115] If the court finds that termination is in the best interests of the child, but the petitioner has not met the other legal requirements for termination, the court may not grant the petition.[116]

The court has the discretion to consider all relevant factors in considering the best interests element.[117] This may include the child's adjustment to his or her foster home and relationship with the foster parents upon a showing that there is the potential for devastating psychological damage to the child upon repeated custodial moves.[118]

§ 22.10 Constitutional Issues

§ 22.10a Statutory Scheme

The Washington and United States Constitutions guarantee that no person may be deprived of life, liberty, or property without due process of law. Parents have a fundamental liberty interest and privacy interest in the care and custody of their children. The state may only interfere with this fundamental right when the state can show that it has a compelling interest, and such interference is narrowly drawn to meet the compelling state interest involved. "In a termination proceeding, the state has a compelling interest to prevent harm to children and has an obligation to intervene and protect a child from harm or risk of harm."[119] "[T]he State necessarily demonstrates that termination of parental rights is required to prevent harm or risk of harm to the child when it shows that all six factors [of the statute] are satisfied."[120] "Accordingly, the termination statutes are narrowly drawn to achieve the State's compelling interest in protecting children from harm and thus, constitutional."[121]

§ 22.10b Guardianship and Open Adoption as Alternatives

The court is not required to consider dependency guardianship as a viable alternative to termination if no guardianship petition has been filed.[122] However, where there are competing guardianship and termination petitions filed, the court must

104 *In re C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006).
105 *In re Krause*, 47 Wn. App. at 747.
106 *In re A.A.*, 105 Wn. App. at 604.
107 RCW 13.34.180(1)(f).
108 *In re K.S.C.*, 137 Wn.2d 918, 927, 976 P.2d 113 (1999).
109 *Id. See also In re A.C.*, 123 Wn. App. 244, 250, 98 P.3d 89 (2004); *In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983).
110 *In re J.W.*, 90 Wn. App. 417, 430, 953 P.2d 104 (1998).
111 *In re A.V.D.*, 62 Wn. App. at 572–573.
112 *In re J.C.*, 130 Wn.2d at 427; *In re T.R.*, 108 Wn. App. at 166.
113 *In re D.A.*, 124 Wn. App. at 651–57.
114 RCW 13.34.190(2).
115 *In re T.R.*, 108 Wn. App. at 166–167.
116 *In re Churape*, 43 Wn. App. 634, 719 P.2d 127 (1986).
117 *In re A.V.D.*, 62 Wn. App. at 572; *In re J.B.S.*, 123 Wn.2d 1, 863 P2d 1344 (1983).
118 *In re Tanango*, 23 Wn. App. at 130–131; *In re A.V.D.*, 62 Wn. App. at 572.
119 *In re I.J.S.,* 128 Wn. App. 108,117,114 P.3d 1215 (2005).
120 *In re C.B.*, 134 Wn. App. 336, 344, 139 P.3d 1119 (2006); *In re I.J.S.*, 128 Wn. App. at 118.
121 *In re T.C.C.B.*, 138 Wn. App. 791, 798–799, 158 P.3d 1251 (2007).
122 *In re I.J.S.,* 128 Wn. App. at 119; *In re T.C.C.B.*, 138 Wn. App. at 798, 800.

consider which option best serves the child.[123] Nor is the court is required to consider an open adoption as an alternative to termination.[124]

§ 22.10c Effective Assistance of Counsel

Parents have a constitutional right to effective assistance of counsel.[125] An attorney's failure to object to the admission of reports by experts who are not present to testify may constitute ineffective assistance of counsel.[126] Depending on the basis for the request, a court's decision to refuse a request for a continuance may deny a parent the right to effective assistance of counsel.[127]

§ 22.11 Procedural Issues

§ 22.11a Termination by Default

An attorney's appearance at a hearing constitutes an appearance by the party the attorney represents, pursuant to CR 55(a)(1).[128] An appearing party cannot be defaulted until notice has been provided on a motion for default.[129]

Even when a termination petition is resolved by default, the court is required to make findings of fact in determining if parental rights should be terminated. The findings must be sufficiently specific to permit meaningful review. This requires more than the testimony of a social worker parroting the language of the statutory requirements set forth in RCW 13.34.180 and RCW 13.34.190.[130] However, "[f]indings which closely follow and which may to a certain extent parrot the requirements of RCW 13.34.180 are not rendered invalid if they are sufficiently specific to permit meaningful review."[131]

§ 22.11b Attendance by Incarcerated Parent

Due process does not guarantee an incarcerated parent the right to attend the hearing. However, the parent does have the right to defend against the action through counsel and to present evidence.[132]

§ 22.11c Continuance Following Trial

The court has the authority to continue the termination proceedings following the trial pending implementation of court ordered requirements. For example, in *In re T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001), the trial court found that the elements for termination had been met and that termination was in the child's best interest. However, the court wanted to delay entry of a termination order to determine if a dependency guardianship could be established. DSHS unsuccessfully attempted to establish a guardianship over the next 12 months. As a result, the state requested termination of the mother's parental rights indicating that the mother's inability to care for the child had been reviewed and affirmed by the dependency court during review hearings. Counsel for the mother objected, asserting that the mother's rights should not be terminated without a resumption of the trial.

The mother did not attend the hearing, but her attorney presented argument. The court denied the mother's request for a trial and entered an order terminating her parental rights. On appeal the trial court's decision was affirmed. The reviewing court noted that while an additional evidentiary hearing would have been preferable, its absence was not a violation of the mother's right to due process:[133]

> [The mother] advocates for a bright line rule to the effect that delay automatically requires resumption of trial when entry of a final termination order is postponed. We reject such a rule. Whether a further hearing is required depends upon the facts and circumstances of each case. If circumstances indicate any reasonable possibility that in the interim, parental deficiencies have been corrected so that reunification is possible in the near future, the court should reopen the proceedings. This fully comports with due process. . . . Here, there were no circumstances indicating any such possibility; rather all indications were to the contrary. Due process therefore did not require reopening the evidentiary proceedings.[134]

In *In re Shantay C.J.*, 121 Wn. App. 926, 91 P.3d 909 (2004), the trial court at the conclusion of the termination trial found that the state had established the first three elements of RCW 13.34.180(1), but the court continued the case for several months to give the parents one last chance to engage in services and make progress. The continuance was contingent on the parents complying with several conditions related to participation in services.

When alleged problems with compliance arose, the state filed a motion to strike the continuance. The parents requested the opportunity to present testimony at the hearing. The court de

123 *In re A.C.*, 123 Wn. App. at 249–250.
124 *In re T.C.C.B.*, 138 Wn. App. at 800.
125 *In re J.M.*, 130 Wn. App. 912, 919–920, 125 P.3d 245 (2005).
126 *In re G.A.R.*, 137 Wn. App. 1, 6-9, 150 P3d 643 (2007); *In re J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005).
127 *In re V.R.R.*, 134 Wn. App. 573, 90–91, 141 P.3d 85 (2006).
128 *In re C.R.B.*, 62 Wn. App. 608, 617, 814 P.2d 1197 (1991).
129 *Id.* at 617–618; CR 55(a)(3).
130 *Id.* at 618–619.
131 *In re K.R.*, 128 Wn. App. at 143.
132 *In re Darrow*, 32 Wn. App. 803, 808–809, 649 P.2d 861 (1982). *See also In re J.W.*, 90 Wn. App. 417, 429, 953 P.2d 104 (1998).
133 *Id.* at 160.
134 *Id.*

nied their request and entered an order terminating the parents' rights.

On appeal it was determined that the procedures used by the trial court deprived the parents of their right to due process because it was unclear from the record if the termination order was entered because the state had met its burden under RCW 13.34.180 or because the state had demonstrated that the court had failed to meet the court's conditions for the continuance. The court of appeals ruled that the trial court was required to take additional evidence and enter findings before entering an order of termination.[135]

§ 22.11d Appointment of Counsel

Parents in dependency and termination proceedings have a right to be represented by counsel and if indigent to have counsel appointed.[136] "The parents' appearance triggers the court's duty to provide counsel; no request for appointment of counsel is required."[137] A waiver of the statutory right to counsel must be made on the record when a parent appears for a dependency or termination proceeding.[138]

A parent's right to counsel may be waived by (1) voluntary relinquishment of the right; (2) waiver by conduct; or (3) forfeiture through extremely dilatory conduct.[139] "Relinquishment is "usually indicated by an affirmative, verbal request.""[140] Relinquishment requires the court to ensure that the parent is aware of the risks of self-representation.[141] Where a parent engages in conduct that may be interpreted as a dilatory tactic or an attempt to hinder the proceedings, the court has an obligation to warn the parent about the consequences of his or her conduct.[142] The record should be clear as to the specific acts that resulted in the waiver of counsel.[143] For more concerning waiver of the right to counsel, please refer to Chapter 6, section § 6.8.

§ 22.11e Withdrawal of Counsel

Civil Rule 71(b) requires the court to enter an order permitting appointed counsel to withdraw. The client must be given notice of the motion to withdraw.[144] For more concerning withdrawal of counsel, please refer to Chapter 6. When the court permits counsel to withdraw prior to a termination trial and the parent does not appear at the hearing, the state may proceed with the hearing. The state must follow the procedural requirements and establish a factual basis for the requisite elements of the termination statue.[145]

§ 22.11f Appointment of Guardian ad Litem for the Child

RCW 13.34.100 requires the court to appoint a guardian ad litem for a child in proceedings under RCW 13.34 unless the court finds good cause why a guardian ad litem is not necessary. The requirement for appointment of a guardian ad litem is met if a child is represented by independent counsel in the proceedings.[146] Upon the motion of a party or on the court's own motion, the court shall appoint an attorney for a child who has no guardian ad litem. Where the child has a guardian ad litem the court is not required to appoint an attorney.[147] The court's failure to appoint a guardian ad litem for the child is not jurisdictional. However, it may render the judgment voidable at the option of the child if he/she contends his or her interests were not protected due to the failure to appoint a guardian ad litem.[148] However, where the parties draw the trial court's attention to the failure to appoint a guardian ad litem and there is no good cause finding permitting the absence of a guardian ad litem, there may be reversible error.[149]

§ 22.11g Termination of One Parent's Rights

One parent's rights can be terminated without affecting the rights of the other.[150]

§ 22.11h Effect of Denying Termination Petition

The state is not entitled to appeal the denial of a termination petition as a matter of right.[151] The state may request appeal through a motion for discretionary review.[152] If the court denies the petition, the dependency remains in effect and DSHS may file another termination petition.[153]

§22.11i Sibling Contact (RCW 13.34.200(3)

RCW 13.34.200(3) requires the court to include a statement in the termination order addressing the status of a child's relat-

135 *Id.* at 940.
136 RCW 13.34.090.
137 *In re G.E.*, 116 Wn. App. 326, 333, 65 P.3d 1219 (2003).
138 *Id.* at 334.
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.* at 336.
143 *Id.* at 337–338. *See also In re V.R.R.*, 134 Wn. App. 573, 141 P.3d 85 (2006).
144 CR 71(b).
145 *In re A.G.*, 93 Wn. App. 268, 279–280, 968 P.2d 424 (1999).
146 RCW 13.34.100(1).
147 JuCR 9.2.
148 *In re A.G.*, 93 Wn. App. at 280–281; *In re O.J.*, 88 Wn. App. 690, 694–695, 947 P.2d 252 (1997).
149 *In re O.J.* at 696.
150 RCW 13.34.200(1).
151 *In re A.G.*, 127 Wn. App. 801, 802–803, 112 P.3d 588 (2005).
152 *Id.*
153 *In re C.B.*, 134 Wn. App. at 962; *In re A. G.*, 127 Wn. App. at 802–803.

ionship with siblings and the nature of any sibling's placement or contact. The provisions of RCW 13.34.130(3) which permit the court in a dependency proceeding to consider whether it is in the child's best interests to be placed with or have contact with siblings do not apply in termination proceedings.[154]

§22.11j Termination by Stipulation

The court is authorized to accept a parent's stipulation to termination of parental rights provided the stipulation was made knowingly, intelligently, and voluntarily.[155] In affirming the trial court's decision, the appellate court in J.M.R. relied on an extensive inquiry by the trial court at the time the stipulation was entered and an explicit finding by the court that the parent's stipulation was made knowingly, intelligently, and voluntarily.

§ 22.12 Voluntary Adoption Plan (RCW 13.34.125)

RCW 13.34.125 permits a parent to make a voluntary adoption plan provided the parent agrees to termination of his or her parental rights. The purpose of RCW 13.34.125 is to promote early resolution of dependency cases in which termination appears likely.[156] More than a parent's passing reference to relinquishment is required to trigger the provisions in RCW 13.34.125.[157]

DSHS is required to follow the parent's plan if the court determines that the proposed adoption is in the child's best interests and the prospective adoptive parents are qualified to adopt under the standards in RCW 13.34 and RCW 26.33. If DSHS has filed a termination petition the parent's preferences regarding the proposed adoptive placement must be given consideration but are not mandatory.[158] The court has broad discretion to receive and evaluate all relevant evidence in determining what is in the child's best interests.[159] A nonexclusive list of factors to be considered includes the following:

> [T]he psychological and emotional bonds between the dependent child and its biological parents, its siblings, and its foster family; the potential harm the child may suffer if severed from contact with these persons as a result of a placement decision; the nature of the child's attachment to the person or persons constituting the proposed placement; and the effect of an abrupt and substantial change in the child's environment.[160]

An important objective is to change custody only when necessary to benefit the child.[161] While voluntary relinquishment of parental rights resolves dependency proceedings faster than involuntary termination proceedings, RCW 13.34.125 was not intended to result in an automatic approval of a voluntary adoption plan offer by a parent.[162] The focus of the statute is clearly on the best interests of the child.[163]

§ 22.13 Nonparental Custody

A nonparental custody decree (i.e., permanent legal custody) constitutes a permanent plan for a dependent child.[164] Nonparental custody actions are typically an option when a relative or nonlicensed, but suitable person wishes to provide a permanent home for a dependent child. Unlike adoption, dependency guardianship, or long term foster care, the Division of Children and Family Services does not provide any monetary support to the custodian. However, the custodian may be eligible for benefits through programs provided by other divisions of DSHS. The dependency action is dismissed upon entry of a non-parental custody order and DSHS does not provide any oversight of the placement. A nonparental custody action is initiated by a person other than a parent who alleges either that the child is not in the physical custody of one of his or her parents or that neither parent is a suitable custodian.[165] The determination of custody is based on the best interests of the child.[166] A nonparental custody order must make provisions for child custody, visitation and child support, allocation of federal tax exemptions, any necessary continuing restraining orders, domestic violence protection orders, or anti-harassment protection orders.[167] Reasonable visitation rights must be granted to the parents unless a statutory limitation exists.[168]

Nonparental custody decrees are meant to be a permanent placement for a dependent child. The placement is not designed to be temporary while the parent continues to work on correcting parental deficiencies. The custodian determines the child's upbringing including education, health care, and religious training unless the court finds based on a motion by the parent that limitations on the custodian's authority are necessary to protect the child's welfare.[169]

154 *In re A.G.*, 155 Wn. App. 578, 596, 229 P.3 935 (2010), *remanded on other grounds* 169 Wn.2d 1032, 242 P.3d 810 (2010), *on remand on other grounds* 160 Wn. App. 841, 248 P.3d 611 (2011).
155 *In re J.M.R.*, 160 Wn. App. 929, 249 P.3d 193 (2011).
156 *In re J.S.*, 111 Wn. App. 796, 802, 46 P.3d 273 (2002).
157 *In re Z.F.S.*, 113 Wn. App. 632, 642–643, 51 P.3d 170 (2002).
158 RCW 13.34.125.
159 *In re J.S.*, 111 Wn. App. at 804.
160 *Id.* at 805.
161 *Id.*
162 *In re J.S.*, 111 Wn. App. at 806.
163 *Id.*
164 RCW 13.34.136(2)(a).
165 RCW 26.10.030(1).
166 RCW 26.10.100.
167 RCW 26.10.040.
168 RCW 26.10.160.
169 RCW 26.10.170.

The dependency court may also hear agreed nonparental custody proceedings regarding a dependent child pursuant to the provisions of RCW 13.34.155. "The parents, guardians, or legal custodian of the child must agree, subject to court approval, to establish a permanent custody order" for juvenile court to hear the matter.[170] Where warranted by the facts, the juvenile court may grant concurrent jurisdiction to the family court to consider nonparental custody as well as the alternate permanent plan of return home.[171] Under these circumstances, the return home portion of the proceeding is conducted pursuant to RCW 13.34 and as such the parent is entitled to counsel.[172]

Once a non-parental custody order is entered the dependency is dismissed and DSHS no longer continues to supervise the placement.[173] The nonparental custody order must also be filed in superior court under a RCW 26.10 action and thereby will survive the dismissal of the dependency proceeding.[174] A nonparental custody decree and related orders are modified pursuant to the provisions in RCW 26.09.[175] Modification should only occur if there has been a substantial change in circumstances since entry of the decree or order and modification is in the best interests of the child.[176]

A useful tool in dependency cases is to include a statement in the nonparental custody decree regarding the nature of the parents' parental deficiencies. This provides assistance to the court in the future hearings should a party request modification of the order. It is not uncommon for nonparental custodians and/or parents to present agreed orders for modification to the court. Since neither DSHS nor the guardian ad litem for the child in the dependency case are parties to the non-parental custody action, there is typically no party to provide information to the court regarding the details of the case. Including a statement regarding parental deficiencies alerts the court to the prior proceedings and permits inquiry into the child and parents' current status.

§ 22.14 Dependency and Title 13.36 Guardianship

In 2010, the legislature modified the statutory scheme for guardianship proceedings which flow from dependency cases. Effective June 20, 2010, guardianship proceedings are initiated pursuant to the requirements of RCW 13.36 and are typically referred to as Title 13.36 guardianships. Dependency guardianships previously established under RCW 13.34 remain in effect, but may be converted to a Title 13.36 guardianship.[177] See Chapter 21 for more information concerning guardianships.

170 RCW 13.34.155(1).
171 *In re E.H.*, 158 Wn. App. 757, 768, 243 P.3d 160 (2010).
172 *Id.*
173 RCW 13.34.155(1).
174 RCW 13.34.155(3). *See also* RCW 13.34.145(8) (related to permanent legal custody proceedings in juvenile court).
175 RCW 26.10.190.
176 RCW 26.09.260.
177 RCW 13.34.237.

Chapter 23

Reinstatement of Parental Rights

Jana Heyd[1]

§ 23.1 History

A new permanency option for children who are not in permanent placements was created in July, 2007 when the Washington legislature passed ESHB 1624, the Parental Reinstatement Bill, now codified at RCW 13.34.215. Approximately 10 other states now have similar legislation.

Prior to the passage of the parental reinstatement legislation, it was not uncommon for an adolescent to request a return to the parental home even if parental rights had been terminated. Until 2007 there was not an appropriate statutory basis to allow placement. The child could request that his or her attorney (if the child had an attorney) set a motions hearing in the dependency case to request placement with a (terminated) parent. The court might have considered placement with the terminated parent if the placement with a "suitable person" or a "relative." In family court, a terminated parent could petition for a "non-parental" custody action , but the dependency court has exclusive jurisdiction over the child, which made it difficult for the parent to bring a custody action in family court unless there was concurrent jurisdiction between both courts. Neither of these options made the parent's rights very clear and neither gave the parent the legal ability to be heard in juvenile court where dependency cases are heard. The new statute has provided terminated parents with the option of resuming their status as the legal parent.

§ 23.2 Eligibility

As of 2007, RCW 13.34.215 allows a youth who is over the age of 12 to petition the court to reinstate the parent's previously terminated rights if the child is not in a permanent placement and at least three years have passed since the termination of rights. [2]

Legislation in 2008 allowed the court on its own motion to petition for reinstatement as well as for a child under the age of 12 to petition if it is in the child's best interest.

Most recently, in 2011, legislation again updated this law, clarifying that children who have once been in a permanent home, but have had that placement disrupted, can also petition for reinstatement.

§ 23.3 Notification to Child

If a parent of an eligible child contacts the Department of Social and Health Services (DSHS), the supervising agency, the child's guardian ad litem (GAL) or court-appointed special advocate (CASA) regarding reinstatement, even if the child has not petitioned for reinstatement, the child must be notified by the contacted party of the right to petition.[3]

§ 23.4 Representation of Child

Washington's laws regarding appointment of counsel for children can make the child's ability to advocate for return to a terminated parent difficult in most counties in Washington because children have to first access counsel before proceeding

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2 RCW 13.34.215(1).

3 *Id.* at (2).

on a reinstatement petition. In some counties, such as King County, all dependent children age 12 and older are appointed dependency counsel. However, this is not the case in all Washington counties. Children with counsel already appointed will have a much easier time navigating the reinstatement statute, yet a child may not be aware that he or she has the right to appointed counsel if a reinstatement petition is filed.

RCW 13.34.215, however, provides for appointment of counsel for any child who petitions the court for reinstatement of parental rights.[4] This is Washington's first uniform law and practice for appointment of an attorney for a child in a dependency proceeding. The statute also allows appointment of a GAL in the proceeding.

§ 23.5 Threshold Hearings

Once the child files a petition to reinstate parental rights, a threshold hearing is set 30 days later.[5] At that hearing, the child must show by a preponderance of the evidence that the parent has established his or her "apparent fitness;" his or her interest in reinstatement of parental rights; and that the best interests of the child may be served by reinstatement of parental rights.[6]

§ 23.6 Conditional Reinstatement Hearing

Approximately 60 days after the threshold hearing, the hearing to conditionally reinstate rights is held.[7] At that hearing, the petitioning child must show by clear and convincing evidence that he or she (the child) has not achieved a permanent plan which has been sustained and is not likely to achieve such a plan, and that reinstatement is in his or her best interest.[8] For children who have experienced many placements and continue to reside in temporary homes, it is fairly easy to establish the lack of a permanent plan and that the rehabilitated parent may be the only option for the child to have a permanent home. Likewise, if the birth parent is the only permanent option, the parent has stabilized and the relationship is a positive one, establishing "best interest" may be fairly straight forward.

§ 23.7 Notification to Interested Parties

Prior to any hearing, the DSHS or other supervising agency must give notice to all interested parties including the parent whose parental rights are at issue, any parent whose rights have not been terminated, the child's current foster parent, relative caregiver, guardian/custodian, and the child's tribe (if applicable).[9]

4 *Id.* at (3).
5 *Id.* at (5).
6 *Id.*
7 *Id.* at (7).
8 *Id.*
9 *Id.* at (6).

§ 23.8 Burden of Proof

At the threshold hearing, the court must order a hearing on the merits of the petition if it finds by a preponderance of the evidence that reinstatement is in the best interests of the child.[10]

At the conditional reinstatement hearing, the court must conditionally grant the child's petition if it finds by clear and convincing evidence that the child has not achieved his or her permanency plan and that reinstatement is in the best interest of the child.[11]

§ 23.9 Considerations of the Court

Generally, the children who petition for reinstatement of parental rights have maintained a relationship or contact with the parent. In some cases, the child has been living with the parent, either unofficially, or with court permission on a "visit" or other type of temporary placement. The child's counsel is required to show that the parent(s) has dealt with the issues that caused the court to terminate rights—that the parent is currently able to care for the child. The court must consider whether the parent has remedied his or her deficiencies, the age/maturity of the child, whether reinstatement would risk the child's health, safety or welfare and any other material changes of circumstance which would lead to the reinstatement process.[12]

§ 23.10 Prior Efforts to Achieve Permanency

DSHS or another supervising agency must provide the court with all information relating to efforts to achieve permanency so that the court may determine whether or not permanency was achieved.[13]

§ 23.11 Timing

Washington's law allows the child to transition home at the time the parent's rights are conditionally reinstated, generally 90 days from the date of the filing of the petition, if all of the requirements are met. Complications arise in cases where the birth parent resides out of state, and the interstate compact process is invoked. A receiving state may not recognize a terminated parent as having the authority for placement and may refuse to conduct a home study. The child may have treatment issues that would not allow placement as early as 90 days from the date of petition (such as in the case of a child in group care or in a treatment facility.) Using the family group conference or other family support meeting process is an important resource for these types of cases.

10 *Id.* at (5).
11 *Id.* at (7).
12 *Id.* at (7)(a)–(d).
13 *Id.* at (8).

§ 23.12 Cause for Dismissal of Petition for Reinstatement

Once the child is placed in the parent's home, and the parent's rights have been conditionally reinstated, a hearing is set for six months later.[14] If the child is removed from the parent due to abuse or neglect during this period of time, where the allegations are proven by a preponderance of the evidence, the court will dismiss the petition for reinstatement of parental rights.[15]

§ 23.13 Cause for Dismissal of Dependency

If the placement was successful for the six month trial period (i.e., the period during which the parent's rights have been conditionally reinstated), the dependency will be dismissed and the parental rights will be permanently reinstated. This reinstatement of parental rights includes powers, privileges, immunities, duties and obligations of a parent to the child.[16]

§ 23.14 Effect on Prior Termination Order

Reinstatement of parental rights does not alter the prior termination of parental rights.[17] The reinstatement of parental rights is a new, more recent court order which is legally enforceable.

§ 23.15 Child Support Obligations

A parent whose parental rights are reinstated is given all of the powers and obligations associated with parenthood, however child support is not owed retroactively from the time the parental rights are terminated until they are reinstated.[18]

§ 23.16 Applicability

RCW 13.34.215 applies to all children under the jurisdiction of the juvenile court regardless of the date parental rights were initially terminated.[19] Parental reinstatement, although new to Washington State, is a promising permanency option for Washington's foster youth who are destined to age out of the foster care system. This plan allows children, especially older children, the chance to return to their birth families, return to a culturally appropriate home, and allows the return to a home that may be the only stable, permanent, and appropriate resource available.

14 *Id.* at (9)(a); RCW 13.34.215(10).
15 RCW 13.34.215(9)(b); RCW 13.34.215(10).
16 RCW 13.34.215(9)(c); RCW 13.34.215(10).
17 RCW 13.34.215(11) and (13).
18 RCW 13.34.215(12).
19 *Id.* at (14).

Chapter 24

Family Reconciliation Act (FRA)

Renee Morioka[1]

§ 24.1 Legislative Overview and History

The 1970s spawned federal policy against incarcerating noncriminal youth ("status offenders") in secure detention facilities. Enactments such as the Federal Juvenile Justice and Delinquency Prevention Act in 1974 encouraged referral of status offenders to counseling, treatment, and other non-secure, voluntary, community-based treatment programs. Over time, failures to properly develop adequate services for youth and their families, deaths of runaway youth, and the movement toward youth discipline and accountability caused lawmakers to rethink their blanket prohibition against incarcerating noncriminal youth.

Washington was not immune to these societal trends. The deaths of three runaway youth in 1993—most notably, the death of Rebecca "Becca" Hedman—forced Washington lawmakers to take a closer look at the youth and their families in our communities.[2] These deaths, coupled with vocal parental rights groups' insistence, caused a review of Washington's 1977 Juvenile Justice Act. As a result, Senate Bill 5439 (the "Becca Bill") came into effect in July 1995. The bill, named after Rebecca Hedman, was born of the intent to provide services to at-risk, runaway[3], and/or truant youth and their families who were in conflict. The Becca Bill amended Chapter 13.32A (Family Reconciliation Act), Chapter 71, and Chapter 38A of the RCWs which, together, were designed to mandate stricter truancy laws and enforcement. It sought to "empower" parents of runaway, disobedient, and truant children by expanding access to services. The primary mechanism of this "empowerment" was two-pronged: (1) it gave law enforcement and the courts the authority to bring these youth into police custody for placement in secure facilities, and (2) it allowed for the involuntary commitment of these youth to substance abuse and mental health services. The provision and utilization of these services were designed to be done in two phases: community-based intervention and legal intervention.

Community-based interventions called to action the expertise of the staff of secure crisis residential centers (S-CRCs), crisis residential centers (CRCs), mental health counseling agencies, substance abuse treatment agencies, other community agencies, and the Department of Social and Health Services (primarily the Family Reconciliation Services (FRS) units of the Division

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2 Rebecca "Becca" Hedman's life story was a compelling catalyst prompting Washington lawmakers to pass the "Becca Bill." Becca was sexually abused by her natural mother and then by her adoptive brother. Despite extensive mental health counseling, Becca "rebelled" as a teenager and began using crack-cocaine and engaging in prostitution. Her parents utilized existing community resources, and Becca spent time in crisis residential centers (CRCs) and group homes. While on "run" status, Becca was solicited by a 35-year-old man who murdered her. Becca's parents aligned with other parents' rights groups and called lawmakers to action.

3 In 2010, E.S.H.B. 2752 added a new section to chapter 13.32A RCW (codified in a note to RCW 13.32A.082) that states, "The legislature finds that youth services provide safety to youth on the streets and are a critical pathway to ensuring the youth's return home. Runaway youth are without protection, live under the threat of violence, and fall victim to predators who exploit their vulnerability. The policy of this state is to provide assistance to youth in crisis and to protect and preserve families. In order to effectively serve youth on the streets and promote their safe return home, shelters must have the time to establish and maintain an environment that facilitates open communication and trust.

The legislature also finds that parents of runaway youth have an interest in knowing their sons and daughters are safe in a shelter, rather than on the streets without protection. The legislature further finds that law enforcement and the department can notify a parent that the youth is safe, without disclosing the youth's location or compromising the ability of youth services providers to effectively assist youth in crisis." E.S.S.B. 2752, sec. 1, 61st Leg., Reg. Sess. (Wash. 2010); Laws of 2010, ch. 229, sec. 1.

of Children and Family Services). The second and more intrusive level/phase of intervention is court intervention which includes the At-Risk Youth (ARY), Child in Need of Services (CHINS), and Truancy processes.

To these ends, the Legislature wrote that it recognizes there is a need for services and assistance for parents and children who are in conflict. These conflicts are manifested by children who exhibit various behaviors including: running away, substance abuse, serious acting out problems, mental health needs and other behaviors that endanger themselves or others….The legislature intends to increase the safety of children through the preservation of families and the provision of assessment, treatment, and placement services or children in need of services and at-risk youth including services and assessments.[4]

Further, it is the intent of the Legislature to

1) Preserve, strengthen, and reconcile families experiencing problems with at-risk youth;
2) Provide a legal process by which parents who are experiencing problems with at-risk youth can request and receive assistance from juvenile courts in providing appropriate care, treatment, and supervision to such youth; and,
3) Assess the effectiveness of the family reconciliation services program.[5]

§ 24.1a Definitions

a. "Abuse or neglect" means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, or safety is harmed, excluding conduct permitted under RCW 9A.16.100.[6] An abused child is a child who has been subjected to child abuse or neglect as defined in this section.
b. "Administrator" means the individual who has the daily administrative responsibility of a crisis residential center or his or her designee.
c. "At-risk youth" means a juvenile (i) Who is absent from home for at least 72 consecutive hours without the consent of his or her parent; (ii) Who is beyond the control of his or her parent such that the child's behavior endangers the health, safety, or welfare of the child or any other person; or (iii) Who has a substance abuse problem for which there are no pending criminal charges related to the substance abuse.
d. "Child," "juvenile," and "youth" mean any unemancipated individual who is under 18 years old.
e. "Child in need of services" means a juvenile (i) Who is beyond the control of his or her parent such that the child's behavior endangers the health, safety, or welfare of the child or another person; (ii) Who has been reported to law enforcement as absent without consent for at least 24 consecutive hours on two or more separate occasions from the home of either parent, a crisis residential center, an out-of-home placement, or a court-ordered placement; and (A) Has exhibited a serious, substance abuse problem; or (B) Has exhibited behaviors that create a serious risk of harm to the health, safety, or welfare of the child or any other person; (iii) Who is in need of (A) Necessary services, including food, shelter, health care, clothing, or education, or services designed to maintain or reunite the family; (B) Who lacks access to, or has declined to utilize, these services; and (C) Whose parents have evidenced continuing but unsuccessful efforts to maintain the family structure or are unable or unwilling to continue efforts to maintain the family structure; or (iv) Who is a "sexually exploited child" (defined below).
f. "Child in need of services petition" means a petition filed in juvenile court by a parent, child, or the Department of Social and Health Services (DSHS) seeking adjudication of placement of the child.
g. "Crisis residential center" means a secure or semi-secure facility established pursuant to Chapter 74.13 RCW.
h. "Custodian" means the person or entity that has the legal right to the custody of the child.
i. "Extended family member" means an adult who is a grandparent, brother, sister, stepbrother, stepsister, uncle, aunt, or first cousin with whom the child has a relationship and is comfortable, and who is willing and available to care for the child.
j. "Guardian" means that person or agency that (a) has been appointed as the guardian of a child in a legal proceeding other than a proceeding under Chapter 13.34 RCW, and (b) has the right to legal custody of the child pursuant to such appointment. The term "guardian" does not include a "dependency guardian" appointed pursuant to a proceeding under Chapter 13.34 RCW.
k. "Multidisciplinary team"[7] (MDT) means a group

4 RCW 13.32A.010.

5 RCW 13.32A.015.

6 "[T]he physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child." RCW 9A.16.100.

7 *Purpose and duties*: MDTs assist families by coordinating referrals to community services. They also evaluate youth and other family members for services and, with parental consent, create a plan for services and assist families in obtaining those services. MDTs also make referrals to substance abuse and mental health treatment services.

In certain circumstances, the MDT may recommend that no further need for intervention exists as the conflict has been resolved

formed to provide assistance and support to a child who is an at-risk youth or a child in need of services and his or her parent. The team shall include the parent, a DSHS social worker, a local government representative when authorized by the local government, and when appropriate, members from the mental health and substance abuse disciplines. The team may also include, but is not limited to, educators, law enforcement personnel, probation officers, employers, church members, tribal members, therapists, medical personnel, social service providers, placement providers, and extended family members. The team members are volunteers who do not receive compensation while acting in a capacity as a team member, unless the member's employer chooses to provide compensation or the member is a state employee.

l. "Out-of-home placement" means a placement in a foster family home or group care facility licensed pursuant to RCW Chapter 74.15 or placement in a home, other than that of the child's parent, guardian, or legal custodian, not required to be licensed pursuant to RCW Chapter 74.15.

m. "Parent" means the parent or parents who have the legal right to custody of the child. "Parents" include custodians or guardians.

n. "Secure facility" means a crisis residential center that has locking doors, locking windows, or a secured perimeter, designed and operated to prevent a child from leaving without permission of the facility staff.

o. "Semi-secure facility" means any facility, including but not limited to crisis residential centers or specialized foster family homes, operated in a manner to reasonably assure that youth placed there will not run away. Pursuant to rules established by DSHS, the facility administrator shall establish reasonable hours for residents to come and go from the facility such that no residents are free to come and go at all hours of the day and night. To prevent residents from taking unreasonable actions, the facility administrator, where appropriate, may condition a resident's leaving the facility upon the resident being accompanied by the administrator or the administrator's designee. Further, the resident may be required to notify the administrator or the administrator's designee of any intent to leave, his or her intended destination, and the probable time of his or her return to the center.

p. "Sexually exploited child" means any person under the age of 18 who is a victim of the crime of commercial sex abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.[8]

q. "Staff secure facility" means a structured group care facility licensed under rules adopted by DSHS with a ratio of at least one adult staff member to every two children.

r. "Temporary out-of-home placement" means an out-of-home placement of not more than 14 days ordered by the court at a fact-finding hearing on a CHINS petition.

or continue to work with the family to resolve the conflict. RCW 13.32A.044. MDTs have no standing in any subsequent court action under Title 13 and may assist families in filing CHINS petitions when requested.

How Formed: Administrators of CRCs may ask for the MDT's assistance when the child's parents cannot be contacted. The Administrator may convene an MDT at the child's or parent's request. The Administrator is required to convene an MDT if the Administrator believes that the child is a child in need of services and the parent is unavailable or unwilling to continue with efforts to resolve the conflict. If the Administrator is unable to contact the parents within five days of the MDT's convening, the case must then be referred to DSHS for consideration of dependency filing under RCW Chapter 13.34.

Disbandment of MDTs: If an MDT was formed because the Administrator believed the case was appropriate for a CHINS petition, and no CHINS petition was filed by DSHS within 24 hours (excluding weekends and holidays), the parent may request that the MDT be disbanded. If a CHINS petition was filed, however, the parent may not disband the team until the initial hearing is held under RCW 13.32A.179. The court may allow the team to continue if an out-of-home placement is ordered under RCW 13.32A.179(3). Upon the filing of an ARY petition under RCW 13.32A or a dependency petition under RCW 13.34, the MDT shall cease to exist, unless the parent requests continuation of the team or unless the out-of-home placement was ordered under RCW 13.32A.179(3). RCW 13.32A.042.

§ 24.1b Taking a Child Into Custody

When Law Enforcement Must Take a Child into Custody

Law enforcement must take a child into custody under the following circumstances:

- If law enforcement has been contacted by the parent of the child and informed that the child is absent from parental custody without consent;
- If law enforcement reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance;
- If an agency legally charged with the supervision of a child has notified law enforcement that the child has run away from placement;
- If law enforcement has been notified by the juvenile court that the court finds probable cause exists to believe that the child has violated a court placement order issued under RCW Chapter 13.32A or RCW Chapter 13.34 or that the court has issued an order for law enforcement
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8 RCW 13.32A.030(17).

pick-up of the child under either of those chapters.[9]

Additionally, if law enforcement has a reasonable suspicion that a child is being unlawfully harbored in violation of RCW 13.32A.080,[10] the officer shall remove the child from the custody of the person harboring the child and shall transport the child to one of the locations specified in RCW 13.32A.060.[11]

Duration and Transfer of Custody

Law enforcement custody must continue for only as long as reasonably necessary to transport and place the child at an appropriate location.[12] Law enforcement custody ends when either once custody is transferred to a person, agency, or other authorized entity under RCW 13.32A or, once law enforcement releases the child because no placement is available.[13]

Transfer of custody is not complete unless the person, agency, or entity to whom the child is released agrees to accept custody.[14]

Procedures Once a Child is Taken into Custody

If a child is taken into custody under RCW 13.32A.050(1)(a) or (b), the following applies:

- Law enforcement must inform the child of the reasons he or she was taken into custody;
- Law enforcement must transport the child home or to the parent's place of employment if the parent is not at home. If the parent requests, law enforcement may transport child to the home of an adult family member, CRC, DSHS, or licensed youth shelter. Law enforcement must utilize the drop-off location that is within a reasonable distance from the parent's home.[15]

- If law enforcement is unable to contact a parent it must take the child to a CRC if either

  1. The child expresses fear or distress at the prospect of being returned to his or her home which leads law enforcement to believe there is a possibility that the child is experiencing some type of child abuse or neglect;
  2. It is not practical to transport the child to his or her home or place of the parent's employment; or
  3. There is no parent available to accept custody of the child.

If, after attempting to notify the parent and failing, and CRC is full, not available, or not located within a reasonable distance, LE may request that DSHS accept custody of the child. If DSHS determines that an appropriate placement is currently available, DSHS shall accept custody and place the child in an out-of-home placement. Upon accepting custody of a child from the officer, DSHS may place the child in an out-of-home placement for up to 72 hours (excluding Saturdays, Sundays, and holidays) without filing a CHINS petition, obtaining parental consent, or obtaining an order for placement under RCW Chapter 13.34. DSHS may take a runaway youth to a secure facility after attempting to notify the parent of the child's whereabouts. DSHS may not take a child to a secure facility if DSHS has reason to believe that the reason for the child's runaway status is the result of abuse or neglect.[16]

If DSHS declines to accept custody of the child, the officer may release the child after attempting to take the child to the following, in the order listed: the home of an adult extended family member; a responsible adult; or a licensed youth shelter. The officer shall immediately notify DSHS if no placement option is available and the child is released.[17] If the child is taken into custody under RCW 13.32A.050(1) (c),[18] the following applies:

- Law enforcement must inform the child of the reasons why he or she was taken into custody; and
- Law enforcement may release the child to the supervising agency or must take the child to a S-CRC.[19]

9 RCW 13.32A.050(1)(a–d).

10 A person commits the crime of unlawful harboring of a minor if the person provides shelter to a minor without the consent of a parent of the minor and after the person knows that the minor is away from the home of the parent, without the parent's permission, and if the person intentionally:

(i) Fails to release the minor to a law enforcement officer after being requested to do so by the officer; or
(ii) Fails to disclose the location of the minor to a law enforcement officer after being requested to do so by the officer, if the person knows the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location; or
(iii) Obstructs a law enforcement officer from taking the minor into custody; or
(iv) Assists the minor in avoiding or attempting to avoid the custody of the law enforcement officer.

RCW 13.32A.080(1)(a).

11 RCW 13.32A.050(6).

12 *Id*. at (2).

13 *Id*.

14 *Id*.

15 RCW 13.32A.060(1)(a).

16 RCW 13.32A.128.

17 *See id*. at (1)–(5).

18 Law enforcement may take a child into custody if "an agency legally charged with the supervision of a child has notified a law enforcement agency that the child has run away from placement." *See* RCW 13.32A.050(1)(c).

19 If an S-CRC is not available or not within a reasonable distance, then law enforcement may place the child at an SS-CRC (semi-secure

If the child is taken into custody under RCW 13.32A.050(1)(d),[20] the following applies:

- Law enforcement must inform the child of the reasons why he or she was taken into custody; and
- Law enforcement must place the child in a juvenile detention facility if the Court has entered a detention order. If no detention order was entered, then law enforcement may still place the child in a juvenile detention facility or place child in another secure facility such as an S-CRC.[21]

Duration of Transferred Custody

If law enforcement has transferred custody to DSHS or a CRC, out-of-home placement may only continue for up to 72 hours (excluding Saturdays, Sundays, and holidays). Thereafter, out-of-home placement may only continue if (1) a parent consents; (2) a CHINS petition has been filed under RCW 13.32A; or (3) a Court has ordered out-of-home placement because a dependency petition has been filed under RCW 13.34.

§ 24.1c Secure Crisis Residential Centers (S-CRCs)

The Legislature recognizes that crisis residential centers provide an opportunity for children to receive short-term necessary support and nurturing in cases where there may be abuse or neglect. The legislature intends that center staff provide an atmosphere of concern, care, and respect for children in the center and their parents.[22] A child admitted to a secure facility *located in a juvenile detention center* shall remain in the facility for at least 24 hours after admission but for not more than five consecutive days. If the child is transferred between secure and semi-secure facilities, the aggregate length of time spent in all such centers or facilities may not exceed fifteen consecutive days per admission and in no event may a child's stay in a secure facility *located in a juvenile detention center* exceed five days per admission.[23]

Notwithstanding the provisions of RCW 13.32A.130(1), parents may remove their child at any time during the five-day period unless the staff of the crisis residential center has reasonable cause to believe that the child is absent from the home because he or she is abused or neglected or if allegations of abuse or neglect have been made against the parents. DSHS or any agency legally charged with the supervision of a child may remove a child from a crisis residential center at any time after the first 24-hour period after admission has elapsed and only after full consideration by all parties of the all factors.[24]

The facility administrator shall determine within 24 hours after a child's admission to a secure facility whether the child is likely to remain in a semi-secure facility and may transfer the child to a semi-secure facility or release the child to DSHS. The determination shall be based on

a) The need for continued assessment, protection, and treatment of the child in a secure facility; and
b) The likelihood the child would remain at a semi-secure facility until his or her parents can take the child home or a petition can be filed.

In making the determination the administrator is required to consider the following information, if known:

a) The child's age and maturity;
b) The child's condition upon arrival at the center;
c) The circumstances that led to the child's being taken to the center;
d) Whether the child's behavior endangers the health, safety, or welfare of the child or any other person;
e) The child's history of running away; and
f) The child's willingness to cooperate in the assessment.

If the administrator of a secure facility determines the child is unlikely to remain in a semi-secure facility, the administrator shall keep the child in the secure facility. In order to provide space for the child, the administrator may transfer another child who has been in the facility for at least 72 hours to a semi-secure facility. The administrator is only permitted to transfer a child after determining that the child who may be transferred is likely to remain at the semi-secure facility.

A CRC administrator is authorized to transfer a child to a CRC in the area where the child's parents reside or where the child's lawfully prescribed residence is located. An administrator may transfer a child from a semi-secure facility to a secure facility whenever he or she has made full consideration of all factors and reasonably believes that the child is likely to leave the semi-secure facility and not return.[25] Upon admitting a child or learning that a child absent from home is placed out of the home, the administrator or DSHS shall notify the child's parent and provide transportation for the child to the residence of the parent or other out-of-home placement. If the administrator performs these duties, he or she shall also notify DSHS of the child's whereabouts.[26] The administrator is also required

CRC). RCW 13.32A.060(2).

20 Law enforcement may take a child into custody if a law enforcement agency has been notified by the juvenile court that the court finds probable cause exists to believe that the child has violated a court placement order" "or that the court has issued an order for law enforcement pick-up of the child." *See* RCW 13.32A.050(1)(d).

21 RCW 13.32A.060(2).

22 RCW 13.32A.010.

23 RCW 13.32A.130(1).

24 *Id.* at (4).

25 RCW 13.32A.130(2).

26 RCW 13.32A.090.

to notify parents and the appropriate law enforcement agency immediately when any child leaves the center without authorization.[27]

§ 24.2 Family Reconciliation Services

Families who are in conflict or who are experiencing problems with at-risk youth, or a child who may be in need of services may request family reconciliation services from DSHS. DSHS may involve a local multidisciplinary team in response for as

sessment and provision of services. Such services shall be provided to alleviate personal or family situations which present a serious and imminent threat to the health or stability of the child or family and to maintain families intact wherever possible. Family reconciliation services shall be designed to develop skills and supports within families to resolve problems related to at-risk youth, children in need of services, or family conflicts. These services may include, but are not limited to, the following:

- Referral for suicide prevention;
- Psychiatric or other medical care;
- Psychological, mental health, and drug or alcohol treatment;
- Welfare, legal, educational, or other social services; and
- Training in parenting, conflict management, and dispute resolution skills.[28]

As indicated at the outset of this chapter, utilization of FRS is part of the "first phase" of intervention—community-based intervention. That said, FRS can also be a prelude to the filing of a dependency petition if it is thought that some parental deficit is involved. FRS has specialized units within DSHS, Division of Children and Family Services, with particular expertise in assisting youth and their families in conflict as identified by the Becca Bill and as indicated in RCW Chapters 74.14A and 74.13.

§ 24.3 Legal Intervention: At-Risk Youth and Child In Need of Services Petitions

The second phase of intervention utilizes legal processes concerning, At-Risk Youth (RCW 13.32A), Child In Need of Services petitions (RCW 13.32A), and truancy (RCW 28A.225) to assist families and youth in conflict as identified in the Becca Bill. For more information concerning At-Risk Youth Petitions, please refer to Chapter 25. CHINS petitions are discussed in Chapter 26, and truancy issues are discussed in further detail in Chapter 27.

27 RCW 13.32A.095.
28 RCW 13.32A.040.

Chapter 25

At-Risk Youth (ARY)

Renee Morioka[1]

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§ 25.1 Definition

"At-risk youth" [ARY] means a juvenile

a) Who is absent from home for at least seventy-two consecutive hours without consent of his or her parent;
b) Who is beyond the control of his or her parent such that the child's behavior endangers the health, safety, or welfare of the child or any other person; or
c) Who has a substance abuse problem for which there are no pending criminal charges related to the substance abuse.[2]

§ 25.2 Petition

§ 25.2a Filed by Parent Only

Although not specifically stated by statute, ARY petitions may only be filed by a youth's parent. "Parent" means the parent or parents who have the legal right to custody of the child. The term "parent" includes custodians and guardians.[3]

§ 25.2b Contents

The petition must set forth the name, age, and residence of the child and the names and residence(s) of the child's parents. It must also make the following allegations:

1. The child is an at-risk youth;
2. The petitioner has the right to legal custody of the child;
3. Court intervention and supervision are necessary to assist the parent to maintain the care, custody, and control of the child; and
4. Alternatives to court intervention have been attempted or there is good cause why such alternatives have not been attempted.[4]

§ 25.2c Where to File and Jurisdiction

The petition must be filed in the county where the petitioner resides.[5] Juvenile court jurisdiction is invoked over an alleged at-risk youth by the filing of an ARY petition.[6]

§ 25.2d Department of Social and Health Services' Assistance

When requested, the Department of Social and Health Ser

2 RCW 13.32A.030(3).
3 RCW 13.32A.191(1).
4 *Id.* Concerning court intervention and its alternatives, please refer to Chapter 22 on the Family Reconciliation Act. Court intervention was intended by the legislature to be a second phase of intervention for a family in conflict.
5 RCW 13.32A.191(1).
6 JuCR 5A.1.

vices (DSHS) is required to assist in the parent's filing of an ARY petition.[7]

§ 25.2e Family Assessments and Court's Acceptance of Petition Filing

No superior court is permitted to refuse to accept for filing a properly completed and presented ARY petition. To be properly presented, the petitioner must verify that the family assessment required under RCW 13.32A.150[8] has been completed. In the event of an improper refusal that is appealed and reversed, the petitioner will be awarded actual damages, costs, and attorneys' fees.[9] It is suggested that the court devise a practice to ensure a family assessment has been requested and/or provided at the time of the ARY petition filing. For example, Pierce County Superior Court has developed a practice in which the petitioner must provide a declaration stating his/her attempts to obtain a family assessment if one is not provided to the court upon the filing. Family assessments provide background information from DSHS as to what pre-filing services have been offered and/or provided by DSHS and other agencies, if any. Moreover, the family assessment is sometimes the only opportunity DSHS may have to assist the court in determining the propriety of granting an ARY petition. Because RCW 13.32A.170(2) requires the court's consideration of the "Departmental recommendation for approval or dismissal of the petition," and because RCW 13.32A.300 creates no entitlement to services unless recommended and available pursuant to DSHS's input, query should be made by the court of DSHS's recommendations if no Family Assessment was filed.

§ 25.3 Custody of Youth Pending At-Risk Youth Fact-Finding

Unless out-of-home placement of the child is otherwise authorized or required by law, the child shall reside in the home of his or her parent or in an out-of-home placement requested by the parent or child and approved by the parent.[10] Where both a Child in Need of Services (CHINS) petition and an ARY petition have been, the petitions and proceedings shall be consolidated as an ARY petition. Pending a fact-finding hearing regarding the petition(s), the youth may be placed in the parent's home or in an out-of-home placement if not already placed in a temporary out-of-home placement pursuant to the also-filed CHINS petition. The youth or the parent may request a review of the youth's placement including a review of any court order requiring the youth to reside in the parent's home.[11]

§ 25.4 Notice and Service[12]

§ 25.4a Contents of Petition

Notice of the ARY petition must be given in accordance with JuCR 11.2, and it must include the following:

a) A statement advising the parent of his or her right to be represented by an attorney at his or her own expense;
b) A statement advising the parties of the legal consequences should the court find the child to be an at-risk youth;
c) A statement advising the parties that they will be allowed to present evidence at the hearing on the petition.[13]

§ 25.4b Who Is Responsible for Providing Notice?

The requirements of service and notice of hearings and rights to be given to a youth who is subject to ARY proceedings are not specifically delineated by the statute. The only specific "notice" requirement is that under 13.32A.192(1)(d) and (e), the *court* is responsible for notifying the ARY parent and youth of certain rights. Because lawyers and judicial officers understand proper service and notice requirements under the Juvenile Court Rules, Court Rules, Local Rules, and other RCWs relating to civil actions in general, but most parents and other laypersons involved in these actions do not, courts should develop a local practice regarding service and notice that specifically address *who* is responsible for proper service of ARY documents upon

7 RCW 13.32A.191(1).

8 RCW 13.32A.150(1):

> Except as otherwise provided in this chapter, the juvenile court shall not accept the filing of a child-in-need-of-services petition by the child or the parents or the filing of an at-risk youth petition by the parent, unless verification is provided that [DSHS] has completed a family assessment. The family assessment shall involve the multidisciplinary team if one exists. The family assessment or plan of services developed by the multidisciplinary team shall be aimed at family reconciliation, reunification, and avoidance of the out-of-home placement of the child. If [DSHS] is unable to complete an assessment within two working days following a request for assessment the child or the parents may proceed [with the CHINS petition or the ARY petition].

9 RCW 13.32A.205.

10 RCW 13.32A.192(2).

11 *Id*. at (4).

12 *See* RCW 13.32A.152(3). Notably, the sections of Chapter 13.32A relating to ARY cases do *not* have similar notification requirements for Indian children (as compared to CHINS proceedings). The Indian Child Welfare Act (ICWA) generally seeks to ensure that parents of Indian children have added procedural protections while also preventing the breakup of Indian families that occurs when Indian children are removed from the family home. While not specifically noted in the statutory history, the Legislature may not have felt tribal notification was necessary in ARY matters because only "parents" can seek court intervention in ARY matters whereas in CHINS cases, DSHS and/or a child may bring a CHINS petition that may affect parental rights with respect to that child. Additionally, because ARY matters (unlike CHINS) do not routinely involve out-of-home placement, the Legislature may not have felt the additional protections/notification requirements were necessary in ARY cases.

13 *See* JuCR 5A.3.

a youth. Good practice dictates that such procedures should be provided to the petitioning party in writing.

§ 25.5 Court's Responsibility Upon Filing

When a proper at-risk youth petition is filed by a child's parent under this chapter, the juvenile court shall

a) Schedule a fact-finding hearing to be held: (A) For a child who resides in a place other than his or her parent's home and other than an out-of-home placement, within five calendar days unless the last calendar day is a Saturday, Sunday, or holiday, in which case the hearing shall be held on the preceding judicial day; or (B) for a child living at home or in an out-of-home placement, within ten days; and (ii) notify the parent and the child of such date; child of such date;
b) Notify the parent of the right to be represented by counsel at the parent's own expense;
c) Appoint legal counsel for the child;
d) Inform the child and his or her parent of the legal consequences of the court finding the child to be an at-risk youth;
e) Notify the parent and the child of their rights to present evidence at the fact-finding hearing.[14]

§ 25.6 At-Risk Youth Fact-Finding Hearing (RCW 13.32A.194)

Courts must hold a fact-finding hearing to consider an ARY petition. If the allegations in the petition are established by a preponderance of the evidence, the petition must be granted and an order must be entered finding that the child is an at-risk youth. The order must also include a requirement that the child shall reside in the home of his or her parent(s) or in an out-of-home placement as provided in RCW 13.32A.192(2).[15]

The court may also order DSHS to submit a dispositional plan if such a plan would assist the court in ordering a suitable disposition in the case. If the plan is ordered, DSHS must provide copies of the plan to the parent, the child, and the court. If the parties or the court want DSHS to be involved in any future proceedings or case plan development, DSHS should continue to receive timely notification of all court proceedings.[16]

Regardless of whether the court grants or denies the ARY petition, a written statement of the decisional reasons must be entered into the records. If the court denies the petition, it is required to verbally advise the parties that the child is required to remain within the care, custody, and control of his or her parent.[17]

§ 25.7 Disposition and Specialized Treatment Authority

A dispositional hearing may occur on the same day as the fact-finding hearing to reduce the number of court appearances, but it must be held no later than 14 days after the fact-finding hearing. Each party is required to be notified of the time and date of the hearing.[18] DSHS may be given notice in accordance with JuCR 11.2.[19]

At the dispositional hearing, the court must consider the recommendations of the parties and the recommendations of any dispositional plan submitted by DSHS. The court may enter a dispositional order that will assist the parent in maintaining the care, custody, and control of the child and assist the family to resolve family conflicts or problems.[20] The court is also permitted to set conditions of supervision for the child that include regular school attendance, counseling, participation in a substance abuse or mental health outpatient treatment program, reporting on a regular basis to DSHS or any other designated person or agency, and any other condition the court deems an appropriate condition of supervision including but not limited to employment, participation in an anger management program, and refraining from using alcohol or drugs.[21]

No Involuntary Commitment. The dispositional order or condition of supervision cannot include involuntary commitment of a child for substance abuse or mental health treatment.[22] However, the court may find that the at-risk youth is not eligible for inpatient treatment for a mental health or substance abuse condition and requires specialized treatment instead.

Specialized Treatment. The court can order that the child be placed in a staff secure facility, other than a crisis residential center, that will provide for the child's participation in a program designed to remedy his or her behavioral difficulties or needs.[23] This order cannot be entered unless the court finds

14 RCW 13.32A.192(1).
15 *See* RCW 13.32A.194(1).
16 *See id*. at (2).
17 *Id*. at (3).
18 *See* RCW 13.32A.196(1).
19 JuCR 5A.5.
20 RCW 13.32A.196(2).
21 *See id*. at (3).
22 *Id*. at (4).
23 Concerning psychotropic medications, many questions/arguments appear before the court regarding psychotropic medications, including whether the court can order administration of such medications over the objections of a parent and/or child. Unfortunately, RCW Chapter 13.32A is silent on this specific issue. Furthermore, the issue is complicated because (1) the youth in these cases are often over the age of 12 and, as such, have the legal right to refuse administration of such medications absent a lawful court order; and (2) the statute's legislative history clearly seeks to empower parents, so administration over a parent's objection would run contrary to the stated legislative intent. Therefore, unless agreed to by the child's par-

that the placement is clearly necessary to protect the child and that a less restrictive order would be inadequate to protect the child, given the child's age, maturity, propensity to run away from home, past exposure to serious risk when the child ran away from home, and possible future exposure to serious risk should the child run away from home again.[24] The order must also require periodic court review of the placement, with the first review hearing conducted not more than 30 days after the date of the placement. At each review hearing the court is required to advise the parents of their rights under RCW 13.32A.160(1), review the progress of the child, and determine whether the orders are still necessary for the protection of the child or a less restrictive placement would be adequate. The court shall modify its orders as it finds necessary to protect the child. Reviews of orders adopted under this section are subject to the review provisions under RCW 13.32A.190 and 13.32A.198.[25]

Placements in staff secure facilities under this section shall be limited to children who meet the statutory definition of an at-risk youth as defined in RCW 13.32A.030.[26] State funds may only be used to pay for placements under this section if, and to the extent that, such funds are appropriated to expressly pay for them.[27]

§ 25.8 Parents' Responsibilities

The court may order the parent to participate in counseling services or any other services for the child requiring parental participation. The parent is required to cooperate with the court-ordered case plan and to take all necessary steps to help implement the case plan. Parents are also financially responsible for costs related to the court-ordered plan. However, this requirement will not affect the eligibility of the parent or child for public assistance or other benefits to which the parent or child may otherwise be entitled.[28]

§ 25.9 Review Hearings (RCW 13.32A.198)

Upon making a disposition regarding an adjudicated at-risk youth, the court is required to schedule the matter on the calendar for review within three months, advise the parties of the hearing date, appoint legal counsel for the child, advise the parent of the right to be represented by legal counsel at the review hearing at the parent's own expense, and notify the parties of their rights to present evidence at the hearing. At the review hearing, the court must approve or disapprove the continuation of court supervision in accordance with the goal of assisting the parent to maintain the care, custody, and control of the child. The court must also determine whether the parent and child are complying with the dispositional plan. If supervision is continued, the court may modify the dispositional plan. Court supervision of the child may not be continued past 180 days from the day the review hearing commenced unless the court finds, and the parent agrees, that there are compelling reasons for an extension of supervision. If the extension is agreed to, it cannot exceed 90 days.

§ 25.10 Contempt and Detention Review

In all ARY proceedings the court is required to verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to ARY proceedings. The court must treat the parents and the child equally for the purposes of applying contempt of court processes and penalties unless specifically noted.[29] For more concerning contempt and purge conditions, please refer to Chapter 10.

§ 25.11 Runaways and Harboring

Runaways. Whenever the court finds that there is probable cause to believe, based upon consideration of a contempt motion and a supporting declaration/affidavit, that a child has violated a placement order, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW 13.32A.065.

Harboring Runaways. RCW 13.32A.082 provides that

(1) Any person who, without legal authorization, provides shelter to a minor and who knows at the time of providing the shelter that the minor is away from the parent's home without the permission of the parent, or other lawfully prescribed residence, shall promptly report the location of the child to the parent, the law enforcement agency of the jurisdiction in which the person lives, or [DSHS]. The report may be made by telephone or any other reasonable means.

(2) Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this section.

a. "Shelter" means the person's home or any structure over which the person has any control.

b. "Promptly report" means to report within eight hours

ent, any order "requiring" the administration of psychotropic medications should probably follow procedures akin to the involuntary commitment statutes as a best court practice.

24 *See* RCW 13.32A.197(1).

25 *Id*. at (2).

26 *Id*. at (3).

27 *Id*. at (4).

28 *See* RCW 13.32A.196(5).

29 RCW 13.32A.250(1).

after the person has knowledge that the minor is away from a lawfully prescribed residence or home without parental permission.

(3) When [DSHS] receives a report under subsection 1) of this section, it shall make a good faith attempt to notify the parent that a report has been received and offer services designed to resolve the conflict and accomplish a reunification of the family.

Penalty for Harboring. RCW 13.32A080 provides that

(1) (a) A person commits the crime of unlawful harboring of a minor if the person provides shelter to a minor without the consent of a parent of the minor and after the person knows that the minor is away from the home of the parent, without the parent's permission, and if the person intentionally:

i. Fails to release the minor to a law enforcement officer after being requested to do so by the officer; or
ii. Fails to disclose the location of the minor to a law enforcement officer after being requested to do so by the officer, if the person knows the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location; or
iii. Obstructs a law enforcement officer from taking the minor into custody; or
iv. Assists the minor in avoiding or attempting to avoid the custody of the law enforcement officer.

(1) (b) It is a defense to a prosecution under this section that the defendant had custody of the minor pursuant to a court order.

(2) Unlawful harboring of a minor is punishable as a gross misdemeanor.

(3) Any person who provides shelter to a child, absent from home, may notify [DSHS's] local community service office of the child's presence.

(4) An adult responsible for involving a child in the commission of an offense may be prosecuted under existing criminal statutes including, but not limited to:

(a) Distribution of a controlled substance to a minor, as defined in RCW 69.50.406;

(b) Promoting prostitution as defined in chapter 9A.88 RCW; and

(c) Complicity of the adult in the crime of a minor, under RCW 9A.08.020.

Immunity. RCW 13.32A.070 provides that

(1) A law enforcement officer acting in good faith pursuant to this chapter is immune from civil or criminal liability for such action.

(2) A person with whom a child is placed pursuant to this chapter and who acts reasonably and in good faith is immune from civil or criminal liability for the act of receiving the child. The immunity does not release the person from liability under any other law.

§ 25.12 Dismissals

Parent-Requested Dismissals

The parent may request dismissal of an ARY proceeding or out-of-home placement at any time. Upon such a request, the court must dismiss the matter and cease court supervision of the child unless the following circumstances exist:

a) A contempt action is pending in the case;
b) A petition has been filed under RCW 13.32A.150 and a hearing has not yet been held under RCW 13.32A.179; or
c) An order has been entered under RCW 13.32A.179(3) and the court retains jurisdiction.

The court may retain jurisdiction over the matter for the purpose of concluding any pending contempt proceedings, including the full satisfaction of any penalties imposed as a result of a contempt finding.[30]

Court Dismissals

The court may dismiss an ARY proceeding at any time if it finds good cause to believe that continuing supervision would serve no useful purpose or that the parent is not cooperating with the court-ordered case plan. The court must dismiss an ARY youth proceeding if the child is the subject of a dependency proceeding.[31]

As stated previously, the court must also dismiss an ARY petition after 180 days from the day of the review hearing commenced unless supervision is extended for up to 90 days.[32] Note that this extension does not apply to CHINS proceedings.

30 RCW 13.32A.196(6).
31 RCW 13.32A.198(4).
32 *Id*. at (3).

§ 25.13 No Entitlement to Services

RCW 13.32A.300 states that "[n]othing in this chapter shall be construed to create an entitlement to services nor to create judicial authority to order the provision at public expense of services to any person or family where [DSHS] has determined that such services are unavailable or unsuitable or that the child or family are not eligible for such services."

Chapter 26

Child In Need of Services (CHINS)

Renee Morioka[1]

§ 26.1 Definition

"Child in need of services" [CHINS] means a juvenile

(a) Who is beyond the control of his or her parent such that the child's behavior endangers the health, safety, or welfare of the child or other person;
(b) Who has been reported to law enforcement as absent without consent for at least twenty-four consecutive hours on two or more separate occasions from the home of either parent, a crisis residential center, an out-of-home placement, or a court-ordered placement;
and
(i) Has exhibited a serious substance abuse problem;
or
(ii) Has exhibited behaviors that create a serious risk of harm to the health, safety, or welfare of the child or any other person;
(c) (i) Who is in need of: (A) Necessary services, including food, shelter, health care, clothing, or education; or (B) services designed to maintain or reunite the family;
(ii) Who lacks access to, or has declined to utilize, these services;
and
(iii) Whose parents have evidenced continuing but unsuccessful efforts to maintain the family structure or are unable or unwilling to continue efforts to maintain the family structure;[2] or

(d) Who is a "sexually exploited child."[3]

§ 26.2 Efforts to Prevent Out-of-Home Placement

Crisis residential center [CRC] staff shall make reasonable efforts to protect the child and achieve a reconciliation of the family. If a reconciliation and voluntary return of the child has not been achieved within 48 hours from the time of admission, and if the administrator of the center does not consider it likely that reconciliation will be achieved within the five-day period, then the administrator shall inform the parent and child of

a) The availability of counseling services;
b) The right to file a child in need of services petition for an out-of-home placement, the right of a parent to file an at-risk youth petition, and the right of the parent and child to obtain assistance in filing the petition;
c) The right to request the facility administrator or his or her designee to form a multidisciplinary team;

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2 RCW 13.32A.030(5) (emphasis added).

3 "Sexually exploited child" means any person under the age of 18 who is a victim of the crime of commercial sex abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102. RCW 13.32A.030(17).

d) The right to request a review of any out-of-home placement;
e) The right to request a mental health or chemical dependency evaluation by a county-designated professional or a private treatment facility; and,
f) The right to request treatment in a program to address the child's at-risk behavior under RCW 13.32A.197.[4]

§ 26.3 Petitions

§ 26.3a Where to File and Jurisdiction

RCW 13.32A.150(2) provides that the petition must be filed in the county where the parent resides.[5] "Parent" means the parent or parents who have the legal right to custody of the child. The term "parent" includes custodians and guardians.[6]

Juvenile court jurisdiction is invoked over a CHINS upon the filing of such petition.[7]

§ 26.3b Petitions Filed by the Department of Social and Health Services

a. "May" File

Department of Social and Health Services (DSHS) must consider filing a CHINS petition if there is no parent available or willing to take custody of the child within 72 hours of the child's placement at a CRC.[8]

b. "Shall" File

Unless a dependency petition is filed, DSHS must file a CHINS petition on behalf of the child for the court to approve an out-of-court placement on behalf of a child under any one (or more) of the following three circumstances:

(1) The child has been admitted to a [CRC] or has been placed by [DSHS] in an out-of-home placement, *and*:

a) The parent has been notified that the child was so admitted or placed;
b) The child cannot return home, and legal authorization is needed for out-of-home placement beyond seventy-two hours;
c) No agreement between the parent and the child as to where the child shall live has been reached;
d) No [CHINS] petition has been filed by either the child or parent;
e) The parent has not filed an at-risk youth petition; *and*
f) The child has no suitable place to live other than the home of his or her parent.

(2) The child has been admitted to a [CRC] *and*:

a) Seventy-two hours, including Saturdays, Sundays, and holidays, have passed since such placement;
b) The staff, after searching with due diligence, have been unable to contact the parent of such child; *and*
c) The child has no suitable place to live other than the home of his or her parent.

(3) An agreement between parent and child made per RCW 13.32A.090(3)(d)(ii) or pursuant to RCW 13.32A.120(1) is no longer acceptable to parent or child, *and*:

a) The party to whom the arrangement is no longer acceptable has so notified the department;
b) Seventy-two hours, including Saturdays, Sundays, and holidays, have passed since such notification;
c) No new agreement between parent and child as to where the child shall live has been reached;
d) No [CHINS] petition has been filed by either the child or the parent;
e) The parent has not filed an at-risk youth petition; *and*
f) The child has no suitable place to live other than the home of his or her parent.[9]

Note that under each numbered subheading, each element must be met before DSHS is required to file.

§ 26.3c Petitions Filed by Youth or Parents (RCW 13.32A.150)

A child or their parent may file a CHINS petition to approve an out-of-home placement for the child. Upon request, DSHS must assist either a parent or child in the filing of the petition. If the petition is filed by the child or parent without the assistance of DSHS, the court shall immediately notify DSHS that a petition has been filed.[10] Additionally, where either a child, their parent, or the person or facility currently providing shelter to the child notifies the center that such individual or individuals cannot agree to the continuation of an out-of-home placement arrived at pursuant to RCW 13.32A.090(3)(d)(ii), the administrator of the center is required to immediately contact the remaining party or parties to the agreement and attempt to bring about the child's return home or to an alternative living arrangement agreeable to the child and the parent as soon as practicable.[11]

4 RCW 13.32A.130(5).
5 *See also* JuCR 5.2(b).
6 RCW 13.32A.030(14).
7 JuCR 5.1.
8 RCW 13.32A.130(3).
9 RCW 13.32A.140 (emphasis added).
10 RCW 13.32A.152(2).
11 *See* RCW 13.32A.120(1).

If a child and his or her parent cannot agree to an out-of-home placement under RCW 13.32A.090(3)(d)(ii), either the child or parent may file a CHINS petition to approve an out-of-home placement, or the parent may file an at-risk youth (ARY) petition.[12] If a child and his or her parent cannot agree to the continuation of an out-of-home placement under RCW 13.32A.090(3)(d)(ii), either the child or parent may file a CHINS petition to continue an out-of-home placement or the parent may file an ARY petition.[13]

§ 26.3d Contents of the Petition and Family Assessments

The petition shall allege that the child is a child in need of services and shall ask only that the placement of a child outside the home of his or her parent be approved.[14] The filing of a petition to approve the placement is not dependent upon the court's having obtained any prior jurisdiction over the child or his or her parent and confers upon the court a special jurisdiction to approve or disapprove an out-of-home placement.[15] The court must not accept the filing of a CHINS petition by the child or the parents unless verification is provided that DSHS has completed a family assessment. The family assessment shall involve the multidisciplinary team if one exists. The family assessment or plan of services developed by the multidisciplinary team shall be aimed at family reconciliation, reunification, and avoidance of the out-of-home placement of the child. If DSHS is unable to complete an assessment within two working days following a request for assessment the child or the parents may proceed with their CHINS petition.[16]

§ 26.4 Notice and Service

The petitioner must ensure that a copy of the petition is served upon the parents of the youth.[17] Although the statute does not require it specifically, a copy of the petition should also be served upon the youth. Because lawyers and judicial officers understand proper service and notice requirements under the Juvenile Court Rules, Court Rules, Local Rules, and other RCWs relating to civil actions in general, but most parents and other laypersons involved in these actions do not, courts should develop a local practice regarding service and notice that specifically address *who* is responsible for proper service of ARY documents upon a youth. Good practice dictates that such procedures should be provided to the petitioning party in writing. Service of the petition on the parent(s) and child shall first be attempted via personal service. If personal service is unsuccessful, then it should be made via certified mail with return receipt.[18]

Again, if the petition is filed by the child or parent, the court shall immediately notify DSHS.[19]

Indian Children[20]

When a CHINS petition is filed *by DSHS*[21], and the court or the petitioner knows or has reason to know that an Indian

12 *Id.* at (2).
13 *Id.* at (3).
14 RCW 13.32A.150(2).
15 *Id.*
16 *Id.* at (1). It is suggested that the court devise a practice to ensure a family assessment has been requested and/or provided at the time of the Child in Need of Services (CHINS) petition filing. For example, Pierce County Superior Court has developed a practice in which the petitioner must provide a declaration stating his/her attempts to obtain a family assessment if one is not provided to the court upon the filing. Family assessments provide background information from DSHS as to what prefiling services have been offered and/or provided by DSHS and other agencies, if any. Moreover, the family assessment is sometimes the only opportunity DSHS may have to assist the court in determining the propriety of granting a CHINS petition. Because RCW 13.32A.170(2) requires the court's consideration of the "Departmental recommendation for approval or dismissal of the petition," and because RCW 13.32A.300 creates no entitlement to services unless recommended and available pursuant to DSHS's input, query should be made by the court of DSHS's recommendations if no Family Assessment was filed.
17 *See* RCW 13.32A.152.
18 *Id.* at (1). This "extra" notice requirement is not specifically required for ARY cases. Please refer to the ARY section, Chapter 25, for more information and discussion on this point.
19 RCW 13.32A.152(2).
20 ESSB 5656 created the "Washington state Indian child welfare act". *See generally* E.S.S.B. 5656, 62nd Legis., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 309. This act outlines definitions, procedures, and responsibilities required when courts address cases involving Indian children. See Chapter 29 for more information concerning the Washington state Indian child welfare act (WICWA).
21 The notice requirements regarding Indian child CHINS cases were refined by E.S.S.B. 5656, secs. 7 and 21. The bill requires heightened notice requirements where DSHS is seeking out-of-home placement via CHINS, but the notice requirements are unclear in a number of other areas. For example, the bill does not clearly state whether the same, or similar, notice requirements are required if the petitioner is the youth or a parent(s); whether these heightened notice requirements are necessary only *if* the parent and/or youth *disagree* with the out-of-home placement (*see* E.S.S.B. sec. 7); whether these heightened notice requirements only apply if there is *foster care* placement *(see id.)*; or whether these notice requirements apply where the youth is placed with a relative(s) or "fictive kin" (which is a common practice within the Native communities).

For these reasons, the notice requirements set forth in this subsection will only serve to address notice requirements when DSHS is the petitioner in a CHINS proceeding regarding an Indian child, the parents do *not* agree with placement, and placement is in foster care. As a "best practice" tip, courts should encourage the same notice practices *regardless* of the petitioner's identity in a CHINS proceeding, whether the out-of-home placement is "voluntary" versus "involuntary" in nature, and if placement is in foster care versus somewhere other than the parent's home.

child is involved, the petitioner must promptly provide notice to the child's parent or Indian custodian and to the Indian child's tribe or tribes. Notice shall be by certified mail with return receipt requested and by use of a mandatory Indian child welfare act notice. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary of the interior by registered mail, return receipt requested, in accordance with the regulations of the Bureau of Indian Affairs. The secretary of the interior has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian. The parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for the hearing.

The notice must contain a statement notifying the parent or custodian and the tribe of the pending proceeding and notify the tribe of the tribe's right to intervene and/or request that the case be transferred to tribal court.[22]

§ 26.5 Court's Responsibility Upon Filing

RCW 13.32A.160(1) provides that upon the filing of a CHINS petition, the court shall do the following:

1. Schedule a fact-finding hearing;
2. Notify the parent(s), DSHS, and the child of the fact-finding hearing date;
3. Notify the parent(s) of the right to be represented by counsel, and if found indigent, of the right to have counsel appointed for them by the court;
4. Appoint legal counsel for the child;
5. Inform the child and the parent(s) of the legal consequences of the court approving or disapproving a CHINS petition;
6. Notify the parent(s) of their rights under RCW 13.32A, 11.88, 13.34, 70.96A, and 71.34, which includes the right to file an ARY petition and the right to submit application for admission of their child to a treatment facility for alcohol, chemical dependency, or mental health treatment, and the right to file a guardianship petition; and
7. Notify all parties, including DSHS, of their right to present evidence at the fact-finding hearing.

Timing

Pursuant to RCW 13.32A.160, the fact-finding hearing must be scheduled for within *five calendar days* of filing if the child is residing in a place other than the parents' home or out-of-home placement. Courts may schedule the hearing for within *ten* calendar days for all other situations. If the last day is a weekend or holiday, the hearing must be scheduled for the *preceding* judicial day.

Courts should pay careful attention to these timelines as calendaring of hearings becomes especially difficult if juvenile court docket time allotted to Becca Bill proceedings is not routinely part of the Juvenile Court's schedule.

§ 26.6 Placement of Youth Pending Court Hearing

When a CHINS petition is filed, the child may be placed (if not already placed) by DSHS in a CRC, licensed foster family home, licensed group home facility or any other suitable residence other than a HOPE center[23] to be determined by DSHS. The court may place a child in a crisis residential center for a temporary out-of-home placement as long as the requirements of RCW 13.32A.125 are met.[24]

If the child has been placed in a foster family home or group care facility under RCW Chapter 74.15, the child shall remain there, or in any other suitable residence as determined by DSHS, pending resolution of the petition by the court.[25]

DSHS may authorize emergency medical or dental care for the child if the child is admitted to a CRC or placed in out-of-home placement.[26]

Temporary out-of-home placement at a semi-secure CRC can be used if all of the following elements are met: (1) no other suitable out-of-home placement is available; (2) space is available at a semi-secure CRC; and (3) no child will be denied access for a five-day placement due to this placement.

Placements in a semi-secure CRC under at CHINS petition are deemed temporary out-of-home placements and do not take priority over non-CHINS youth referred to the semi-secure CRC.[27]

22 RCW 13.32A.152(3)(b).

23 A HOPE center means an agency licensed to provide temporary residential placement and other services to street youth. A street youth may remain in a HOPE center for 30 days while services are arranged and permanent placement is coordinated. No street youth may stay longer than 30 days unless approved by DSHS and any additional days approved by DSHS must be based on the unavailability of a long-term placement option. A street youth whose parent wants him or her returned to home may remain in a HOPE center until his or her parent arranges return of the youth, not longer. All other street youth must have court approval under RCW 13.34 or RCW 13.32A to remain in a HOPE center up to 30 days. RCW 74.15.020(1)(g).

24 RCW 13.32A.160(2); *see also* RCW 13.32A.140.

25 RCW 13.32A.160(3).

26 RCW 13.32A.140.

27 RCW 13.32A.125.

Any placement may be reviewed by the court within three judicial days upon the request of the child or the child's parent.[28]

§ 26.7 Child In Need of Services Fact-Finding

The court and DSHS should remind parents and/or the child's current placement of the need to have the child present for all CHINS-related hearings. While the statute does not specifically require the child's presence, because the child is an integral piece to these proceedings, their presence should be required. In fact, many courts delay CHINS proceedings from occurring unless and until the child is able to be present (e.g., once the child is picked up and returned from a runaway episode). The child's presence is also advised so that the court has the opportunity to warn the child about contempt sanctions, explain the court's expectations, and allow the child to participate meaningfully throughout the court proceedings with the assistance of their attorney.[29] At the beginning of the hearing, the court should first advise the parent(s) of their rights as set forth in RCW 13.32A.160(1).[30]

If the court approves a CHINS petition, a written statement of the court's reasons (i.e. an Order on CHINS Petition) must be filed. RCW 13.32A.170(2) provides that at the fact-finding hearing, the court can approve an order stating that the child shall be placed in a residence other than the home of his/her parent(s) only if it has been established by a preponderance of the evidence (which includes DSHS's recommendation for approval or dismissal of the petition[31]) that all of the following have been met:

a. The child is in need of services as defined in RCW 13.32A.030(5);
b. If the petitioner is the child, he or she has made reasonable efforts to resolve the conflict;
c. Reasonable efforts have been made to prevent or eliminate the need for removal of the child from the parent(s) home and to make it possible for the child to return home; and
d. A suitable out-of-home placement is available.

The court cannot grant a petition filed by the child or DSHS if it is established that the petition is only based upon the child's dislike of reasonable rules or reasonable discipline established by the parent(s). At the end of the fact-finding hearing, the court must make one of the following decisions regarding the CHINS petition:

1. Approve the CHINS petition and, if appropriate, enter a temporary out-of-home placement for a period *not to exceed 14 days* pending approval of a disposition decision to be made under RCW 13.32A.179(2);
2. Approve an ARY petition filed by the parents and dismiss the CHINS petition;
3. Dismiss the CHINS petition as not satisfying the statutory definition of a child-in-need-of-services or because the youth is already the subject of a dependency proceeding;[32] or
4. Order DSHS to review the case to determine whether the case is appropriate for dependency petition under RCW 13.34. (The court may do this at any time throughout the duration of the CHINS action).[33]

§ 26.8 Disposition

A disposition hearing must be held no later than 14 days after the approval and entry of the Order on CHINS Petition and the temporary out-of-home placement.[34] Disposition may occur on the same day as the fact-finding hearing to reduce the number of court appearances or if there are other timing concerns.

RCW 13.32A.179(4) provides that the court may order DSHS to submit a dispositional plan. In this plan, DSHS can only address the needs of the child. It should not address the needs of the parent(s) unless the CHINS order was entered upon the request of the child or DSHS under RCW 13.32A.179(d)(2) or was unless specifically agreed to by the parent(s). Otherwise, parental participation is merely voluntary.

The court must notify the parent(s), the child, and DSHS of the time and place of the dispositional hearing.[35] At the conclusion of the dispositional hearing, the court can do any one of the following:

a. Reunite the family and dismiss the CHINS petition;
b. Approve an ARY petition filed by the parent(s) and dismiss the CHINS;

28 RCW 13.32A.160.

29 In some counties, the court requires the child's presence at the courthouse at least 30 minutes *prior to* the docket actually beginning (i.e., the court order or notice of hearing requires the child be present at 8:30 a.m. for a 9:00 hearing). This allows ample time for "lateness" that invariably occurs with youth of these ages and to allow the youth to meet with counsel prior to their hearing

30 Please refer to § 26.5 of this chapter for a list of these rights.

31 If no family assessment was filed along with the petition, the court should inquire as to DSHS's recommendation. Because RCW 13.32A.170(2) requires the court's consideration of the "Departmental recommendation for approval or dismissal of the petition," query should be made by the court of DSHS's recommendations prior to ruling on a CHINS petition at fact-finding.

32 If a dependency is filed at any time during while the CHINS is pending, jurisdiction transfers to the dependency court and the CHINS proceeding shall be dismissed. *See* RCW 13.32A.170; *see also* RCW 13.34.020 and RCW 13.32A.150.

33 *See* RCW 13.32A.170.

34 RCW 13.32A.179(1).

35 RCW 13.32A.179.

c. Approve an out-of-home placement requested in the CHINS petition filed by the parents;
d. Order an out-of-home placement at the request of the child or DSHS which shall not exceed 90-days; or
e. Order DSHS to review the matter for purposes of filing a Dependency Petition.[36]

Warning of Contempt

RCW 13.32A.250 provides that the court must verbally notify the parent(s) and child of the possibility of the finding of contempt for failure to comply with the terms of the court order. It is good practice that the court advise the parties of contempt at every CHINS hearing and language should be included in every CHINS order produced from a substantive hearing acknowledging that the parties have been so advised.

Setting Review Date

After making a dispositional order, the court shall schedule a review hearing to be held within the following 90 days. It is the court's duty to advise the parties of the review hearing date, appoint legal counsel for the child and/or a guardian ad litem or court-appointed special advocate to represent the child at the review hearing, advise the parent(s) of their right to representation, and notify the parties of their rights to present evidence at the review hearing.[37] Whether or not the court approves an out-of-home placement, the court can order any conditions of supervision as set forth in RCW 13.32A.196(3).[38] These conditions of supervision include regular school attendance with no unexcused absences, counseling, participation in substance abuse/mental health out-patient program, reporting on a regular basis to DSHS or any other designated person or agency, or any other condition of supervision the court deems appropriate (e.g., employment, anger management, and refraining from using/possessing drugs/alcohol). No disposition order shall ever include involuntary commitment to a substance abuse or mental health treatment facility.[39]

DSHS or Child-Requested Out-of-Home Placement

The court can only order an out-of-home placement at the request of DSHS or the child if it finds by clear, cogent, and convincing evidence that either of the following three conditions have been met:

(1) The order is in the best interests of the family and

i. The parents have *not* requested an out-of-home placement;
ii. The parents have *not* exercised any other right in RCW 13.32A.160(1)(e);
iii. The child has made reasonable efforts to resolve the problems that led to the filing of the CHINS petition;
iv. The problems cannot be resolved by delivery of services to the family during continued placement in the parental home;
v. Reasonable efforts have been made to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to return home; *and*
vi. A suitable out-of-home placement is available; *or*

(2) The order is in the best interest of the child and the parents are unavailable; *or*

(3) The parent's actions cause imminent threat to the child's health or safety.

Any placement can be reviewed by the court within three days of the child's or parent's request.[40]

§ 26.9 Review Hearings (RCW 13.32A.190)

In addition to reports for dispositional hearings, RCW 13.32A.179(4) provides that the court may order DSHS to submit a dispositional plan. Again, the plan shall only address the needs of the child and shall *not* address the needs of the parent(s) *unless* the CHINS order was entered upon the request of the child or DSHS (RCW 13.32A.179(d)(2) where the child or DSHS petitioned for the CHINS), or unless specifically agreed to by the parent(s). Otherwise, parental participation is merely voluntary. At the review hearing, the court is to determine whether to approve or disapprove the continuation of the dispositional plan. The court will determine whether reasonable efforts have been made to reunify the family and to make it possible for the child to return home.

The court shall discontinue the out-of-home placement and order the child to return home if the court has reasonable grounds to believe that the parents have made reasonable efforts to resolve the conflict and the court has reason to believe that the child's refusal to return home is capricious.

If out-of-home placement is continued, the court may modify the original dispositional plan.

Out-of-home placement *cannot* be continued beyond 180 days of the first review hearing. Once the "nine months" (total) has passed, the CHINS petition must be dismissed. For example, if the first review occurs after 90 days of placement and the next review is scheduled for six months later, at that "second" review, the court must dismiss the CHINS.

36 *See id.* at (2).
37 RCW 13.32A.190(1).
38 RCW 13.32A.179(2).
39 RCW 13.32A.196(4).
40 RCW 13.32A.160(3).

§ 26.10 Out-of-Home Placement[41] in CHINS Proceedings

Again, in CHINS proceedings, the court may only place a child outside of the family home if it is established by a preponderance of the evidence that

(1) the child is in need of services as defined in RCW 13.32A.030(5);
(2) if the petitioner is the child, he or she has made reasonable efforts to resolve the conflict;
(3) reasonable efforts have been made to prevent or eliminate the need for removal of the child from the parent(s) home and to make it possible for the child to return home; *and*
(4) a suitable out-of-home placement is available.[42]

The court must hear DSHS recommendations regarding whether a suitable out-of-home placement is "available" if the court intends to place the child in the care and custody of DSHS.[43] If DSHS determines that it has no suitable out-of-home placement for the child, the court must look for alternative placements or the child should be placed or remain in the parent's home.[44]

41 Remember—the court can only order an out-of-home placement at the request of DSHS or the child if it finds by clear, cogent, and convincing evidence that either (1), (2), or (3) applies:

(1) The order is in the best interests of the family and
i. The parents have *not* requested an out-of-home placement;
ii. The parents have *not* exercised any other right in RCW 13.32A.160(1)(e);
iii. The child has made reasonable efforts to resolve the problems that led to the filing of the CHINS petition;
iv. The problems cannot be resolved by delivery of services to the family during continued placement in the parental home;
v. Reasonable efforts have been made to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to return home; *and*
vi. A suitable out-of-home placement is available; or

(2) The order is in the best interest of the child and the parents are unavailable; *or*

(3) The parent's actions cause imminent threat to the child's health or safety.

42 RCW 13.32A.170(2).

43 *See id*.

44 *See* RCW 13.32A.300. It has been this author's experience that CHINS and ARY courts question whether DSHS has true "gate keeping" authority regarding whether a suitable out-of-home placement is "available." Much of these discussions have occurred in cases where youth with violent or sexually aggressive histories are being released from Juvenile rehabilitation administration (JRA) facilities and their parents are not willing to re-assume custody of them. RCW 13.32A.300 clearly provides DSHS with the sole authority to determine the availability of out-of-home placements in situations like this. It is this author's opinion that in these circumstances the court must work with the family to locate other placements outside of DSHS-monitored/sponsored facilities.

§ 26.11 Contempt, Detention, and Pick-Up of Runaway Youth[45]

In all CHINS proceedings, the court shall verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to this chapter. The court must treat the parents and the child equally for the purposes of applying contempt of court processes and penalties unless specifically noted.[46] For more concerning contempt and purge conditions, please refer to Chapter 10.

§ 26.12 Runaways and Harboring

Runaways. Whenever the court finds that there is probable cause to believe, based upon consideration of a contempt motion and a supporting declaration/affidavit, that a child has violated a placement order, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW 13.32A.065.

Harboring Runaways. RCW 13.32A.082 provides that

(1) Any person who, without legal authorization, provides shelter to a minor and who knows at the time of providing the shelter that the minor is away from the parent's home without the permission of the parent, or other lawfully prescribed residence, shall promptly report the location of the child to the parent, the law enforcement agency of the jurisdiction in which the person lives, or DSHS. The report may be made by telephone or any other reasonable means.

(2) Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this section.

a. "Shelter" means the person's home or any structure over which the person has any control.
b. "Promptly report" means to report within eight hours after the person has knowledge that the minor is away from a lawfully prescribed residence or home without parental permission.

(3) When [DSHS] receives a report under subsection 1) of this section, it shall make a good faith attempt to notify the parent that a report has been received and offer services designed to

45 Please take note, case law on the issue of civil contempt has remained a fluid discussion by Washington appellate courts, and the court should undertake a review of applicable current court decisions prior to issuing orders of contempt and sanctions

46 RCW 13.32A.250(1).

resolve the conflict and accomplish a reunification of the family.

Penalty for Harboring. RCW 13.32A080 provides that

(1) (a) A person commits the crime of unlawful harboring of a minor if the person provides shelter to a minor without the consent of a parent of the minor and after the person knows that the minor is away from the home of the parent, without the parent's permission, and if the person intentionally:

i. Fails to release the minor to a law enforcement officer after being requested to do so by the officer; or
ii. Fails to disclose the location of the minor to a law enforcement officer after being requested to do so by the officer, if the person knows the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location; or
iii. Obstructs a law enforcement officer from taking the minor into custody; or
iv. Assists the minor in avoiding or attempting to avoid the custody of the law enforcement officer.

(1) (b) It is a defense to a prosecution under this section that the defendant had custody of the minor pursuant to a court order.

(2) Unlawful harboring of a minor is punishable as a gross misdemeanor.

(3) Any person who provides shelter to a child, absent from home, may notify [DSHS's] local community service office of the child's presence.

(4) An adult responsible for involving a child in the commission of an offense may be prosecuted under existing criminal statutes including, but not limited to:

(a) Distribution of a controlled substance to a minor, as defined in RCW 69.50.406;
(b) Promoting prostitution as defined in chapter 9A.88 RCW; and
(c) Complicity of the adult in the crime of a minor, under RCW 9A.08.020.

Immunity. RCW 13.32A.070 provides that

(1) A law enforcement officer acting in good faith pursuant to this chapter is immune from civil or criminal liability for such action.

(2) A person with whom a child is placed pursuant to this chapter and who acts reasonably and in good faith is immune from civil or criminal liability for the act of receiving the child. The immunity does not release the person from liability under any other law.

§ 26.13 Time Limitations of CHINS Proceedings and Dismissals

As stated above, out-of-home placement *cannot* be continued beyond 180 days of the first review hearing. The following are the grounds upon which the court *must* dismiss a CHINS petition:

1. The problems that led to the filing of the CHINS have been addressed such that court involvement is no longer needed;
2. The out-of-home placement will be beyond the statutorily allowed 180-days from the commencement of the first review hearing if the CHINS is further continued;
3. The parent was the petitioner and requested out-of-home placement, but now requests that the child be returned home;
4. The child is now the subject of a dependency proceeding under RCW 13.34; or
5. The parent was the petitioner and had requested court intervention, but the parent now wishes to withdraw the petition—to dismiss the action and court involvement.

The following are the grounds upon which the court *may* dismiss a CHINS petition:

(1) It is not feasible for DSHS to provide services under one or more of the following circumstances under RCW 13.32A.190(4):

(a) The child has been absent from the court approved placement for 30 consecutive days or more;
(b) The parent(s) or the child, or all of them, refuse to cooperate with available, appropriate intervention aimed at reunifying the family; *or*
(c) DSHS has exhausted all available and appropriate services that would result in reunification;

(2) The child is now the subject of an ARY petition (these cases are simply "consolidated" ARY cases); or

(3) The parent(s) were the petitioners and the court finds good cause to believe that the continuation of out-of-home placement would serve no useful purpose.

§ 26.14 No Entitlement to Services

RCW 13.32A.300 states that "[n]othing in this chapter shall be construed to create an entitlement to services nor to create

judicial authority to order the provision at public expense of services to any person or family where [DSHS] has determined that such services are unavailable or unsuitable or that the child or family are not eligible for such services."[47]

47 Also see the discussion at footnote 16. Situations may arise where a parent and/or child requests a specific service that DSHS either believes is *not* appropriate for the child or family and/or DSHS has determined that such a "service" is "unavailable." In these situations, DSHS has maintained that the court cannot *require* DSHS to fund the service in this situation and can only be "ordered" by the court upon the youth if the parent will be financially responsible for payment.

Chapter 27

Truancy

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2011 Updates by Meghann McCann

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Washington State's Constitution declares that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders."[2] In fulfillment of that duty, the legislature enacted compulsory educational attendance, with certain exceptions, for all school-aged children.[3]

§ 27.1 Definitions

1. *Parent* - A parent means a parent, guardian, or person having legal custody of the child.[4]

2. *Approved Private School* - An approved private school shall be one established under the regulations set forth in RCW 28A.305.130.[5]

3. *Home-Based Schooling* - Instruction is "homebased" if it consists of planned and supervised instructional and related educational activities that includes a curriculum and instruction in the basic skills of occupational education, mathematics, science, social studies, language, health, history, reading, writing, spelling, and development of an appreciation for art and music, and only if the instruction is provided for the appropriate amount of hours.[6] Such activities must also be

(a) Provided by a parent who is instructing his or her child only and are supervised by a certificated person. A certificated person for purposes of this chapter and chapter 28A.200 RCW shall be a person certified under chapter 28A.410 RCW. For purposes of this section, "supervised by a certificated person" means: The planning by the certificated person and the parent of objectives consistent with this subsection; a minimum each month of an average of one contact hour per week with the child being supervised by the certificated person; and evaluation of such child's progress by the certificated person. The number of children supervised by the certificated person shall not exceed thirty for purposes of this subsection; or

(b) Provided by a parent who is instructing his or her child only and who has either earned forty-five college level quarter credit hours or its equivalent in semester hours or has completed a course in home-based instruction at a postsecondary institution or a vocational-technical institute; or

(c) Provided by a parent who is deemed sufficiently qualified to provide home-based instruction by the superintendent of the local school district in which the child resides.[7]

2 Wash. Const. art. IX, § 1.
3 *See* RCW 28A.225.
4 RCW 28A.225.010(2).
5 *Id.* at (3).
6 *See* RCW 28A.195.010.
7 RCW 28A.225.010(4)(a)–(c).

4. *Unexcused Absence* - An unexcused absence means that a child (1) has failed to attend the majority of hours or periods in an average school day or has failed to comply with a more restrictive school district policy; and (2) has failed to meet the school district's policy for excused absences.[8]

5. *Community Truancy Boards* – A community truancy board is composed of members of the local community in which the child attends school. Juvenile courts may establish and operate community truancy boards. If the juvenile court and the school district agree, a school district may establish and operate a community truancy board under the jurisdiction of the juvenile court. Juvenile courts may create a community truancy board or may use other entities that exist or are created, such as diversion units. However, a diversion unit or other existing entity must agree before it is used as a truancy board. Duties of a community truancy board shall include, but not be limited to, recommending methods for improving school attendance such as assisting the parent or the child to obtain supplementary services that might eliminate or ameliorate the causes for the absences or suggesting to the school district that the child enroll in another school, an alternative education program, an education center, a skill center, a dropout prevention program, or another public or private educational program.[9]

Additionally, if a referral is made to a community truancy board by the court upon the filing of a truancy petition, the truancy board must meet with the child, a parent, and the school district representative and enter into an agreement with the petitioner and respondent regarding expectations and any actions necessary to address the child's truancy within 20 days of the referral. If the petition is based on RCW 28A.225.015 (meaning, the child is six or seven years old), the child shall not be required to attend and the agreement under this subsection shall be between the truancy board, the school district, and the child's parent. If an agreement among the parties is reached, the agreement shall be presented to the juvenile court for its approval.[10] The court may, if the school district and community truancy board agree, permit the truancy board to provide continued supervision over the student, or parent if the petition is based on RCW 28A.225.015, and report on compliance with the order.[11]

If the truancy board fails to reach an agreement with the school district or the parents, the truancy board shall return the case to the juvenile court for a hearing.[12]

8 RCW 28A.225.020(2)(a)–(b).
9 RCW 28A.225.025.
10 RCW 28A.225.035(5).
11 *Id.* at (6).
12 *Id.* at (7).

§ 27.2 Mandatory Attendance by Age and Exceptions

§ 27.2a Children Aged Eight Through 17

Children aged eight through 17 must, on a full-time basis, attend the public school within the district where he or she resides.[13] Parents have equal responsibility for ensuring their child's school attendance.[14] Full-time attendance is mandatory unless the following circumstances exist:

(1) The child is attending an approved private school for the same time or is enrolled in an extension program as provided in RCW 28A.195.010(4); or

(2) The child is receiving home-based instruction; or

(3) The child is attending an education center as provided in RCW 28A.205; or

(4) The school district superintendent of the district in which the child resides has excused the child from attendance because the child is physically or mentally unable to attend school, is attending a residential school operated by the Department of Social and Health Services (DSHS), is incarcerated in an adult correctional facility, or has been temporarily excused upon the request of his or her parents for purposes agreed upon by the school authorities and the parent; or

(5) The child is 16 years of age or older and (i) The child is regularly and lawfully employed and either the parent agrees that the child should not be required to attend school or the child is emancipated; (ii) The child has already met graduation requirements in accordance with state board of education rules and regulations; or (iii) The child has received a certificate of educational competence under rules and regulations established by the state board of education under RCW 28A.305.190.[15]

Search and rescue activities are "excused" absences under RCW 28A.225.055:

> The legislature finds that state-recognized search and rescue activities, as defined in chapter 38.52 RCW and the rules interpreting the chapter, are recognized as activities deserving of excuse from school. Therefore, the legislature strongly encourages that excused absences be granted to students for up to five days each year to participate in search and rescue activities, subject to approval by the student's parent and the principal of the student's school, and provided that the activities do not cause a serious adverse effect upon the student's educational progress.

13 RCW 28A.225.010(1).
14 *Id.*
15 *See* RCW 28A.225.010(1)(a)–(e).

§ 27.2b Children Aged Six Through Seven

Parents and children aged six to seven are subject to truancy and compulsory attendance requirements only if the parents enroll the children in a public school.[16] Again, however, these requirements are inapplicable once a parent formally withdraws that child from school—so long as the child is currently less than eight years old, and there is no pending truancy petition against the parent and/or child under RCW 28A.225.035.[17]

§ 27.3 School's Duties upon Failed Attendance (RCW 28A.225.020)

§ 27.3a Children Aged Eight Through 17

- First unexcused absence in one month

Inform the child's custodial parent, parents, or guardian by a notice in writing or by telephone whenever the child has failed to attend school after one unexcused absence. School officials shall inform the parent of the potential consequences of additional unexcused absences. If the custodial parent, parents, or guardian is not fluent in English, the preferred practice is to provide this information in a language in which the custodial parent, parents, or guardian is fluent.[18]

- Second unexcused absence in one month

The school must schedule a conference with the parent and child at a reasonably convenient time to analyze the causes of the child's absences. This may take place during a parent-teacher conference if the parent-teacher conference is scheduled to occur within 30 days of the second unexcused absence.[19] The conference may occur without the parent's presence if the parent fails to attend, but the parent must be notified of the steps to be taken to eliminate or reduce the child's absences.[20]
The school must also take steps to eliminate or reduce the child's absences which, if appropriate, must include adjusting the child's school program assignments, providing more individualized or remedial instruction, offering assistance in enrolling the child in available alternative schools or programs, or assisting the parent or child to obtain supplementary services that may help eliminate or ameliorate the cause or causes for the absence from school.[21]

- Fifth through sixth unexcused absence in one month

RCW 28A.225.030(2) provides that no later than the fifth unexcused absence in one month, the school district must (1) Enter into an agreement with a student and parent that establishes school attendance requirements; (2) Refer a student to a community truancy board, if available. The community truancy board must enter into an agreement with the student and parent that establishes school attendance requirements and take other appropriate actions to reduce the child's absences; or (3) File a petition under RCW 28A.225.030(1).

- Seventh unexcused absence in one month and/or tenth unexcused absence of school year

If previous actions taken by a school district have not been successful in substantially reducing the child's absences, and not later than the seventh unexcused absence in one month or not later than the tenth unexcused absence during the current school year, the school district is required to file a truancy petition under RCW 28A.225.035.[22]

§ 27.3b Children Aged Six Through Seven

- First unexcused absence in one month

The school must inform the child's parent of the child's failure to attend school, and of the potential consequences of additional unexcused absences.[23]

- Second unexcused absence in one month

The school must schedule a conference with the parent and child at a reasonably convenient time to analyze the causes o f the child's absences. This may take place during a parent-teacher conference if the parent-teacher conference is scheduled to occur within 30 days of the second unexcused absence.[24] Note, unlike children aged 8–17, these conferences may *not* take place in the parents' absence; however, the statute does not provide direction as to the school district's responsibility if the parent does not appear. The school must also take steps to eliminate or reduce the child's absences which, if appropriate, must include adjusting the child's school program assignments, providing more individualized or remedial instruction, offering assistance in enrolling the child in available alternative schools or programs, or assisting the parent or child to obtain supplementary services that may help eliminate or ameliorate the cause or causes for the absence from school.[25]

- Fifth through sixth unexcused absence in one month

RCW 28A.225.030(2) provides that no later than the fifth unexcused absence in one month, the school district must (1)

16 RCW 28A.225.015.
17 *Id.*
18 RCW 28A.225.020(1)(a).
19 *Id.* at (b).
20 *Id.* at (c).
21 *Id.*
22 RCW 28A.030(1).
23 RCW 28A.225.015(2)(a).
24 *Id.* at (2)(b).
25 *Id.* at (2)(c).

Enter into an agreement with a student and parent that establishes school attendance requirements; (2) Refer a student to a community truancy board, if available. The community truancy board must enter into an agreement with the student and parent that establishes school attendance requirements and take other appropriate actions to reduce the child's absences; or (3) File a petition under RCW 28A.225.030(1).

- Seventh unexcused absence in one month and/or tenth unexcused absence of school year

If previous actions taken by a school district have not been successful in substantially reducing the child's absences, and not later than the seventh unexcused absence in one month or not later than the tenth unexcused absence during the current school year, the school district is required to file a truancy petition under RCW 28A.225.035.[26]

§ 27.3c School Transfers Do Not Provide Exception

"If a child transfers from one school district to another during the school year, the receiving school or school district shall include the unexcused absences accumulated at the previous school or from the previous school district for purposes of this section, RCW 28A.225.030, and 28A.225.015."[27]

§ 27.4 Truancy Petitions

§ 27.4a Timing

- Fifth or sixth unexcused absence in one month

The school *may* file a truancy petition after the child's fifth or sixth unexcused absence in one month.[28]

- Seventh unexcused absence in one month and/or tenth unexcused absence of school year

The school *must* file a truancy petition under RCW 28A.225.035 once a child has had the seventh unexcused absence in one month and/or once a child has had the tenth unexcused absence in a school year.[29]

§ 27.4b Failure to File a Petition

If the school district fails to file a petition under this section, the parent of a child with five or more unexcused absences in any month during the current school year or upon the tenth unexcused absence during the current school year may file a petition with the juvenile court alleging a violation of RCW 28A.225.010.[30]

§ 27.4c Contents of the Truancy Petition

Truancy petitions under RCW 28A.225.030 or 28A.225.015 must allege the following:

- The child has unexcused absences during the current school year;
- Actions taken by the school district have not been successful in substantially reducing the child's absences from school; and
- Court intervention and supervision are necessary to assist the school district or parent to reduce the child's absences from school.

The petition must also include the facts that support these allegations. The request for relief should specify what the court might order under RCW 28A.225.090. The petition shall set forth the name, date of birth, school, address, gender, race, and ethnicity of the child and the names and addresses of the child's parents, and shall set forth whether the child and parent are fluent in English and whether there is an existing individualized education program.[31]

§ 27.4d Notice/Service of Petition

The school district may serve petitions upon the parents and/or child by certified mail, return receipt requested. If such service is unsuccessful, or if the receipt is not signed by the addressee, then personal service is required.[32]

§ 27.4e Court's Responsibilities upon Filing a Petition

When a petition is filed under RCW 28A.225.030 or 28A.225.015, the juvenile court must schedule a hearing on the petition. In the alternative, if the court determines that a referral to an available community truancy board would substantially reduce the child's unexcused absences, the court may refer the case to a community truancy board under the jurisdiction of the juvenile court.[33]

If a referral is made to a community truancy board, the truancy board must meet with the child, a parent, and the school district representative and enter into an agreement with the petitioner and respondent regarding expectations and any actions necessary to address the child's truancy within 20 days of

26 RCW 28A.225.030(1).
27 RCW 28A.225.020(3).
28 *Id.* at (4).
29 RCW 28A.225.030(1).
30 *Id.*
31 RCW 28A.225.035(1)–(2).
32 RCW 28A.225.030(5).
33 RCW 28A.225.035(4).

the referral.[34]

If the petition is based on RCW 28A.225.015 (meaning, the child is six or seven years old), the child shall not be required to attend the meeting, and the agreement will only be between the truancy board, the school district, and the parent. The court may permit the truancy board or truancy prevention counselor to provide continued supervision over the student, or parent if the petition is based on RCW 28A.225.015.

If the truancy board fails to reach an agreement or the parent or student does not comply with the agreement, the truancy board shall return the case to the juvenile court for a hearing.

If a truancy hearing is scheduled before the court, the court shall separately notify the child, the parent of the child, and the school district of the hearing. If the parent is not fluent in English, the preferred practice is for notice to be provided in a language in which the parent is fluent. Second, the court must notify the parent and the child of their rights to present evidence at the hearing and notify the parent and the child of the options and rights available under chapter 13.32A RCW.[35]

The court may require the attendance of the child (if he or she is eight-years-old or older), the parents, and the school district at any hearing on a petition filed under RCW 28A.225.030. The school district is responsible for determining who shall represent the school district at hearings on a petition filed under RCW 28A.225.030 or 28A.225.015.[36]

The 2011 Supreme Court decision *Bellevue Sch. Dist. vs. E.S.*, 171 Wn.2d 695, 714, 257 P.3d 570 (2011), held that youth are not constitutionally entitled to an attorney for the first truancy hearing. The legislature also enacted RCW 13.34.035(10) (prior to the *E.S.* decision), which allows for the initial truancy hearing to proceed without legal counsel for youth.

However, if a hearing occurs in which a student is not represented by counsel, the court shall advise the student of his or her rights by means of a colloquy between the court and the child (if he or she is eight-years-old or older, and the parent.[37]

The first hearing can also be held without a guardian ad litem for the child under RCW 4.08.050 (guardians ad litem for children under the age of 14). At the request of the school district, a school district representative who is not an attorney shall be allowed to represent the school district at any future hearings.[38]

34 RCW 28A.225.030(5).
35 RCW 28A.225.035(7)–(9).
36 *Id.* at (8)–(9).
37 *Id.* at (7).
38 *Id.* at (11).

§ 27.4f Court's Duties at Hearings, Burden of Proof, Jurisdiction Timeline, and Transfer of Jurisdiction to Another County

- Notifications

Under RCW 28A.225.035(8), when a juvenile court hearing is held, the court must (a)
separately notify the child, the parent of the child, and the school district of the hearing; (b) notify the parent and the child of their rights to present evidence at the hearing; and (c) notify the parent and the child of the options and rights available under chapter 13.32A RCW.

- Burden of Proof and Bases to Grant the School District's Petition

If the allegations in the petition are established by a preponderance of the evidence, the court must grant the petition. The court then enters an order assuming jurisdiction to intervene for a period of time it determines will most likely cause the juvenile to return to and remain in school while subject to truancy proceedings. The time period should be based on the facts alleged in the petition and the circumstances of the juvenile. In no case can the order expire before the end of the school year in which it is entered.[39]

- Report of Subsequent/Additional Violations Mandated

If the court assumes jurisdiction by finding a child truant, the school district must regularly report to the court any additional unexcused absences by the child.[40]

- Relocation to Another County

If the juvenile court assumes jurisdiction in one county and the child then relocates to another county, the juvenile court in the receiving county shall, upon the request of a school district or parent, assume jurisdiction of the petition filed in the previous county.[41]

- Court's Orders for Child

Under RCW 28A.225.090(1), a court may order a child subject to a petition under RCW 28A.225.035 to do one or more of the following:

(1) Attend their current school. Minimum attendance requirements may also be set forth, including suspensions;

(2) If there is space available and the program can provide educational services appropriate for the child, order the child to

39 *Id.* at (12).
40 *Id.* at (13).
41 *Id.* at (15).

attend another public school, an alternative education program, center, a skill center, dropout prevention program, or another public educational program;

(3) Attend a private nonsectarian school or program including an education center. Before ordering a child to attend an approved or certified private nonsectarian school or program, the court must (i) consider the public and private programs available; (ii) find that placement is in the best interest of the child; and (iii) find that the private school or program is willing to accept the child and will not charge any fees in addition to those established by contract with the student's school district.

If the court orders the child to enroll in a private school or program, the child's school district shall contract with the school or program to provide educational services for the child. The school district shall not be required to contract for a weekly rate that exceeds the state general apportionment dollars calculated on a weekly basis generated by the child and received by the district. A school district shall not be required to enter into a contract that is longer than the remainder of the school year. A school district shall not be required to enter into or continue a contract if the child is no longer enrolled in the district;

(4) Be referred to a community truancy board, if available; or

(5) Submit to testing for the use of controlled substances or alcohol based on a determination that such testing is appropriate to the circumstances and behavior of the child and will facilitate the child's compliance with the mandatory attendance law. If any test ordered under this subsection indicates the use of controlled substances or alcohol, the minor may be ordered to abstain from the unlawful consumption of controlled substances or alcohol and adhere to the recommendations of the drug assessment at no expense to the school.[42]

§ 27.4g Child's Failure to Comply with Court Order

If the child fails to comply with the court order, the court may order the child to be subject to detention, as provided in RCW 7.21.030(2)(e), or may impose alternatives to detention such as community restitution. Detention cannot be ordered for a period greater than that permitted pursuant to a civil contempt proceeding against a child under RCW Chapter 13.32A.[43]

If a child continues to be truant after entering into a court-approved order with the truancy board under RCW 28A.225.035, the juvenile court shall find the child in contempt. The court may order the child to be subject to detention, as provided in RCW 7.21.030(2)(e) or impose alternatives to detention such as meaningful community restitution. Again, detention cannot be ordered for a period greater than that permitted pursuant to a civil contempt proceeding against a child under RCW Chapter 13.32A.[44]

None of the above court actions are applicable to children ages six through seven who otherwise must satisfy the compulsory attendance law.[45]

§ 27.4h Parent's Failure to Comply with Court Order

Parents who violate either RCW 28A.225.010, 28A.225.015, or 28A.225.080 shall be fined not more than twenty-five dollars for each day of unexcused absence from school. The court shall remit 50 percent of the fine collected under this section to the child's school district.

It is a defense for a parent charged with violating RCW 28A.225.010 to show that he or she exercised reasonable diligence in attempting to cause a child in his or her custody to attend school or that the child's school did not perform its duties as required in RCW 28A.225.020.

The court may order the parent to provide community restitution instead of imposing a fine. Any fine imposed pursuant to this section may be suspended upon the condition that the parent participates with the school and the child in a supervised plan for the child's attendance at school or upon condition that the parent attends a conference or conferences scheduled by a school for the purpose of analyzing the causes of a child's absence.[46]

§ 27.4i Contempt

As stated above, if a child continues to be truant after entering into a court-approved order with the truancy board under RCW 28A.225.035, the juvenile court shall find the child in contempt. The court may order the child to be subject to detention, as provided in RCW 7.21.030(2) (e) or impose alternatives to detention such as meaningful community restitution. Again, detention cannot be ordered for a period greater than that permitted pursuant to a civil contempt proceeding against a child under RCW Chapter 13.32A.[47]

Please take note, case law on the issue of civil contempt has remained a fluid discussion by Washington appellate courts, and the court should undertake a review of applicable current court decisions prior to issuing orders of contempt and sanctions. For further discussion on this point, please refer to Chapter 10 of this book.

42 *See also* RCW 28A.225.031.
43 RCW 28A.225.090(2).
44 *Id.* at (4).
45 *Id.* at (5).
46 *Id.* at (3).
47 *Id.* at (4).

Chapter 28

Interstate Compact on the Placement of Children (ICPC)

Commissioner Michelle Ressa Weber[1]

When children are placed out-of-state, they are entitled to the same protections and services they would receive if they remained in Washington. The Interstate Compact on the Placement of Children (ICPC) provides a statutory means to ensure that children placed in another state have a suitable place to live and have access to the appropriate services for that child. Failure to follow the ICPC by Washington courts can lead to the harming of children—the antithesis of the dependency process.

If a child is subject to a dependency action, regardless of the stage of the proceeding, the ICPC applies.

1 Michelle Ressa Weber was appointed to the Spokane County Superior Court bench in May 2007. Before that, she spent a year as the Superior Court Commissioner in Grant County. Michelle was born and raised in Spokane and graduated from the University of Washington in 1992 with a degree in Political Science. She graduated, cum laude, in 1996 from Gonzaga University School of Law. Michelle has spent her entire legal career working in the field of child welfare. Appointed in 1996 by then-Attorney General Christine Gregoire, Michelle represented the Department of Social and Health Services (DSHS) in dependency, termination, and licensing actions in Thurston, Lewis, and Mason Counties. Michelle also represented DSHS in King County for several years before taking a position representing Children's Administration headquarters in 2002. Michelle also represented DSHS in civil tort cases for two years before her appointment to the bench. Michelle has conducted numerous hours of training for the courts, DSHS, the Attorney General's office and the child welfare community. She has consistently showed her dedication and passion for children and families navigating their way through a complicated, emotional, and financially challenging legal system.

§ 28.1 What is the ICPC?

1. A uniform law that all 50 states have adopted verbatim.

2. A contract between member jurisdictions.

3. 10 Articles codified in RCW 26.34.010.

4. 10 Administrative Regulations (These are not adopted as binding authority in Washington State, but they are persuasive interpretative authority).

5. A law that benefits the *sending* states because

    a) The placement is supervised;
    b) The sending agency and court receive reports on the child's adjustment and progress in placement; and
    c) The sending state does not lose jurisdiction over child.

6. A law that benefits the *receiving* states because

    a) Prior approval of the placement ensures that the placement is appropriate; and
    b) It ensures that the receiving state's laws have been followed.

§ 28.2 Types of Cases Not Subject to the ICPC (Regulation 3)

1. Dissolution actions and establishment of parenting plans between parents.

2. Custody cases involving relatives (to a specified degree) and parents.

    a) The specified degree includes stepparent, grandparent, brother, sister, uncle, and aunt.

3. Tribal placements.

4. The court must inquire whether the child is being placed on sovereign tribal land.

    a) The court must also inquire whether the receiving tribe has a contract with the receiving state for ICPC application. For example, some tribes contract with their state for child welfare services, home studies, and other similar services. If the receiving tribe has a contract with the receiving state, then the ICPC most likely applies to a placement with that tribe.
    b) If the tribe has a Title IV-E agreement with the re

ceiving state, the ICPC will most likely apply.

c) If the tribe assumes jurisdiction, there is no authority for a Washington court to act, so the ICPC does not apply.

5. Out-of-State Visits (see also below).

6. Placement of a child into another country.

7. Placement of a child into a hospital or other medical facility, to any institution that cares for the mentally ill, or to a school.[2]

8. Potentially, placement of child with a biological parent.[3]

§ 28.3 Procedure

The process for placing a child in a receiving state involves several steps and several different personnel. It can be a lengthy process; however, a Washington court *cannot* place a child in the receiving state until or unless the receiving state approves. (See Violations section below.)

The procedure for placement is as follows:

1. The local Department of Children and Family Services (DCFS) office must request application of the ICPC through the Program Manager (also known as the Compact Administrator) in Olympia.

2. There are several forms to fill out, and they must be completed correctly to avoid delay.

3. The Program Manager in Olympia then contacts the receiving state to start the process.

4. The receiving state addresses its questions and concerns through the Program Manager who then seeks answers from the local social worker.

5. The receiving state then sends its approval or denial within 20 business days through the Program Manger in Olympia.

How to address delay

Not all social workers, AAGs, Public Defenders, and GALs will know or understand the ICPC process. The following measures can assist in addressing any delay that may arise:

1. Specifically inquire at a court hearing about issues involving delay in the ICPC approval/denial. Ask the AAG or social worker to identify when the paperwork left Olympia and get answers about any delays.

2. Require declaration or phone testimony from the ICPC Program Manger in Olympia.

3. Set status reviews (weekly, bi-monthly, or monthly) to determine where the delay exists (whether with Washington or with the receiving state).

4. Engage in direct communication with the receiving state ICPC Administrator during court hearings.

5. Consider ordering specific action by the social worker, his or her supervisor, or the Washington ICPC Program Manager.

§ 28.4 Priority Placements [Regulation 7]

Timeframes for the compact administrators/program managers differ depending on whether or not the placement is a "priority" placement. Priority placements occur under the following circumstances:

1. The proposed placement is with a parent, stepparent, grandparent, adult brother or sister, or adult uncle or aunt or guardian, *and*

2. The child is under two years old; *or*

3. The child is in an emergency placement; *or*

4. The court finds the child has spent substantial time in the home of the proposed placement.

Even if these criteria are met, a child in the receiving state in *violation* of the ICPC does *not* qualify for priority processing.

Placement with a parent

When the court wants to place a child with a parent, but does not want to dismiss dependency court jurisdiction over that child, a specific court order is needed showing that the case qualifies as a priority placement case.

The order must state that:

1. The child is being placed with a parent; *and*

2. The child is not already in the receiving state in violation of the ICPC; *and*

2 *See* RCW 26.34.010, art. II, § d.

3 *See also* §26.4; *In re D.F.M.,* 157 Wn. App 179, 236 P.2d 961 (2010).

3. One of the other factors above applies:

    a) The child is under two years old; *or*
    b) The child is in an emergency placement; *or*
    c) The court finds the child has spent substantial time in the home of the proposed placement.

Until recently, whether the ICPC applied to placement with a parent was not settled law in Washington. Many attorneys argued that the ICPC does *not* apply to placement with a parent. Their argument was essentially as follows: because ICPC article VIII does not mention parental placements and because the ICPC is to be construed liberally, the ICPC does apply to parental placements.[4] .

A recent Division I decision affirmed this position, holding that the ICPC's application to foster care placements did not extend to parental placements.[5] The only federal court to have addressed the issue agrees, arguing that to construe placement of a child with his parent as a placement in foster care under the ICPC "would result in the anomalous situation of imposing a financial obligation upon a sending state that supersedes parents' duty to support their children."[6] Similarly, a slight majority of courts that have addressed the issue have decided that the ICPC applies to a placement with a parent so long as the child remains subject to the jurisdiction of the juvenile court.[7] Although this appellate decision is now precedential law for Division I, it is not necessarily the conclusion other divisions of the Washington State Court of Appeals will draw.[8] Meanwhile, Washington will have to wait and see what this Division I decision does to the relationship our state has with the other 49 states under the ICPC. If we violate the ICPC laws of other states, our children may have more difficulty proceeding quickly to permanency.[9]

§ 28.5 Non-Priority Placements

Routine processing of other requests are not considered priority placements under Regulation 7. Placement requirements are not uniform among states. As a result, the court will need to know if the receiving state home study will meet Washington State standards (e.g., criminal background checks and child protective services checks) before approving the placement.

It is generally agreed among member states that a home study is to be completed within 30 working days from the date the worker receives the request. In reality, the completion date is closer to 60 actual days. Approval from the receiving state is good for six months. If no permanent placement is made within six months, the sending state must reapply. If the court is placing tribal children out-of-state, the child's tribe has the authority to set that tribe's community standards for home studies conducted within its jurisdiction.

§ 28.6 Visits [Regulation 9]

The question may arise as to whether a child is visiting another state or being placed in another state. A visit, even an "extended visit," is not a placement subject to the ICPC. A visit is defined as having a beginning date and an ending date, and the court should expect the child to return to Washington. If a child is visiting another state, no services are available to them, and the state the child is visiting will not have approved a placement or made an evaluation of the appropriateness of the home. Further neither the child nor the home will be monitored.

If the child travels to another state pending an ICPC home study, a rebuttable presumption of placement arises. Consequently, the receiving state may deny the ICPC request because of a violation of the compact. (See other Consequences below).

§ 28.7 Consequences for Violations

1. First and foremost, the child may be harmed;
2. The child will not have access to services because Washington DSHS cannot pay for out-of-state providers;
3. The Washington social worker may be violating the other state's law if it is determined that they are practicing social work in another state without a license by trying to conduct a "health and safety" check or home study in the other state;
4. The court will have no authority to bring the child back to Washington;
5. The next child placed in the receiving state will not receive timely services or evaluation of placement;
6. Some states have adopted criminal offense provisions expressly for violation of the ICPC; and
7. Judicial officers and attorneys must comply with the law. Case law describes attorneys sanctioned and suspended for failing to follow the ICPC, and the Canons of Judicial Conduct prohibit conduct that violates the law.

4 *See, e.g., In re D.F.M.*, 157 Wn. App. 179.
5 *Id.*
6 *McComb v. Wambaugh,* 934 F.2d 474, 480 (3d Cir.1991).
7 *In re D.F.M.* at 190.
8 Although divisions of the Washington State Court of Appeals typically show deference to each other's decisions, this horizontal stare decisis is aspirational and dependent on judicial self-restraint, unlike the inexorable command of vertical stare decisis. Kelly Kunsch, *Stare Decisis: Everything You Never Realized You Need to Know*, 52 Wash. State Bar News, Oct. 1998, at 31. As a result, Divisions II and III and lower courts within these divisions may adopt an alternative reading of the ICPC.
9 *See* §28.7.

Caution: DSHS, attorneys, or GALs may ask the court to approve a placement that DSHS cannot approve because they have no ICPC approval. This is *not* appropriate. If Washington courts violate the ICPC and place children in another state without approval from the other state, we

leave our children vulnerable and harm the ability of future children to have timely and appropriate placements in that state.

§ 28.8 Other Resources

- APHSA/National Council of Juvenile and Family Court Judges Manual, 2001

- Association of Administrators on the ICPC – http://aaicama.org/cms/

Chapter 29

Indian Child Welfare Act

Judge Tom Tremaine[1]

1 Tom Tremaine is the Presiding Judge of the Kalispel Tribal Court. Prior to his appointment to the court, Tom served for 15 years as the senior attorney in the Spokane office of Northwest Justice Project (NJP), and as a part of NJP's Native American Unit. A significant portion of Tom's work focused on Indian child welfare, representing the interests of Indian children, parents, and tribes in Indian Child Welfare (ICW) proceedings in state and tribal courts throughout Washington. Tom has presented trainings on the Indian Child Welfare Act for the National Congress of American Indians, National Legal Aid and Defenders Association, Washington State Bar Association, Washington State CASA, and at the Children's Justice Conference.

§ 29.1 Purpose Statement

The Indian Child Welfare Act of 1978 (ICWA) is federal legislation that imposes jurisdictional, procedural, and evidentiary standards on state courts in "child custody proceedings" involving "Indian children." The purposes of the ICWA are (1) to protect Indian children from unwarranted removal from their families; (2) when such removal is warranted and necessary, ensure placement of Indian children in homes that will reflect the unique values of Indian culture; and (3) promote the stability and security of Indian tribes and families.[2]

In the 33 years since its enactment, the ICWA has been the subject of many court decisions, several state legislative actions, and much opining in law reviews, treatises, and social work publications. In 2011 the Washington legislature passed a comprehensive Washington State Indian Child Welfare Act (WSICWA). As a starting point to discussing application of the ICWA and WSICWA, it is important to review what the legislature sought to do with its comprehensive enactment.

The WSICWA is clear in setting out as its goal to protect "the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe."[3] The intent section of the WSICWA goes on to list a number of principles that must inform court decisions in ICWA/WSICWA governed proceedings:

- Whenever out-of-home placement is necessary, the best interests of the Indian child may be served by placing the child in accordance with the WSICWA's placement priorities.
- Where placement away from the parent or Indian custodian is necessary for the child's safety, the placement must reflect and honor the unique values of the child's tribal culture and must be the one that is best able to assist the child in establishing, developing, and maintaining his or her political, cultural, social, and spiritual relationship with his or her tribe and tribal community.
- The WSICWA is a step in clarifying existing laws and codifying existing policies and practices.
- The WSICWA shall not be construed to reject or eliminate current policies and practices that are not included in its provisions.
- Nothing in the WSICWA is intended to interfere with policies and procedures that are derived from agreements entered into between DSHS and a tribe or tribes, as authorized by section 1919 of the federal ICWA.
- The WSICWA specifies the minimum requirements that

2 25 U.S.C. § 1902.

3 E.S.S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 309.

must be applied in a child custody proceeding and does not prevent the Department of Social and Health Services (DSHS) from providing a higher standard of protection to the right of any Indian child, parent, Indian custodian, or Indian child's tribe.

- The DSHS policy manual on Indian child welfare, the tribal-state agreement, and relevant local agreements between individual federally recognized tribes and DSHS should serve as persuasive guides in the interpretation and implementation of the federal ICWA, WSICWA, and other relevant state laws.

The U.S. Congress that adopted the ICWA believed the principles contained in it protected the best interests of Indian children.[4] However, that Congress also recognized that any "best interest" standard is somewhat vague and may make it difficult for judges to avoid making decisions based on their subjective values.[5] The Washington legislature, mindful of this ambiguity, defined the "best interest of the Indian child" as follows:

> [T]he use of practices in accordance with the federal Indian child welfare act, [the WSICWA] and other applicable law, that are designed to accomplish the following:
>
> (a) Protect the safety, well-being, development, and stability of the Indian child;
>
> (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families;
>
> (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and
>
> (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of [the WSICWA].[6]

These principles are expressed in the conjunctive, not the disjunctive, and thus are collectively the filter through which evidence must be sifted and out of which decisions must be made.

§ 29.2 Child Custody Proceedings Under ICWA

The ICWA and WSICWA specifically apply to the following proceedings:

- Child in Need of Services (CHINS);[7]
- Shelter Care, Dependency, Termination of Parental Rights under RCW 13.34;[8]
- Guardianship under RCW 13.36;[9]
- Nonparental Custody under RCW 26.10;[10]
- Termination of Parental Rights and Adoption under RCW 26.33;[11]
- De facto parentage.[12]

By definition,[13] in state court proceedings not listed above, the ICWA and WSICWA apply where an Indian child is

- Removed from the custody of a parent or Indian custodian;
- The parent or custodian cannot have the child returned upon demand, but where parental rights have not been terminated; and
- The out of home placement is NOT based on the child's criminal activity.
    - It is important to distinguish between "punishment" for a crime (ICWA and WISCWA do not apply), placement or detention because a child in a juvenile justice proceeding has no parent capable of adequately supervising the child (ICWA and WISCWA do apply), and placement based upon a "status offense" (ICWA and WISCWA do apply).[14]

4 25 U.S.C. § 1902.
5 H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 19 (1978).
6 E.S.S.B. 5656, § 4(2).
7 *Id*. at § 2; RCW 13.32A.152(3).
8 E.S.S.B. 5656, § 2; RCW 13.34.040(3).
9 E.S.S.B. 5656, § 2; RCW 13.36.030(3).
10 E.S.S.B. 5656, § 2; RCW 26.10.034(1).
11 E.S.S.B. 5656, § 2; RCW 26.33.040(1)(a).
12 *In re Beach*, 159 Wn. App. 686, 690–91, 246 P.3d 845 (2011).
13 25 U.S.C. § 1903(1)(i); E.S.S.B. 5656, § 4(3)(a).
14 "Although most juvenile delinquency proceedings are not covered by the [ICWA], the [ICWA] does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in termination of a parental relationship." Bureau of Indian Affairs, Guidelines for State Courts: Indian Child Custody Proceedings (1979), *available at* http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf [hereinafter Guidelines for State Courts]; 44 Fed. Reg. 67587 (1979).

ICWA does NOT apply to awards of custody between biological or adoptive parents in RCW 26.09 proceedings.[15]

§ 29.3 Indian Status

There are two components to the question of "Indian status:" Who is an Indian child, and what must be done to make that determination?

An Indian child is a person under the age of 18 who is not married, not emancipated, and who is either a member of an Indian tribe, or is the biological child of a member of an Indian tribe and eligible for membership in an Indian tribe.[16]

"Indian tribe" means a federally recognized tribe.[17] As of the writing of this section there are 564 federally recognized tribes. The complete listing of federally recognized tribes can be found at 75 Fed. Reg.60810–60814 (Oct. 1, 2010).

Membership or eligibility for membership is the key, yet it is the most confusing of the elements of a child's Indian status. Membership and enrollment are terms that are often used interchangeably. However, Congress chose the term "member" specifically intending to extend application of the ICWA to children who are not "formally enrolled" as members of an Indian tribe.[18]

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common means of establishing Indian status, but it is not the only means, nor is it necessarily determinative.[19]

> Tribal membership and tribal enrollment are not the same thing. Tribal enrollment is a process. About half of all Native Americans and Alaska Natives are formally enrolled in their Tribe. To be enrolled in a Tribe, a person must be a tribal member; membership in a Tribe is not dependent upon being enrolled. This is a very important distinction that all workers need to understand, since the ICWA applies to children who are members or eligible for membership in a Tribe, not just those who are enrolled in a Tribe.[20]

Tribes have the absolute right to determine their own membership by whatever method or however many methods or processes they determine are appropriate.

> This court will not go behind the internal decision-making processes of the tribe. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."
>
> . . . .
>
> [T]he purpose of the ICWA is, in part, to curtail state encroachment on the authority of the Indian tribes with respect to their children. . . . And "there is perhaps no greater intrusion upon tribal sovereignty than for a [non-tribal] court to interfere with a sovereign tribe's membership determination."[21]

The WSICWA defines "member" and "membership" as "a determination by an Indian tribe that a person is a member or eligible for membership in that Indian tribe."[22]

The WSICWA requires that the petitioner must make a good faith effort to determine a child's Indian status.[23] This includes, at a minimum, consultation with the child's parents, anyone who has custody of the child, anyone with whom the child resides, and any other person who might reasonably be expected to have such information. If the petitioner has information identifying a possible tribal connection, the petitioner is expected to make contact with that tribe as well.[24]

In proceedings under RCW 13.34, an appointed guardian ad litem also has a duty "[t]o report to the court information on the legal status of a child's membership in any Indian tribe or band."[25]

At the first moment a parent or other family member appears before the court, the court should inquire about native ancestry. This will add a little extra time to the hearing, but it could save enormous amounts of time, confusion, and anguish later in the case. The court should also ask what the petitioner has done to determine that a child is or is not an "Indian child." The court should require a thorough and honest inquiry and order additional investigation of the child's native ancestry where necessary to rule out application of the ICWA.

15 44 Fed. Reg. 67587.

16 25 U.S.C. § 1903(4); E.S.S.B. 5656, § 4 (7). Note, however, that "unemancipated" is not a term in the ICWA's definition of Indian child.

17 25 U.S.C. § 1903(8); E.S.S.B. 5656, § 4 (11).

18 H.R. Rep. No. 1386, at 16 (1978).

19 Guidelines for State Courts; 44 Fed. Reg. 67586 (1979) (citing *United States v. Broncheau,* 597 F.2d 1260, 1263 (9th Cir. 1979)).

20 Children's Admin., Dep't Soc. & Health Serv., Indian Child Welfare Manual § 3.01 (2007), *available at* http://www1.dshs.wa.gov/CA/pubs/manuals_ICW.asp [hereinafter Indian Child Welfare Manual].

21 *In re A.L.W.,* 108 Wn. App. 664, 671–672, 32 P.2d 297 (2001).

22 E.S.S.B. 5656, § 4(12).

23 *Id.* at § 5.

24 It should be noted that these inquiries do NOT constitute "notice" as required by both the ICWA and the WSICWA. *Id.*

25 RCW 13.34.105(1)(d).

The court should also ensure that all inquiries to tribes about tribal status refer to "membership" not "enrollment." If a tribe responds that a child is not enrolled or eligible for enrollment a further inquiry should be made as to whether the tribe has any other means or criteria for determining membership and, if so, whether those apply to the child in question.

§ 29.4 Notice

In every involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, the petitioning party must notify the parents, Indian custodian(s), and the Indian child's tribe.[26] In these cases use of a mandatory notice form is required.[27] Washington's dependency, nonparental custody, and adoption statutes require petitioners to make an affirmative allegation that the child involved is or may be an Indian child.[28] Mandatory petition forms in dependency and nonparental custody actions require that the petitioner affirmatively allege in the alternative that the child is not an Indian child.

Beyond what may be found in the pleadings, a court "has reason to know" an Indian child is involved under the following, nonexclusive circumstances:

i. Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is and Indian child;
ii. Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child;
iii. The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child;
iv. The residence or the domicile of the child, his or her biological parents, or the Indian custodian(s) is known by the court to be or is shown to be a predominantly Indian community; or
v. An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.[29]

The ICWA specifies that the notice must be served by registered mail with return receipt requested.[30] The Bureau of Indian Affairs (BIA) implementing regulations specify service by certified mail with return receipt requested.[31] The WSICWA also requires service by certified mail, return receipt requested.[32]

The BIA's implementing regulations and Washington statutory law require that ICWA notices be sent to the person or tribal department designated by the tribe.[33] The most recent publication of tribally designated agents for receipt of ICWA notices is found at 76 Fed. Reg. 30438–30490 (May 25, 2011).

If the identity or whereabouts of the parent, Indian custodian, or the child is unknown, the notice must be served on the Secretary of the Interior.[34] In Washington, service on the Secretary is made by sending the notice to the Portland Area Director of the BIA at the following address:

> Portland Area Director
> Bureau of Indian Affairs
> 911 NE 11th Avenue
> Portland, Oregon 97232[35]

The original or a copy of each notice must be filed with the court along with return receipts or other proof of service.[36] The petitioner bears the burden of proving that notice has been given and that the notice complies with the ICWA.[37]

Early identification of a child's Indian status is critical to avoiding removal, placement, and other dispositional decisions that must later be reversed and which may add to the unintended impact the proceeding has on the child. Therefore, in every action that meets the ICWA/WSICWA definition of a "child custody proceeding," the court should ensure that the petitioner has made an affirmative allegation that the child is, may be, or is not an Indian child. Where information received in court raises the prospect that the child may be an Indian child, ensure that complete and accurate notice is immediately provided to the parent, the Indian custodian, the child's tribe (if known), any tribe with which the child may be affiliated, and the BIA.

The ICWA notice serves two purposes. First, it notifies the parent, Indian custodian, and the child's tribe of the nature of the proceeding, where it is taking place, and important rights such as the right to counsel, the right to intervene, and the right to a continuance. The second and equally important function is to give the BIA and the tribe or tribes who receive the notice family information that helps to identify the child as an "Indian child." Therefore, the court should review the notice sent by the petitioner to ensure that the information is complete. Where family information is incomplete or alleged to be un

26 25 U.S.C. § 1912(a); E.S.S.B. 5656, § 7(1).
27 E.S.S.B. 5656, § 7(1).
28 RCW 13.34.040(3); RCW 26.10.034(1)(a); RCW 26.33.040(1)(a).
29 Guidelines for State Courts; 44 Fed.Reg. 67586 (1979).
30 *Id.*
31 25 C.F.R. § 23.11; *In re M.S.S.*, 86 Wn. App. 127, 134, 936 P.2d 36 (1997).
32 E.S.S.B. 5656, § 7(1).
33 25 C.F.R. § 23.11; RCW 13.34.070(10)(a); RCW 26.10.034(1)(b); RCW 26.33.040(1)(d); RCW 13.32A.152(3)(a).
34 25 U.S.C. § 1912(a).
35 25 C.F.R. § 23.11(c)(11).
36 Guidelines for State Courts; 44 Fed. Reg.67588 (1979).
37 *In re M.S.S.*, 86 Wn. App. at 136.

available, the court must consider steps that may be ordered to fill in the gaps. This can be particularly challenging when the child or an ancestor of the child was adopted. Courts have appointed counsel for the child for the specific purpose of seeking information from sealed adoption records to determine the child's tribal membership or eligibility for membership.[38]

It is not uncommon for a tribe to respond to a proper ICWA notice indicating that it does not have enough information to make a determination about a child's eligibility for membership. Under such circumstances the court should direct the petitioner to contact the tribe (either the agent designated in the federal register or the tribe's Indian Child Welfare (ICW) program) to find out what specific information is needed. The petitioner's efforts in this regard should be documented in the court record.

Although the ICWA requires notice in involuntary proceedings, Washington law expands the notice requirement to those proceedings that would be characterized as voluntary, such as voluntary relinquishment of parental rights, preadoptive placement, and adoption.[39]

Except where the court is exercising emergency jurisdiction pursuant to 25 U.S.C. § 1922, it is important that no hearing take place sooner than 10 days from the date of receipt of the notice by the parent, Indian custodian(s), and tribe.

Perhaps most important to any discussion or consideration of the ICWA's notice requirements is that failure to provide proper notice is grounds for invalidating the court's action.[40] This has resulted in the disruption of long standing adoptions and the return of children after many years to the parent. Without arguing the benefit or harm that can result from such an outcome, it is painfully clear that decisions that are made in full compliance with the ICWA provide the greatest assurance of finality. Exercising an abundance of caution and providing notice where there is only scant indication of possible tribal affiliation may involve extra effort and expense. Avoiding the consequences described in this paragraph is well worth that added effort and expense.

The final issue in the Indian status/notice realm is the affect of a tribe's decision. A written determination or testimony by a tribe that the child is a member or is eligible for membership is conclusive.[41]If a tribe makes a determination that a child is not a member or eligible for membership, that is conclusive as to that tribe.[42] That same section of the WSICWA should alert the court to the possibility that notice is sent to and a response comes from someone within a tribe that does not have author ity to make the determination.[43] Where there is no response from a tribe to a notice, the court cannot construe the non response as the tribe's decision that the child is not a member or eligible for membership.[44] However, under such circumstances the party asserting application of the ICWA/WSICWA will have the burden of establishing the child's Indian status. Finally, during the pendency of a child custody proceeding, it is possible a child's Indian status will change. Tribes may change the basis upon which they determine their membership, a tribe may gain federal recognition,[45] or new evidence may help a tribe make a more accurate determination.[46]

§ 29.5 Jurisdiction

§ 29.5a Exclusive Jurisdiction

The tribal court has exclusive jurisdiction for child custody proceedings involving Indian children who reside or are domiciled within the boundaries of the reservation of a federally recognized Indian tribe whether or not that tribe is the child's tribe.[47] Once a child has been made a ward of a tribal court that tribal court has and retains exclusive jurisdiction regardless of the child's residence or domicile.[48]

§ 29.5b Exception to Exclusive Jurisdiction

There is an exception to a tribe's exclusive jurisdiction where existing federal law otherwise vests jurisdiction in the state.[49]Until passage of the WSICWA, the "existing Federal law" proviso in § 1911(a) included a federal law popularly referred to as "Public Law 280," which gives certain states . . . limited jurisdiction over civil causes of action that arise in Indian country."[50]

The WSICWA, however, recognizes the exclusive jurisdiction of all tribes irrespective of P.L. 280. The only exceptions now are where a tribe "has consented to the state's concurrent juris

38 *See, e.g., In re Mellinger*, 288 N.J. Super. 191, 672 A.2d 197 (1996).
39 RCW 26.33.040.
40 25 U.S.C. § 1914.
41 E.S.S.B. 5656, § 7(3)(a).
42 *Id*. at § 7.
43 *Id*. at § 7(3)(b) (noting that a tribal resolution or written or testimonial evidence from the tribe's governing body or its designated agent listed in the federal register is presumptively that of the tribe. Responses from others within the tribe are subject to challenge.)
44 *Id*. at § 7(3)(c).
45 As of this writing there are 15 tribes whose denial of federal recognition is still on appeal or in litigation, and four tribes whose application for recognition is still pending.
46 *Id*. at § 7(4)(a).
47 25 U.S.C. § 1911(a); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989); E.S.S.B. 5656, § 6(1).
48 25 U.S.C. § 1911(a); E.S.S.B. 5656, § 6(2).
49 25 U.S.C. § 1911(a).
50 *Doe v. Mann,* 415 F.3d 1038, 1048 (9th Cir. 2005).

diction, expressly declined to exercise its jurisdiction, or where the state is exercising emergency jurisdiction in strict compliance with section 14 of [the WSICWA]."[51]

§ 29.5c Concurrent Jurisdiction

The ICWA establishes concurrent but presumptively tribal jurisdiction in the case of an Indian child not domiciled or residing within a federally recognized tribe's reservation.[52] Thus, a "child custody proceeding involving an Indian child not domiciled or residing on an Indian reservation, may begin in either state court or the child's tribe's court.

§ 29.5d Transfer of Jurisdiction

Where the state and tribal court have concurrent jurisdiction and an ICWA proceeding begins in state court, the child's parent(s), Indian custodian(s), the child if age 12 or older, or tribe can petition to transfer the proceeding to the child's tribe's court.[53]

Either parent has absolute veto power over the transfer.[54] If neither parent objects to the transfer, the court must transfer the proceeding to tribal court, absent good cause.

Parents do not lose their veto power through their own misconduct such as failing to comply with court ordered services.[55] Although an Indian custodian or child over age 12 can request a transfer, he or she cannot veto a transfer.

§ 29.5e Declination of Transfer

Just as a parent can veto transfer of a child custody proceeding to tribal court, a tribe can decline to accept jurisdiction when a request for transfer has been made.[56] A tribal court's decision to decline jurisdiction does not have any impact on the tribe's right to intervene and participate in the state court child custody proceeding pursuant to 25 U.S.C. § 1911(c).

§ 29.5f Denial of Transfer

This section applies only where there is a request for transfer of jurisdiction to a tribal court where the state court has proper concurrent jurisdiction.

Transfer to tribal court occurs upon a proper request unless there is a parental veto or good cause is shown to deny transfer.[57] "The burden of establishing good cause by clear and convincing evidence is on the party opposing the transfer."[58]

When transfer takes place, the tribe takes full authority and the state court is no longer involved. Absent an agreement between DSHS and the tribe, DSHS's role in case management will end as well. This does not automatically mean that a child's placement in a parent's or Indian custodian's home, in relative care, in foster care, or in a preadoptive placement will be changed. Nor does it automatically mean that the child will be moved to or placed in the tribal community.

A request for transfer can be made at any time during the proceeding. Good cause to deny transfer exists where the Indian child's tribe does not have a "tribal court" as defined by the ICWA.[59] Good cause to deny transfer also exists where the child custody proceeding is at an advanced stage when the petition to transfer is received and the party seeking transfer did not file the petition promptly after receiving notice of the child custody proceeding.[60]

Good cause to deny transfer also exists where the Indian child is over 12 years of age and objects to the transfer.[61] Good cause to deny transfer may be found where the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.[62] This may appear to increase the likelihood that transfer will be denied the further the tribe's reservation is from the state court. However, distant tribes may be able to conduct proceedings in the family's community; utilize court facilities of tribes that are much closer to the family, witnesses, and evidence; or take advantage of videoconferencing technologies that would allow the tribal court to conduct a hearing without the parties or witnesses leaving their own community.[63]

On the other hand, "[s]ocio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."[64]

There are two circumstances where good cause to deny transfer due to the advanced stage of the proceeding must be done

51 E.S.S.B. 5656, § 6(1).
52 *Mississippi Band of Choctaw Indians*, 490 U.S. at 36.
53 25 U.S.C. § 1911(b); *Mississippi Band of Choctaw Indians*, 490 U.S.at 36; E.S.S.B. 5656, § 8.
54 25 U.S.C. § 1911(a)*;* E.S.S.B. 5656, § 8(3).
55 *In re A.E.,* 572 N.W.2d 579, 582 (Iowa 1997).
56 25 U.S.C. § 1911(b).
57 *Id.*
58 *In re E.S.*, 92 Wn. App. 762, 769, 964 P.2d 404 (1998).
59 25 U.S.C. § 1903(12).
60 25 U.S.C. § 1911(b)*; see also In re E.S.*, 92 Wn. App. at 770–771 ("The Tribe filed its motion to transfer on June 4, 1996, that is, nine months after the State petitioned the trial court for termination, three months after the Tribe received actual notice of the termination proceedings, and 13 days before the termination hearing was scheduled to begin.").
61 Guidelines for State Courts; 44 Fed. Reg. 67591 (1979).
62 *Id.*
63 *See id.*
64 *Id.*

with caution. First, take caution when the parent(s), Indian custodian(s) or tribe has not received timely notice of the proceeding (as when, through no fault of the tribe, the child's Indian status is determined late in the proceeding). If the

tribe's application is made immediately upon receipt of notice, transfer should be granted.[65] Aside from promoting greater diligence by petitioners, placement and service decisions made without application of the ICWA or without the input of the child's tribe may lack consideration—careful or otherwise—of the principles of the ICWA or application of its procedural and evidentiary requirements. Denial of transfer under such circumstances is likely to compound the problems created by these failures.

Second, and more challenging for state courts, is the reluctance of many tribes to seek transfer at the outset of a state court child custody proceeding, particularly one initiated in a state a great distance from the tribe's reservation. This is often the result of the tribe's recognition that, assuming the state court properly applies other provisions of the ICWA, a family in a distant community may have a greater chance for successful reunification if the services and supports to address the family's problems are ordered by a court in the community where the family intends to continue living and which has greater familiarity with the service providers. However, that same tribe may seek transfer once permanency planning begins or when it appears that the services may be failing. This is particularly true where the petitioner is proposing termination and adoption permanency options may be anathema to the tribe's core values and practices concerning family structure.

It should also be noted that termination of parental rights is accomplished by a separate proceeding. When termination petitions are filed and served on the child's tribe and the tribe or parent(s) immediately respond with a motion to transfer, then "good cause due to the advanced stage of the proceeding" is not applicable.

The WSICWA establishes a set of basic procedures for transfer of jurisdiction.[66] Where a motion to transfer is received from a party other than the child's tribe and the child's tribe has not intervened, the moving party must give notice to the child's tribe including a copy of the motion and any supporting pleadings. When the court orders transfer, that ruling is communicated to the tribal court to which jurisdiction is being transferred. While the state court awaits receipt of an order from the tribal court accepting jurisdiction it can continue to hold hearings and take actions necessary to child's interests so long as those are done in strict compliance with the ICWA/WSICWA. The state court cannot enter a final order except an order dismissing the action and returning the child to the care of the parent or Indian custodian from which the child had

been removed. The tribal court has 75 days within which it must respond. It may decline to accept jurisdiction or it may enter an order accepting jurisdiction. Upon receipt of an order accepting transfer the state court enters an order dismissing the proceeding. If the state court does not receive a response within 75 days it will assume transfer has been declined, enter an order vacating the order to transfer and proceed with the dependency.[67]

§ 29.5g Emergency Jurisdiction

Irrespective of the jurisdictional, notice, and other procedural requirements of the ICWA and WSICWA, a state court can exercise jurisdiction to affect emergency removal of an Indian child in order to prevent imminent physical damage or harm to the child.[68]The specific language of this provision appears to limit its application to children who are residents of or domiciled on a reservation, but temporarily located off the reservation.[69]

> If this reading were correct, however, the statute would not then go on to allow the social services agency to initiate a child custody proceeding *or* to transfer the child to the jurisdiction of the appropriate Indian tribe . . . . Moreover, it would make no sense to give a state *more* power to make an emergency placement of an Indian child who lives *on* a reservation than one who lives *off* the reservation. Thus, as the legislative history confirms, Congress intended this section to apply to emergency removals and placements of *all* Indian children.[70]

Exercise of this emergency jurisdiction essentially allows for temporary suspension of some, most, or all of the procedural and notice requirements of the ICWA and WSICWA. The ICWA and WSICWA require that when this emergency authority is exercised, the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.[71]It also requires that the state official or authority must act expeditiously to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or initiate a child custody proceeding in compliance with the provisions

65 Guidelines for State Courts; 44 Fed. Reg. 67590 (1979) ("Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.").

66 E.S.S.B. 5656, § 8(2)–(4).

67 *Id.*

68 25 U.S.C. § 1922; E.S.S.B. 5656, §14.

69 25 U.S.C. § 1922; E.S.S.B. 5656, §14.

70 *In re S.B.*, 130 Cal. App. 4th 1148, 1163–1164 (2005) (emphasis in original). *See also* H.R. Rep. No. 1386, at 25 (1978).

71 25 U.S.C. § 1922; E.S.S.B. 5656, §14.

of the ICWA.[72]

§ 29.5h Full Faith and Credit

The federal government, state agencies, and state courts must give full faith and credit to the "public acts, records, and judicial proceedings" of a federally recognized tribe relating to child custody proceedings.[73] This includes tribal court decisions, orders, or decrees concerning any of the types of proceedings covered under 25 U.S.C. § 1903(1).The names of the causes of action may be different from their counterparts in state court, and the adjudicatory body may not be a "court" as that term would be understood in the state judicial system. However, it need only be the process and body that is authorized under the tribe's law to address the range of child custody matters described in the ICWA. Unlike a tribe's decision about tribal membership, in its decision to give full faith and credit to a tribal court order the state court may look behind the entry of tribal court orders to determine whether the tribal court had proper personal and subject matter jurisdiction under the tribe's laws and whether the parties were afforded due process.[74]

§ 29.6 Intervention

In any state court proceeding for the foster care placement of or termination of parental rights to an Indian child, the Indian custodian(s) of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.[75] The "Indian custodian" is a person who is a member of a federally recognized tribe and who has legal custody of the child under state or tribal law or custom, or in whom temporary physical care, custody, and control has been transferred by the child's parent.[76] The "child's tribe" is a federally recognized Indian tribe in which the child is a member or is eligible for membership.[77] Under the ICWA if a child is a member or eligible for membership in more than one tribe, the "child's tribe" is the tribe with which the child has the more significant contacts.[78] The WSICWA does not contain such a limitation, instead recognizing any tribe in which a child is a member or eligible for membership as the child's tribe.[79]

The right to intervene is clear, unambiguous, and absolute. The state court has no authority to prevent the Indian custodian(s) or the child's tribe from intervening, and these parties need not seek the permission of the court to intervene. There is no accepted or required form or procedure for intervention pursuant to the ICWA or the WSICWA. Rather, the court may receive a motion to intervene or it may simply receive a notice of intervention. Any of the parties may object, and the court may require an evidentiary hearing to determine whether an intervenor meets the ICWA/WSICWA definitions of "Indian custodian" or "Indian child's tribe." However, there is no other basis for granting a party's objection. The court may also consider a request for permissive intervention under CR 24(b) for individuals and tribes who have a vital interest in the child, but who do not meet the ICWA/WSICWA definitions.

The Congressional findings and declaration of policy and the Washington legislature's intent language indicate the importance of the child's tribe. The process of identifying and supporting relative placements, services, and permanency planning is greatly enhanced by having more tribal involvement. Where such circumstances exist and there are conflicting views or opinions between the tribes, the Department of Social and Health Services (DSHS) has trained and experienced ICW workers up to and including the ICW program Manager in Olympia who can facilitate the conversation necessary for reaching consensus.

It should also be noted that the decision of the child's tribe not to intervene does not change the requirement for proper application of the other procedural and evidentiary requirements of the ICWA.

§ 29.7 Appointment of Counsel

An important protection for parents and Indian custodians under the ICWA and WSICWA is the right to court-appointed counsel in any removal, placement, or termination proceeding where the court determines indigence.[80] The state courts are familiar with the procedures for payment of court-appointed counsel in dependency and termination proceedings. However, court-appointed counsel for indigent parents and Indian custodians is required in every type of proceeding covered by the WSICWA.[81]

These same provisions also authorize appointment of counsel for the child when the court determines that it is in the child's best interest.

§ 29.8 Requirements for Involuntary Proceedings

§ 29.8a Active Efforts

A party seeking involuntary removal of an Indian child from his or her parent or Indian custodian, or the involuntary termination of parental rights, must satisfy the court that "active

72 25 U.S.C. § 1922; E.S.S.B. 5656, §14; H.R. Rep. No. 1386, at 25 (1978).
73 25 U.S.C. § 1911(d).
74 *Starr v. George*, 175 P.3d 50 (Alaska 2008).
75 25 U.S.C. § 1911(c); E.S.S.B. 5656, §9.
76 25 U.S.C. § 1903(6); E.S.S.B. 5656, § 4(10).
77 25 U.S.C. § 1903(5)(a).
78 *Id*. at (5)(b).
79 E.S.S.B. 5656, § 4(9).
80 25 U.S.C. § 1912(b); E.S.S.B. 5656, § 11.
81 E.S.S.B. 5656, § 11.

efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful."[82] Contained in the "active efforts" language are two general requirements: first, actual service delivery; and second, the character of services offered and actually provided.

The drafters of the ICWA considered the character of social work practice then common around the country:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring a client to find a job, acquiring new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the case worker help the client develop job and parenting skills necessary to retain custody of her child.[83]

The BIA Guidelines address a second component of the "active efforts" provision—the design of services and programs aimed at Indian families. "These efforts shall take into account the prevailing social and cultural conditions and 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."[84]

Under the WSICWA where DSHS is the petitioner, the active efforts provision requires DSHS to make timely and diligent efforts to work with and engage the parents or Indian custodian in culturally appropriate preventative, remedial, or rehabilitative services and whenever possible those must be services offered by tribes and Indian organizations.[85] Where the petitioner does not have a statutory or contractual obligation to directly provide or procure services (i.e., nonparental custody), the petitioner must document a concerted and good faith effort to the parents' or Indian custodian's receipt of and engagement in culturally appropriate preventative, remedial, or rehabilitative services and includes services offered by tribes and Indian organizations, whenever possible.[86]

The active efforts requirement persists throughout the duration of a dependency.[87]

It should also be noted that the services must be relevant and appropriate to the needs of the child and parents. In all such proceedings prior to the placement of a child in foster care, efforts must be made to prevent or eliminate the need for removing the child from the child's home and, when a child has to be removed, to make it possible for a child to safely return to the child's home.[88] This means services specifically targeted at the parent's parenting deficiencies.

The Adoption and Safe Families Act (ASFA) relieves states of the "reasonable efforts" requirement where a parent's behavior has been more egregious:

> "[R]easonable efforts…shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); (ii) the parent has (I) committed murder… of another child of the parent; (II) committed voluntary manslaughter…of another child of the parent; (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or (iii) the parental rights of the parent to a sibling have been terminated involuntarily.[89]

However, ASFA does not modify the ICWA. Irrespective of the parental behavior that necessitates the dependency or termination proceeding, in a child custody proceeding involving an Indian child, the state is required to make active efforts.[90]

The court should make sure that services are identified that address the parenting deficiencies that necessitated the child custody proceeding. It is important to determine that the "problem" represents a danger to the child, such as drug or alcohol addiction, and not a cultural bias such as a child appearing to reside as much of the time in the home of extended family members as in the home of the parent.

The court should make sure the services that are offered are culturally relevant to the parent or Indian custodian. For instance, active efforts to address drug or alcohol issues cannot be shown if there is no consideration of the cultural relevance of the treatment modality of an offered treatment program.

The court should make sure that the petitioner has made significant effort to engage the parent or Indian custodian in the

82 25 U.S.C. § 1912(d); E.S.S.B. 5656, § 13(1).
83 Dorsay, Craig J., The Indian Child Welfare Act and Laws Affecting Indian Juveniles 157–158 (1984).
84 Guidelines for State Courts; 44 Fed. Reg. 67592 (1979).
85 E.S.S.B. 5656, § 4(1)
86 *Id.* at § 4(1)(b).
87 *Id.* at § 4(1)(a)(ii) and (b).
88 42 U.S.C. § 671(a)(15)(B)(i)–(ii).
89 42 U.S.C. § 671(a)(15)(D).
90 *See People ex rel. J.S.B., Jr.,* 691 N.W. 2d 611, 619–20 (S.D. 2005).

services. A case worker may put tremendous effort into identifying services and making referrals only to have all that effort wasted because there is something fundamentally culturally inappropriate in the manner in which the caseworker communicates or tries to work with the parent or Indian custodian that virtually guarantees failure.

Where a parent has failed to complete the service, or has not benefited from the service, the court should inquire as to the cultural competence of the service provider. Finally, where a parent or Indian custodian fails to engage in services (or to participate in the child custody proceeding) the court must consider the cultural implications of that behavior. The ICWA, including the requirement for active efforts, is intended to overcome the legacy of mass permanent removal of Indian children from the families, tribes, culture and community. The trauma this has caused to Indian people continues to affect parents today, both in their parenting and their response to intervention by child protection agencies.[91]

The "qualified expert witness" discussed below can be a valuable resource to the court in assessing whether the active efforts requirement has been met.

Finally, the Washington legislature was mindful of the significant collaborative efforts made by DSHS and Washington tribes to develop policies and practices that best serve and protect Indian children and families. These policies and practices are contained in the Children's Administration's Indian Child Welfare Policy Manual,[92] the Tribal-State Agreements regarding jurisdiction[93], and local agreements that have been entered into, or are in the process of development between individual tribes and DSHS.[94] The Washington legislature specifically identified these documents as the "persuasive guides" for implementation and interpretation of the ICWA and WSICWA.[95] When the court determines whether "active efforts" have been made, reference to the expectations set out in these agreements is vital.

§ 29.8b Evidentiary Standards

Involuntary foster care placement requires clear and convincing evidence that the continued custody of the child by the parent(s) or Indian custodian(s) is likely to result in serious emotional or physical damage to the child.[96] The standard of proof increases to "beyond a reasonable doubt" when the proceeding is for the termination of parental rights.[97]

The BIA Guidelines instruct that

> [e]vidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show 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 evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.[98]

This interpretation focuses on the parent's or Indian custodian's current unfitness.

In the only Washington case to sort through the requirements of this provision, the court held that even where there is no showing of present parental unfitness, the court may take into consideration emotional and psychological damage from prior unfitness of a parent and the child's current special needs for treatment and care.[99] Despite the court's look backwards at the behavior or deficits of the parent, the facts before the court demonstrated that the children faced inevitable and overwhelming peril if immediately returned to the care of their parent.

As expressed in the BIA's guidelines, blanket determinations

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91 *See* Charles Horejsi, Bonnie Heavy Runner Craig, & Joe Pablo, Reactions By Native American Parents To Child Protection Agencies: Cultural And Community Factors (2008), *available at* http://www1.dshs.wa.gov/CA/pubs/manuals_ICWApA_6.asp.

92 Indian Child Welfare Manual, *supra* note 20.

93 Dep't Soc. & Health Serv., Agreement Regarding Child Custody Services and Proceedings Between the [ ] Tribe and the State of Washington Department of Social and Health Services: Concurrent Jurisdiction (2009); *available at* http://www.dshs.wa.gov/pdf/ca/state_ConJuris.pdf; Dep't Soc. & Health Serv., Agreement Regarding Child Custody Services and Proceedings Between the [ ] Tribe and the State of Washington Department of Social and Health Services: Concurrent Jurisdiction (2009); *available at* http://www.dshs.wa.gov/pdf/ca/state_ExclusJuris.pdf.

94 *See, e.g.*, Dep't Soc. & Health Serv. & Jamestown S'Klallam Tribe, Memorandum of Agreement Between the Jamestown S'Klallam Tribe and the Washington State Department of Social and Health Services Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to the Children of the Jamestown S'Klallam Tribe, *available at* http://www.dshs.wa.gov/pdf/ca/JamestownSKlallam.pdf; Dep't Soc. & Health Serv. &Snoqualmie Indian Tribe, Cooperative Agreement Between the Snoqualmie Indian Tribe and Children's Administration, Region 4, *available at* http://www.dshs.wa.gov/pdf/ca/SnoqualmieTribe.pdf.

95 E.S.S.B. 5656, § 3.

96 25 U.S.C. § 1912(e); E.S.S.B. 5656, § 13(2).

97 25 U.S.C. §1912(f); E.S.S.B. 5656, § 13(3).

98 Guidelines for State Courts; 44 Fed. Reg. 67593 (1979).

99 *In re Mahaney*, 146 Wn.2d 878, 894, 51 P.3d 776 (2002).

of risk based on certain conditions are disfavored under Washington law. For instance, "exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself."[100]

Where parental deficits have persisted for a sufficient period of time to indicate that continuing efforts are unlikely to reduce the likely risk of harm to the child, permanent placement away from the parent or the Indian custodian is considered in the child's best interest. This determination is based on the parent(s) or Indian custodian(s) having failed to reduce the risk he or she poses to the child. However, this harm should be distinguished from the anticipated harm that disrupting the psychological bond of an Indian child to a foster or prospective adoptive parent might cause. Bonding and attachment to the foster or preadoptive parent is not to be used as the sole basis or primary reason for finding that return to the parent is likely to result in serious emotional or physical damage to the child.[101]

§ 29.8c Qualified Expert Witnesses

The "clear and convincing" standard in involuntary foster care proceedings and the "beyond a reasonable doubt" standard in termination proceedings both require that the evidence include the testimony of qualified expert witnesses.[102] The "qualified expert witnesses" requirement has been hotly debated in trial courts and has had numerous definitions and permutations applied to it over the years. The WSICWA clarifies that a "qualified expert witness" is "a person who provides testimony in a proceeding under [the WSICWA] to assist a court in the determination of whether the continued custody of the child by, or return of the child to, the parent, parents, or Indian custodian, is likely to result in serious emotional or physical damage to the child."[103] The petitioner must ask the child's tribe to identify such an expert. Where the child's tribe is not involved in the case or does not respond to the request to identify a qualified expert witness, in descending order of preference, the petitioner must provide:[104]

> (i) A member of the child's Indian tribe or other person of the tribe's choice who is recognized by the tribe as knowledgeable regarding tribal customs as they pertain to family organization or child rearing practices for this purpose;
> (ii) Any person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe;
> (iii) Any person 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 in Indian tribes with cultural similarities to the Indian child's tribe; or
> (iv) A professional person having substantial education and experience in the area of his or her specialty.

Where DSHS is the petitioner, the qualified expert witness cannot be the currently assigned caseworker or the caseworker's supervisor.[105]

§ 29.9 Placement of an Indian Child

> 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 .. . .the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .[106]

This Congressional policy is repeated in the "intent" section of the WSICWA and further expresses the intention to assure placements that can assist the Indian child to establish, develop and maintain his or her political, cultural, social, and spiritual relationship with his or her tribe and tribal community.[107]

In the absence of good cause to the contrary, preference in adoptive placements is given first to a member of the child's extended family; second to other members of the Indian child's tribe; and third to other Indian families.[108] Again, the WSICWA mirrors this list of preferences.[109] However, the WSICWA gives preference at the third level to Indian families of a similar culture to the child's tribe prior to other Indian families.[110]

The provisions relating to foster care and preadoptive placement are the same in the ICWA and the WSICWA, requiring placement within reasonable proximity to the child's home, in the least restrictive setting which most approximates a family

100 RCW 26.44.020(15).
101 E.S.S.B. 5656, § 13(2)–(3). *See also In re Phoebe S.*, 11 Neb. Ct. App. 919, 936–938, 664 N.W.2d 470 (2003); *In re Teela H.,* 547 N.W2d 512 (Neb. Ct. App. 1996) ("For the State to now argue that the children have now become so 'bonded' to their foster parents as to require termination of parental rights in this case is to defy legal logic. By separating a parent from that parent's children for extraordinary lengths of time, the State could justify termination of any parental rights. This cannot be, and is not, the law.").
102 25 U.S.C. § 1912(e)–(f).
103 E.S.S.B. 5656, § 13(4)(a).
104 *Id*. at § 13(4)(b).
105 *Id*. at § 13(4)(c). However, the assigned casework can testify as an expert on other issues in the case.
106 25 U.S.C. § 1902.
107 E.S.S.B. 5656, § 3.
108 25 U.S.C. § 1915(a).
109 E.S.S.B. 5656, § 18(3).
110 *Id*. at § 18(3)(c).

and which meets any special needs the child may have.[111]

Similarly, in the absence of good cause to the contrary, preference in foster care or preadoptive placement is given first to a

member of the Indian child's extended family; second to a foster home licensed, approved, or specified by the Indian child's tribe; third to an Indian foster home licensed or approved by an authorized non-Indian licensing authority; and fourth to an institution for children or child foster care agency approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[112]

The child's tribe can establish a different order of preference for adoptive, preadoptive, or foster care placements through a tribal resolution.[113] The court must follow the alternative preferences so long as the placement is the least restrictive setting appropriate to the particular needs of the child.[114]The court is required to consider a parent's request for anonymity in applying tribal preferences. The standards to be applied in meeting the preference requirements of this section shall be 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 members maintain social and cultural ties.

§ 29.10 Consent

Child custody proceedings under the ICWA may be either voluntary or involuntary. Involuntary proceedings are those in which a child is removed over the objection of the parent or Indian custodian and is placed in the custody of someone other than the parent or Indian custodian, parental rights are terminated over the objection of the parent, or the child is adopted over the objection of the parent. Voluntary proceedings involve agreed foster care placement, relinquishment of parental rights, or consent to adoptive placement.

Consent to foster care placement, relinquishment of parental rights, or an adoptive placement is not valid unless

(1) It is in writing;
(2) It is recorded before a judge in a court of competent jurisdiction; and
(3) The judge certifies that the terms and consequences of the consent were
   a. Fully explained in the parent or Indian custodian's primary language (or translated);
   b. Fully understood by the parent or Indian custodian; and
   c. Given at more than 10 days after the birth of the child.[115]

Consent to voluntary foster care placement can be withdrawn at any time during the placement.[116] Consent to relinquishment of parental rights can be withdrawn at any time prior to entry of a final order terminating the parent child relationship.[117] ICWA does not give a parent the right to revoke his or her consent to an adoption after a final order terminating that parent's rights has been entered.[118]

§ 29.11 Petition to Invalidate State Court Orders

If a state court has removed an Indian child from a parent or Indian custodian or the court has terminated the child's relationship with a parent in violation of the provisions in §§ 1911, 1912, or 1913, then the child, parent, or Indian custodian from whom the child was removed; the parent whose rights have been terminated; and the Indian child's tribe each have the right to petition "any court of competent jurisdiction" to invalidate the state court's action.[119]

The ICWA does not define "court of competent jurisdiction," but the WSICWA does:

> "Court of competent jurisdiction" means a federal court, or a state court that entered an order in a child custody proceeding involving an Indian child, as long as the state court had proper subject matter jurisdiction in accordance with [the WSICWA] and the laws of that state, or a tribal court that had or has exclusive or concurrent jurisdiction pursuant to 25 U.S.C. Sec. 1911.[120]

There is no time limitation on the parties' right to petition a court to invalidate a state court order. In the absence of such time constraints, some state courts have sought to impose state law appeal limitations.[121] This appears to be contrary to the intent of Congress.[122]

> First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely

111 25 U.S.C. § 1915 (b); E.S.S.B. 5656, § 18(1).
112 25 U.S.C. § 1915 (b); E.S.S.B. 5656, § 18(2).
113 25 U.S.C. § 1915(c); E.S.S.B. 5656, § (4).
114 25 U.S.C. § 1915(c); E.S.S.B. 5656, § (4).
115 25 U.S.C. § 1913(a); E.S.S.B. 5656, § 15(1).
116 25 U.S.C. § 1913(b); E.S.S.B. 5656, § (2).
117 25 U.S.C. § 1913(c).
118 *In re M.D*. 110 Wn. App. 524, 531–532, 42 P.3d 424 (2002).
119 25 U.S.C. § 1914.
120 E.S.S.B. 5656, §4(4).
121 *State v. Native Village of Curyung,* 151 P.3d 388, 411 (Alaska 2006).
122 *See generally Jerome v. United States*, 318 U.S. 101, 104 (1943); *Nat'l Labor Relations Bd. v. Natural Gas Util. Dist.*, 402 U.S. 600, 603(1971); *Dickerson v. New Banner Inst.,* 460 U.S. 103, 119 (1983).

> on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities.[123]

The invalidation mechanism in the ICWA is one which provides protection to the rights of parents and Indian custodians. The types of violations that are subject to invalidation include jurisdiction, transfer of jurisdiction, intervention, full faith and credit, notice, appointment of counsel, access to records, services and evidentiary standards for removal or termination, and consent to placement or termination. The earliest appellate court consideration of the invocation of this provision in Washington was an adoption case in which notice had not been given to the child's tribe. In that case, the court adopted the "existing Indian family exception" and held the ICWA not applicable even though the matter was a "child custody proceeding" involving an "Indian child."[124] This case is mentioned not for its definitive ruling on the application of § 1914, but to take the opportunity to note that the Washington legislature has since acted to eliminate application of this court-created exception to application of the ICWA. In state court child custody proceedings, "if the child is an Indian child as defined under the Indian child welfare act, the provisions of the act shall apply."[125]

Invalidation is generally mandatory where violations have occurred.[126] In some instances invalidation of earlier actions have not been required where later actions have been taken by a state court in full compliance with the ICWA.[127]

With respect to tribal notice, technical compliance with the ICWA's service requirements will not be required when the tribe indicates it has no interest and does not intend to intervene.[128] Where tribal notice has not been given at all, or the time frames have not been strictly observed, remand to correct the notice deficiency rather than wholesale invalidation of the court's action has been the initial remedy. In such cases, the court has held that in the absence of a tribal response to the subsequent proper notice, the trial court's prior action would be affirmed.[129]

Existence of this provision is one of the most compelling reasons to ensure that all notice, procedural, and evidentiary requirements of the ICWA have been strictly complied with. Time, effort, and resources are sometimes needlessly expended only to learn that the ICWA does not apply. These expenditures pale in comparison to the disruption, distrust, and trauma that can result from unwinding actions that have been taken in violation of the ICWA. The court should inspect the notices and proof of service to ensure full compliance with the ICWA requirements whenever there is information suggesting the child might be an Indian child. The court should also make the inquiries necessary to ensure that the ICWA procedural, case service, and evidentiary standards are complied with when it has been determined that the child is an Indian child.

§ 29.12 Failed Adoption and Permanency

If an adoption decree is vacated or set aside or if adoptive parents voluntarily consent to termination of their parental rights to an Indian child, the biological parent or prior Indian custodian may petition for return of custody. The petition must be granted unless "there is a showing in a proceeding conducted in compliance with 25 U.S.C. § 1912 that return to custody of the petitioner is not in the best interest of the child."[130]

Unfortunately, there is no useful case law interpreting this provision and the legislative history is merely a restatement of the statutory language. This provision gives the biological parent and a prior Indian custodian standing to petition for return of the child. However, careful consideration of the language of the provision raises doubt as to how either party will know of the failed adoption. Amendments to RCW 26.33.040 require that in any proceeding under that chapter, notice must be given to the child's parents, Indian custodian(s), and tribe. This provision should trigger notice sufficient to alert the biological parent and potentially a prior Indian custodian of the change in the adoption status of the child. There is no specific requirement that the notice contain information about the right to seek return of custody.

Whenever a child is removed from one foster placement to ei

123 *Mississippi Band of Choctaw Indians,* 490 U.S. at 43–44; 25 U.S.C. § 1921 applying state law where it provides a higher standard of protection to the rights of parents and Indian custodians, indicating state laws that would diminish the ICWA's protections should not be applied.

124 *In re Crews,* 118 Wn.2d 561, 825 P.2d 305 (1992).

125 RCW 13.34.040(3); RCW 26.10.034(1)(a); RCW 26.33.040(1)(a); *see also In re Beach*, 159 Wn. App. at 691 (noting that "*Crews* . . . has been superseded by statute.").

126 *See, e.g.*, *In re L.A.M.,* 727 P.2d 1057 (Alaska 1986) (failure to provide proper notice resulted in vacation of the termination order and remand for a new trial); *In re Morgan,* 364 N.W.2d 754 (Mich. Ct. App. 1985) (case remanded for new termination trial within 60 days or return of the child to the parent); *In re H.D.,* 729 P.2d 1234 (Kan. Ct. App. 1986) (termination reversed and remanded for failure to provide required notice).

127 *See, e.g., In re S.W.,* 727 N.W.2d 144 (Minn. Ct. App. 2007) (invalidation of termination order, which was entered in full compliance with the ICWA, was not required in spite of ICWA violations during prior dependency proceeding).

128 *See, e.g.*, *In re M.S.S.,* 86 Wn. App. 127.

129 *Id.* at 138*; In re Colnar,* 52 Wn. App. 37, 41, 757 P.2d 534 (1988).

130 25 U.S.C. § 1916(a).

ther another foster placement, a preadoptive placement, or an adoptive placement, that placement must be made in accordance with all the requirements of the ICWA. The ICWA need not be applied if the child is being removed from foster care placement and returned to the parent or Indian custodian from whom he or she was originally removed.[131] This section clarifies that when an Indian child already in a foster care placement moves to another foster care placement or to a different out of home "permanent" placement, the provisions of the ICWA must be met.

§ 29.13 Access to Records for Tribal Enrollment

An Indian person who has been the subject of an adoptive placement who has reached the age of 18 may apply to the court in which the final adoption decree was entered for information necessary to protect rights that person may have flowing from their tribal relationship.[132] Upon receipt of such an application, the court must provide the applicant with information including his or her tribal affiliation, the identity of the applicant's biological parents, and any other information necessary to establish the applicant's eligibility for tribal membership.[133]

Courts in Washington have generally responded to motions for access pursuant to this provision by giving the adopted person or his or her representative unrestricted access to the adoption court file, sometimes with a directive that information obtained from the file not be given to the applicant and further disclosed only to the appropriate tribal enrollment official. In some instances in Washington and elsewhere, the court has requested a name and mailing address for the tribal enrollment official and sent the requested information directly to that official.[134] This approach only works if the tribal affiliation is known to the applicant at the time the application is made or is readily identifiable to the court when it inspects the contents of the adoption file.

There is no established process for releasing adoption record information necessary to help an adult adoptee establish his or her eligibility for membership. In most instances it will be most practical to provide the applicant or the applicant's attorney with access to the file and impose a limitation on further dissemination of the information that allows the purpose of this ICWA provision to be met without unduly harming the privacy rights of the biological parents. Where an adult adoptee makes the application pro se, the court may find it necessary to follow the example of the New York court.

131 *Id.* at (b).
132 25 U.S.C. § 1917.
133 *Id.*
134 *See, e.g., In re Rebecca,* 158 Misc.2d 644, 601 N.Y.S.2d 682, 683–684 (Sur. Ct. 1993) ("Accordingly, in order to protect the biological parents' privacy rights and at the same time assure the Petitioner's rights under the ICWA, the Petition is granted but the requested information shall be released only to the Oneida Nation Administrator with a request that the Nation keep the information confidential.").

Chapter 30

Adoption Support[1]

Sheila Malloy Huber[2]

The Department of Social and Health Services' (DSHS) Adoption Support Program provides post-adoption assistance to families who adopt special needs children out of the foster care system or from a nonprofit adoption agency. Substantially all of the children who move from foster care to adoption in Washington are eligible for the program. By summer 2008 more than 13,000 children in Washington were receiving adoption support benefits.

§ 30.1 Legal Basis

The adoption support program is governed by state law (RCW 74.13.100–159) and federal law (Title IV-E of the Social Security Act, 42 U.S.C. §§671–675). The rules governing the program are set out in WAC 388-27-0120–0390, which provide a comprehensive overview of adoption support in Washington.

The United States Department of Health and Human Services (DHHS), the federal agency charged with overseeing the administration of the federal adoption support program, has published guidelines which states are required to follow in administering the federal program. These guidelines can be found in the DHHS Child Welfare Policy Manual at http://www.acf.dhhs.gov/programs/cb/laws/cwpm/index.jsp.

§ 30.2 Eligibility

Eligibility is based on a complex formula that first applies the federal statute's three-part definition of "special needs child" and then looks to qualifying factors set out in federal or state law. The income of the adopting family is not considered in determining the eligibility of the child. Special needs children placed by private nonprofit agencies may be eligible for adoption support even though the children are not adopted out of the foster care system. However, it is highly unlikely that a former foster child who moves from a guardianship to adoption will be eligible for adoption support. Moreover, foster children who are independently placed by parents (even with court approval), rather than by an agency, are also unlikely to qualify for the program.

§ 30.3 Agreement and Benefits

If a child is eligible for the program, the prospective adoptive parents and DSHS negotiate a contract setting out the benefits that will be received by the family on behalf of the child. The child's needs and the circumstances of the family are considered in negotiating the contract. This agreement must be negotiated and signed by both parties (the prospective adoptive parents and DSHS) *before* the adoption is finalized. Benefits available under the program may include the following:

- Medical assistance through Medicaid (offered to all families on the program);
- Assistance with psychological and therapy expenses;
- Training for adoptive parents;
- A monthly cash payment (The amount of the payment, if any, may vary from family to family, as it is a negotiated amount based on the needs of the child and the circumstances of the family. The payment amount cannot exceed the amount of the "foster care maintenance payment" that the child would receive if the child were in a foster family home. Also the amount can be changed at any time, if a need in the family arises.); and
- Reimbursement (up to a maximum of $1,500.00) for nonrecurring adoption expenses, such as adoption agency fees, attorney fees, and court costs incurred in finalizing the adoption.

The benefits generally continue until the child is 18 years old. However, they may be extended to age 21 if the child is still in school and pursuing a high school diploma or vocational education certificate. Additionally, the agreements are modifiable at any time based on a change in the needs of the child or in the circumstances of the family. Residential care is not paid for through the adoption support program. RCW 74.13.180 requires a child to be in the custody of DSHS if group care payments are made. However, services other than adoption

1 Last revised in Fall 2009.

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support may be available to adoptive parents and children under family preservation, family reconciliation, or other child welfare services.

In any adoption where there is an adoption support agreement, the court finalizing the adoption must review the agreement before entering the adoption decree (although the court may not change the terms of the agreement) and at any time there is a motion to vacate or modify the adoption.[3]

3 RCW 26.33.320.

Chapter 31

Resources for Additional Information on Adoption, Involuntary Mental Health Treatment, & Involuntary Chemical Dependency Treatment

Proceedings related to nonoffender juvenile actions may involve issues of involuntary mental health treatment, chemical dependency treatment, and adoption law. These areas are beyond the scope of this volume but are covered in the following resources:

Adoption

Wash. State Bar Ass'n, Family Law Deskbook Ch. 60 (Daniel J. Radin, 2d ed. 2000 & Supp. 2006).

Kelly Kunsch, Methods of Practice, vol. 1, Ch. 22 (4th ed. 2008).

King County Bar Ass'n, Washington Lawyers Practice Manual Ch. 9, pt. 3 (2008).

Involuntary Mental Health Treatment and Involuntary Chemical Dependency Treatment

Bd. of Trial Ct. Educ., Office of the Adm'r for the Cts., Mental Illness Proceedings Benchbook (County Judges' Mental Illness Committee ed., 2001).

Chapter 32

Emancipation of Minors[1]

Commissioner Thurman W. Lowans[2]

§ 32.1 Purpose Statement

Any minor who is 16 years of age or older and a resident of Washington may petition for a declaration of emancipation. If granted, parental obligations are terminated including financial support, care, supervision, and obligations imposed by reason of dissolution such as child support. Further, an emancipated minor receives a number of legal rights and new capacity as an adult, including but not limited to, the right to sue and be sued; the right to retain earnings; the right to enter into non-voidable contracts; the right to work and earn a living; the right to act autonomously in all business relationships; and the right to give informed consent for receiving health care services.[3]

Emancipation does not alter the status of being a minor with respect to criminal laws, either as a defendant or as a victim, nor does it change the age requirements for voting, use of alcoholic beverages, possession of firearms or other health and safety regulations.[4]

§ 32.2 Timing

The emancipation hearing shall be held no later than 60 days after the date on which the petition is filed.[5] Generally such hearings are scheduled for a specific calendar or time, and should receive priority in light of the 60 day requirement. Although there is no state superior court rule concerning emancipation hearings, some counties have their own specific rules governing hearings procedures.[6]

§ 32.3 Contents of Petition

The Administrative Office of the Courts (AOC) has generated forms for use in emancipation proceedings, including petitions and decrees. These forms can be found at http://www.courts.wa.gov/forms/. In many less urban areas in Washington State, it is unusual for an attorney to be involved in filing such a petition. In these cases, the usual challenges facing a pro se litigant to accurately complete form pleadings are compounded by reason of age. It should be noted that a certified copy of the petitioner's birth certificate is required to be attached to the petition, but often it is not and should therefore be supplied at the time of the hearing.[7] A filing fee of $50 is assessed upon filing of a Petition for Emancipation.[8]

§ 32.4 Service of Petition

A copy of the Petition and Notice of Hearing must be served upon the petitioner's parent or parents, guardian or custodian at least 15 days before the emancipation hearing.[9] If the petitioner is subject to a dependency, service is also required upon the Department of Child and Family Services (DCFS).[10] Service shall be waived upon proof that the address of the parent(s), guardian, or custodian is unavailable or unascertainable.[11]

The statute specifically states that a summons is not required,

1 Last revised in Fall 2009.

2 Commissioner Thurman W. Lowans was appointed to the Kitsap County Superior Court in 1993 and is responsible for the Paternity calendar, Dependency calendar, Family Law motions calendar, Mental Commitment calendar, Domestic Violence calendar, Adoption calendar, Civil Contempt calendar, and the Ex Parte calendar. He established the position of Courthouse Facilitator for the Superior Court in 1993, and in 2001 he established a juvenile diversion program known as Youth Court where teens serve as judge, advocate, and jury in diversion cases. Commissioner Lowans graduated cum laude from Dartmouth College in 1972 and received his J.D. from Boston University School of Law in 1975. In 1996 he retired as a Commander with the JAG Corps of the U.S. Navy following 22 years of service in the Reserves. Commissioner Lowans was in private practice in Bremerton with Soriano, Soriano and Lowans for 15 years before his appointment to the Bench. His trial practice included felony defense, juvenile offenders and dependencies, domestic relations, real estate and probate. He served as Land Hearing Examiner for Kitsap County in 1992–1993 and as President of the Kitsap County Bar Association in 1993. Commissioner Lowans served on the Faculty of the Washington State Judicial College (2002–2007 and 2009–2011) as instructor concerning Dependencies, and served as the judicial representative to the Board of Directors of Washington State Court-Appointed Special Advocates (2002–2005).

3 RCW 13.64.060(1).
4 *Id.* at (2).
5 RCW 13.64.030.
6 *E.g.,* Thurston Super. Ct. LJuCR 12.
7 RCW 13.64.020(1)(b).
8 RCW 36.18.014.
9 RCW 13.64.030.
10 *Id.*; RCW 13.34.130.
11 RCW 13.64.030.

and thus no formal response is required by a parent, guardian, custodian or, in the case of a dependent child, DCFS. Rather, the statute requires service of the petition and notice of hearing so as to afford an opportunity to be heard on the issue.

§ 32.5 Hearing Procedures

Given the age of the petitioner, the lack of any other formal parties to the action and the issues presented, the format and approach taken at the hearing should be somewhat flexible, possibly more akin to the approach taken in At-Risk Youth (ARY) or Child in Need of Services (CHINS) proceedings. Clearly the petitioner and any witnesses offering testimony should be placed under oath. Individual practice will vary, but a short recital by the court at the beginning of the hearing as to procedures, expectations, statutory elements and burden of proof may help the petitioner to understand the approach, formality and seriousness of the proceedings. The petitioner may bring witnesses who should be sworn and invited to testify. A parent, guardian, custodian or, in the case of a dependent child, DCFS, may appear in support of or opposition to the petition for emancipation. They too should be sworn in and invited to testify as to their positions.

RCW 13.64.010 grants any minor 16 years of age or older the right to file a petition for emancipation, and thus a guardian ad litem (GAL) by reason of the minority status of the petitioner is not required. However, good practice would indicate that the court have the independent assistance of a GAL to investigate and report to the court in writing with recommendations concerning the merits of the petition for emancipation. An independent GAL should be familiar with the statutory elements for emancipation and be able to investigate and report back to the court on an expedited basis. Identification of individuals to serve in such a capacity, as well as the source of funding for their work is not addressed in the statute and is within the sound discretion of the court. Local rules may give further instruction on identifying GALs for this purpose.

§ 32.6 Burden of Proof

The petition shall be granted upon proof by clear and convincing evidence.[12] However, if the petition is opposed by a parent, guardian, custodian or, in the case of a dependent child, DCFS, the petition is to be denied unless the court finds by clear and convincing evidence that denial of emancipation would be detrimental to the interests of the child.[13]

§ 32.7 Entry of Decree

The petitioner is to be given a certified copy of the decree of emancipation upon entry.[14] The decree directs the petitioner to obtain a new drivers license or Washington identification card, and directs the Department of Licensing to make a notation of the emancipated status on the new license or identification card.

§ 32.8 Voidable

A decree of emancipation (also referred to as a declaration of emancipation, RCW 13.64.010) obtained by fraud is *voidable*.[15] Obligations, rights, or interests arising during the period in which the decree is in effect are not affected by the voiding of the decree.[16]

12 RCW 13.64.050(1).
13 *Id.* at (2).
14 *Id.* at (3).
15 RCW 13.64.070.
16 *Id.*

Chapter 33

Parentage

Wallace Murray, Lianne Malloy,
June Tomioka and Carol Bryant[1]

§ 33.1 Purpose Statement

The purpose of this document is to assist in understanding parentage establishment under the Uniform Parentage Act (UPA), which is codified at RCW 26.26. Parentage establishment affects many families and is necessary to secure important rights and benefits for children. These rights include child support, medical benefits, and familial bonding. Nationwide, the percentage of births involving unmarried parents increased from 19 percent in 1980 to 41 percent in 2009.[2] Although out-of-wedlock births in Washington are lower than the national average (33.5 percent of births in 2009[3]), over 29,000 children are born to unmarried parents annually in Washington State.[4]

In Washington, a conflict exists between the statutory definition for a father who is a parent in dependency proceedings under RCW 13.34 and parentage proceedings under the UPA. In dependency proceedings, "parent" means the biological or adoptive parent unless the legal rights of that person have been terminated.[5] Under the UPA, there are several ways to become a parent. Parentage can be based upon: (1) a judicial order establishing parentage; (2) an affidavit of paternity filed with the registrar of vital records; or (3) a presumption of parentage under RCW 26.26.116. A presumption of parentage can arise from the parents' marriage or registered domestic partnership, or a parent living with the child and holding the child out as his or her own for the first two years of the child's life. Parentage can also be based upon a valid surrogacy contract or an affidavit and physician's certificate verifying an egg donor's or gestational carrier's intent to be the legal parent. A biological parent is not always the legal parent under the UPA. The conflict between the UPA and dependencies will exist until it is resolved by the legislature. Until then, it is important for dependency judges to understand how parentage is determined under the UPA because it can affect parties to a dependency proceeding.

§ 33.2 Uniform Parentage Act (UPA) RCW 26.26

The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the model Uniform Parentage Act (model UPA 2000) in 2000. Enactment of the model act in 2002, by the Washington State Legislature (Laws of 2002, Ch. 302) was a first step in bringing our parentage law in line with modern scientific developments in genetic testing.[6] The NCCUSL amended the model UPA 2000 in 2001. It reinstated certain presumptions of paternity found in the former model act (UPA 1973). In 2002, the model UPA was amended by NCCUSL to expand the definition of legal parent when identifying a child's mother or father. In 2011, the Washington State Legislature (Laws 2011, Ch. 283) amended the UPA to adopt these amendments.

1 Wallace Murray was counsel for the Washington State Association of Prosecuting Attorneys' Support Enforcement Project before retiring in 2010. He was an observer to the National Conference of Commissioners on Uniform State Laws revision of the Uniform Parentage Act. Lianne Malloy is an Assistant Attorney General. She has represented the Division of Child Support since 1990 and has been their lead counsel since1998. June Tomioka is current counsel for the Washington State Association of Prosecuting Attorneys' Support Enforcement Project. She has been a child support deputy prosecuting attorney since 1992, first in King County and later in Walla Walla County. Carol Bryant has represented the Division of Child Support at the King County Prosecuting Attorney's Office since 1981 and is also a co-author of the parentage chapter of the Washington Family Law Deskbook.

2 Brady E. Hamilton, Ph.D. et al., U.S. Dep't of Health & Human Servs, Nat'l Ctr. for Health Statistics Births: Preliminary Data for 2009, vol. 59, no. 3 (2010), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf.

3 Washington State Dep't of Health, *Natality Table A1, Demographic Summary Indicators for Residents* (2000–2009), *available at* http://www.doh.wa.gov/ehsphl/chs/chs-data/birth/bir_VD.htm.

4 Washington State Dep't of Health, *Natality Table A11. Single Mothers, Mother's Age Group by County of Residence* (2009), *available at* http://www.doh.wa.gov/ehsphl/chs/chs-data/birth/bir_VD.htm.

5 RCW 13.04.011(5). *See also* 45 U.S.C. § 675(2) ("parents" means biological or adoptive parents or legal guardians).

6 As of 2011, the model UPA has been adopted by eight states in addition to Washington (Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah and Wyoming.) Unif. Law Commissioners, *Legislative Fact Sheet - Parentage Act* (as amended in 2002), *available at* http://www.nccusl.org/LegislativeFactSheet.aspx?title=Parentage Act. No state has adopted the act verbatim. *Id.* Washington State's version of the model UPA does not include Article 4 (Registry of Paternity) or Article 8 (Gestational Agreement). However, it retains the surrogacy provisions of the Uniform Parentage Act 1973 (former RCW 26.26). *See* RCW 26.26.700–740.

§ 33.2a Definitions of Important Terms

The UPA describes a man or woman's relationship to a child using terms of art as follows:

1. "*Acknowledged Father*" means a man who establishes a father-child relationship by signing an affidavit claiming to be the genetic father in compliance with RCW 26.26.300 through RCW 26.26.375.[7] Paternity by acknowledgment can only occur when the mother and father voluntarily agree the man is the genetic father and the acknowledgment is filed with the registrar of vital statistics.[8]

2. "*Adjudicated Parent*" means a person who has been judicially determined by a court of competent jurisdiction to be the parent of a child.[9]

3. "*Alleged Parent*" means a person who alleges he or she is the genetic parent or possible genetic parent of a child, but whose parentage has not yet been determined.[10]

4. "*Domestic partner*" means a state-registered domestic partner as defined by RCW 26.60.[11]

5. "*Genetic Parent*" means a person who is the source of the egg or sperm that produced the child, but does not include a donor.[12]

6. "*Presumed Parent*" means a person regarded as the parent of the child under RCW 26.26.116 until that status is rebutted or confirmed in a judicial proceeding.[13]

§ 33.2b Parental Status without Judicial Intervention

Under the UPA, there are several ways to establish parentage that do not require judicial intervention. Parentage can be established by: (1) an egg donor filing an affidavit and a doctor's certificate with the registrar of vital statistics which sets forth her intention to be the parent of a child born through assisted reproduction; (2) a person consenting to assisted reproduction by his or her spouse or registered domestic partner; (3) a person entering into a valid surrogate parentage contract; or (4) a person filing a voluntary paternity acknowledgment.[14] *In all other circumstances, the parentage of a child must be adjudicated or confirmed by the superior court.*[15] Even though parentage can be established outside of the courtroom, once established, it can only be disestablished judicially.

7 RCW 26.26.011(1). *See generally* RCW 26.26.300–375.
8 RCW 26.26.011(1).
9 *Id*. at (2).
10 *Id*. at (3).
11 RCW 26.26.011(8).
12 *Id*. at (25). "Donor" means an individual who contributes a gamete or gametes for assisted reproduction whether or not for consideration, but this term is not applicable between spouses or registered domestic partners, or to a woman who gives birth by means of assisted reproduction, except under RCW 26.26.210 through 26.26.260 or 26.26.735. *Id*. at (9).
13 *Id*. at (18).

§ 33.2b(i) Presumption of Parentage in the Context of Marriage or Registered Domestic Partnership

"Presumed parent" in the context of a marriage or a registered domestic partnership means a person who, *under RCW 26.26.116(1)*,[16] is recognized to be the legal parent of a child based on that person's status as a spouse or registered domestic partner. A presumption of parentage exists if the child was born to a spouse or registered domestic partner during the relationship or within 300 days after the marriage or registered do

14 RCW 26.26.101.
15 *See Taylor v. Morris*, 88 Wn.2d 586, 564 P.2d 795 (1977).
16 (1) In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if:

a) The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership;
b) The person and the mother or father of the child were married to each other or in a domestic partnership with each other and the child is born within three hundred days after the marriage or domestic partnership is terminated by death, annulment, dissolution, legal separation, or declaration of invalidity;
c) Before the birth of the child, the person and the mother of the child married each other or entered into a domestic partnership with each other in apparent compliance with law, even if the attempted marriage or domestic partnership is, or could be, declared invalid and the child is born during the invalid marriage or invalid domestic partnership within three hundred days after its termination by death, annulment, dissolution, legal separation, or declaration of invalidity; or
d) After the birth of the child, the person and the mother or the father of the child have married each other or entered into a domestic partnership with each other in apparent compliance with law, whether or not the marriage or domestic partnership is, or could be declared invalid, and the person voluntarily asserted parentage of the child, and:
   i. The assertion is in a record filed with the state registrar of vital statistics;
   ii. The person agreed to be and is named as the child's parent on the child's birth certificate; or
   iii. The person promised in a record to support the child as his or her own.

(2) A person is presumed to be the parent of a child if, for the first two years of the child's life, the person resided in the same household with the child and openly held out the child as his or her own.

(3) A presumption of parentage established under this section may be rebutted only by adjudication under RCW 26.26.500 through RCW 26.26.630.

mestic partnership ends.[17] A presumption of parentage is also present when parties attempt to marry or enter into a registered domestic partnership but do not comply with all the requirements or the relationship is later determined to be invalid.[18] A spouse or registered domestic partner can become a presumed parent if the relationship is entered into after the birth of the child only if the spouse or registered domestic partner voluntarily asserts parentage in a record.[19] The presumption of parentage remains until that status is rebutted or confirmed in a judicial proceeding."[20]

§33.2b(ii) Presumption of Parentage in the Context of "Holding Out"

Adoption of the model UPA 2000 in Washington represented a major change from prior parentage law, which used to permit "presumptions of paternity" outside of marriage when a man held the child out as his own.[21]

After the adoption of model UPA 2000 (as amended), in 2002, the only parentage presumption was a presumption based upon marriage or an attempt to marry. [22] The 2011 Legislature reinstated the presumption of parentage based upon a person's relationship to the child.[23] With the adoption of Laws of 2011, Ch. 283, a person is presumed to be a parent of a child if the person resides with the child for the first two years of the child's life and openly holds out the child as her or his own.[24] This presumption, like the marital presumption, remains until that status is rebutted or confirmed in a judicial proceeding.[25]

§ 33.2b(iii) Voluntary Acknowledgments of Paternity

Federal Requirements for Expedited Paternity Establishment

Beginning in 1996, federal laws required all states to have a voluntary paternity acknowledgment program to maintain their eligibility to receive federal matching funds for their child support enforcement programs.[26] A valid voluntary acknowledgment of paternity must be an available method to establish paternity under state law.[27] Federal requirements prevent states from requiring or permitting unchallenged acknowledgments to be ratified judicially or administratively.[28] This mandate has prompted all states to enact laws permitting parents to establish paternity through voluntary acknowledgements. But because federal laws give states discretion in how they implement these requirements, laws authorizing paternity acknowledgment vary considerably from state to state.[29] Washington's implementation of federal paternity acknowledgement requirements is codified in RCW 26.26.300 through RCW 26.26.375.

The legal effect of a paternity acknowledgment is determined under the laws of the state where the acknowledgement is filed.[30] All states are required to give "full faith and credit" to an acknowledgment that is in compliance with the laws of another state.[31] Washington's voluntary acknowledgment program predates the federal requirements.[32] Prior to July 1, 1997, a paternity acknowledgment created a rebuttable presumption of paternity, which can be adjudicated in a parentage action.[33] Effective July 1, 1997, a paternity acknowledgement is equivalent to an adjudication of paternity, consistent with federal requirements.[34] These differences are discussed more fully below under the heading Effect of Pre-July 1, 1997, Acknowledgements.

Overview of Paternity Acknowledgments in Washington

The voluntary paternity acknowledgment program simplifies paternity establishment when paternity is uncontested.[35] Paternity can be established outside of the courtroom when the mother and father sign an affidavit that identifies the biological father.[36] In 2007, over 21,000 paternity affidavits were filed in Washington.[37] Only the "mother of a child and a man claim

17 RCW 26.26.116(1).
18 *Id.* at (1)(c).
19 *Id.* at (1)(d).
20 RCW 26.26.011(18).
21 *See* former RCW 26.26.040.
22 *See* former RCW 26.26.116 (2002–2010).
23 RCW 26.26.116(2).
24 *Id.*
25 RCW 26.26.011(18).
26 *See* 42 U.S.C. § 666(a)(5)(C); 45 C.F.R. § 302.70(a)(2).
27 42 U.S.C. § 666(a)(5)(C); 45 C.F.R. § 302.70(a)(2).
28 42 U.S.C. § 666(a)(5)(E). *See also* RCW 26.26.345; Unif. Parentage Act § 310 (2000) [hereinafter model UPA 2000].
29 Article 3 of the model act provides guidance and was replicated in nearly all of its parts by our Legislature.
30 42 U.S.C. § 666 (a)(5)(C)(iv). *See also* model UPA 2000 § 311; RCW 26.26.350.
31 *See* RCW 26.26.350.
32 Former RCW 26.26.040(1)(e) provided in part "A man is presumed to be the natural father of a child for all intents and purposes if...he acknowledges his paternity of the child pursuant to [an affidavit of paternity] or in writing filed with the state office of vital statistics...."
33 RCW 26.26.370(2).
34 RCW 26.26.320.
35 RCW 26.26.300–375. The term "paternity acknowledgement" is used interchangeably with "paternity affidavit." An acknowledgement is a witnessed document and an affidavit is a notarized document. An acknowledgement of paternity becomes an affidavit once it is notarized. Although state laws use the term "paternity acknowledgement," the Department of Health requires acknowledgements to be notarized and refers to the document as a "paternity affidavit." A paternity affidavit is an acknowledgment of paternity under the UPA.
36 RCW 26.26.300; RCW 26.26.305; RCW 26.26.320. A "determination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity...." RCW 26.26.011(7).
37 *See generally* Washington State Dep't of Health, Natality Table

ing to be the genetic father of the child may sign the acknowledgment with "the intent to establish the man's paternity."[38] Although the "genetic" requirement is not part of the federal law, the purpose of the requirement is to limit the use of acknowledgments to biological fathers.

The paternity acknowledgment form requires the father to state whether he has "submitted to genetic testing regarding the child named" in the acknowledgment and, if so, to state whether the genetic test results show that the acknowledging man is the father of the child named.[39] Parents do not need to have a genetic test to sign the paternity acknowledgment form. However, the acknowledgment will not bind the child unless "[t]he acknowledgment of paternity is consistent with the results of the genetic testing."[40] If the parents are considering signing a paternity acknowledgment form, they may be able to participate in a voluntary paternity genetic testing process at state expense. Genetic testing is made available free of charge to encourage the use of paternity acknowledgements.

The "registrar of vital statistics" is required to prescribe the "form" of the acknowledgment. However, the Legislature specifically provides that the form "shall state, in prominent lettering, that signing...is equivalent to an adjudication of paternity and confers...all ...rights and duties of a parent… [if it is] not challenged or rescinded as prescribed [by law]."[41] This warning, which is provided prior to the execution of a voluntary and consensual agreement of parenthood, is particularly appropriate when genetic testing does not take place.

The paternity acknowledgement must be filed with the state registrar of vital statistics, of the Department of Health, to be valid.[42] When it is done properly, a paternity acknowledgement "is equivalent to an adjudication of parentage of a child and confers upon the acknowledged father all the rights and duties of a parent.[43] Unless parental rights are terminated, the parent-child relationship established by acknowledgment applies for all purposes.[44] An acknowledgment is void if it (1) states another man is a presumed father, unless the presumed father has filed a denial of paternity; (2) states that another man is an acknowledged or adjudicated father; or (3) falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child.[45] These limitations prevent an acknowledgment from establishing paternity when there is a presumed father, an adjudicated father, or a prior acknowledgment naming another father.

Unmarried parents usually sign the affidavit at a birthing hospital, a birthing clinic, or a home under the care of a midwife shortly after the birth of their child. A paternity acknowledgment form can also be obtained from county health departments, the Division of Child Support (DCS), and Community Services Offices. Parents should be provided with written and oral information about the legal consequences of signing the paternity acknowledgment form before signing the form. If the mother is married to another man during the pregnancy, a paternity acknowledgment will not be valid unless the husband signs a denial of paternity.[46] If the affidavit and denial are not filed with the Department of Health within 10 days of the child's birth, the mother's husband will be named as the father on the birth certificate.

Status of Minors

RCW 26.26.315(4) provides that "[a]n acknowledgment or denial of paternity signed by a minor is valid if otherwise in compliance with this chapter." Unlike a judicial proceeding to adjudicate paternity, there are no provisions for a guardian or guardian ad litem to act on behalf of a minor. Minors, however, can bring a court action to rescind the acknowledgment anytime before the minor's 19th birthday.[47] This contrasts with the rescission period for adult signatories, who are limited to 60 days.[48]

Effective Date of an Acknowledgement

A paternity acknowledgment takes effect on the birth of the child or the filing of the document with the state registrar of vital statistics, whichever occurs later.[49] Although an acknowledgment can be signed and filed with the registrar of vital statistics before the child's birth, it does not become effective until *after* the child's birth.[50] An acknowledgment filed after the child's birth becomes effective immediately.[51]

A12, Father's Age Group by Place of Residence (2007), *available at* http://www.doh.wa.gov/ehsphl/chs/chs-data/birth/bir_VD.htm.

38 RCW 26.26.300. *See also* model UPA 2000 § 301.

39 RCW 26.26.305(d). *See also* model UPA 2000 §302(4).

40 RCW 26.26.630(2)(a). *See In re Q.A.L.,* 146 Wn. App. 631, 191, P.3d 934(2008) (child permitted to challenge a paternity acknowledgment without a time limit when genetic testing showed that the acknowledged father was not the child's biological father).

41 RCW 26.26.355; *see also* model UPA 2000 § 312(a).

42 RCW 26.26.320(1).

43 *Id.; see also* model UPA 2000 § 305(a). Per RCW 26.26.305, an acknowledgment of paternity must state that the child whose paternity is being acknowledged (1) does not have a presumed father, or has a presumed father whose full name is stated; and (2) does not have another acknowledged or adjudicated father.

44 RCW 26.26.111.

45 RCW 26.26.305(2).

46 *Id.*

47 RCW 26.26.330.

48 *Id.*

49 RCW 26.26.315.

50 *Id.*; see also model UPA 2000 § 304. Where the acknowledgment of paternity is filed before the child's birth, genetic testing will generally not have occurred. This underscores the reasoning for not requiring genetic testing but addressing non-testing in other ways.

51 A man who signs a paternity acknowledgement acquires the

Rescission of the Acknowledgment

Federal law requires a "no fault" or "cooling-off" period within which a parent can recant the acknowledgment.[52] An adult signatory of an acknowledgment filed in Washington may rescind[53] an acknowledgment of paternity by commencing a court proceeding to rescind before the earlier of(1) Sixty days after the effective date of the acknowledgment..., as provided in RCW 26.26.315; or
(2) The date of the first hearing in a proceeding to which the signatory is a party before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.[54]

The 60-day rescission period will be shortened if a signatory participates in a hearing involving the child before the rescission period ends.[55] This includes show cause hearings in domestic violence proceedings, dependency actions, and other family law actions. As explained above, minor signatories to an acknowledgment can rescind it anytime on or before the signer's 19th birthday.[56]

Challenge to the Validity of the Acknowledgment

Federal law limits the permissible grounds to challenge an acknowledgment after the rescission period has expired.[57] A signed voluntary paternity acknowledgment can only be challenged in court on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the challenger.[58] Further, the legal responsibilities, which include child support obligations, cannot be suspended during the challenge except for good cause.[59] These federal requirements are mirrored in the model UPA 2000 and codified in Washington law.[60] Each basis to challenge a voluntary acknowledgment is a question of fact decided under state law.

Presuming an acknowledgement is successfully challenged, paternity can only be disestablished through genetic testing. RCW 26.26.600(1) provides that "[t]he parentage of a child having …an acknowledged father may be disproved only by admissible results of genetic testing excluding that person as the parent of the child or identifying another man as the father of the child."[61] While states have all adopted different statutes of limitation for challenging an acknowledgment or denial of paternity, a Washington signatory must file an action to challenge an acknowledgement (or denial) within four years after the date of filing the acknowledgment (or denial) with the registrar of vital statistics.[62] The statute of limitations will end before the child's fourth birthday if the acknowledgment is filed prior to the birth of the child.[63] The usual and first line of defense when an acknowledgment or denial is challenged is the limitation period, which must be accurately calculated.[64] An exception to the four year statute of limitations exists if the acknowledgment is inconsistent with genetic test results. When this occurs, the child is not bound by the acknowledgment and can challenge it at anytime.[65]

Procedure for Rescission or Challenge

An acknowledgement or denial of paternity can only be rescinded judicially.[66] The process for doing so is set forth at RCW 26.26.340, which provides in pertinent part:

1) Every signatory to an acknowledgment of paternity and any related denial of paternity must be made a party to a proceeding to rescind or challenge the acknowledgment or denial,

2) For the purpose of rescission of, or challenge to, an acknowledgment...of paternity, a signatory submits to per

rights and responsibilities of a parent even when the child is not alive at birth. RCW 26.26.315. On the other hand, an alleged father [person claimed to be the father] cannot be established as the legal father unless a paternity action is filed during the life of the child. RCW 26.26.525; RCW 26.26.550; *see also* model UPA 2000 §§ 606, 611.

52 42 U.S.C. § 666(a)(5)(D)(ii).

53 Note that, as used here, the father is attempting to rescind his *acknowledgment* of paternity; this is not a method of rescinding or disestablishing paternity itself. The Administrative Office of the Courts has developed mandatory form pleadings that reflect this: "The result of this proceeding will not establish or disestablish the paternity of the acknowledged father; it will only establish whether the Acknowledgment of Paternity may be rescinded (withdrawn)." Admin. Office of the Courts, *Petition for Rescission of Acknowledgment of Paternity*, *available at* http://www.courts.wa.gov/forms.

54 RCW 26.26.330. *See also* model UPA 2000 §§ 304, 307.

55 RCW 26.26.330(1)(b).

56 *See* RCW 26.26.330.

57 42 U.S.C. § 666 (a)(5)(D)(iii).

58 *Id.*

59 *Id.*

60 *See* RCW 26.26.335; RCW 26.26.340; model UPA 2000 § 308. Section 308 (RCW 26.26.335) provides that

"(1) After the period for rescission under RCW 26.26.330 has expired, a signatory of an acknowledgment...of paternity may commence a proceeding to challenge the acknowledgment...only:
(a) On the basis of fraud, duress, or material mistake of fact; and
(b) Within four years after the acknowledgment...is filed with the state registrar of vital statistics.
(2) A party challenging an acknowledgment...of paternity has the burden of proof."

61 *See also* model UPA 2000 § 631(a).

62 RCW 26.26.335(1)(b). *See generally* Paula Roberts, *Voluntary Paternity Acknowledgment: An Update of State Law* Table 3 (2006) (outlining the various statutes of limitation), *available at* http://www.clasp.org/publications/voluntary_paternity_update.pdf.

63 RCW 26.26.315(2).

64 RCW 26.26.540(1). *Cf.* model UPA 2000 § 609(a).

65 RCW 26.26.630(2)(a).

66 RCW 26.26.330.

sonal jurisdiction of this state by signing the acknowledgment..., effective upon the filing of the document with the state registrar of vital statistics.

3) Except for good cause shown, during the pendency of a proceeding to rescind or challenge an acknowledgment... of paternity, the court may not suspend the legal responsibilities of a signatory arising from the acknowledgment, including the duty to pay child support.

4) A proceeding to rescind or to challenge an acknowledgment...of paternity must be conducted in the same manner as a proceeding to adjudicate parentage under RCW 26.26.500 through RCW 26.26.630.

5) At the conclusion of a proceeding to rescind or challenge an acknowledgment...of paternity, the court shall order the state registrar of vital statistics to amend the birth record of the child, if appropriate.[67]

Effect of Pre-July 1, 1997, Acknowledgements

As noted above, Washington permitted fathers to acknowledge paternity before this became a federal child support program mandate. However, many changes were made to Washington's acknowledgement laws to comply with federal requirements.[68] Pre-1997 versions of former RCW 26.26.040(e) provide that paternity acknowledgments create a rebuttable presumption of paternity. As a result, the legal effect of acknowledgements filed before July 1, 1997, differs markedly from those filed on or after July 1, 1997. The Legislature enacted additional provisions not contained in the model UPA 2000 to address these differences.

RCW 26.26.370 provides as follows:

1) RCW 26.26.300 through 26.26.375 applies to all acknowledgments of paternity executed on or after July 1, 1997.

2) A man who executed an acknowledgment of paternity before July 1, 1997, is rebuttably identified as the father of the child named therein. Any dispute of the parentage, custody, visitation, or support of the child named therein shall be determined in a proceeding to adjudicate the child's parentage commenced under RCW 26.26.500 through 26.26.630.

Although RCW 26.26.370(1) was enacted in 2002, it made UPA acknowledgement laws retroactive to July 1, 1997. The Legislature did so to preserve the distinction between binding and nonbinding acknowledgments under former laws. Statutes describing the legal affect of acknowledgments do not apply to acknowledgments filed before July 1, 1997.[69] Men who executed a paternity acknowledgment prior to this date are "rebuttably identified" fathers whose parental status can be rebutted or ratified judicially. In order words, a man who executed a paternity acknowledgment prior to July 1, 1997, has the status of an "alleged father" rather than the status of an adjudicated father.

Child Custody and Visitation (Parenting Plans/Residential Schedules) and Child Support

The paternity acknowledgment program under model UPA 2000 has no provisions for custody, visitation, or child support. Once the period for rescission has ended, these issues can be addressed in a judicial proceeding.[70] RCW 26.26.375 clarifies that the mother and acknowledged father have access to the courts to resolve legal issues associated with parenthood. To aid this process, the Administrative Office of the Courts (AOC) has developed user-friendly, mandatory form pleadings that track the requirements of this provision. These forms can be found at http://www.courts.wa.gov/forms/.

DCS provides child support establishment and enforcement services whenever public assistance (including foster care) is expended for a child or when a parent or person with whom the child resides requests services.[71] Support enforcement services are not available to persons who have wrongfully deprived the legal custodian of custody.[72] If there is no court order establishing a child support obligation, DCS will establish the obligation administratively.[73] Support enforcement services do not include obtaining parenting plans to resolve custody/visitation disputes. A mother or acknowledged father wishing to obtain a parenting plan is required to commence an action on his or her own in court.

§ 33.2c Judicial Establishment of Parentage

Superior courts of this state are authorized to adjudicate par

67 Changing the child's surname should be based on the best interests of the child. *Daves v. Nastos*, 105 Wn.2d 24, 711 P.2d 314(1985). Most notably, a valid acknowledgement conclusively establishes paternity instead of creating a rebuttable presumption of paternity.

68 Compare RCW 26.26.320 and former RCW 26.26.040(e) (1997), which provide that paternity acknowledgments conclusively establish paternity if not rescinded within 60 days, with prior versions of RCW 26.26.040(e).

69 RCW 26.26.370(1).

70 RCW 26.26.375.

71 RCW 74.20.040. DCS provides support enforcement services to a parent or other person residing with the child who does not have legal custody so long as that person has not wrongfully deprived another of custody.

72 RCW 74.20.065; WAC 388-14A-3370.

73 RCW 74.20A.055.

entage actions.[74] Venue is in the county where (1) the child resides or is found; (2) the respondent resides if the child does not reside in this state; or (3) the probate of the estate of a pre

sumed or alleged father has been commenced.[75] A parentage proceeding can be joined with other family law proceedings including a dependency action, an adoption action, or an action to terminate parental rights.[76] A parentage proceeding can also be joined with a probate action or other appropriate proceeding.[77] When a parentage proceeding is joined with another type of action, the court is required to follow the UPA.[78]

Typically, parentage is only established judicially when the identity of the biological father is unclear or parentage is otherwise disputed. The paternity acknowledgment program has significantly reduced the number of parentage actions that are filed in court. Pattern forms approved by the AOC must be used to establish parentage.[79] As with child custody issues between unmarried parents, these forms are available on-line from the AOC (http://www.courts.wa.gov/forms/) or can be purchased from the court clerk.

Deputy prosecuting attorneys will establish parentage on behalf of DCS when this is necessary to obtain a child support order. DCS will refer a case to the prosecuting attorney when the child is being supported by public assistance, including foster care benefits, or a parent requests support enforcement services.[80]

§ 33.2c(i) Standing to Maintain Parentage Proceedings

The UPA grants standing to maintain a parentage action to (1) the child; (2) the person who has established a parent-child relationship with the child; (3) a person whose parentage of the child is to be adjudicated; (4) the DCS; (5) an authorized adoption agency; (6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding; and (7) an intended parent under a surrogate parentage contract.[81]

§ 33.2c(ii) Necessary Parties to Parentage Proceedings

The following individuals must be joined as parties to parentage proceedings: (1) the parent who has established a parent-child relationship with the child; (2) the person whose parentage is to be adjudicated; (3) an intended parent under a surrogate parentage contract; and (4) the child if required by the statute. If the child is made a party to the action, the child must be represented by a guardian ad litem.[82] A parent of the child cannot represent the child as the guardian or in any other capacity. [83]

§ 33.2c(iii) Four-Year Time Limit When There is a Presumed Parent or Acknowledged Father

When there is a presumed parent based on marriage, registered domestic partnership, or the holding out provision,[84] the presumed parent, mother, or another individual seeking to adjudicate the parentage of the child must commence the action within four years of child's birth.[85] Professor Melanie Jacobs has explained that the time limit in the model UPA 2000 is intended to ensure "… that the best interests of the child are met, by preserving an intact parent-child relationship, while providing the legal but nonbiological father with a reasonable amount of time to disestablish parentage if circumstances warrant."[86] It also is intended to create stability for the child. Washington State courts and the legislature have similarly recognized the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent.[87] In cases commenced more than two years after the birth of a child, the child must be made a party to the action.[88]

A proceeding to disprove the parent-child relationship between a child and the child's presumed parent may be maintained at anytime if the court determines that (1) the presumed parent

74 RCW 26.26.031.
75 *See* RCW 26.26.520.
76 RCW 26.26.545.
77 *Id.*
78 *McKinnon v. White*, 40 Wn. App. 184, 193, 698 P.2d 94 (1985).
79 RCW 26.26.065.
80 RCW 74.20.040.
81 RCW 26.26.505; *See also* model UPA 2000 § 602.
82 RCW 26.26.510.
83 RCW 26.26.555.
84 *See* RCW 26.26.116.
85 RCW 26.26.530(1); *See also* model UPA 2000 § 607. DCS is considered "another individual" and likewise must commence an action within the statue of limitations when there is a presumed father. *In re Parentage and Support of M.K.M.R.*, 148 Wn. App 383, 199 P.3d 1038 (2009).
86 Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore:an Argument Against Paternity Fraud Claims,* bepress Legal Series, working paper 151 (2004), *available at* http://law.bepress.com/expresso/eps/151/.
87 *See McDaniels v. Carlson,* 108 Wn.2d at 310, 738 P.2d 254 (1987). The comment to the model UPA 2000 states that subsection (b) is open ended if the mother did not live with the presumed father or engage in sexual intercourse with him at the probable time of conception. This distinction is based on the belief that a two year period allows an adequate period to resolve the status of a child within the context of an intact family unit; a longer period may have severe consequences for the child in that circumstance. But, if the family is not intact and the presumed father neither cohabited with the mother at the time of conception nor treated the child as his own, the non-paternity of the presumed father is generally assumed by all the parties as a practical matter. It is inappropriate to assume a presumption known by all those concerned to be untrue. Model UPA 2000 § 607.
88 RCW 26.26.530(1).

and the other parent did not cohabitate or engage in sexual intercourse during the probable time of conception and (2) the presumed parent never held out the child as his or her own.[89]

In these situations (e.g., presumed parent incarcerated for 20 years), there is usually no biological or social tie to preserve. [90]

The four year statute of limitations does not apply to the child in some situations. The child is not bound by a parentage order and can attack it at anytime if: (1) the child was not joined as a party;[91] (2) the order is not based on a finding that it is consistent with genetic test results;[92] and (3) the child was not represented by a guardian ad litem.[93]

§ 33.2c(iv) No Limitation: Child without Presumed or Adjudicated Parent, or Acknowledged Father

A proceeding to adjudicate parentage *may occur at any time* during the life of the child where there is no presumed or adjudicated parent, and no acknowledged father.[94] A parentage action can be commenced even after the child is an adult or after an earlier proceeding to adjudicate parentage has been dismissed based on the statue of limitations then in effect.[95] A parentage action can also be commenced after an earlier action is dismissed for want of prosecution since all such dismissals are without prejudice, and any recitals to the contrary are void.[96] When the Legislature restricted parentage actions to the life of the child, it codified *Gonzales v. Cowen*, 76 Wn. App. 277, 884, P.2d 19 (1994). In *Gonzales*, the court ruled that a paternity action can only be brought so long as a child can be made a party, which is only possible before the child dies.[97] As a result, the alleged father in *Gonzales* was unable to reap any monetary benefit through his deceased child when he never took any responsibility for supporting or raising his child during the child's lifetime.[98]

§ 33.2c(v) Authority to Deny Genetic Testing—Presumed Parent's Parentage by Estoppel

The court is authorized to deny genetic testing of the mother or father, the child, and the presumed or acknowledged father if the court determines that the conduct of any of the parties estops any of them from denying parentage and it would be inequitable to disprove the parent-child relationship between the child and the presumed or acknowledged parent.[99] The court bases its decision on the best interest of the child, which includes consideration of at least eight different factors.[100] Genetic testing may also be denied when a child is conceived through assisted reproduction.[101]

This provision allows the court to protect the child's relationship with his or her presumed or acknowledged parent, when this is in the best interest of the child whether or not there is a biological tie between the two. A decision to deny genetic testing is a two-step proceeding. First the court determines whether there are equitable grounds to deny genetic testing. Second, assuming equitable grounds are present, the court establishes the presumed or acknowledged parent as the child's legal adjudicated parent.[102]

The comment to section 608 of the model UPA 2000 provides additional insight. The comment explains that the most common situation to apply estoppel is when a man knows that a child is not, or may not be, his genetic child, but the man has affirmatively accepted his role as the child's father and both the mother and the child have relied on that acceptance. Conversely, the father may have relied on the mother's acceptance of him as the child's father and may be stopped from denying parentage.[103]

In Washington, the doctrine of parentage by estoppel is broader because it applies to presumed parents and acknowledged fathers. As explained in section 31.2b(i) above, presumed parents include not only relationships that arise through marriage, but also those that arise through domestic partnership or by living with the child for the first two years of the child's life and holding the child out as one's own. [104] In appropriate circumstances, the court may deny genetic testing and find, based on clear and convincing evidence, the presumed parent or acknowledged father to be the parent of the child.[105] Washington courts have long recognized that stable family relationships outweigh the need for accurate determinations of parentage, when this is in the child's best interest.[106] Because a child has

89 *Id.* at (2).
90 *Id.*
91 RCW 26.26.555.
92 RCW 26.26.630(2)(b).
93 *Id.* at (2)(c).
94 RCW 26.26.525.
95 *Id.*
96 RCW 26.26.620.
97 *Id.*
98 RCW 26.26.525 implements a federal child support program requirement that states have laws to "permit the establishment of the paternity of a child *at any time* before the child attains 18 years of age." 42 U.S.C. § 666(a)(5)(A)(I); model UPA 2000 § 606, Comment. It differs from the model UPA 2000 by limiting paternity actions to the life of the child. Model UPA 2000 § 606.
99 RCW 26.26.535(1); *See also* model UPA 2000 § 608.
100 RCW 26.26.535(2).
101 RCW 26.26.535(1)(b).
102 *See also* model UPA 2000 §§ 607(a), 608.
103 Model UPA 2000§ 208 Comment.
104 RCW 26.26.116.
105 RCW 26.26.535(4), (5).
106 *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987); *In re Marriage of Thier*, 67 Wn. App. 940, 841 P.2d 794 (1992); *In re*

the right to assert an equitable ground for denying genetic testing as an affirmative defense, the child must be represented by a guardian ad litem in any proceeding involving a motion for genetic testing of the child, the child's mother or father and the presumed or acknowledged parent of the child.[107]

§ 33.2c(vi) Self Genetic Testing: Admissibility

Many individuals obtain "over the counter" paternity genetic testing without informing the other parent or obtaining court approval. The UPA addresses this occurrence. RCW 26.26.570(3) provides that: "If a child has a presumed or adjudicated parent or an acknowledged father the results of genetic testing are inadmissible to adjudicate parentage unless performed (a) [w]ith the consent of both the person with a parent-child relationship with the child and the presumed or adjudicated parent or an acknowledged father; or (b) [u]nder an order of the court under RCW 26.26.405."[108] This provision prevents a person from using the results of a genetic test to change the legal relationship between parent and child, when the court's authority to determine whether genetic testing is appropriate has been bypassed.[109]

When there is a presumed parent or an acknowledged father, the child, as a permissible party to the proceeding, has the opportunity to object to the court's consideration of genetic test results even when the person with a parent-child relationship to the child and presumed parent or acknowledged father have consented.[110] The court considers whether the conduct of the person with the parent-child relationship to the child and presumed parent or acknowledged father estops the party from denying parentage and if it would be inequitable to disprove the parent-child relationship.[111]

§ 33.2c(vii) Genetic Testing During Dependency Action

Genetic testing may occur after a dependency action is filed. When genetic testing excludes a presumed or adjudicated parent, or acknowledged father from being the biological parent, the nonbiological parent will be dismissed from the dependency action. The presumed or adjudicated parent, or acknowledged father will remain the child's legal parent unless parentage is disestablished judicially.

Conversely, the biological parent cannot be named on the birth certificate until his or her parentage is established legally. The prosecuting attorney may establish parentage based upon a proper referral for paternity establishment from DCS. Generally, DCS may make a referral where there is a public assistance assignment or when DCS receives a written request for parentage establishment services from a party or child's custodian. A deputy prosecuting attorney assigned to represent DCS will then pursue parentage establishment in superior court and seek a judicial order authorizing release of any genetic testing results to the dependency court.

The state's attorney assigned to the dependency case and the local prosecuting attorney assigned to represent DCS are encouraged to confer about a parentage issue arising in the dependency court. When parentage is in question, the dependency attorney can obtain a juvenile court order requiring that the parties cooperate with parentage establishment while reserving issues related to the child's residential placement to the dependency court as required under the dependency statutes. A deputy prosecuting attorney assigned to represent DCS will pursue parentage establishment.

Generally, DCS will not disestablish parentage when there is a legally presumed parent. DCS makes an exception when disestablishment is necessary to obtain child support. This occurs most often when the statute of limitations is not a bar, the presumed parent cannot be located, and the biological parent is available to pay child support.

Because the UPA has a four-year statute of limitations for challenging the status of an acknowledged father,[112] or a presumed parent,[113] a nonbiological parent may have continuing obligations as the child's legal parent, including the obligation to pay child support. These obligations do not end after the nonbiological parent is dismissed from the dependency action. Until the legislature addresses differences in how parentage is defined in dependency actions, RCW 13.04.011(5), and under the UPA, RCW 26.26.011, this situation and its associated difficulties will continue.

§ 33.2d State Registered Domestic Partnerships

The Registered Domestic Partnership Act, enacted in 2007, gives domestic partners rights and responsibilities similar to those of married spouses.[114] Same sex couples, or different sex

Marriage of T., 68 Wn. App. 329, 842 P.2d 1010 (1993).

107 RCW 26.26.535(3).

108 *See also* model UPA 2000 § 621(c).

109 *See* RCW 26.26.535 (disallows genetic testing when not in the best interest of the child).

110 RCW 26.26.535(1) and (3).

111 *Id.* at (1).

112 RCW 26.26.540.

113 RCW 26.26.530(1). RCW 26.26.530(2) provides,

> A proceeding seeking to disprove the parent-child relationship between a child and the child's presumed parent may be maintained at any time if the court determines that the presumed parent and the person who has a parent-child relationship with the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception and the presumed parent never held out the child as his or her own.

114 *See* RCW 26.60.

couples in which at least one partner is 62-years-old, may become registered domestic partners.[115] Because the Act made no changes to the UPA, however, it had little impact on parentage determinations. The non-biologically-related domestic partner was required to adopt the child to become the child's

legal mother or father. The rights of domestic partners were substantially expanded in 2009 with the passage of E2SSB 5688[116]. The legislation requires terms such as "spouse," "marriage," "marital," "husband," and "wife" to be interpreted to apply equally to state registered domestic partnerships and to be construed as gender neutral where necessary to implement the Act.[117] The legislation amended many, many, chapters of the Revised Code of Washington and was codified in the UPA at RCW 26.26.914.

Although RCW 26.26.914 directs the court to make gender-specific terms such as "husband" and "wife" gender neutral, the statute offers no assistance on applying this directive to the UPA, which is premised on the unique roles of males and females in the procreation process. The language in RCW 26.26.914 is very difficult to apply to the UPA, because many of the terms in RCW 26.26.914 do not match the terms used in the Act.[118]

The passage of ESSHB 1267 in 2011 has provided much needed clarification.[119] The acknowledgement process is only available to the mother of the child and "a man claiming to be the *genetic* father of the child"[120]. Because it is biologically impossible for same sex couples to conceive a child who is genetically related to both of them, only persons in opposite sex domestic partnerships can establish parentage through the acknowledgment process.

A husband is presumed to be the father of any children born during the marriage.[121] This marital presumption may be applied differently to same sex female domestic partnerships than to same sex male domestic partnerships. Although the marital presumption statute does not expressly require the spouse or domestic partner to give birth to the child in order for the presumption to apply, it is necessarily implied.[122] In a female same-sex registered domestic partnership, the non-birthing partner becomes a presumed parent at the time of the birth or by living with the child for the first two years of the child's life and holding out the child as her own.[123] In a male same-sex registered partnership, neither parent can give birth as anticipated by RCW 26.26.116. Although male same-sex partners are unlikely to be considered a presumed father at the time of birth, they can become a presumed parent by living with the child for the first two years of the child's life and holding the child out as their own.[124] Both male and female same-sex

registered domestic partners can become parents of children conceived through assisted reproduction when there is a signed writing or other evidence of this intent.[125] The surrogate parenting provisions of the UPA apply to both male and female same-sex registered domestic partnerships.

A same-sex partner or registered domestic partner may also have rights as a de facto parent. A de facto parent stands on legal parity with the biological or adoptive parent.[126] A domestic partner or other person living in the same household as the child may become a de facto parent if that person functions in a parental role for a sufficient length of time without compensation and the legal parent fosters the parent-child relationship.[127] A de facto parent is entitled to parental privileges not as a matter of right but based on the best interests of the child.[128]

§ 33.2e Assisted Reproduction

"Assisted reproduction" means a method of causing pregnancy other than sexual intercourse and includes artificial insemination, egg donation, and embryo donation.[129] Generally, if the parties to assisted reproduction have an agreement that is in a signed record, that agreement determines the parent-child relationship. A donor is not the parent of a child unless the donor and the person intending to be the parent agree to this arrangement in a signed writing.[130] A person, who provides gametes for assisted reproduction or consents to assisted reproduction in a signed record with the intent to be parent of the child, is the parent of the resulting child.[131] A couple who intend to be parents of a child conceived through assisted reproduction must consent in a signed record.[132]However, the couple can be estopped from denying parentage, even if they did not give their written consent, if they reside with the child and openly hold the child out as their own.[133] A spouse or domestic partner of a man or woman who gave birth through assisted reproduction must challenge parentage within four years of

115 RCW 26.60.030.
116 Laws of 2009, ch. 521.
117 *Id.*
118 *Cf.* RCW 26.26.914 with 26.26, RCW.
119 Laws of 2011, ch. 283.
120 RCW 26.26.300.
121 RCW 26.26.116.
122 *Id.*
123 *Id.*
124 *Id.* at (2).
125 RCW 26.26.715 and 720.
126 *In re L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005).
127 *Id.*
128 *Id.* at 708–709.
129 RCW 26.26.011(4).
130 RCW 26.26.705.
131 RCW 26.26.710.
132 RCW 26.26.715.
133 *Id.*

learning of the birth of the child.[134] The child must be made a party to the action if the child is more than two years old. [135] A woman who gives birth to a child conceived through assisted reproduction under the supervision of a licensed physician is considered the parent of the child unless an agreement between the birth mother and the ovum donor states otherwise.[136]

§ 33.3 Conclusion

The above overview of the UPA is necessarily limited in scope. The model UPA 2000 comments and out-of-state cases construing the UPA are additional resources that should not be overlooked. These aids to construing the UPA are particularly relevant because courts are required to consider "…the need to promote uniformity of the law [UPA] with respect to its subject matter among states that enact it."[137]

134 RCW 26.26.720.
135 *Id.*
136 RCW 26.26.735.
137 RCW 26.26.903.

Commonly Used Acronyms

AG/AAG	Attorney General/Assistant Attorney General
ASFA	Adoption and Safe Families Act
ARY	At-Risk Youth
CA	Children's Administration
CAPTA	Child Abuse Prevention and Treatment Act
CASA	Court-Appointed Special Advocate
CHINS	Child In Need of Services
CPS	Child Protective Services
CPT	Child Protection Team (DSHS)
CRC	Crisis Residential Center
CWS	Child Welfare Services
DCFS	Department of Social and Health Services
FRA	Family Reconciliation Act
FRS	Family Reconciliation Services
FVS	Family Voluntary Services
GAL	Guardian ad Litem
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
ISP/ISSP	Individual Service Plan/Individual Service and Safety Plan
JJDPA	Juvenile Justice and Delinquency Prevent Act of 1974
LICWAC	Local Indian Child Welfare Advisory Committee
MDT	Multi-Disciplinary Team
OPD	Office of Public Defense
SCRAP	Society of Counsel Representing Accused Persons
S-CRC	Secure Crisis Residential Center
SS-CRC	Semi-Secure Crisis Residential Center
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
UPA	Uniform Parentage Act
VPA	Voluntary Placement Agreement
WSICWA	Washington State Indian Child Welfare Act

Resource Directory

Washington State CASA
http://www.washingtonstatecasa.org
603 Stewart St, #206
Seattle, WA 98101
(206) 667-9716

National CASA
http://www.nationalcasa.org/
100 West Harrison
North Tower, Suite 500
Seattle, WA 98119
(800) 628-3233

Association of Administrators on the ICPC
http://aaicama.org/cms/

National Council of Juvenile and
Family Court Judges (NCJFCJ)
http://www.ncjfcj.org/
P.O. Box 8970
Reno, NV 89507
(775) 784-6012

Center for Children & Youth Justice
http://www.ccyj.org/
615 Second Ave., Suite 275
Seattle, WA 98104
(206) 696-7503

Partners for Our Children
http://www.partnersforourchildren.org
UW Mailbox 359476
Seattle, WA 98195-9476
(206) 221-3100

Washington Judicial Assistance Services Program
Confidential Counseling Service for Judicial Officers
(206) 727-8265

Washington State Bar Association
www.wsba.org
Washington State Bar Association
1325 Fourth Ave., Ste. 600
Seattle, WA 98101-2539
(206) 443-WSBA (9722)
(800) 945-WSBA (9722)

Washington State Commission on Judicial Conduct
http://www.cjc.state.wa.us/

American Bar Association Judicial Division
http://www.abanet.org/jd/
ABA Judicial Division
321 N. Clark Street
Mail Stop 19.1
Chicago, Illinois 60654-7598
(800) 238-2667 x5705

Washington State Institute for Public Policy
Child Welfare Division
http://www.wsipp.wa.gov/topic.asp?cat=9
110 Fifth Avenue SE, Suite 214
P.O. Box 40999
Olympia, WA 98504-0999
(360) 586-2677

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T. George et al., Admin. Office of the Courts, Timeliness of Dependency Case Processing in Washington State: Annual Report, 2010 (2011), *available at* http://www.courts.wa.gov/wsccr/docs/Timeliness%20of%20Dependency%20Case%20Processing%20Annual%20Report%202010.pdf.

Mark Chaffin & Bill Friedrich, *Evidence-based Treatments in Child Abuse and Neglect,* 26 Children and Youth Serv. Rev. 1097 (2004).

Nancy Theonnes, *What We Know Now: Findings from Dependency Mediation Research*, 47 Fam. Ct. Rev. 21 (2009).

Washington State Institute for Public Policy: http://www.wsipp.wa.gov/topic.asp?cat=9.

Partners for Our Children: http://www.partnersforourchildren.org/knowledge-center.

An Overview of State and Federal Time Markers

March 18, 2009

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Court Improvement Training Academy

University of Washington School of Law

Time Markers Based on Birth Date

If the child is less than 72 hours old and voluntarily transferred pursuant to RCW 13.34.360

- DSHS must assume custody of newborns[1] voluntarily transferred under RCW 13.34.360 within 24 hours after receipt of notification. RCW 13.34.360(3)(c).

If the child is 16–23 years old

- Services may be available to youth age 18–21 who "age out of the system" under the Chafee Foster Care Independence Program. 42 U.S.C. § 677.

- Under the Chaffee Program, even youth who have been adopted following their 16th birthday may be eligible, and federal law allows states to permit participation in the educational voucher part of the program until the child reaches the age of 23. 42 U.S.C. § 677(i)

If the Child is an Indian Child[2] under the Indian Child Welfare Act

- ICWA voluntary placements are not valid prior to or within 10 days of the child's birth. 25 U.S.C. § 1913(a); RCW 13.34.245(1).

- ICWA voluntary placements may be withdrawn at anytime. 25 U.S.C. § 1913(b).

Time Markers Based on Placement

- If a parent has no contact with a child for a period of three months, a rebuttable presumption arises that the child is abandoned. RCW 13.34.030(1).

$ States are not eligible for Title IV-E reimbursement of foster care maintenance payments for voluntary placements that exceed 180 days absent a judicial finding that such a placement is in the child's best interest. 42 U.S.C. § 672(e).

$ The state may be limited in its ability to claim reimbursement for "Time limited family reunification services" under Title IV-B of the social security act after the child has been in care as defined in federal law for more than 15 months. 42 U.S.C. § 629a(a)(7).

$ Title IV-E requires states to develop a plan to reduce the number of children in foster care for more than 24 months. 42 U.S.C. § 671(a)(14).

If the child was involuntarily placed:

- No contact with a child for three months creates a rebuttable presumption of abandonment. RCW 13.34.030(1).

- Notice that a child has been taken into custody under RCW 13.34 must be given to parents within 24 hours of assuming custody. RCW 13.34.062.

- Once in custody pursuant to RCW 13.34, a shelter care hearing must be held within 72 hours excluding weekends and holidays. RCW 13.34.060; RCW 13.34.065.

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1 "Newborn" is defined by RCW 13.34.360(1)(b) as "a human who is less than 72 hours old".

2 "Indian Child" is defined as any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" 25 U.S.C. § 1903(4).

- A parent who for good cause cannot attend the shelter care hearing may ask for a subsequent shelter care hearing which shall be scheduled by the court within 72 hours excluding weekend and holidays. RCW 13.34.065.

- Whenever a child is ordered removed from the home, a permanent plan must be developed within 60 from placement or at the disposition hearing, whichever occurs first. RCW 13.34.136(1). This plan must be submitted to the court 14 days prior to the scheduled hearing and any responsive reports must be submitted within 7 days. RCW 13.34.136(2).

$ Dependency cases shall be reviewed every six months from the date of placement or from entry of the disposition order, whichever is first; however, the first review shall be within 60 months of placement or 90 days of the disposition, whichever is first. 25 U.S.C. § 675(5)(B); RCW 13.34.138(1).

- ***Data Point: From 2004-8/2008, 94 percent of dependencies filed state-wide met the initial review hearing deadline.***[3]

$ A permanency planning hearing shall be held in cases where a child has remained in out of home care for at least 9 months and shall be held prior to the child being in out of home care for 12 months. 25 USC 675(5)(C); RCW 13.34.145(1)(a).

- ***Data Point: From 2004-8/2008, 82 percent of dependencies filed state-wide met the permanency planning hearing deadline.***[4]

$ Children who are placed in out of home care out of state must be visited by an agency official at least every 12 months. 42 U.S.C. § 675(5)(ii).

- Permanency goals should be achieved within 15 months of out of home care. RCW 13.34.145(1)(c).

- ***Data Point: From 2004-8/2008, 28 percent of dependencies filed state-wide met the permanency goal.***[5]

$ Absent good cause or statutory exception, if the child has been in out of home care for 15 of the last 22 months, the court shall require the department to file a termination petition. 25 USC 675(5)(E); RCW 13.34.136(3); RCW 13.34.145 (good cause exceptions).

- ***Data Point: From 2004-8/2008, 34 percent of dependencies filed state-wide met the termination petition standard.***[6]

If the Child is an Indian Child under the Indian Child Welfare Act:

- Petitions for ICW VPAs must have a validation hearing within 48 hours of filing.

  RCW 13.34.245(3).

- ICWA voluntary placements may be withdrawn at anytime. 25 U.S.C. § 1913(b).

If the child is placed on a Developmental Disability Voluntary Placement Agreement pursuant to RCW 13.34.270:

- Developmental Disability Placements must be reviewed by the court within 180 days of placement. RCW 13.34.270(1).

- Upon request for a hearing to review a Developmental Disability placement, a hearing shall be held no later than 14 days after the request. RCW 13.34.270.

- A permanency planning hearing must be held for Developmental Disability Children subject to RCW 13.34.270 between 9 and 12 months if the child is under 10 years of age and between 15 and 18 months for children over 10 years of age. Written permanent plans must be submitted by the agency 10 working days prior to any such hearing. RCW 13.34.270(5).

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3 Washington State Center for Court Research. Timeliness of Dependency Case Processing: 2008 Annual Report 8 (2008).
4 *Id*. at 10.
5 *Id*. at 16.
6 *Id*. at 13.

- Developmentally disabled placement agreements may be terminated by any party at any time. RCW 13.34.270(6).

Time Markers Based on Hearings and Other Case Events

Time Markers Based on Filing of Petition

- Fact findings on dependency petitions must be held no later than 75 days after filing. RCW 13.34.070.

- ***Data Point: From 2004-8/2008, 69 percent of dependencies filed state-wide the 75 days deadline.***[7]

Time Markers Based on Date of Shelter Care

- Records must be provided to parties prior to the shelter care hearing and within 15 days of a written request. RCW 13.34.090(4).

If the Child is an Indian Child under the Indian Child Welfare Act

- Indian Child Welfare Act cases must be transferred to tribal court upon request absent good cause or objection by the parent. 25 U.S.C. § 1911(b).

- In Indian Child Welfare Act cases the Indian Custodian and tribe have a right to intervene at any point in the proceeding. 25 U.S.C. § 1911(c).

- In Indian Child Welfare Act cases, the tribe must be notified of any involuntary proceeding 10 days prior to the hearing. If requested by the tribe, the court shall grant an additional 20 days to prepare for the hearing. 25 U.S.C. § 1912(a).

- If the tribe of the child is unknown, notice must be given to the Bureau of Indian Affairs who has 15 days from receipt of notice to attempt to notify the parent, custodian, and tribe. 25 U.S.C. § 1912(a).

Time Markers Based on Date of Fact Finding

- Shelter Care orders may be amended at any time upon a showing of change in circumstances. RCW 13.34.065(7)(a).

- If a court orders a case conference at shelter care, it must be set 30 days prior to Fact Finding. RCW 13.34.065(6)(b); .13.34.067(1).

- Service by publication must begin at least 25 days prior to the fact finding.

  RCW 13.34.080(1).

- Parties within state must be served within 15 court days prior to the fact finding.

  RCW 13.34.070(8).

- Parties outside the state must be served within 10 court days of the fact finding.

  RCW 13.34.070(8).

- Disposition shall be held immediately after fact finding or within 14 days for good cause. RCW 13.34.110(4).

- DSHS may file a petition to terminate parental rights or for a guardianship at any time following the establishment of dependency. RCW 13.34.145(10).

- Generally, to petition for termination of the parent child relationship or a guardianship, a child must be dependent for a period of at least six months. RCW 13.34.180(1)(c); RCW 13.34.231(3).

Time Markers Based on Date of Disposition

- Individual Service and Safety Plan (ISSP) is due 10 working days prior to disposition hearing. RCW 13.34.120(1).

7 *Id.*

$ If reasonable efforts are not ordered under RCW 13.34.136 and the court orders the filing of a termination petition, a permanency planning hearing shall be held within 30 days. 42 U.S.C. § 671(a)(15)(E)(i); RCW 13.34.134.

- Dependency cases shall be reviewed every six months from the date of placement or from entry of the disposition order, whichever is first, however the first review shall be within six months of placement or 90 days of the disposition, whichever is first. RCW 13.34.138(1).

• ***Data Point: From 2004-8/2008, 94 percent of dependencies filed state-wide the initial review hearing deadline.***[8]

Time Markers Based on Initiation of Drug and Alcohol Treatment

- If the court has ordered an alcohol or substance abuse diagnostic evaluation and investigation, providers must provide an initial written progress report to the court within six weeks of initiating treatment. Subsequent progress reports shall be made at three, six, and 12 months and there after every six months. RCW 13.34.174.

- If the parent ordered to undergo treatment fails to do so, the provider must report the violation within 24 hours. RCW 13.34.174(4). A show cause hearing may be held on any such violation within 10 days of a request for a hearing. RCW 13.34.176(2).

Time Markers Based on Date of Permanency Planning Hearing

- ISSP shall be submitted 10 working days prior. RCW 13.34.145(2).

- If child has been placed with foster parent or a relative for more than six months, they must receive notice of the hearing. RCW 13.34.145(3)(d).

- Subsequent permanency planning hearings must be held at least every 12 months after the initial hearing. RCW 13.34.145(5).

Time Markers Based on Date of Return Home

- If a child is returned home, casework supervision shall continue for a period of six months at which time a review hearing shall be held to consider whether further supervision is necessary. RCW 13.34.138(2)(a); RCW 13.34.145(7).

- If a child returned home as part of a dependency action is later removed from the home, a review hearing shall be held within 30 days of removal to determine the permanent plan. RCW 13.34.138(3)(c).

Time Markers Based on Date of Termination of Parental Rights

- It shall be the goal to complete adoptions within 6 months following entry of a termination order. RCW 13.34.136(3); 13.34.145(1)(c).

• ***Data Point: from 2004–8/2008, 26 percent of terminations filed state-wide met the adoption goal.***[9]

- If a child has not achieved permanence within 3 years of entry of a final termination order, the child may be eligible to petition for reinstatement. RCW 13.34.215.

- Indian Child Welfare relinquishments may be withdrawn at any time prior to entry of a final decree of termination or adoption. However, no adoption effective for at least two years may be invalidated in this manner. 25 U.S.C. § 1913.

Time Markers Based on Date of Reinstatement Petition

If a court conditionally grants a reinstatement petition, the case is continued for six months at the end of which a hearing is held and an appropriate disposition is entered. RCW 13.34.215(8)(a).

8 *Id*. at 8.
9 *Id*. at19.

WASHINGTON COURTS

DEPENDENT CHILD'S EDUCATION JUDICIAL CHECKLIST
May 9, 2006 Edition

A more comprehensive checklist and accompanying technical brief are available at www.ncjfcj.org

1. Enrollment and Attendance
- ☐ Is the child enrolled and attending school?
- ☐ Have efforts been made so the child can remain at the same school?
- ☐ Has there been a **change of school** since the last hearing? If so, **why?**
- ☐ Who is responsible for getting the child to school?
- ☐ Has the child been truant, suspended, or expelled?

2. Child's Progress
- ☐ Is the child making academic progress?
- ☐ Is the child passing the WASL?
- ☐ Is the child making social/emotional progress?
- ☐ Does the child have physical, emotional, or mental health issues that adversely affect the child's progress at school?
- ☐ Are any assessments needed?
- ☐ Does the child have special education needs?
- ☐ Does the child have an IEP or a Section 504 Plan?
- ☐ For age 14+: is there an independent living skills/transition plan (ILS)?
- ☐ For grades 9 –12: is there preparation for post-secondary education?

3. Education Decision Making Responsibility
- ☐ Who will collect and communicate child's educational history and needs?
- ☐ Who will be responsible for regular, day-to-day decision-making?
- ☐ Who will be responsible for special education needs decision-making?
- ☐ Who will monitor the child's educational progress on an on-going basis?

4. When did the Social Worker Last See the Child?

5. What can the court do to ensure the child's educational stability and success?

The Administrative Office of the Courts gratefully acknowledges the work done by the National Council of Juvenile and Family Court Judges, Casey Family Programs, and TeamChild. This checklist was developed from NCJFCJ's Technical Assistance Brief "Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed" (April 2005), in collaboration with Children's Administration, OSPI, Casey Family Programs, and TeamChild.

SHELTER CARE HEARING CHECKLIST

Persons who should always be present at the Shelter Care Hearing:

- Judge or Court Commissioner
- Parents whose rights have not been terminated, including putative fathers
- Relatives with legal standing or other custodial adults
- Assigned caseworker
- AAG or attorney for State (DCFS)
- Attorneys for parents
- GAL / CASA for child
- Attorney for the child (if appointed)
- Tribal Representative (if ICWA case)
- Court reporter or suitable technology
- Security Personnel

Persons whose presence may also be needed at the Shelter Care Hearing:

- Age-appropriate children
- Extended family members
- Foster parents – Relative placement
- Judicial case management staff
- Law enforcement officers
- Service providers
- Adult or juvenile probation or parole officer
- Other witnesses

Courts can make sure that parties and key witnesses are present by:

- Requiring quick and diligent notification efforts by DSHS.
- Requiring both oral and written notification in language understandable to each party and witness.
- Requiring notice to include reason for removal, purpose of hearing and right to counsel.
- Requiring caseworkers to encourage attendance of parents and other parties.

Filing the Petition:

- A verified Petition with Notice & Summons should be filed at or prior to the hearing.
- The Petition should be complete and accurate.
- A Motion and Order to Take Child Into Custody should be filed at or prior to the hearing.

Key decisions the Court should make at the Shelter Care Hearing:

- Have Reasonable Efforts been made to avoid removal of child from home?
- Is there a serious risk of substantial harm to the child if returned home?
- Should the child be returned home or remain in out of home placement?
- What services or Court Orders would allow the child to remain safely at home?
- Will the parties voluntarily agree to participate in such services?
- Are responsible relatives or other responsible adults available?
- Is the placement proposed by DSHS the least disruptive and most family-like setting that meets the needs of the child?
- Will the implementation of the service plan and the child's continued well-being be monitored on an ongoing basis by a GAL/CASA?
- Are restraining orders, or orders expelling an allegedly abusive parent from the home appropriate?
- Are orders needed to obtain examinations, evaluations or immediate services?
- What are the conditions\frequency of visitation?
- What consideration has been given to financial support of the child?
- What consideration has been given to continuity of the education of the child?

Additional activities at the Shelter Care Hearing:

- Inquire as to reasonable efforts to notify missing parties and relatives.
- Advise parties of their rights, including appointment of attorneys for party as needed.
- Inquire as to Native American Heritage (ICWA)
- Inquire as to any relatives who may be available for placement or visitation if child remains out of home.
- Accept response/admissions to Petition or set date for Response Hearing.
- DSHS may serve parties with copy of Petition.

Submission of reports to the Court:

- The Court should require submission of DSHS and/or law enforcement reports at least one hour prior to the preliminary protective hearing, including copies for counsel for parties.
- Reports to the Court should describe all circumstances of removal, all allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent need for removal.

The Court's written Findings of Fact and Conclusions of Law should:

- Be written in easily understandable language which allows the parents and all parties to fully understand the Court's order.
- If placement is with a relative, ensure the relative consents to jurisdiction and the Orders of the Court in writing.

If child is placed outside the home:

- Describe who is to have custody and where child is to be placed.
- Specify why continuation of child in home would be contrary to the child's welfare (as required to be eligible for federal matching funds).
- Specify whether reasonable efforts have been made to prevent placement (including a brief description of what services, if any, were provided and why placement is necessary).
- Specify the terms of visitation, including approval of other adults or relatives to supervise/facilitate visitation.

Whether or not the child is returned home:

- Provide further direction to the parties, e.g. court's expectations on future parental conduct, DSHS services and actions, visitation, status of services for child prior to adjudication.
- Notify parents to date and location of Case Conference scheduled by DSHS
- Set date and time of next Court Hearing. Shelter Care Order is limited to 30 days.

Statutory Reference

RCW 13.34.065 - Elements for Shelter Care
RCW 13.34.067 - Case Conference w/i 30 Days
RCW 13.34.115 - Hearing Open to Public

FACT FINDING HEARING CHECKLIST

Persons who should always be present at the Fact Finding Hearing:

- Judge or Court Commissioner
- Parents whose rights have not been terminated, including putative fathers
- Relatives with legal standing or other custodial adults
- Assigned caseworker
- Agency attorney
- Attorneys for parents
- GAL / CASA for child
- Attorney for child (if appointed)
- Tribal Representative (if ICWA case)
- Court reporter or suitable technology
- Security Personnel

Persons whose presence may also be needed at the Fact Finding Hearing:

- Age-appropriate children
- Extended family members
- Foster parents – Relative Placement
- Judicial case management staff
- Law enforcement officers
- Service providers
- Other witnesses

Key decisions the Court should make at the Fact Finding Hearing:

- Which allegations of the Petition have been proved or admitted, if any
- Whether there is a legal basis for continued Court and DSHS intervention.
- Whether reasonable efforts have been made to prevent the need for placement or to safely reunify the family.
- Is Child of Native American Heritage (ICWA compliance)

Additional decisions at the Fact Finding Hearing:
Disposition Hearing should occur not later than 14 days after the Fact Finding Hearing. Pending Disposition, additional decisions need to be made:

- Determine where the child is to be placed prior to Disposition Hearing.
- Order further testing or evaluation of the child or parents in preparation for the Disposition Hearing.
- Direct DSHS to promptly evaluate relatives as possible caretakers, including relatives from outside the area, and to commence ICPC process if necessary.
- Order the alleged perpetrator to stay out of the family home and have no contacts with the child.
- Direct DSHS to continue its efforts to notify noncustodial parents, including unwed fathers.
- If foster care placement is ordered, set terms for visitation, support, and other intra-family communications including both parent-child and sibling visits.
- Advise parents that their failure to substantially remedy the problems may result in filing of a Petition for Termination of parental rights.

The Court's written Findings of Fact and Conclusions of Law should:

- Accurately recite facts and circumstances which resulted in finding of Dependency or dismissal of Petition.
- State facts and circumstances which are basis for any preliminary choices for treatment and services.
- State facts and circumstances as to why a child cannot be returned home at this time, including risks to the child.
- Be written in easily understandable language so that all parties know how the Court's findings relate to subsequent case planning.
- Set a date for prompt presentation of orders reflecting decision of the court.
- If Dependency is established, set Dispositional Hearing no later than 14 days from decision.

Statutory Reference

RCW 13.34.070 - within 75 Days
RCW 13.34.110 - Rules of Evidence Apply Preponderance Std.
RCW 13.34.115 - Hearing Open to Public

DISPOSITION HEARING CHECKLIST

Persons who should always be present at the Disposition Hearing:

- Judge or Court Commissioner
- Parents whose rights have not been terminated, including putative fathers
- Relatives with legal standing or other custodial adults
- Assigned caseworker
- Agency attorney
- Attorneys for parents
- GAL / CASA for child
- Attorney for child (if appointed)
- Tribal Representative (if ICWA case)
- Court reporter or suitable technology
- Security personnel

Persons whose presence may also be needed at the Disposition Hearing:

- Age-appropriate children
- Extended family members
- Foster parents – Relative placement
- Judicial case management staff
- Law enforcement officers
- Therapists, Counselors and other Service providers
- Adult or juvenile probation or parole officer
- Other witnesses

Individual Service and Safety Plan (ISSP):
ISSP shall be submitted at least 10 days prior to the Hearing. The report should address developments and changes and recommendations for specific services for parents and child, including:

- A statement of family changes needed to correct the problems which required state intervention, with timetables for change.
- A description of services to be provided to assist the family and actions to be taken by parent to correct problems as identified.
- A Verification of Notice to Foster parents, relative placement, pre-adopt parents of Notice of Hearing and right to be heard.
- Recommendations as to parents' visitation.
- Recommendations concerning child's relationship with siblings.
- Recommendations for long term plan for the child.

Reasonable Efforts:
Verification of reasonable efforts should be documented in the ISSP, including:

- A description of the efforts made by DSHS to avoid the need for placement and an explanation why they were not successful.
- If child is not returned home, a description of the risks to the child and why the child cannot be protected if returned home.
- A description of services, compliance and progress by each parent, the child and DSHS concerning the case plan during the period of review.
- A description of the current circumstances of the child, including education, medical, dental, emotional welfare, sibling visitation, etc.
- A description of whether the child has been placed in a least restrictive setting appropriate to child's needs, including relative placement.

Key decisions the Court should make at the Disposition Hearing:

- What reasonable services need to be provided to the parents and child to resolve problems presented.
- Can the child be safely returned home?
- If out of home placement, is child in a least restrictive setting appropriate to child's needs, including relative placement?
- Has DSHS made reasonable efforts to eliminate the need for placement or prevent the need for placement?
- Has DSHS made reasonable efforts to ensure health, safety and welfare interests of the child, including education and sibling visitation?
- Are parents engaged in services, and, if not, should case be set for an early permanency planning hearing?

The Court's written Findings of Fact and Conclusions of Law should include:

- Findings as to why the child was found to be dependent, including specific health, safety or welfare risks to the child.
- Findings as to whether and why return home continues to be the long-term case goal.
- Findings as to reasonable efforts to return child and/or achieve the court approved permanent plan, with specific findings as to what actions DSHS is taking.
- Findings which identify what problems are presented by the family and order services reasonable and necessary to meet the needs of the family and move the case toward permanence.
- Be written in easily understandable language which allows the parents and all parties to fully understand what action they must take to have their children returned to their care.
- Determine whether there is a plan for monitoring the implementation of the service plan and assuming the child's continued well-being? Is a GAL/CASA available to do this?
- Specify the terms of parental visitation and sibling visitation.
- Be written in easily understandable language so that the parents and all parties fully understand the Court's order.
- Approve, disapprove or modify the case plan proposed by DSHS, as supported by the evidence.
- Set the date and time for Review Hearing, no later than 90 days from Disposition Hearing.

Statutory Reference

RCW 13.34.110 - w/i 14 Days of Fact Finding
RCW 13.34.115 - Hearing Open to Public
RCW 13.34.130 - Sibling Contact

PERMANENCY PLANNING HEARING CHECKLIST

Persons who should always be present at the Permanency Planning Hearing:

- Judge or Court Commissioner
- Age-appropriate children
- Parents whose rights have not been terminated, including putative fathers
- Relatives with legal standing or other custodial adults
- Foster parents – Relative placement
- Assigned caseworker
- Agency attorney
- Attorneys for parents
- GAL / CASA for child
- Attorney for child (if appointed)
- Representative of Tribe if ICWA case
- Court reporter or suitable technology
- Security personnel

Persons whose presence may also be needed at the Permanency Planning Hearing:

- Extended family members
- Prospective adoptive parents
- Judicial case management staff
- Therapists, Counselors and other Service providers
- Adult or juvenile probation or parole officer
- Other witnesses

Court to Decide Upon Permanent Plan(s):

- **Return Home** - the child is to be returned home, preferably with a stated time frame.
- **Adoption** - parental rights must be terminated to legally free child for adoption.
- **Guardianship** - an individual or couple will receive legal authority over the child, subject to visitation rights by parents as ordered.
- **Non-Parental Custody** - parental rights are legally restricted with establishment of new legal custodian for child. (RCW 13.34.155)
- **Long Term Placement with Relative** - the child will remain with relative on a permanent or long term basis without further legal refinement.
- **Long Term Foster Care** - the child will remain in foster care on a permanent or long term basis without further legal refinement.
- **Independent Living** - the child is instructed as to skills with which to function in society as an adult.

Individual Service and Safety Plan (ISSP)
ISSP shall be submitted at least 10 days prior to the Hearing (RCW 13.34.145(5)). The report should focus upon recommendations for a permanent plan, and include developments and changes, compliance and progress with services, and recommendations for next review period, including:

- Facts, circumstances and specific recommendations for a permanent plan for the child, including reasons for excluding higher priority options for permanence.
- Facts, circumstances and specific recommendations for alternative permanent plan(s) for the child.
- Facts and circumstances demonstrating the appropriateness of the individual or couple to serve as permanent caretaker of the child;
- A statement of family changes needed to correct the problems which required state intervention, with timetables for change.
- A description of services to be provided to assist the family and actions to be taken by parent to correct problems as identified.
- Verification of Notice to Foster parents, relative placement, pre-adopt parents of Notice of Hearing and right to be heard.
- Frequency/difficulties of parents' visitation.
- A statement of steps necessary to implement permanent plan and projected date to achieve permanence, including what progress, if any, has been made towards permanence since last review hearing.
- Recommendations concerning child's relationship with siblings.
- Recommendations as to any new or additional services to implement the permanent plan.
- A plan to ensure the stability of the placement.

When Permanent Plan is to return home, the ISSP should set forth:

- How the conditions or circumstances which led to the removal of the child have been corrected.
- The quality and frequency of recent visitation and its impact on the child.
- A plan and specific time table for the child's safe return home and follow-up supervision and services as needed.
- If return home is not likely in short term, yet reunification remains plan, facts and

circumstances showing strong and positive relationship between parents and child and likely return within 6 months.
- Facts and circumstances showing why it is too early to specify a time certain for return home.
- A plan to return home within next 6 months and for follow-up supervision and services as needed.

When permanent plan is adoption, ISSP should set forth:
- Facts and circumstances showing the grounds for termination of parental rights, including services provided to resolve specific deficiencies and the lack of compliance and/or progress with such services by parents.
- A plan to place the child for adoption.

When permanent plan is for nonparental custody or guardianship, the ISSP should set forth:
- Facts and circumstances refuting grounds for termination of parental rights or that it is not in the best interests of the child even though the child cannot be returned home.
- Facts and circumstances demonstrating the fitness of individuals proposed as nonparental custodians or guardians and the reasons why such a legal arrangement is in the best interests of the child.
- A plan to move forward with the legal process necessary to effect such a placement.
- Facts and circumstances explaining why a permanent legal custodian is not practical or appropriate;
- Facts and circumstances demonstrating the appropriateness of the foster parents and the foster parents' commitment to permanently caring for the child; and
- A plan to ensure the stability of the placement.

When permanent plan is for long-term foster care or relative care, the ISSP should set forth:
- Facts and circumstances refuting grounds for termination of parental rights or that it is not in the best interests of the child.
- Facts and circumstances demonstrating why nonparental custody or guardianship is not practical or appropriate.
- Facts and circumstances demonstrating the appropriateness of foster parents/relatives and their commitment to permanently caring for the child.
- A plan to prepare the child to live in a stable family setting at the earliest possible time and for visitation with parents and siblings.

When permanent plan includes independent living skills, the ISSP should set forth:
- A plan to prepare the child for independent living and for visitation between the child, parents and siblings.

The Court's written Findings of Fact and Conclusions of Law should:
- Be written in easily understandable language so that parents and all parties fully understand the Court's order;
- Make findings as to both compliance and progress by parents, and identify specifically what further actions the parents need to complete or demonstrate.
- Make findings by clear, cogent and convincing standard as to the permanent plan for the child.
- Make any other orders necessary to advance the permanent plan as approved.
- Approve, disapprove or modify the case plan proposed by DSHS, as the evidence directs.
- Unless case is dismissed, set date and time for next hearing 6 months out or less.

Statutory Reference

RCW 13.34.145 - w/i first 9 to 12 months
ASFA and ICWA requirements
RCW 13.34.115 - Hearing Open to Public
RCW 13.34.145(6) - Notice to Foster Parents

REVIEW HEARING CHECKLIST

Persons who should always be present at the Review Hearing:

- Judge or Court Commissioner
- Parents whose rights have not been terminated, including putative fathers
- Age-appropriate children
- Relatives with legal standing or other custodial adults
- Foster parents – Relative placement
- Assigned caseworker
- Agency attorney
- Attorneys for parents
- GAL / CASA for child
- Attorney for child (if appointed)
- Tribal Representative (if ICWA case)
- Court reporter or suitable technology
- Security personnel

Persons whose presence may also be needed at the Review Hearing:

- Extended family members
- Judicial case management staff
- Therapists, Counselors and other Service providers
- Adult or juvenile probation or parole officer
- Other witnesses
- School officials

Key decisions the Court should make at the Review Hearing:

- Whether there is a need for continued placement of a child.
- Whether the Court-approved, long-term permanent plan for the child remains the best plan for the child.
- Whether DSHS is making reasonable efforts to rehabilitate the family and eliminate the need for placement of a child.
- Whether services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- Whether the child is in an appropriate placement which adequately meets all physical, emotion and educational needs.
- Whether the terms of visitation need to be modified.
- Whether the terms of child support need to be set or adjusted.
- Whether any additional Court orders need to be made to move the case toward successful completion.
- What time frame should be set forth as goals to achieve reunification or other permanent plan for each child.

Individual Service and Safety Plan (ISSP)

ISSP shall be submitted at least 10 days prior to the Hearing. The report should address developments and changes, compliance and progress with services, and recommendations for next review period, including:

- A statement of family changes needed to correct the problems which required state intervention, with timetables for change.
- A description of services to be provided to assist the family and actions to be taken by parent to correct problems as identified.
- Verification of Notice to Foster parents, relative placement, pre-adopt parents of Notice of Hearing and right to be heard.
- Frequency/difficulties of parents' visitation.
- Projected date for return home of child or for implementation of alternative permanent plan.
- Recommendations concerning child's relationship with siblings.
- Recommendations as to any new or additional services to facilitate return home and/or implementation of the permanent plan.

Reasonable Efforts:

Verification of reasonable efforts should be documented in the ISSP, including:

- A description of services, compliance and progress by each parent, the child and DSHS concerning the case plan during the period of review.
- A description of the current circumstances of the child, including education, medical, dental, emotional welfare, sibling visitation, etc.
- A description of whether the child has been placed in a least restrictive setting appropriate to child's needs, including relative placement.
- If child is not returned home, a description of the risks to the child and why the child cannot be protected if returned home.

Court's written Findings of Fact and Conclusions of Law should include:

- Findings as to why the child remains dependent, including specific health, safety or welfare risks to the child.
- Findings as to whether and why family reunification and an end to Court supervision continues to be the long-term case goal.
- Findings as to reasonable efforts to return child and/or achieve the court approved permanent plan, with specific findings as to what actions DSHS is taking.
- Findings as to both compliance and progress by parents, and identify specifically what further actions the parents need to complete or demonstrate.
- Order additional services reasonable and necessary to meet the needs of the family and move the case toward permanence.
- Be written in easily understandable language which allows the parents and all parties to fully understand what action they must take to have their children returned to their care.
- Identify an expected date for final reunification or other permanent plan for the child.
- Make any other orders necessary to resolve the problems that are preventing reunification or the completion of another permanent plan for the child.
- Approve, disapprove or modify the case plan proposed by DSHS, as supported by the evidence.
- Unless case is dismissed, set the date and time of next hearing 6 months out or less. Permanency Planning Hearing is required at least every 12 months.

Statutory Reference

RCW 13.34.138 - Minimum every 6 Months
ASFA and ICWA requirements
RCW 13.34.115 - Hearing Open to Public
RCW 13.34.138(1) - Notice to Foster Parents
RCW 13.34.136(2)(b) - Visitation is the Right of the Parent and Child

TERMINATION CHECKLIST

Persons who should always be present at the Termination of Parental Rights Trial:

- Judge or Judge Pro Tempore
- Parents, including putative fathers
- Assigned caseworker
- AAG or attorney for State (DCFS)
- Attorneys for parents
- GAL / CASA for child
- Attorney for the child (if appointed)
- Representative of Tribe if ICWA case
- Court reporter or suitable technology
- Security personnel

The following are persons whose presence may also be needed at the Termination of Parental Rights Trial:

- Age-appropriate children whose testimony is required
- Judicial case management staff
- Foster parents – Relative placement
- Law enforcement officers
- Service providers
- Adult or juvenile probation or parole officer
- Other witnesses

Key decisions the Court should make at the Termination of Parental Rights Trial:

- Whether the statutory grounds for termination of parental rights have been established by **clear, cogent and convincing evidence**. (If **ICWA** applies - beyond a reasonable doubt standard)
- Whether termination is in the best interests of the child.
- Is Child of Native American Heritage? (ICWA compliance)

The Court's written Findings of Fact and Conclusions of Law should:

- State whether or not Petition for Termination of Parental Rights is granted.
- Make specific findings as to each of the statutory elements for termination.
- If elements of termination as established, make specific findings as to whether termination is in the best interests of the child.
- Findings should be of sufficient detail to withstand Appellate Review.
- Set a date for prompt presentation of Findings, Conclusions and Order of Termination.

Statutory Reference

RCW 13.34.180 - Elements for Termination
RCW 13.34.132 - Aggravated Circumstances
ICWA Case Higher Burden of Proof
RCW 13.34.180(1)(e) - Presumption w/i 12 mos.

VOLUNTARY CONSENT TO FOSTER CARE PLACEMENT OF INDIAN CHILDREN CHECK LIST

When to Use this Checklist:

Use if:

1. The mother wants to voluntarily place the child in the care and custody of the DSHS for further placement; or
2. The mother wants to voluntarily place the child in the legal care and custody of a nonparent; and
    a. Paternity has not been established or acknowledged; or
    b. Paternity has been established or acknowledged and the father is also consenting to placement.
3. There is only one parent, the other parent being deceased or having had his or her parental rights terminated, and that parent is seeking placement described in 1 or 2 above; or
4. The child is in the physical custody of an Indian custodian with the consent of the parent(s) or by court order and the Indian custodian is seeking placement similar to that described in 1 or 2 above.

DO NOT use if:

1. One parent does not agree to voluntary placement; or
2. The parent or Indian custodian is entering into an "agreed dependency order" or "agreed shelter care order"; and
    a. The parent or Indian custodian will be required to successfully complete certain steps prior to having the child returned; and
    b. Prior to completion of those steps the child will not be returned to the parent's or Indian custodian's custody upon that person's demand.

Mandatory Participants

- ☐ Judge or Court Commissioner and juvenile court staff
- ☐ Parent or Indian custodian (including non-consenting parents or Indian custodians)
- ☐ Assigned social worker (if there is one)
- ☐ Child (if age appropriate)

Questions

- ☐ Is the Indian child who is at issue 10 days old or older?
- ☐ Has a dependency petition been filed with regard to the child?
- ☐ Are the terms and consequences of the voluntary consent fully understood by the parent or Indian custodian?
- ☐ Do all the parties acknowledge and agree that the child shall be returned to the parent or Indian custodian's custody upon that person's demand?
- ☐ Has the child's tribe received notice of the hearing and a copy of the petition for voluntary placement.

Actions

- ☐ Reschedule court certification if the child's tribe has not received notice and a copy of the petition.
- ☐ Do not progress with the hearing and dismiss the petition for voluntary placement if:
    - There is a pending dependency on the child; The child is not yet 10 days old; or
    - Once placed, the parent or Indian custodian will not be able to have the child returned upon his or her demand.

Order

- ☐ Grant petition and certify in writing that
    - The terms & consequences of the voluntary consent have been fully explained to the parent or Indian custodian; &
    - The parent or Indian custodian fully understands the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.
- ☐ Deny petition based on invalid consent or because placement sought is not "voluntary."

Checklist for the Healthy Development of Infants & Toddlers in Foster Care[1]

From birth to age three, children experience the most rapid brain growth in their life. Brain growth and development that occur during this narrow window is heavily influenced by experiences and early relationships. These experiences and relationships lay the foundation for an infant or toddler's later learning, greatly influencing a child's chance at growing up to live a happy, healthy, and productive life.[2]

The following questions can elicit important information concerning the healthy development of infants and toddlers in foster care—an essential component of foster case review and permanency planning.

What are the MEDICAL NEEDS of this young child?

1. What health problems and risks are identified in the child's birth and medical records (e.g. low birth weight, prematurity, prenatal exposure to toxic substances)?
2. Does the young child have a medical home?
3. Are the child's immunizations complete and up-to-date?

Common Medical Diagnoses Seen in Infants in Foster Care

Fetal Alcohol Syndrome	Congenital infections-HIV, hepatitis and syphilis
Growth failure, failure to thrive	Shaken Baby Syndrome
Lead poisoning	Respiratory illness
Hearing and vision problems	

What are the DEVELOPMENTAL NEEDS of this young child?

1. What are the young child's risks for developmental delay or disability?
2. Has the young child had a developmental screening/assessment?
3. Has the young infant been referred to the Early Intervention Program?

Developmental Red Flags

Premature birth	Low-birth weight
Abuse or neglect	Prenatal exposure to substance abuse

What are the ATTACHMENT and EMOTIONAL NEEDS of this young child?

1. Has the young child had a mental health assessment?
2. Does the young child exhibit any red flags for emotional health problems?
3. Has the young child demonstrated attachment to a caregiver?
4. Has concurrent planning been initiated?

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1 Adapted from materials developed by the Permanent Judicial Commission on Justice for Children in New York. http://www.courts.state.ny.us/ip/justiceforchildren/index.shtml.

2 For more information, please visit Texans Care For Children on the web at www.texanscareforchildren.org. *See also* Joy Osofsky et al., Nat' Council of Juvenile and Family Court Judges, Questions Every Judge and Lawyer Should Ask About Infants and Toddlers in the Child Welfare System (2002); Healthy Beginnings, Healthy Futures: A Judge's Guide, ABA Center on Children and the Law et al. (Claire S. Chiamulera ed.) (2009).

Emotional Health Red Flags

Chronic sleeping or feeding disturbances	Failure to thrive
Excessive fussiness	Multiple foster care placements
Incessant crying with little ability to be consoled	

What challenges does this CAREGIVER face that could impact his or her capacity to parent this young child?

1. What are the specific challenges faced by the caregiver in caring for this infant (e.g. addiction to drugs and/or alcohol, mental illness, cognitive limitations)?
2. What are the learning requirements for caregivers to meet the infant's needs?
3. What are specific illustrations of this caregiver's ability to meet the infant's needs?

Caregiver Capacity Red Flags

Noncompliance with the child's scheduled health appointments and medication or therapeutic regimens

Caregiver substance abuse and noncompliance with psychiatric treatment and medications

Confirmed instances of child abuse or neglect

Incomplete immunizations and a child's poor growth or arrested development

- Noncompliance with the child's scheduled health appointments and medication or therapeutic regimens
- Caregiver substance abuse and noncompliance with psychiatric treatment and medications
- Confirmed instances of child abuse or neglect
- Incomplete immunizations and a child's poor growth or arrested development

What RESOURCES are available to enhance this young child's healthy development and prospects for permanency?

1. Does the young child have Medicaid, CHIP, or other health insurance?
2. Is the child receiving services under the Early Intervention Program?
3. Have the infant and caregiver been referred to Early Head Start or another quality early childhood program?

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