CALIFORNIA JUDGES BENCHGUIDES

Benchguide 200

CUSTODY AND VISITATION

2004

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APPENDIX: TITLE [illegible] COURT REQUIREMENTS

FEDERAL (Title IV-E of the Social Security Act, 42 U.S.C. 670 et seq.)	CALIFORNIA **DEPENDENCY** (WIC 300 et seq.)	 **DELINQUENCY** (WIC 602 et seq.)	RESULT IF NO FINDING
At Removal Hearings			
A. Continuance in the home of the parent or legal guardian would be contrary to the child's welfare. (42 USC 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 CFR 1356.21(c))	Substantial danger to child and no reasonable means to protect without removal. (WIC 319, WIC 11401(b)(3), CRC rule 1446(c)(1))	Continuance in the home of the parent or legal guardian would be contrary to the child's welfare. (WIC 636, and 11401(b), CRC rule 1475(c)(1))	**NEVER** eligible for Title IV-E funding (45 CFR 1356.21(c)
B. Placement and care are the responsibility of the State agency (In California, it is not the state agency, but the local child welfare agency or the probation department). (42 USC 672 (a)(2); 45 CFR 1356.71(d)(1)(iii))	Temporary placement and care is vested with the child welfare agency pending disposition or further order of court. (CRC rule 1446(c)(2))	Temporary placement and care is vested with the probation officer pending disposition or further order of court. (WIC 636 and 11401(a), CRC rule 1475(c)(2))	No funding until made
C. Reasonable efforts have been made to prevent or eliminate need for removal. (42 USC 671(a)(15); 42 USC 672(a)(1); 45 CFR 1356.21(b)(1)). This finding must be made within 60 days of the date of removal. (45 CFR 1356.21(b)(1))	Reasonable efforts have been made to prevent or eliminate the need for removal. (WIC 319, CRC rule 1446(d))	Reasonable efforts have been made to prevent or eliminate the need for removal (WIC 636, 727.4(d)(5) and 11401(b), CRC rule 1475(c)(3))	**NEVER** eligible for Title IV-E funding (45 CFR 1356.21(b)(1)(ii))
At Case Reviews			
D. Review child's status and safety no less frequently than once every 6 months from **the date the child entered foster care,** in order to determine: (1) the continuing necessity for and appropriateness of the placement, (2) the extent of the agency's compliance with the case plan in making reasonable efforts to safely return the child to the child's home and to complete whatever steps are necessary to finalize the permanent placement of the child, (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and (4) the likely date by which the child may be returned to and safely maintained in the home or placed for adoption, appointed a legal guardian, placed permanently with a relative, or placed in another planned permanent living arrangement. (42 USC 671(a)(15)(B), (C); 42 USC 675(5)(B); 45 CFR 1355.34(c)(2)(ii); 45 CFR 1355.20)	Must hold periodic status reviews no less frequently than every 6 months from **the date of original disposition hearing** until termination of the case. (WIC 366(a), 366.21(e) & (f), 366.3, 11400(i), 11404.1, CRC rule 1460(a)).	Must hold periodic case plan reviews for children in placement no less frequently than every 6 months from **the date the child entered foster care,** until termination of the case. (WIC 727.3(c), 11400(l), 11404.1)	Funding stops unless Finding made
At Permanency Hearings			
E. Must hold a permanency hearing to select a permanent plan no later than 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency plan hearings every 12 months thereafter. (45 CFR 1356.21(b)(2)(i); (42 USC 675(5)(C) and (F); 45 CFR 1355.20)) For dependency cases where no reunification services are offered, the permanency hearing must be held within 30 days of disposition. (45 CFR 1356.21(h)(2))	Must hold permanency-planning hearing within 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency hearings every 12 months thereafter. (WIC 361.5(f), 366.21(f), 366.21(g), 366.22, 366.3, 11400(j), 11404.1)	Must hold permanency hearing within 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency hearings every 12 months thereafter. (WIC 727.3(f), 727.31, 11400(j), 11404.1)	Funding stops unless Findings made
Definition of Date Entered Foster Care			
Date the child is considered to have entered foster care means the earlier of: the date of the first judicial finding that the child has been subjected to child abuse or neglect, or the date that is 60 calendar days after the date on which the child is removed from home. (45 CFR 1355.20)	Date entered foster care is the earlier of the first finding of child abuse or neglect (jurisdictional finding) or 60 days after the child is removed from home. (WIC 361.5(a))	Date of entry into foster care means the date that is 60 days after the date on which the child was removed from his or her home. (WIC 727.4(d)(4))	

Recommended Legal Findings

To Ensure Federal Foster Care Reimbursement

Detention Hearings

Make A, B and C Findings as follows:

A. Continuance in the home is contrary to the child's welfare;
B. Temporary placement and care is vested with the child welfare agency/probation department; and
C. Reasonable efforts have been made to prevent removal.

Pre-Permanency Case Reviews

Make D1 - D4 Findings as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts to make it possible for the child to safely return home and to complete whatever steps are necessary to finalize the permanent placement of the child;
D. (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement has been _____; and
D. (4) the likely date by which the child may be returned to and safely maintained in the home or placed for adoption, appointed a legal guardian, placed permanently with a relative, or placed in another planned permanent living arrangement.

Permanency Hearings

Make D1 - D3 findings and E finding as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts to make it possible for the child to safely return home and to complete whatever steps are necessary to finalize the permanent placement of the child;
D. (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement has been _____; and
E. The permanent plan of
_*return home* is appropriate
_*adoption*
_*legal guardianship*
_*permanent placement with a fit and willing relative*
_planned permanent living arrangement

Post-Permanency Case Reviews

Make D1 and D2 findings and E finding as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts, including whatever steps are necessary to finalize the permanent placement of the child; and
E. The permanent plan of
_*return home* is appropriate
_*adoption*
_*legal guardianship*
_*permanent placement with a fit and willing relative*
_*planned permanent living arrangement*

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CALIFORNIA JUDGES BENCHGUIDES

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JUVENILE DEPENDENCY INITIAL OR DETENTION HEARING

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California Center for Judicial Education and Research

California Judges Benchguides

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Ms. Jennifer Walter
Center for Families, Children & the Courts

Editorial comments and inquiries: Ellen Matthews, Editor 415/865-7794
fax 415/865-4335

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I. [§100.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency initial or detention hearings under Welf & I C §§290.1–324 and Cal Rules of Ct 1400–1447. The initial petition hearing or detention hearing is the first instance of judicial intervention in the dependency process and is held whenever a petition is filed, whether or not the child is in custody. Cal Rules of Ct 1440(a), 1442(a)–(b). If the child is in custody, the initial hearing is called a detention hearing. This benchguide includes a procedural checklist, a brief summary of the applicable law, and spoken forms.

Throughout this benchguide, the agency responsible for abused or neglected children will be referred to as the Department of Social Services (DSS) and the person who investigates and supervises dependency cases will be called the social worker. See Welf & I C §215. The grounds for initial detention by a police officer or social worker and the procedures followed until the time of the detention hearing are set out in §§100.53–100.60.

II. [§100.2] PROCEDURAL CHECKLIST

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 244.* If desired, referees should also obtain a written stipulation from the parties to serve as a temporary judge. See discussion in §100.15.

(2) *Call the case.* In many counties, the social worker, the social worker assigned to the court as a court officer, or a deputy county counsel calls the case. See the spoken form in §100.49 for the conduct of the detention hearing.

(3) *Determine who are present and their interest in the case before the court.* Welf & I C §§290.1(a), 346, 349; Cal Rules of Ct 1410(b).

- *Ask each parent or guardian to designate for the court his or her permanent mailing address.*
- *Advise each parent or guardian that the designated mailing address will be used by the court and the social services agency for*

notification purposes until the parent or guardian provides a new address in writing to the court or social services agency and make sure that Judicial Council form Notification of Mailing Address (JV-140) is completed and filed. Welf & I C §316.1(a); Cal Rules of Ct 1412(*l*). See form in §100.49.

☛ JUDICIAL TIP: Judges should ensure that the clerk places the addresses and the advisement into the minute order and that the DSS gets the order. Judges should also advise the parents that they may change the addresses by written notice as often as necessary.

(4) *If no parent or guardian is present:*

- *Determine whether they received notice.*
- *If not, determine whether due diligence efforts to notify them were made, and, if so, conduct the hearing.*
- *If the parents or guardians can be easily located (e.g., if they are incarcerated in the local county jail), continue the case for one day to permit due diligence efforts to be used to locate and serve them.* Most judges will hold the detention hearing even if due diligence efforts to serve were not made, subject to the holding of a rehearing once the parents or guardians are served. See §100.43 for a discussion of continuances.

☛ JUDICIAL TIP: If friends, relatives, and/or the child are present in the court, they should be questioned for information that may lead to the parents' whereabouts.

(5) *If a parent or other relative is present, inquire whether the child has possible American Indian heritage and, if so, take steps to ensure that proper notice is given.* See discussion in §100.48.

(6) *Make a finding whether notice has been given or attempted as required by law.* See Cal Rules of Ct 1412(k).

(7) *Inquire whether the factual information (names, dates, addresses, ages, etc.) on the petition is correct.* The judge should order that the petition be corrected by interlineation if, on inquiry, any of the participants provide corrections to the names, addresses, ages, or other factual information in the petition.

(8) *Advise the parents and guardians of their right to counsel.* If counsel has been retained or appointed to represent more than one parent or guardian, the judge should obtain a personal waiver of conflict of interest from each concerned participant. The judge should appoint counsel for the parents or guardians as warranted, including any incarcerated parents. Welf & I C §317(a); Cal Rules of Ct 1412(g). See discussion in §100.17.

☛ JUDICIAL TIP: In some courts, an unrepresented parent or guardian is "counseled" by an attorney before the hearing. That attorney then accompanies the parent or guardian to the hearing and is available for appointment.

(9) *Review any reports and receive comments from the parties as to whether the child would benefit from appointed counsel.* Welf & I C §317; Cal Rules of Ct 1412(h)(1)(A). See discussion in §§100.18–100.21.

- *Appoint counsel for the child, unless there is a finding that the child would not benefit from the representation by counsel, as required in Cal Rules of Ct 1438(b), and designate the attorney as the child's Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem under Cal Rules of Ct 1448.*
- *If an attorney is not appointed for the child, appoint a court-appointed special advocate (CASA) as the child's CAPTA guardian ad litem under Cal Rules of Ct 1448.*

(10) *Unless waived by counsel, tell the parties what to expect of this and of other juvenile court proceedings and their rights at each stage of the proceedings.* Welf & I C §§311(b), 316; Cal Rules of Ct 1412(g), (j), 1441(a). See form in §100.49 (conduct of initial or detention hearing).

- *Read the substance of the allegations in the petition to the parties, or*
- *Obtain a waiver of this reading requirement. Confirm that the parties have read the petition or that their attorneys have read it to them and that they understood it.*
- *If the child was detained, inform the parties of the reason for the detention.*

(11) *Review the documentary evidence and, if necessary, receive testimony from the parents, guardians, or others with pertinent knowledge, as well as from the social worker.* See Welf & I C §319(a); Cal Rules of Ct 1438(f), 1444(b)–(c). In making the findings necessary to an order of detention, the court may rely solely on documentary evidence. Cal Rules of Ct 1445(b). In making findings related to reasonable efforts, the court must read and consider any DSS reports and relevant evidence submitted by the parties and their counsel. Welf & I C §319(d)(1).

(12) *Plan to facilitate child's testimony if appropriate.* See Welf & I C §350(b); Cal Rules of Ct 1412(c).

(13) *Initiate an inquiry as to the paternity of the child and take steps to make a determination regarding paternity if appropriate.* See Cal Rules of Ct 1441(b), and discussion in §§100.32–100.33.

(14) *If the child has been detained, order his or her release unless a prima facie case has been made that: the child comes within Welf & I C*

§300, continuing in the home of the parent or guardian is contrary to the child's welfare, and one or more of the circumstances specified in Welf & I C §319(b)(1)–(4) exist. Welf & I C §319(b); Cal Rules of Ct 1445(a).

☛ JUDICIAL TIP: If the child has been removed, it is essential to make the "contrary to the child's welfare" finding the first time the court considers the case, even if the court is just granting a short continuance. See Welf & I C §319(c); Cal Rules of Ct 1422(c)(2), 1445(a)(2). This finding may be made on a temporary basis without prejudice. See Cal Rules of Ct 1443(a) and discussion in §100.11. Failure to make this finding may result in permanent loss of foster care federal funding.

(15) *If a prima facie case has been made that the child comes within Welf & I C §300 and that continuing in the home of the parent or guardian would be contrary to the child's welfare, make appropriate findings and orders, and ensure that the petition is set for hearing.* If the child is ordered detained,

- *State the grounds for detention under Welf & I C §319(b) and Cal Rules of Ct 1446(a)(1)–(2), and make the findings justifying detention required by Cal Rules of Ct 1446(a)(3).* See §100.36.
- *State that reasonable efforts have been made to prevent or eliminate the need for removal.* See Welf & I C §319(d)(1); Cal Rules of Ct 1446(b)–(c). Although detention may be ordered even if there was a lack of preplacement services and this lack was unreasonable under the circumstances, there will be adverse financial consequences for the county if a "no reasonable services" finding was made. See discussion in §100.38.
- *Make sure that information received by the court addresses the efforts that have been made.*
- *Order visitation with other persons, including siblings, with whom contact would benefit the child.* Cal Rules of Ct 1442(g).
- *State whether there is a relative willing and available to take the child.* Welf & I C §319(b), (d)(2). If so, the court should order DSS to investigate him or her as a possible placement.
- *Order reunification services.* Welf & I C §319(b).
- *State that there are no reasonable services that would prevent the need for further detention unless there was a lack of preplacement services and the lack was unreasonable.* In that case, the court must identify needed services and order DSS to provide them.

See Welf & I C §319(d)(1); see also Cal Rules of Ct 1446(c)(2).

- *Order each parent or guardian to either complete the Health and Education Questionnaire (JV-225) or to apprise the social worker or court staff of the information necessary to complete the form.* Welf & I C §16010; Cal Rules of Ct 1441(c).
- *Order that temporary placement and care be vested with the DSS, pending disposition or further court order.* Cal Rules of Ct 1446(d).

(16) *Ensure that all detention findings and orders are made on the record and in the written orders of the court.* Cal Rules of Ct 1444(b).

(17) *Consider ascertaining whether the child has lived out-of-state and therefore whether provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400–3465) may apply.* See Appendix II.

(18) *Rule on any additional requests.* If requested, rule on any additional requests such as motions for restraining orders under Welf & I C §213.5 and, if appropriate, under Welf & I C §§340.5. See §§100.4–100.8.

III. APPLICABLE LAW

A. [§100.3] Initial or Detention Hearing—General Background

When a child has been detained by a peace officer or social worker, a petition has been filed, and the child has not been released to the custody of a parent or guardian, the juvenile court must hold a hearing to determine whether the detention should continue. Welf & I C §315; Cal Rules of Ct 1442(d). Under the juvenile court law "detained" means removal of the child from the persons legally entitled to physical custody. Cal Rules of Ct 1401(a)(9). A child is also deemed to have been taken into custody and delivered to the social worker if there is reasonable cause to believe the child is described by Welf & I C §300, but the child cannot be moved because he or she is under medical care. Welf & I C §309(b); Cal Rules of Ct 1442(c) (commonly called a "hospital hold"). In addition, a child is deemed detained if he or she is not returned to the custody of the parent or guardian after a social worker has received the child and made an initial investigation. See Welf & I C §309(c).

If a child has not been detained, but DSS determines that a petition concerning the child should be filed, an initial hearing on the petition must be held within 15 days after the petition was filed. See Cal Rules of Ct 1442(a). If the child has been detained, a petition must be filed within 48 hours (excluding nonjudicial days) of the time at which the child was removed from the custody of the parent or guardian by a social worker or police officer. Welf & I C §313(a); Cal Rules of Ct 1442(b). The detention

hearing must be heard the next judicial day after the petition has been filed. Welf & I C §315; Cal Rules of Ct 1442(d).

B. Restraining Orders

1. [§100.4] In General

Once a petition has been filed, the juvenile court may issue restraining orders under Welf & I C §213.5, using a Judicial Council form provided for this purpose. Welf & I C §304. Judicial Council form JV-245 is required for the application for a restraining order and Judicial Council form JV-250 for temporary restraining orders and for orders after hearing. Welf & I C §213.5(i); Cal Rules of Ct 1429.1(b), 1429.5.

Restraining orders may be used to protect children who are the subject of dependency proceedings, other children in the house, and the parent, guardian, or caretaker, even if the child does not reside with that person. Welf & I C §213.5(a)–(b); Cal Rules of Ct 1429.5(c)–(d).

Willful and knowing violation of a restraining order issued under Welf & I C §213.5 is a misdemeanor punishable under Pen C §273.65. Welf & I C §213.5(h); Cal Rules of Ct 1429.5(k). Once a restraining order has been issued under Welf & I C §213.5, no court other than a criminal court may issue a restraining order that is contrary to the juvenile court order. See Welf & I C §304; Cal Rules of Ct 1429.5(*l*).

Although rarely applicable at the detention hearing stage, restraining orders may also be sought under Welf & I C §340.5 to protect a social worker from threats.

2. [§100.5] Procedure

The court may issue these orders after notice and a hearing (Welf & I C §213.5(d); Cal Rules of Ct 1429.5(e)) or ex parte on application as provided in CCP §527 (Welf & I C §213.5(a)–(b); see Cal Rules of Ct 1429.5(f)–(g)). If issued ex parte without notice, an order to show cause must be made returnable on the earliest day the business of the court permits, but not later than 15 days from the issuance of the order, or 20 days if good cause appears to the court for the later date. Welf & I C §213.5(c); Cal Rules of Ct 1429.5(g). This hearing may be combined with any other regularly scheduled hearing regarding the child. Welf & I C §213.5(c); Cal Rules of Ct 1429.5(h)(1).

☛ JUDICIAL TIP: It is important to ensure that the person to be restrained has had proper notice; many judicial officers require that this person be personally served with the petition for the restraining order and with the restraining order itself. See

generally Cal Rules of Ct 363 (using civil harassment procedure by analogy).

In determining whether to issue the order ex parte, the court must consider all documents submitted with the application and may review the child's juvenile court file. Cal Rules of Ct 1429.5(f)(1).

The court must state the time period for the order on its face. Welf & I C §213.5(d), (f) (not to exceed three years—Cal Rules of Ct 1429.5(h)). But the court may terminate the restraining order before its expiration date or extend it beyond the expiration date by court order or consent of all parties. See Welf & I C §213.5(d); Cal Rules of Ct 1429.5(j)(1)–(2).

Once the restraining order is issued, the court must order a designated person (who may be an attorney) to mail a copy of the order (or any subsequent modification, termination, or extension) to each local law enforcement agency specified by the person seeking the order. Welf & I C §213.5(g). In some counties, notice to any one agency results in entry of the order into a computer system accessible to all relevant agencies.

Information on restraining orders must also be transmitted to the Department of Justice under Fam C §6380(b). Welf & I C §213.5(j).

When issuing custody or visitation orders under Welf & I C §213.5, the court must follow the procedures of Fam C §6323(c)–(d) (making orders when there are domestic violence allegations). Welf & I C §213.5(*l*).

3. [§100.6] Reissuance of Previous Orders

The court may reissue a previous order if it finds that the person to be restrained could not be timely served; it may make this finding either on its own motion or on the filing of an affidavit by the person seeking the restraining order. Welf & I C §213.5(c); see Cal Rules of Ct 1429.5(g)(2). The reissued order must state the expiration date on its face. Welf & I C §213.5(c).

4. [§100.7] Content of Restraining Orders

Under Welf & I C §213.5(a) and Cal Rules of Ct 1429.5(e), the juvenile court may issue the following orders during the pendency of a dependency proceeding:

(1) Enjoining any person from sexually or physically abusing or stalking the child who is the subject of the proceedings or any other child of the household;

(2) Excluding any person from the residence of the person having custody of the child;

(3) Requiring any person to refrain from conduct that would interfere with the restraining orders issued under Welf & I C §213.5(a)(1)–(2), such as threatening the child.

(4) Enjoining any person from attacking or abusing the child's current caretaker, whether or not the child lives with him or her.

The court may also make an order restraining the child's caretaker from allowing the abusing parent or stepparent to have contact with the child. See Welf & I C §213.5(a); Cal Rules of Ct 1429.5(e)(2).

☛ JUDICIAL TIP: If the person to be restrained is not a household member, it is good practice for the judge to enjoin the parents from permitting "contact" with that person. "Contact" may be defined in the order as including messages or gifts sent to the child, telephone calls, and other forms of communication.

The showing necessary to exclude a person from the child's dwelling is that required for removal of a child from the parent's custody. See Welf & I C §361(c). Restraining orders may be issued excluding a person from the child's residence only when the evidence shows that the person seeking the order has a right under color of law to possession of the premises. Welf & I C §213.5(e)(2)(A); Cal Rules of Ct 1529.5(e)(2).

5. [§100.8] Prior Restraining Orders

Before the hearing on issuance or denial of a restraining order, a search must be conducted under Fam C §6306(a) for prior criminal convictions or restraining orders. Welf & I C §213.5(k)(1); Cal Rules of Ct 1429.5(i)(1). In deciding whether to issue such an order, the court must consider parole or probation status, whether the conviction was for a violent or serious felony, whether misdemeanor convictions involved domestic violence, weapons, or other violence, and whether there were any prior restraining orders and, if so, whether they were violated. Welf & I C §213.5(k)(2).

If an outstanding warrant is found, or if the search results indicate that the subject of the search is on parole or probation, the judge must order the clerk to notify appropriate law enforcement officials. Welf & I C §213.5(k)(3)(A); Cal Rules of Ct 1429.5(i)(2). Similarly, if the search uncovers the fact that the person who is the subject of the search is on probation or parole, the judge must order the clerk to notify the appropriate parole or probation officer of any information discovered that the judge determines to be applicable. Welf & I C §213.5(k)(3)(B).

C. Conducting the Initial or Detention Hearing

1. [§100.9] Initiating the Hearing

If the social worker determines that the child is to be detained, a petition must be filed with the juvenile court clerk, who must set the matter for hearing on the detention hearing calendar. Welf & I C §§290.1, 311(a); Cal Rules of Ct 1442(b). A detained child must be released within 48 hours (excluding nonjudicial days) if no petition has been filed. Welf & I C §313(a); Cal Rules of Ct 1442(b). The notice of the hearing must be given as soon as possible after the filing of the petition. Welf & I C §290.1(c).

The contents of the petition are prescribed by Welf & I C §332 and Cal Rules of Ct 1407. An unverified petition may be dismissed without prejudice. Welf & I C §333. If DSS seeks to dismiss the petition and the child's counsel does not object to dismissal, a verified petition may also be dismissed; in that case, the parents do not have the right to present evidence before the dismissal. See *In re Eric H.* (1997) 54 CA4th 955, 965–967, 63 CR2d 230. However, once a verified petition has been filed, it may not be dismissed by DSS in opposition to the wishes of the child's counsel without notification to all interested parties so that each may have an opportunity to be heard and to object. *Allen M. v Superior Court* (1992) 6 CA4th 1069, 1074, 8 CR2d 259.

An initial hearing for a nondetained child is also initiated by the filing of a petition in juvenile court. Cal Rules of Ct 1442(a). Once a petition is filed, the clerk must set the hearing within 15 court days. Cal Rules of Ct 1442(a).

Once a petition has been filed and until it is dismissed or dependency is terminated, the juvenile court has sole jurisdiction over issues of custody and visitation. Welf & I C §304; Cal Rules of Ct 1429.1(a).

2. [§100.10] Venue

The initial or detention hearing must be commenced in the juvenile court in the county in which the child resides, the county in which the child is found, or the county in which the acts take place, or circumstances exist, that bring the child under Welf & I C §300. See Welf & I C §327. Under Welf & I C §375 and Cal Rules of Ct 1425, after the court sustains the petition, it can transfer venue of future dependency proceedings to the county in which the child resides with legal guardians, even if the biological parent's residence does not change. *In re Christopher T.* (1998) 60 CA4th 1282, 1288, 1292, 71 CR2d 116.

☛ JUDICIAL TIPS:

- If the child is found within a county, that county's DSS may file a petition even when the acts underlying the allegations in the petition occurred in another county, the child is a legal resident of another county, or the child was not abandoned in the county in which the petition was filed. The case can always be transferred either before or after disposition to the county of legal residence.
- If a petition is filed in a county different from the county of legal residence of the child and in which the witnesses reside, the court may wish to consider initiating contact with the other county's court and DSS to determine whether a petition should be filed there on the agreement of the original court to dismiss the petition before it.
- There are no provisions in federal or state law to permit the transfer of dependency cases between states.

3. [§100.11] Time Limitations

The court must hold the detention hearing for a child who has been removed from the custody of a parent or guardian by a police officer or social worker as soon as possible, but no later than the expiration of the next judicial day after a petition to declare the child a dependent has been filed. Welf & I C §315; Cal Rules of Ct 1442(d). Failure to hold the hearing within these time limits generally requires release of the child from custody. See Welf & I C §315; Cal Rules of Ct 1442(d)–(e). However, because the purpose of the juvenile court law is to protect children, a court should not jeopardize the child's safety as a "punishment" for the DSS's failure to meet time constraints. *Los Angeles County Dep't of Children's Servs. v Superior Court* (1988) 200 CA3d 505, 509, 246 CR 150 (DSS had not filed the petition within the requisite time). An initial hearing for a nondetained child must be held within 15 court days of the filing of the petition. Cal Rules of Ct 1442(a).

When a child has been detained in another county or taken into custody on a warrant, a detention hearing must be held within 48 hours (excluding noncourt days) after the child has arrived at a facility within the county (Cal Rules of Ct 1442(e)) if:

(1) The child was taken into custody in a different county and transported to the requesting county under a protective custody warrant,

(2) The child was taken into custody in the county in which a protective custody warrant was issued, or

(3) The child was transferred in custody from another county's juvenile court under Cal Rules of Ct 1425.

In any event, a court may continue any hearing beyond the time limit that is otherwise required as long as the continuance is not contrary to the child's interest. Welf & I C §352(a). Moreover, there is an automatic right to a one-day continuance on motion of the child, parent, or guardian. Welf & I C §322; Cal Rules of Ct 1443(a). The child must remain in custody pending completion of a continued detention hearing or rehearing unless otherwise ordered by the court. Cal Rules of Ct 1443(a). See also §100.43 on continuances.

If the case is continued under Welf & I C §322 or for any other reason, the court must order the child's release or find that remaining in the parent or guardian's home is contrary to the child's welfare. Welf & I C §319(c); Cal Rules of Ct 1422(c)(2), 1443(a). The court may enter the "contrary to the child's welfare" finding on a temporary basis without prejudice and may reevaluate it at the continued detention hearing. Cal Rules of Ct 1422(c)(2), 1443(a).

☛ JUDICIAL TIP: Failure to make this finding may cause permanent loss of federal funding for foster care. See discussion of other required findings in §100.36. The court may make this a temporary finding pending the continued detention hearing.

If the child is not detained, continuances of the initial hearing must be made under Cal Rules of Ct 1422. Cal Rules of Ct 1443(b).

4. Notifying the Parents, Guardians, and Counsel

a. [§100.12] Who Must Be Notified

When a detention hearing has been set, the following people whose whereabouts are known or become known must be served by the social worker before the petition is filed (Welf & I C §290.1(a)) or by the clerk after the petition is filed (Welf & I C §290.2(a)):

- The mother, any fathers, presumed and alleged, and the legal guardians;
- The child, if 10 years old or older;
- When there is no parent or guardian who lives in California, or when the parent's or guardian's residence is unknown, any adult relative residing within the county or if none, the adult relative residing nearest the court;
- The attorneys for the parent or guardian and the child;
- The district attorney, when that person has notified the clerk that he or she wishes to receive the petition, containing the time, date, and place of the hearing;

- The probate court that appointed the guardian if the child is a ward of a guardian appointed under the Probate Code;
- The Indian custodian and the tribe of that child if the court knows or has reason to know that an Indian child is involved;
- The Bureau of Indian Affairs if an Indian child is involved and the identity or location of the parent, Indian custodian, or the tribe cannot be determined; and
- The probate department that appointed a guardian for the child if the child is a ward of a guardian appointed under the Probate Code.

☛ JUDICIAL TIP: Although not usually done at a detention hearing, the court may consider terminating or modifying a guardianship appointed under the Probate Code. Welf & I C §728. If the child is a ward of a guardian who was appointed as a result of a juvenile dependency permanency plan, the juvenile court may wish to consider terminating the guardianship under Cal Rules of Ct 1466(c). If guardianship is terminated under any of these methods, it may affect the need for a new dependency petition and any potential disposition.

No notice need by given to a parent whose parental rights have been terminated. Welf & I C §§290.1(b), 290.2(b).

Once there is an alleged father who comes to the court's attention, he must be notified of all court proceedings. Welf & I C §§290.1(a)(2), 290.2(a)(2), 316.2(b). This notice does not make the alleged father a party to the proceedings, nor does it entitle him to participate in the proceedings. It only notifies him that it has been alleged that he is or could be the father of the child, the child is the subject of proceedings under Welf & I C §300, and that termination of parental rights could result. See Welf & I C §316.2(b). Thereafter, it is the responsibility of the alleged father to step forward and seek to establish his paternity and a relationship with the child if he desires. See, *e.g., In re Joseph G.* (2000) 83 CA4th 712, 715–716, 99 CR2d 915 (receipt of statutory notice insufficient to make alleged biological father a party of record); *In re Emily R.* (2000) 80 CA4th 1344, 1355, 96 CR2d 285 (to be declared a presumed father, the alleged father must first assume parental responsibilities).

☛ JUDICIAL TIP: The statutes only require notice to presumed and alleged fathers. They do not require notice to biological fathers who may be men who have had their paternity established in a child support or family law action, but who do not qualify for presumed father status. It is "best practice," however, to notify all possible fathers—presumed, biological, and alleged—to help ensure that paternity issues can be fully dealt with.

b. [§100.13] Contents and Timing of Notice

Once the petition is filed if the child has been detained, notice must be given as soon as possible and at least five days before the hearing; if the hearing is scheduled to be heard within five days, notice must be given at least 24 hours before the hearing. Welf & I C §290.2(c)(1); Cal Rules of Ct 1407(f). If the child is not detained, notice must be given at least five days before the hearing. Welf & I C §290.2(c)(2); Cal Rules of Ct 1407(g).

If any person who is required to be notified resides outside the county, the clerk must send the notice and copy of the petition by first class mail as soon as possible after the petition is filed and at least 10 days before the hearing is scheduled. Welf & I C §290.2(b)(2). Personal service outside the county at least 10 days before the hearing is equivalent to service by first-class mail. Welf & I C §290.2(c)(2).

The notice must include the date, time, and place of the jurisdiction hearing, the name of the child on whose behalf the petition was brought; each code section and subdivision under which the proceeding was brought, and a copy of the petition. Welf & I C §§290.1(d), 290.2(d).

If notice is given to the Bureau of Indian Affairs, the bureau must have 15 days after receipt to notify the parent or Indian custodian and the tribe. Welf & I C §§290.1(c), 290.2(c)(3).

c. [§100.14] Type of Notification

Before the petition is filed, the notice may be written or oral. See Welf & I C §290.1(e). If the person to be served cannot read, the notice must be given orally. Welf & I C §290.1(e).

If a person fails to appear after service by mail, the court must order personal service. Welf & I C §290.2(c)(2); Cal Rules of Ct 1407(g). Failure to respond is not a basis for arrest or detention. Welf & I C §290.2(c)(2). When appropriate, however, the court can issue a warrant of arrest for the parent and a protective custody warrant for the child. Welf & I C §§339–340. Service may be waived by a voluntary appearance in court entered in the minutes or by written waiver filed with the clerk. Welf & I C §290.2(c)(2); Cal Rules of Ct 1407(h).

Notice to the Bureau of Indian Affairs must be by registered or certified mail, return receipt requested. See Welf & I C §290.1(e). The required notice form to be used by the social worker is one provided by the State Department of Social Services, entitled *Notice Of Involuntary Child Custody Proceeding Involving An Indian Child. In re H.A.* (2002) 103 CA4th 1206, 1215, 128 CR2d 12.

When using due diligence in locating the parent, it means at the very least that the party doing the investigation (usually DSS) must not ignore the most likely means of finding the parent. *In re Arlyne A.* (2000) 85

CA4th 591, 599, 102 CR2d 109 (due diligence declaration appeared valid on its face, but DSS had failed to check directory assistance for town of father's family residence when informed that the father lived there).

5. [§100.15] Judicial Officers

Initial and detention hearings, like other juvenile court hearings, may be conducted by referees who meet the qualifications of Welf & I C §247 (five years of legal practice in California or admitted to practice in any other state and California for a combined minimum of 10 years). Referees may perform subordinate judicial duties assigned to them by the presiding judge of the juvenile court. Welf & I C §247; Cal Rules of Ct 1415(a). They generally have the same power as judges and are entitled to hear dependency cases as a matter of right (*i.e.*, without a stipulation—Welf & I C §248), except that the presiding judge of the juvenile court may require that certain of a referee's orders be approved by a juvenile court judge before becoming effective (Welf & I C §251). Any orders by a referee requiring removal of a child from the physical custody of the person entitled to custody must be approved by a judge within two days in order to become effective. Welf & I C §249; Cal Rules of Ct 1417(b). Lack of compliance with Welf & I C §249 does not deprive a referee of fundamental jurisdiction, thereby invalidating later orders in the proceeding. *In re Jesse W* (2001) 93 CA4th 349, 359, 113 CR2d 184.

A referee who has received a stipulation as a temporary judge under Cal Const art VI, §21 is empowered to act fully as a juvenile court judge. Cal Const art VI, §21; Cal Rules of Ct 1415(b). Indeed, the orders of a subordinate judicial officer who sits as a temporary judge are as final and nonreviewable as those of a judge. *In re Brittany K.* (2002) 96 CA4th 805, 815, 117 CR2d 813. Their orders, therefore, require no approval by a judge.

To avoid the necessity for approval by a judge, a referee may obtain a stipulation to act as a temporary judge. See Cal Rules of Ct 1415. Procedures to follow in obtaining the stipulation are set out in Cal Rules of Ct 244 (not applicable to commissioners). Failure to follow the procedures exactly will not void the stipulation and deprive the court of jurisdiction. *In re Richard S.* (1991) 54 C3d 857, 865, 2 CR2d 2 (Rule 244 is directory rather than mandatory). A stipulation is necessary to give the court's acts immediate finality, but the absence of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551, 18 CR2d 555. The consequence of a failure to obtain a stipulation is that a rehearing may be required (see §100.46).

If, before the jurisdiction hearing takes place, a stipulation is made that a commissioner should serve as a temporary judge until the final

determination, a parent may not withdraw the stipulation before the disposition hearing. *In re Steven A.* (1993) 15 CA4th 754, 772, 19 CR2d 576.

The superior court is not required to designate commissioners as juvenile court referees and, in many jurisdictions, commissioners serve as temporary judges by express or implied stipulation. As such, their decisions and orders are not subject to rehearing. California Rules of Court 244(a), relating to the required stipulations for temporary judges, specifically states that it does not apply to court commissioners sitting as temporary judges. A stipulation to a commissioner acting as a temporary judge need not be in writing; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98, 284 CR 305; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–1228, 45 CR2d 560. For example, a failure to timely object to a commissioner sitting as a judge is tantamount to an implied waiver of the required stipulation. *In re Brittany K., supra,* 96 CA4th at 813.

A referee or commissioner assigned as a referee who is *not* acting as a temporary judge must inform the child and parent or guardian that review by a juvenile court judge may be sought. See Welf & I C §248; Cal Rules of Ct 1416(a)(2). A child, parent, guardian, or the DSS may apply for a rehearing at any time up to ten days after the service of a written order. Welf & I C §252; Cal Rules of Ct 1418(a). If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873. For decisions by a referee that do not require approval by a juvenile court judge to become effective, a judge may make an order for a rehearing within 20 judicial days of the hearing, but not more than ten days following the service of a written copy of the order. *In re Clifford C., supra* (delinquency case reconciling Welf & I C §§250 and 253).

If the proceedings that were before a referee were recorded by a court reporter, the reviewing judge must rule on the request for a rehearing on the basis of the transcripts. Welf & I C §252; Cal Rules of Ct 1418(c). If there was no official report of the proceedings or if the judge fails to rule on the application within 20 days of receiving it (maximum of 45 days with an extension), the application for rehearing must be granted as a matter of right. Welf & I C §252; Cal Rules of Ct 1418(b)–(c). Rehearings of matters heard before a referee are conducted de novo before a juvenile court judge. Welf & I C §254; Cal Rules of Ct 1418(e). See discussion of rehearings in §100.46.

Attorneys who act as pro tem judges under Cal Const art VI, §21 must follow the stipulation procedure of Cal Rules of Ct §244. Parties may

not compensate the referee unless they agree in writing on the rate of compensation that they will pay. Cal Rules of Ct 244(h).

6. Right to Counsel

a. [§100.16] In General

Although the right to counsel in dependency proceedings was historically viewed as a purely statutory one (see, *e.g., In re James S.* (1991) 227 CA3d 930, 936, 278 CR 295), this view has changed since passage of Senate Bill 243 (Stats 1987, ch 1485), which placed the termination of parental rights within the context of the dependency case itself. Courts have held that right to counsel may acquire a due process dimension when the proceedings could lead to a termination of parental rights. See *Lassiter v Department of Social Servs.* (1981) 452 US 18, 31–32, 101 S Ct 2153, 68 L Ed 2d 640; *In re Arturo A.* (1992) 8 CA4th 229, 238–240, 10 CR2d 131 (in dependency, right to counsel may be raised to a constitutional dimension when the issues are complex and there is a likelihood that counsel's assistance might sway the outcome at certain crucial points). Moreover, one case has held that the right to counsel may be of constitutional dimensions when the petition contains allegations against a parent that could result in criminal charges being filed. *In re Emilye A.* (1992) 9 CA4th 1695, 1707, 12 CR2d 294.

Neither failure to appoint counsel at the detention hearing nor possible ineffectiveness of later-appointed counsel is a due process violation that may be raised on appeal after termination of parental rights; significant safeguards built into dependency proceedings preclude such a claim. *In re Meranda P.* (1997) 56 CA4th 1143, 1151–1155, 65 CR2d 913 If, however, possible ineffectiveness of counsel undermines those safeguards to such an extent that the parent is denied due process, it is possible that a claim of ineffective assistance of counsel could be raised on a later appeal. See *In re Janee J.* (1999) 74 CA4th 198, 208–209, 87 CR2d 634. It may also be raised by a later petition for writ of habeas corpus in an appropriate case. See *In re O.S.* (2002) 102 CA4th 1402, 1406 n2, 126 CR2d 571.

Once appointed, counsel may not withdraw because of lack of contact with the client without establishing why the lack of contact prevents the performance of his or her duty. *In re Malcolm D.* (1996) 42 CA4th 904, 916, 50 CR2d 148. Once appointed, counsel must represent the client in all proceedings (see Welf & I C §317(d)), including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1404–1405, 25 CR2d 259), and all subsequent proceedings (*In re Tanya H.* (1993) 17 CA4th 825, 827, 833 n7, 21 CR2d 503), unless the parents

demonstrate that they no longer desire further legal representation (*Janet O. v Superior Court* (1996) 42 CA4th 1058, 1065, 50 CR2d 57).

Although the court should monitor the bills of appointed counsel, it may not by local policy interfere with the statutory right of the parent to continued representation (Welf & I C §317(d)) by requiring that all counsel be relieved of the appointment after the first permanency planning review hearing unless there is a showing of good cause. *In re Tanya H., supra,* 17 CA4th at 830–832.

Each party who is represented by an attorney is statutorily entitled to competent counsel. Welf & I C §317.5(a); see Cal Rules of Ct 1438(c) (defining competence and discussing standards of representation, experience, and education). The court must establish a complaint process and inform parties of the procedure (Cal Rules of Ct 1438(d)) and may require evidence of competency (Cal Rules of Ct 1438(c)(2)). Once the court determines that an attorney has acted improperly, it must take appropriate action. Cal Rules of Ct 1438(d). See also Welf & I C §317.6 (enabling legislation requiring establishment of standards and procedures with respect to counsel practicing in dependency court).

The juvenile court judge has an obligation to encourage local attorneys to practice in juvenile court over a substantial period of time, to raise the status of public attorneys who practice in juvenile court, and to establish minimum standards of practice for court-appointed attorneys who practice in juvenile court. Standards of Judicial Administration §24(c). The judge should also institute and encourage training programs for lawyers who serve as court-appointed attorneys in juvenile court, as well as set minimum training and continuing legal education standards. Standards of Judicial Administration §24(d). Each superior court must adopt or amend local rules governing representation of parties in dependency court after first consulting local offices of the county counsel, district attorneys, and others specified in Cal Rules of Ct 1438(a)(1). Cal Rules of Ct 1438(a). The rules must address issues relating to representation, such as training and appointment of attorneys, establishment of standards, and procedures for reviewing complaints, procedures for appointing a CAPTA guardian ad litem, as well as procedures relating to settlement, mediation, and discovery. Cal Rules of Ct 1438(a)(2).

b. [§100.17] Parents or Guardian

At each hearing, the court must advise an unrepresented parent or guardian of the right to be represented by an attorney and the right of the indigent parent or guardian to have one appointed if the child is placed, or recommended to be placed, outside the home. Welf & I C §317(a); Cal

Rules of Ct 1412(g)–(h). Generally, the court may appoint counsel for an indigent parent or guardian. Welf & I C §317(a). If the child has been removed from the home or the petitioning agency is recommending removal, the court must appoint counsel for an indigent parent or guardian. Welf & I C §317(b); Cal Rules of Ct 1412(h)(1)(B).

In deciding whether to appoint counsel, the court must make a case-by-case determination of whether the presence of counsel would have made a "determinative difference" in deciding if a parent has a due process right to representation by counsel at a stage in the dependency proceeding in which parental rights may be terminated. *In re Ronald R.* (1995) 37 CA4th 1186, 1196, 44 CR2d 22.

☛ JUDICIAL TIP: Many judges recommend appointing counsel for all parents at this stage of the proceedings because it is not yet clear which parent the child will reside with, which parent is likely to reunify with the child, or what conflicts between the parents exist or may arise.

However, the court has no obligation under Welf & I C §317 to appoint counsel for an indigent parent who has chosen not to appear and has made no request for counsel. *In re Ebony W.* (1996) 47 CA4th 1643, 1645, 55 CR2d 337.

☛ JUDICIAL TIP: When a parent is incarcerated, it is often advisable to have that parent appear in court for the detention hearing, but it may be sufficient to appoint counsel for the parent, hold the detention hearing in the parent's absence, and advise the attorney that the hearing can be put back on calendar if, after the attorney speaks with the client, it becomes clear that there is an issue that needs to be dealt with. Another option is to continue the hearing for a day to allow appointed counsel to speak with the incarcerated client.

A parent may waive his or her right to counsel in a dependency hearing, whether that right is statutory under Welf & I C §317 or constitutional. *In re Gilberto M.* (1992) 6 CA4th 1194, 1200, 8 CR2d 285 (waiver occurs when parent does not object to proceeding in absence of counsel). The better practice in the juvenile court, however, is to make parents aware of the dangers and disadvantages of self-representation. *In re Brian R.* (1991) 2 CA4th 904, 921–922, 3 CR2d 768. There is no requirement, however, that the court engage in a full *Faretta*-type inquiry with the parent. *In re Angel W.* (2001) 93 CA4th 1074, 1084, 113 CR2d 659.

The court *must* take a waiver before precluding a disruptive but mentally competent parent from self-representation, whether on the

grounds of protecting a person unskilled in the law or protecting the process from disruption. *In re Angel W., supra,* 93 CA4th at 1084–1085. (.26 hearing). The conduct precluding self-representation must be such that it would significantly delay the proceedings or render them meaningless and negatively impact the rights of the child. *In re Angel W, supra.,* 93 CA4th at 1085

Because a parent has the statutory right to counsel under Welf & I C §317, the court must appoint counsel for both a mother and a presumed father if they are indigent. See *In re Zacharia D.* (1993) 6 C4th 435, 451, 24 CR2d 751 (parent is defined as a mother or a presumed father as used in dependency statutes). Judicial officers often will appoint counsel for a biological father who has established paternity and has taken steps toward filling a parental role in the child's life.

☛ JUDICIAL TIP: When counsel represents both parents, the judge should determine whether a conflict between the parents exists and should warn the parents about the dangers of dual representation. Some judges always appoint separate counsel because there is so often a potential for conflict.

If the social services agency or another party is seeking to establish the paternity of an alleged father over his objection, the alleged father does have a right to appointed counsel to help him defend against that action. *Salas v* Cortez (1979) 24 C3d 22, 34, 154 CR 529. Alleged fathers have no right to appointed counsel to help them in bringing their own action to establish paternity, however. Despite this, some courts do appoint counsel for the limited purpose of helping an alleged father to establish paternity. If paternity is not established in a timely fashion, or if it is determined the alleged father does not qualify for either biological or presumed father status, counsel should then be relieved.

For a discussion of appointment of a guardian ad litem for a parent, see §100.26.

c. Child

(1) [§100.18] In General

The court must appoint counsel for the child unless it finds that the child would not benefit from the appointment of counsel. Welf & I C §317(c); Cal Rules of Ct 1412(h)(1)(A), 1438(b). It must also appoint a CAPTA guardian ad litem for each child who is the subject of a dependency petition. Cal Rules of Ct 1448(c). If an attorney is appointed, he or she will serve as the CAPTA guardian ad litem. Cal Rules of Ct

1448(c). The court must identify the CAPTA guardian ad litem on the record. Cal Rules of Ct 1448(c).

In order to find that the child would not benefit from counsel, the court must find all of the following (Cal Rules of Ct 1438(b)(1)):

- The child understands the nature of the proceedings;
- The child can communicate with the court, other counsel, other parties, and the social workers and other professionals involved in the case, and can advocate effectively for him or herself; and
- Under the circumstances, there would be no benefit to the child from having counsel appointed.

If the court finds that the child would not benefit from counsel, it must state reasons on the record for that finding on each of the criteria listed above. Welf & I C §317(c); Cal Rules of Ct 1438(b)(2).

☛ JUDICIAL TIP: If the court appoints an attorney for the child, the attorney must also be named as the child's guardian ad litem. The dual appointment should be clearly indicated on the court's minute order.

If the court finds no benefit from appointment of counsel for the child, it must appoint a court-appointed special advocate (CASA) to serve as the CAPTA guardian ad litem. Welf & I C §326.5; Cal Rules of Ct 1401(a)(13), 1438(b)(3), (e), 1448(c). See also Cal Rules of Ct 1424 (recruitment, duties, etc. of CASAs). The court may also appoint a CASA for a child who has an attorney. Cal Rules of Ct 1438(e)(4).

☛ JUDICIAL TIPS:

- It is up to the court whether the attorney or the CASA is to be appointed as the CAPTA guardian-ad-litem. If both are appointed, the court must state on the record which is the CAPTA guardian-ad-litem.
- If the court appoints an attorney for the child, the attorney must also be named as the child's guardian ad litem. The dual appointment should be clearly indicated on the court's minute order.

When appointing counsel, the court must determine whether to appoint independent counsel; the court may appoint the district attorney, public defender, or other member of the bar, as long as that attorney does not represent a party or an agency whose interests conflict with those of the child. Welf & I C §317(c).

☛ JUDICIAL TIPS:

- Whether the court is appointing a government attorney (from the office of district attorney or public defender) or private counsel, the court must ensure that the attorney has the skill and judgment to handle the child's case.
- If there is a pending family law case and the child is represented by counsel in that case, the court should consider appointing the same counsel if that counsel is qualified to appear in juvenile court under Cal Rules of Ct 1438(c) and any local rules of court. If that appointment would not work, the court should order juvenile court counsel to keep the family law counsel informed.

The attorney must be free to make an independent assessment of how to handle the litigation to best serve the interests of the child. *In re Patricia E.* (1985) 174 CA3d 1, 7–8, 219 CR 783; *Allen M. v Superior Court* (1992) 6 CA4th 1069, 1075, 8 CR2d 259 (child's counsel has great latitude in presenting pertinent information to the court).

A parent has standing to raise the question of a child's right to counsel as long as the parent's interests and the child's interests are intertwined. *In re Patricia E., supra,* 174 CA3d at 6.

There is good cause under Welf & I C §317(d) to relieve the child's counsel when the court finds representation no longer benefits the child. *In re Jesse C.* (1999) 71CA4th 1481, 1490, 84 CR2d 609. If counsel for the child is relieved, however, a CASA must be appointed as the child's CAPTA guardian ad litem. See Welf & I C §326.5.

(2) [§100.19] Attorney's Duties

The child's attorney must generally represent the child's legal interests at the detention hearing and at all subsequent hearings. Welf & I C §317(d)–(e). To that end, the attorney must make investigations on the child's behalf, examine and cross-examine witnesses appropriately, interview any child client who is four years of age or older, and make recommendations to the court concerning the child's welfare. Welf & I C §317(e). The attorney must meet regularly with his or her client and work with other counsel and the court to resolve disputed aspects of the case. Cal Rules of Ct 1438(c)(4). See also *In re Jesse B.* (1992) 8 CA4th 845, 853, 10 CR2d 516 (because counsel for children must interview their clients to ascertain their wishes, judge may generally assume that attorney who advocates for a certain disposition has previously consulted the child regarding that disposition).

The attorney represents the child's legal interests and is not required to assume the responsibilities of a social worker. Welf & I C §317(e); Cal

Rules of Ct 1438(c)(4); see also Welf & I C §280 (duties of social worker). However, in assessing how to handle the litigation, the child's attorney, as well as the social worker, CASA, or guardian ad litem, must be notified of changes in the child's life, including changes in placement. See *In re Robert A.* (1992) 4 CA4th 174, 192, 5 CR2d 438.

A primary obligation of the child's attorney is to advocate for the protection, safety, and physical and emotional well-being of the child. Welf & I C §317(c). The role of the child's counsel is not merely to express the wishes of the child if orders consistent with those wishes would endanger the child. *In re Alexis W.* (1999) 71 CA4th 28, 36, 83 CR2d 488. Because the child's attorney has an obligation to represent the child's interests, the attorney may have to present a position to the court that runs counter to both the parents' and the petitioning agency's position. See *Allen M. v Superior Court* (1992) 6 CA4th 1069, 1075, 8 CR2d 259 (child's counsel may properly request that petition not be dismissed despite agreement between DSS and parents regarding dismissal).

Either the child or the child's counsel may invoke a privilege, such as the psychotherapist-patient privilege, and if the child invokes it, counsel may not waive it; but if counsel invokes it, the child may waive it. Welf & I C §317(f). If the child is neither old nor mature enough, counsel is the holder of the privileges. Welf & I C §317(f).

(3) [§100.20] Siblings

Each child in a family need not have his or her own counsel unless there is an actual conflict of interest (*In re Candida S.* (1992) 7 CA4th 1240, 1252, 9 CR2d 521) or a reasonable likelihood that one will arise (*Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891). Whether there is an actual conflict must be assessed on a case-by-case basis. *In re Candida S., supra*, 7 CA4th at 1253 (disagreements among siblings about visitation will not necessarily present conflict of interest). Moreover, despite the *theoretical* conflict of interest in every sibling situation, the judge need not appoint separate counsel for each sibling at the outset of dependency proceedings because it would result in unnecessary duplication of efforts. *Carroll v Superior Court, supra,* 101 CA4th at 1429.

An attorney may not accept representation of siblings in a dependency case, however, if there is a reasonable likelihood that an actual conflict will arise. 101 CA4th at 1429–1430. See also *In re Elizabeth M.* (1991) 232 CA3d 553, 565–566, 283 CR 483 (court may need to appoint separate counsel for siblings if potential conflict of interest). If one attorney represents multiple siblings when an actual conflict of interest arises, the attorney must be relieved from representing any of the children.

101 CA4th at 1431. See also *In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778 (holding that the court should appoint independent counsel for each sibling or group of siblings when there is an actual conflict of interest). In that case, one sibling was clearly adoptable and the other expressed a desire not to have the adoptable sibling's parental rights terminated because of the danger that termination would permanently limit sibling contact. *In re Cliffton B., supra.*

☛ JUDICIAL TIP: Potential and actual conflicts of interest for children's counsel have increased with the requirement for concurrent services planning and the enactment of the provisions for a "sibling petition" under Welf & I C §388(b), and the "interference with sibling relationships" exception to termination of parental rights under Welf & I C §366.26(c)(1)(E). Judges therefore need to be aware of the possibility of future conflicts in making these appointments.

(4) [§100.21] Child's Choice

Under Welf & I C §349, the child is entitled to be represented by counsel of his or her own choice. When a child retains a particular attorney, the court may not deny child that counsel without having first ruled that the child was incapable of selecting an attorney or did not select a competent one. *Akkiko M. v Superior Court* (1985) 163 CA3d 525, 527, 209 CR 568. Even with appointed counsel, when a child is dissatisfied, the court may not deny a request for new counsel without inquiry into the cause of the dissatisfaction. *In re Ann S.* (1982) 137 CA3d 148, 150, 188 CR 1. If the complaint is valid, the judge must appoint new counsel. *In re Ann S., supra.*

d. [§100.22] Conflicts

The district attorney's office may represent the DSS. Welf & I C §318.5. It may also represent the child, and may represent both the petitioning agency and the child if there is no conflict of interest. Welf & I C §317(c). The district attorney's office may also pursue criminal charges against the parent while representing the child. Welf & I C §317(c) (not an automatic conflict of interest). Finally, the district attorney may also represent children in some instances in which the office had previously prosecuted the parents as long as it does not represent another party or agency whose interest conflicts with the child's. *In re Albert B.* (1989) 215 CA3d 361, 382, 263 CR 694. However, in any of these cases, the court must consider the facts of the case to determine if there is an actual conflict.

e. [§100.23] Attorneys' Fees; Training

The court may fix compensation for appointed counsel for the child. Welf & I C §317(c). However, a court may not order one parent to pay the other parent's attorneys' fees under the Family Law Act when those fees were incurred for a dependency proceeding occurring simultaneously with a dissolution action. *Marriage of Seaman & Menjou* (1991) 1 CA4th 1489, 1499, 2 CR2d 690 (dependency proceeding is not "related to" simultaneous family law proceeding, permitting an award of attorneys' fees under Family Law Act).

Appointed counsel must have training that ensures that the child is adequately represented. Welf & I C §317(c); Cal Rules of Ct 1438(c).

7. [§100.24] Conduct of Hearing

At the initial or detention hearing, the court must first advise the parents and guardians of their rights and serve them with a copy of the petition. See Welf & I C §316; Cal Rules of Ct 1441(a). See discussion in §100.19. The court must examine the child's parents, guardians, or others with pertinent knowledge, and hear any relevant evidence that the child and the parents, guardians, or others would like to present; the court must also receive evidence from the social worker on any necessity for initial removal and continued detention. Welf & I C §319(a). In making the findings necessary to an order of detention, the court may rely solely on documentary evidence, such as police reports or reports of the probation officer or social worker. Cal Rules of Ct 1445(b); see §100.29. At this hearing, the court must also ask the mother and other appropriate persons about the identity and whereabouts of any alleged or presumed fathers. Cal Rules of Ct 1441(b). See §§100.32–100.33. The court must also ask about American Indian ancestry. See discussion in §100.48.

As with any juvenile court hearing, the initial or detention hearing must be closed to the public, heard at a special or separate session of court, and granted precedence on the calendar. See Welf & I C §§345–346. The hearing must be conducted in an informal, nonadversarial manner, unless there is a contested issue of law or fact. See Welf & I C §350(a)(1); Cal Rules of Ct 1412(b). The court must control the proceedings with a view to expeditious determination of the facts and to obtaining maximum cooperation of the child and persons interested in the child's welfare. Welf & I C §350(a)(1); Cal Rules of Ct 1412(a). The court must also provide accommodations for persons with disabilities (see Cal Rules of Ct 989.3 for procedural requirements), as well as English language interpreters or interpreters for deaf or hearing-impaired persons if necessary (see Evid C §§752, 754). The proceedings must be transcribed by a court reporter if the hearing is conducted by a judge or by a referee acting as a temporary

judge. Welf & I C §347; Cal Rules of Ct 1411(a). If the hearing is before a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 1411(b).

a. [§100.25] Advisement of Rights

At the initial or detention hearing, the court must inform the parties of the reason for the detention, let them know what to expect from juvenile court proceedings, and inform them of their rights, including the right to counsel at each stage of the proceedings unless waived. See Welf & I C §§311(b), 316; Cal Rules of Ct 1412(g), (j), 1441(a). A personal waiver by the parent is required. *In re Monique T.* (1992) 2 CA4th 1372, 1377, 4 CR2d 198.

☛ JUDICIAL TIP: It is common for judges to obtain waivers of formal advisement of these rights from parents who are represented by counsel.

Specifically, under Cal Rules of Ct 1412(j), the court (or the parents' or guardians' attorney) must advise the parents and guardians of any right to assert the privilege against self-incrimination. However, it may not be an abuse of discretion for a judge to omit this advisement because of the "use immunity" provided by Welf & I C §355.1(f) (testimony of parent or guardian in dependency proceeding may not be used against parent or guardian in any other action or proceeding). *In re Amos L.* (1981) 124 CA3d 1031, 1039, 177 CR 783.

Although the court may wish to inform the parents or guardians of the "use immunity" conferred by Welf & I C §355.1(f), the court is not required to advise parents of this immunity when parents are represented by counsel (*In re Candida S.* (1992) 7 CA4th 1240, 1250, 9 CR2d 521).

Under Cal Rules of Ct 1412(j), the court must also advise the child, parents, and guardians of the right

- To confront and cross-examine witnesses, including preparers of reports submitted in court.
- To use court process to obtain witnesses.
- To present evidence to the court. See also Welf & I C §311(b).

Under Cal Rules of Ct 1441(a), the court must also inform the parents, guardians, and child of

- The contents and meaning of the petition.
- The reasons for the detention and the goal and scope of the detention hearing if the child was taken into custody.

- The nature of juvenile court proceedings and the consequences of different hearings.
- Maximum time limits for providing reunification services based on when the services were considered to have been offered or provided and the age of the child at the time of removal.

The child and parents are also entitled to future notice of all proceedings; to that end, they must provide permanent mailing addresses to the court and the DSS, and the court must advise them that, until further notice, the court and social services agency will use those addresses for purposes of notice. Welf & I C §316.1; Cal Rules of Ct 1412(*l*). Judicial Council form JV-140 must be delivered with the petition and made available in the courtroom. Cal Rules of Ct 1412(*l*)(3). Thereafter, at each hearing in a dependency proceeding, the court must inquire whether notice has been given as required by law. Cal Rules of Ct 1412(k).

b. [§100.26] Who May Be Present

The child, who is the subject of the proceeding, is also a party. Welf & I C §317.5(b). Welfare and Institutions Code §349 and Cal Rules of Ct 1410(b) permit the following persons to be present:

- The child;
- Parents or guardians, or if none can be found or none reside within the state, any adult relatives residing within the county, or if none, any adult relatives residing nearest the court;
- Counsel for child, as well as counsel for parent or guardian, adult relative, Indian custodian, or Indian tribe;
- County counsel or district attorney;
- Social worker;
- Court clerk;
- Court reporter;
- Bailiff, at the court's discretion;.
- Representative of the Indian child's tribe (see Cal Rules of Ct 1439); and
- Any CASA.

The court may also permit any of the child's relatives to be present at the detention hearing on a sufficient showing. See Cal Rules of Ct 1412(f).

All others must be excluded from the courtroom, unless a parent or guardian requests that the public be admitted and this request is consented to by the child or the child requests an open hearing. Welf & I C §346; Cal Rules of Ct 1410(e)(1). The court may also admit anyone who it

determines has a direct and legitimate interest in the case or in the work of the court. Welf & I C §346; Cal Rules of Ct 1410(e). In any case, no person on trial, accused of a crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is a parent, guardian, or relative. Welf & I C §345; Cal Rules of Ct 1410(a).

☛ JUDICIAL TIPS:

- Even at a detention hearing, some judges permit participation from anyone who might provide information that could assist the court in making a good decision regarding the child. Other judges only allow participation by the parties and exclude all others unless they are called as witnesses by one of the parties.
- Some judges occasionally permit attorneys who are not connected with the case being heard, but who are appointed in other cases, to stay in the courtroom as a learning experience; this practice may result in a better-trained bar.

In addition to the participants mentioned above, it is good practice for the court to allow the child a support person. Welf & I C §§100–109, 356.5 (setting forth the requirements governing the appointment and duties of a court-appointed special advocate or CASA volunteer) and Cal Rules of Ct 1424 (implementing the statutory requirements). When that role cannot be fulfilled by the social worker or a CASA who is already present, the court may allow a support person to be present by using its discretion under Welf & I C §346 and its inherent authority to provide for the child's best interest.

Without statutory authority, the district attorney may not participate in juvenile dependency proceedings to represent state interests. *In re Dennis H.* (2001) 88 CA4th 94, 102, 105 CR2d 705. Moreover, the court may not appoint a guardian ad litem for a parent without holding an informal hearing and giving the parent an opportunity to be heard. *In re Sara D.* (2001) 87 CA4th 661, 671, 104 CR2d 909. If the parent's attorney believes that a guardian ad litem should be appointed, the attorney must ask the parent for consent and, if the parent does not consent, the attorney must approach the court directly. *In re Jessica G.* (2001) 93 CA4th 1180, 1187–1188, 113 CR2d 714. At an informal hearing on the issue, the court or counsel must explain to the parent the reason for the proposed appointment and the authority that the guardian ad litem would have if appointed and give the parent an opportunity to respond. 93 CA4th at 1188. To appoint a guardian ad litem, the court must determine that the parent is unable to help counsel or to understand the proceedings because

of mental disorder or developmental disability, as required in Pen C §1367. 93 CA4th at 1186.

c. [§100.27] Presentation of Testimony and Other Evidence

The court must consider evidence from the social worker regarding reasons for the initial removal from custody of the parent or guardian and the basis of the recommendation for continuing detention. Welf & I C §319(e); see Cal Rules of Ct 1444(b). This evidence may be in the form of testimony or documents. Cal Rules of Ct 1444(b)–(c), 1445(b).

The court must also examine the parents, guardians, or others with relevant knowledge of the situation and hear any relevant evidence that they or the child would like to present. Welf & I C §319(a); Cal Rules of Ct 1444(c). When ruling on reasonable efforts (see §100.38), the court must read and consider any DSS reports and relevant evidence submitted by the parties and their counsel. Welf & I C §319(d)(1); see Cal Rules of Ct 1446(c), 1444(b).

The court must consider what services could be provided to the child that would enable the child to return home. See Welf & I C §319(d)(1). The court must also review whether the social worker has considered public assistance as a possible resource that would eliminate the need for detention or prevent further detention. Welf & I C §319(d)(1).

In addition, at the detention hearing or at any other dependency proceeding, an interested person may give the court information relevant to the child's interests or rights to be protected or pursued in other judicial or administrative forums. Cal Rules of Ct 1438(f).

(1) [§100.28] Rights of Child, Parents, and Others During Testimony

At the detention hearing, the child, parents, and guardians are entitled to assert the privilege against self-incrimination. Cal Rules of Ct 1444(d). A parent or guardian also has a right to confront and cross-examine any preparers of reports received by the court who are present and any other persons examined by the court under Rule 1444(c). Cal Rules of Ct 1444(d). The right to confrontation is not a constitutional one because a dependency proceeding is not a criminal proceeding and therefore some of the formalities of a criminal proceeding are not applicable. *In re Kerry O.* (1989) 210 CA3d 326, 334, 258 CR 448.

(2) [§100.29] Documentary Evidence

The court may rely solely on written police, probation, or social worker reports or other documents in making findings that are prerequisite

to an order of detention. Cal Rules of Ct 1444(b), 1445(b). Under Rule 1445(b), these reports must include:

(1) Statement of reasons why the child was removed from the parents' custody,

(2) Description of services already provided (including those provided at the time of prehearing detention) and indication of whether further services are available that would eliminate the need for further detention,

(3) Need for continued detention.

If continued detention is recommended, the reports should include a section on whether there is a noncustodial parent or other relative with whom the child may be detained. Cal Rules of Ct 1445(b)(4).

(3) [§100.30] Child's Testimony

Although children rarely testify at detention hearings, when a child does testify, the court must first administer an oath to the child or obtain a satisfactory promise from the child to tell the truth. See *In re Heather H.* (1988) 200 CA3d 91, 95–97, 246 CR 38 (failure to administer oath rendered testimony inadmissible). See also Evid C §710 (witnesses under ten years old need only promise to tell the truth). At the conclusion of the child's testimony, the judge may wish to state whether the testimony demonstrated that the child understood the questions and had the ability to be responsive. For a discussion of handling child witnesses in court generally, see THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002).

In addition, if the court determines that the child's testimony is necessary, the child may testify in chambers outside the presence of the parents if the parents' counsel is present and any one of the following conditions exists (Welf & I C §350(b); Cal Rules of Ct 1412(c)):

- The court determines that testimony in chambers is necessary to ensure truthful testimony.
- The child is likely to be intimidated in the more formal courtroom setting.
- The child is frightened to testify in front of the parent or parents.

In determining whether to permit in-chambers testimony, the court may rely on the social worker's report or other stipulated offers of proof. Cal Rules of Ct 1412(c)(3); *In re Katrina L.* (1988) 200 CA3d 1288, 1297, 247 CR 754 (court properly relied on statements in social worker's report that child would probably be intimidated in courtroom setting; social worker was available for cross-examination). The presence of parents'

counsel is essential; it may be prejudicial error for the court to question the child in chambers with only a reporter present. See *In re Laura H.* (1992) 8 CA4th 1689, 1697, 11 CR2d 285.

When the child testifies in chambers, the testimony must be recorded and the parent or guardian may request the reporter to read back the testimony. See Cal Rules of Ct 1412(c)(3).

The court may permit the child to testify in chambers even when the child does not expressly state a fear of testifying in open court. *In re Katrina L., supra*, 200 CA3d at 1297–1298 (requirements of Welf & I C §350 were otherwise met).

☛ JUDICIAL TIP: To accommodate the needs of the child witness, some judges remove their robes, which can be frightening symbols of formality to the child, and take other steps to make the proceedings as informal as possible. See generally THE CHILD VICTIM WITNESS BENCH HANDBOOK §§1.19, 3.19 (CJER 2002). In addition, some judges conduct "in-chambers" proceedings in the courtroom without the parents because some chambers become too crowded and therefore too frightening for the child.

Finally, when a child is unwilling to testify even at an in-chambers hearing because of the presence of so many adults (the judge, many attorneys, social worker, and court reporter), a court is entitled to use its inherent powers to carry out its duties and ensure the orderly administration of justice (derived from Cal Const art VI, §1) and may permit the testimony of the child by closed-circuit television even in the absence of any express statutory authority for this procedure. *In re Amber S.* (1993) 15 CA4th 1260, 1266, 19 CR2d 404 (court may use this procedure to protect best interests of child because parents' rights are at least as protected as they would have been under Welf & I C §350(b)).

(4) [§100.31] Child's Out-of-Court Statements

There are a number of situations in which a child's out-of-court statements to others would not be made inadmissible by the hearsay rule, although this issue does not often arise in a detention hearing. For example, a statement made by a child victim of abuse or neglect when that child was under 12 years old may be admissible despite the hearsay rule if the statement was made for medical diagnosis or treatment. Evid C §1253. Moreover, a child's hearsay statements may be admissible under a "child dependency hearsay exception" when there are indicia of reliability even if the child is not competent to testify. See *In re Cindy L.* (1997) 17 C4th 15, 18, 69 CR2d 803. Indeed, a child's out-of-court statements may be admissible even if they do not meet the requirements of the child dependency hearsay exception and even if the child has been ruled

incompetent to testify. *In re Lucero L.* (2000) 22 C4th 1227, 1242–1243, 96 CR2d 56. See discussion in California Judges Benchguide 101: *Juvenile Dependency Jurisdiction Hearing* §101.43 (Cal CJER).

d. Determination of Parentage

(1) [§100.32] In General

Under Welf & I C §316.2(a) and Cal Rules of Ct 1413(a) and 1441(b), the court must inquire about the identity and address of possible presumed or alleged fathers at the detention hearing. It must engage in this inquiry even if a man claiming to be a father appears at the detention hearing. Welf & I C §316.2. It must engage in a paternity inquiry by asking at least the following questions as it deems appropriate (Welf & I C §316.2(a); Cal Rules of Ct 1413(b)(1)–(6), 1441(b)(1)–(6)):

(1) Has there been a paternity judgment?

(2) Was the mother married, or did she believe herself to be married, at the time of conception?

(3) Was the mother cohabiting with a man at the time of conception?

(4) Did the mother receive support or promises of support during her pregnancy?

(5) Has a man formally or informally acknowledged paternity, including by signing a declaration of paternity?

(6) Have paternity tests been administered and, if so, what were the results?

(7) Does the man qualify as a presumed father under Fam C §7611 or any other Family Code provision? Sometimes the court may be called on to balance competing presumptions. See, *e.g., In re Kiana A.* (2001) 93 CA4th 1109, 1117–1118, 113 CR2d 669 (court chose man who had taken child into home rather than incarcerated husband of mother, although both were presumptive fathers).

The court may also ask if the man has executed a voluntary declaration of paternity and filed it with the state DSS and whether his name is on the birth certificate. See Fam C §§7571–7574. If so, this declaration acts to establish paternity, has the same effect as a paternity judgment, and establishes the man as a presumed father. *In re Liam L.* (2000) 84 CA4th 739, 746, 101 CR2d 13; Cal Rules of Ct 1413(c).

The court may also be asked to resolve issues of the maternal relationship. A child has standing to bring an action under the Uniform Parentage Act (Fam C §§7600–7730) to determine the existence of a mother-child relationship. *In re Karen C.* (2002) 101 CA4th 932, 935–936, 124 CR2d 677 (presumed, but not biological, mother).

In the absence of a marital presumption, full paternity findings will not normally be made at an initial hearing. After conducting its inquiry, however, the court must at least note its findings in the court minutes. Welf & I C §316.2(f).

Generally, when conducting the paternity hearing, the court may establish paternity of a child who is the subject of a §300 petition either by blood or genetic tests or on presentation of evidence using procedures established by Cal Rules of Ct 1413. See Cal Rules of Ct 1413(a). These procedures begin with a determination under Cal Rules of Ct 1413(d) of whether a prior finding of paternity was made by:

(1) Asking the person alleging paternity whether there has been such a finding,

(2) Directing the clerk to request the child support enforcement office to inquire whether paternity was established (using Judicial Council form JV-500),

(3) Receiving copies of the completed form from the child support enforcement office, with certified copies of any paternity judgment or order attached, and

(4) Taking judicial notice of the prior paternity determination.

Under Cal Rules of Ct 1413(e), if the child support enforcement office reports or if the court determines through inquiry no prior determination of paternity, the court may undertake such a determination itself by:

(1) Ordering the child, mother, and alleged father to take blood or genetic tests under Fam C §§7550–7557, or

(2) Determining paternity based on testimony, declarations, or statements of the mother and any alleged father, and

(3) Advising any alleged father that if he is declared the father, he will be obligated to support the child and may be the subject of an action to recover support payments and could be convicted of a felony if he is able to provide support and fails to do so (see Pen C §271a).

A presumption of paternity under Fam C §7555 based on the blood test score may be overcome by evidence that the man had no access to the mother at the applicable time. *City & County of San Francisco v Givens* (2000) 85 CA4th 51, 55–56, 101 CR2d 859.

A man who has been named as a father and/or one who wishes to establish paternity must use Judicial Council form JV-505 to exercise a number of options including requesting or waiving an attorney, denying paternity, requesting paternity testing, or requesting a judgment of paternity. If a man requests a finding of paternity on Judicial Council form JV-500 or appears in the dependency case and files an action under Fam C §7630 or §7631, the court must determine if he is the biological father.

Welf & I C §316.2(d); Cal Rules of Ct 1413(h). After a dependency petition has been filed, the juvenile court has jurisdiction over actions brought under Fam C §7630 or §7631. Welf & I C §316.2(e).

Once the court determines paternity, it must direct the clerk to prepare and transmit form JV-501 to the child support enforcement office. Cal Rules of Ct 1413(f). The clerk must provide a copy of the petition, a notice of the next scheduled hearing, and Judicial Council form JV 505 to each alleged father unless the petition has been dismissed, dependency has been terminated, the man has denied paternity and waived further notice, or the man has relinquished custody to DSS. Cal Rules of Ct 1413(g).

(2) [§100.33] When Presumed Father Status Sought

Courts may encounter situations in which a man who is not the biological father seeks custody of the child. Courts have held that a man should not lose his status as a presumed father merely by admitting that he is not the biological father. See *In re Nicholas H.* (2002) 28 C4th 56, 63, 120 CR2d 146. Presumed fatherhood status is not necessarily negated by evidence that the man is not the biological father. *In re Jerry P.* (2002) 95 CA4th 793, 797, 116 CR2d 123. If presumed father status were to be denied to nonbiological fathers, the anomalous result would be that Fam C §7611 and related dependency statutes would permit mothers who are unwilling and incapable parents to have reunification services, while denying such services to a man who is willing and capable. 95 CA4th at 812.

Indeed, in the dependency context, biological fatherhood may be irrelevant to presumed fatherhood. See 95 CA4th at 803–804. There is no policy that would support a requirement of rejecting a man who has acted as the child's *only* father, solely because he has been determined not to be the biological father. *In re Raphael P.* (2002) 97 CA4th 716, 735–736, 118 CR2d 610.

☛ JUDICIAL TIP: The area of paternity in dependency cases, which has *always* had some confusion and uncertainty, is now fraught with further uncertainty as law develops to include some non-biological fathers in the class of presumed fathers. Because this further uncertainty may result in an increase in contested paternity hearings and additional new law, judicial officers should require attorneys to make a good record on paternity issues and to provide relevant points and authorities.

e. [§100.34] Prima Facie Case; Burden of Proof

At the close of the hearing, the court must order the child's release unless a prima facie showing has been made that the child comes within Welf & I C §300 and that certain other conditions exist. Welf & I C §319(b); Cal Rules of Ct 1445(a). The prima facie case for removal must be made by relevant evidence. *In re Raymond G.* (1991) 230 CA3d 964, 972, 281 CR 625 (reasoning by analogy to delinquency cases).

When the petitioning agency does not meet the burden of proof, the court may order whatever action is required on motion of the child, parent, or guardian or its own motion. Welf & I C §350(c); Cal Rules of Ct 1412(d). The court may take this action after weighing the evidence then before it. Welf & I C §350(c). However, if it denies the motion, the child, parent, or guardian may offer additional evidence without having first reserved that right. Welf & I C §350(c); Cal Rules of Ct 1412(d).

f. [§100.35] When Parent Admits Allegations, Submits, or Enters No-Contest Plea

Whether or not the child is detained, if the parent or guardian wishes to admit the allegations in the petition, plead no contest, or submit the jurisdictional determination based on information provided at the detention hearing and waives a separate jurisdictional hearing, the judge must proceed according to Cal Rules of Ct 1449 and 1451. See Cal Rules of Ct 1444(a).

If the parent admits the allegations, the court must still find that there is a factual basis for the admission. Cal Rules of Ct 1449(f)(6). Normally, this is made based on the court's reading of the social worker's report.

If fewer than all parents or guardians admit the allegations, plead no contest, or submit, or if any parent or guardian who has not been properly notified or for whom service had not been excused on a showing of due diligence is not present, the court must make the necessary findings concerning the taking of the plea or the submission. See Cal Rules of Ct 1449(f). However, the court must take the following issues under submission until the jurisdictional issues concerning all parents can be dealt with: (1) whether the child is described by Welf & I C §300, (2) the factual basis for the allegations, and (3) the truth of the allegations. See Cal Rules of Ct 1449(f)(6)–(8).

☛ JUDICIAL TIPS:

- If all parents wish to submit, but the DSS wishes to present additional evidence, the case must be set for a jurisdictional hearing.

- A submission does not preclude argument on behalf of the parent or guardian, and does not constitue a waiver of appeal of the sustained allegations.

g. [§100.36] Findings

The court must order the child's release unless it finds that there is a prima facie case that the child comes within Welf & I C §300, the court finds that continuing in the home of the parent or guardian would be contrary to the child's welfare, and that any of the following circumstances exist (Welf & I C §319(b); Cal Rules of Ct 1445(a), 1446(a)):

- There is substantial danger to the child's physical health, or the child is seriously emotionally damaged and removal is the only way to protect the child.
- The child has left placement in which he or she was placed by order of the juvenile court.
- The parent, guardian, or custodian is likely to flee the jurisdiction.
- The child is unwilling to return home, and it is alleged that the child has been physically or sexually abused by a person in the home.

If the child is ordered detained, the court must order that temporary placement and care is vested with the DSS, pending disposition or further court order. Cal Rules of Ct 1446(d). The court must also make a determination that the child's continuing residence in the home of the parent or legal guardian is contrary to the child's welfare. Cal Rules of Ct 1446(a)(2). Moreover, under Welf & I C §319(e) and Cal Rules of Ct 1446(c)(3), when ordering detention the court must:

- Determine if there are any services that would enable the child to return home until the next hearing, and state the facts on which the decision is based;
- Specify why the initial removal was necessary; and
- Order reunification services to be provided as soon as possible, if appropriate.

If the court's findings do not justify detention, the child must be released. See Welf & I C §319(b); Cal Rules of Ct 1445(a). However, unless DSS and the child otherwise agree to a dismissal of the petition, a jurisdiction hearing must still be held. See, *e.g., Allen M. v Superior Court* (1992) 6 CA4th 1069, 1074, 8 CR2d 259 (once a verified petition has been filed, it may not be dismissed by the DSS without notification to all

interested parties so that each may have an opportunity to be heard and to object).

The court must also make a finding of whether notice had been given as required by law. Cal Rules of Ct 1412(k).

The court must make findings on the record of whether reasonable efforts were made to prevent or eliminate the need for removal and/or whether the child might be able to be returned home if services were provided. Welf & I C §§306, 319(d)(1); Cal Rules of Ct 1446(c). For discussion of services, see §100.38. If ordering detention, the court must find that there are *no* reasonable services that would prevent need for detaining child or that would allow the child to return home. Cal Rules of Ct 1446(c)(2).

Whether the child is released or detained, the court must make one of the following reasonable efforts findings concerning efforts to prevent or eliminate the need for removal (see Cal Rules of Ct 1446(c)):

(1) Reasonable efforts have been made, or

(2) Reasonable efforts have not been made.

☛ JUDICIAL TIPS:

- For a county to be eligible for Title IV-E federal foster care funding, the judge must have made specified reasonable efforts findings. See 45 CFR §1356.21(b)(2)(ii). Therefore, it is strongly advised that the court find that "reasonable efforts to prevent removal were made" in a situation in which it might previously have found that the failure to make efforts was reasonable or that reasonable efforts were excused. If the court determines that DSS's concern for the child's safety was a valid basis for not providing services to prevent or eliminate the need for removal, it may find that the level of effort was reasonable, and should thus make a finding that reasonable efforts were made.
- Some judges require DSS workers to file a separate declaration of reasonable efforts at each stage of the proceedings. However, in many counties, the social worker's statement of efforts is included within the normal DSS reports.

If the court orders the child detained, the court must also make the following findings in order to ensure eligibility for Title IV-E funding:

- Continuance in the home of the parent or guardian would be contrary to the child's welfare. Welf & I C §319(b); Cal Rules of Ct 1445(a)(2), 1446(a)(2). See also 42 USC §672(a)(1).
- Temporary placement and care are vested with the child welfare agency pending disposition or further order of the court. Welf & I C §319(e); Cal Rules of Ct 1446(d). See also 42 USC §672(a)(2).

All detention findings must be made on the record and in the written orders of the court. Cal Rules of Ct 1444(b).

h. [§100.37] Orders

As in other juvenile court proceedings, the court may direct its orders to the parent or guardian as necessary for the best interests of the child, and these orders may concern the child's care, supervision, custody, conduct, maintenance, education, medical treatment, and support. Welf & I C §245.5. The court must also order each parent or guardian to complete the Health and Education Questionnaire (JV-225) or to provide the social worker or court staff with the information necessary to complete the form. Welf & I C §16010; Cal Rules of Ct 1441(c).

When the court orders detention, it must: state the facts on which the decision was based by referring to the social worker's report or other evidence on which it relied to make its determination that having the child remain at home is contrary to his or her welfare; order temporary custody to DSS; explain why the initial removal was justified; and order reunification services to be provided. Welf & I C §319(e). As with findings, all detention orders must also be on the record and a part of the written orders of the court. Cal Rules of Ct 1444(b). For spoken findings and orders, see §100.50.

(1) [§100.38] Services

In making orders, the court must consider whether reasonable efforts were made to prevent or eliminate the need for removal of the child and whether there are available services that would prevent the need for further detention. Welf & I C §319(d)(1); Cal Rules of Ct 1446(c). The court must order the child to be returned to the parent or guardian if that option is made feasible by virtue of these services. Welf & I C §319(d)(2); see Cal Rules of Ct 1446(c)(2). Among the services that the judge may order to return the child home are (Welf & I C §319(d)(1)):

- Case management,
- Counseling,
- Emergency shelter care,
- Emergency in-home caretakers,
- Respite care,
- Homemakers for teaching and demonstrating,
- Parenting classes, and
- Any other services authorized by Welf & I C §§16500 et seq.

☛ JUDICIAL TIP: Because the child's safety is paramount, the court may make whatever orders are reasonably necessary to achieve this goal, including continued detention, in-home classes and services, medical counseling, transportation, or frequent checks by the social worker. When the court makes orders for intensive services, it should ensure that such services are not only reasonably necessary, but also reasonably feasible and practical. See *Elijah R. v Superior Court* (1998) 66 CA4th 965, 969, 78 CR2d 311 (the best possible services are not required; the standard is reasonable services under the circumstances).

If the court orders the child to be detained out of the home, it must order DSS to provide reunification services, which should begin as soon as possible. Welf & I C §319(e); Cal Rules of Ct 1446(c)(3)(C). This is true even if the court anticipates that there will be a request at the disposition hearing to deny services under Welf & I C §361.5.

The court may also order mental health evaluation and treatment. Welf & I C §319.1. If the court believes that the child needs mental health treatment while detained, it must notify the director of the county mental health department in the county in which the child lives. Welf & I C §319.1. However, if the parent does not consent, the court may not order a psychological evaluation of that parent before the jurisdiction hearing is held, even if there is an allegation or evidence of a parent's mental illness. *Laurie S. v Superior Court* (1994) 26 CA4th 195, 202, 31 CR2d 506.

(2) [§100.39] Visitation

If the child is to be detained, the court must consider whether visitation with other persons, including siblings, would be beneficial or detrimental, and must order visitation if it would benefit the child. See Cal Rules of Ct 1442(g).

Although visitation normally must be ordered with the parent or guardian, it may be limited, modified, or supervised, as the court deems necessary. Visitation may be denied, if necessary, to protect the child. *In re Daniel C. H.* (1990) 220 CA3d 814, 838–839, 269 CR 624. In certain cases, visitation may be curtailed until the parent is rehabilitated. See *In re Cheryl H.* (1984) 153 CA3d 1098, 1133, 200 CR 789.

It is the court's obligation to determine whether visitation is to occur; however, in an appropriate case, the details of implementation of the court's visitation order may be delegated to the DSS. See *In re Moriah T.* (1994) 23 CA4th 1367, 1374, 28 CR2d 705.

(3) [§100.40] Placement

If the court cannot order the child returned to the custody of a parent or guardian, it must determine if there is an approved relative who is willing and able to care for the child. Welf & I C §319(f). Adult siblings, aunts, uncles, and grandparents must be given preferential consideration. Welf & I C §319(f). See also Welf & I C §281.5 (DSS must recommend placement with relative if it is in child's best interest and is conducive to reunification). If feasible, the child must be placed with detained siblings or half-siblings. See Welf & I C §306.5.

If the court cannot detain the child with a sibling, aunt, uncle, or grandparent, it may order detention with any other approved relative (*i.e.*, related by blood and affinity including "steprelative"), in an emergency shelter or licensed care center or other authorized placement, or in the approved home of a nonrelative extended family member as defined by Welf & I C §362.7; the period of placement must not exceed 15 days. See Welf & I C §319(f); Cal Rules of Ct 1446(e).

☛ JUDICIAL TIP: Many judges use Welf & I C §319(f) to place the child with a nonrelated adult who is known to the child and with whom the child has a close relationship. This may include a family friend, a parent's domestic partner, or some other adult who has been involved in the child's life.

In determining whether detention with a relative is appropriate, the court must consider the recommendations of DSS which should have made an emergency assessment of the relative, including prior reports of abuse and criminal records. See Welf & I C §309; Cal Rules of Ct 1446(e)(1). The court must order the parent to disclose to the social worker the names, residences, and identifying information of any known relative. Welf & I C §319(f); Cal Rules of Ct 1446(e)(2).

The court may always consider detention with the noncustodial parent, even when that parent is out of state. If the court later retains jurisdiction or maintains dependency in order to provide services to or to impose conditions on the noncustodial out-of-state parent, the Interstate Compact on the Placement of Children (ICPC) (Fam C §§7900–7910) must be applied, except when the "placement" is for a short period, such as a school vacation or a period that is less than 30 days. Cal Rules of Ct 1428(b)(1). See Cal Rules of Ct 1428 generally for procedures to apply when placing the child out of state under the ICPC. See also *Tara S. v Superior Court* (1993) 13 CA4th 1834, 1837–1838, 17 CR2d 315, and *In re Johnny S.* (1995) 40 CA4th 969, 977, 47 CR2d 94 (ICPC applies only to interstate placements for foster care or those preliminary to adoption,

not to placement with a noncustodial parent out of state whether before or after the jurisdiction and disposition hearing).

☛ JUDICIAL TIP: The *Tara S.* and *Johnny S.* decisions that placements with out-of-state parents is not covered by the ICPC, puts California at odds with the majority of states and the ICPC administrators on this issue. The continuing viability of these cases is unclear, given the promulgation of Cal Rules of Ct 1428.

The court may not order the child removed from the custody of the parents and then physically detain or place the child back in the home under a "detention with parent" order. *In re Andres G.* (1998) 64 CA4th 476, 481, 75 CR2d 285 (placement occurred after disposition hearing). See also *In re Damonte A.* (1997) 57 CA4th 894, 899–900, 67 CR2d 369 ("trial placement" with parent following removal order is not authorized); *Savannah B. v Superior Court* (2000) 81 CA4th 158, 161–163, 96 CR2d 428 (60-day visit immediately following removal order is not authorized—disposition hearing).

(4) [§100.41] Orders of Referees

Any order by a referee ordering removal of a child from the home is not effective until approved by a juvenile court judge. Welf & I C §249; Cal Rules of Ct 1417(b)(1). Presumably, this includes orders for continuing detention. Other orders of a referee are effective immediately, subject to the right of review by a juvenile court judge. Cal Rules of Ct 1417(a). If no application for rehearing is made and the judge has not ordered a rehearing on his or her own motion (see Welf & I C §253; Cal Rules of Ct 1418(d)), the order becomes final ten calendar days after service of the order. Cal Rules of Ct 1417(c).

When making findings and orders, the referee must (Welf & I C §248, Cal Rules of Ct 1416(b)):

- Furnish a copy of the findings and orders to the juvenile court presiding judge;
- Furnish each child who is 14 years old or older (or to a younger child on request) with a copy of the findings and orders, as well as with a written explanation of the right to seek review by a juvenile court judge;
- Serve the parent and guardian and counsel for the parent, child, and guardian with a copy of the findings and orders, as well as with a written explanation of the right to seek review by a juvenile court judge. Service must be by mailing to the last known address and is deemed complete as of the mailing.

For a general discussion about commissioners and referees, see §100.15.

i. [§100.42] Service of Findings and Orders

Written findings and orders must be personally served by the clerk or served by first class mail within three judicial days of issuance on the petitioning agency, the child or child's counsel, and the parent or guardian or parent's or guardian's counsel. Welf & I C §248.5.

☛ JUDICIAL TIP Some smaller counties save on postage by giving attorneys who represent children mailboxes in the clerk's office. The attorneys then sign an agreement that placement in their mailbox is equivalent to first class mail.

8. [§100.43] Continuances

On the request of the child or a parent, the court must continue the detention hearing for one court day, during which time the child remains detained. See Welf & I C §322; Cal Rules of Ct 1443(a). See also discussion in §100.11. A longer continuance may be granted on request of counsel for the parent, child, or petitioning agency if it would not be contrary to the child's best interests. Welf & I C §352. In determining whether to grant a continuance, the judge must give substantial weight to the need for prompt resolution of the child's custody status, the need to provide the child with a stable environment, and damage that could be caused by prolonged temporary placements. Welf & I C §352(a).

If a continuance is granted under Welf & I C §322 or for any other reason, the court must either order the child's release or find that remaining in the parent or guardian's home is contrary to the child's welfare. Welf & I C §319(c); Cal Rules of Ct 1422(c)(2), 1443(a). The court may enter this finding on a temporary basis without prejudice and may reevaluate it at the time of the continued detention hearing. Cal Rules of Ct 1422(c)(2), 1443(a). See §100.11.

A grant of a continuance must be based on good cause, which is *not* shown by (Welf & I C §352(a); Cal Rules of Ct 1422(a)(2)):

- Stipulation between counsel,
- Convenience of parties,
- Pending criminal prosecution, or
- Pending family law case.

To request a continuance, written notice must be filed at least two court days before the date set for hearing. Welf & I C §352(a). The party seeking a continuance must submit affidavits or declarations showing specific facts demonstrating that a continuance is necessary, unless the

judge for good cause permits an oral motion. Welf & I C §352(a). When granting a continuance, the facts that form the basis for the continuance must be entered in the court minutes. Welf & I C §352(a).

☛ JUDICIAL TIP: There is rarely time for written motions for continuance at a detention hearing. Most requests for continuances are based on oral motions.

In any event, the continuance should last only for the time shown necessary by the evidence. Welf & I C §352(a).

☛ JUDICIAL TIP: A detention hearing is a critical one and should rarely be continued for more than a few days. Because a detention hearing is one at which the court makes only temporary orders pending further investigation and adjudication, it is not expected that the investigation should be completed or all relative placement possibilities explored before a detention hearing can be held. Most judicial officers will hold the detention hearing in a timely fashion and then reconsider those orders in conjunction with the jurisdiction and disposition hearings as more information becomes available.

If the child has not been detained, motions for continuance must be made and ruled on under Cal Rules of Ct 1422. Cal Rules of Ct 1443(b).

D. Detention Rehearings

1. [§100.44] Rehearing for Lack of Notice

When a detention hearing is held, a parent or guardian who did not receive actual notice and therefore did not attend may request a rehearing by filing an affidavit setting forth these facts. Welf & I C §321; Cal Rules of Ct 1447(a). A parent's general appearance at a detention hearing waives that person's right to challenge adequacy of notice of the proceedings. *In re Raymond R.* (1994) 26 CA4th 436, 441, 31 CR2d 551. On receipt of the affidavit, the clerk must calendar a rehearing within 24 hours from the filing of the affidavit, excluding Sundays and nonjudicial days. Welf & I C §321; Cal Rules of Ct 1447(a). At this type of rehearing, the court must proceed in the same manner as in the original hearing. Welf & I C §321; see Cal Rules of Ct 1447(a) (court must proceed under Cal Rules of Ct 1442–1446). A rehearing for lack of notice is not the same as a prima facie rehearing.

2. [§100.45] Prima Facie Rehearing

After a court has decided that a child should be further detained, the child, the parent or guardian, or the child's attorney or guardian ad litem

may request further evidence of the prima facie case or the grounds for detention by invoking the right to confront and cross-examine the preparers of the reports or documents the court relied on in making its initial detention decision, and the court must schedule a prima facie rehearing within three judicial days. Welf & I C §321; Cal Rules of Ct 1447(d). However, if the preparers of all the reports relied on by the court are present in court or are otherwise available for cross-examination, there is no right to a prima facie rehearing. Cal Rules of Ct 1447(c).

If the court determines that a rehearing cannot be held within three judicial days because a witness is unavailable, it may continue the case for no longer than five judicial days. Welf & I C §321. If a rehearing is held, the child must be released when no prima facie case is found. Welf & I C §321.

Instead of a prima facie rehearing, the court may schedule the jurisdiction hearing to commence within ten calendar days of the detention hearing. Welf & I C §321; Cal Rules of Ct 1447(d).

☛ JUDICIAL TIP: Whenever there is a request for a prima facie rehearing, the judge should seriously consider denying the request and setting the case for a jurisdiction hearing within ten calendar days. This alternative is an effective means of reducing the number of prima facie rehearings, thereby enabling the court to move cases expeditiously to serve the best interests of children.

3. [§100.46] Proceedings Before Referees

At any time before the expiration of ten days after the child, parent, or guardian is served with the written findings and orders of a referee, the child, parent, or guardian may apply for a rehearing before a juvenile court judge. Welf & I C §252; Cal Rules of Ct 1418(a). The application may be directed toward the entire order or a specified part, and must contain the reasons for the request. Cal Rules of Ct 1418(a). When the judicial officer is sitting as a temporary judge, however, there is no right to a rehearing, nor is there one when the party is represented by an attorney who fails to request such a rehearing. *In re Brittany K.* (2002) 96 CA4th 805, 816, 117 CR2d 813.

In addition, a juvenile court judge, on his or her own motion, may order a rehearing of any case heard by a referee within 20 judicial days of the hearing before the referee. Welf & I C §253; Cal Rules of Ct 1418(d). All rehearings of proceedings heard by referees must be conducted de novo. Welf & I C §254; Cal Rules of Ct 1418(e).

A rehearing must be granted if the proceedings held before a referee were not recorded by an authorized reporting procedure such as a court reporter. Welf & I C §252; Cal Rules of Ct 1418(b). If the proceedings had

been recorded, the juvenile court judge may grant or deny the request for rehearing on the basis of the transcript, provided that if the request is not denied within 20 calendar days following its receipt (or within 45 calendar days if the court extends the time for good cause), it will be deemed granted. Welf & I C §252; Cal Rules of Ct 1418(c).

E. [§100.47] Setting Petition for Jurisdiction Hearing

If the child is not detained, the jurisdiction hearing must be held within 30 calendar days of the date that the petition has been filed. Welf & I C §334; Cal Rules of Ct 1442(f). If the child is detained, the hearing on the petition must be set to begin within 15 court days from the date of the detention order. Welf & I C §334; Cal Rules of Ct 1442(f)

F. [§100.48] Indian Child Welfare Act

Judges must comply with the Indian Child Welfare Act (ICWA) at the earliest stages of a dependency proceeding. See Cal Rules of Ct 1439(b), (d). The ICWA (25 USC §§1901–1963) is federal legislation that applies to juvenile court dependency cases when a child is a member of an Indian tribe or eligible for membership in one. See Cal Rules of Ct 1439(a), (c). Two main purposes of the ICWA are to protect the Indian child's interests and to promote the stability and security of Indian tribes and families. *In re Kahlen W.* (1991) 233 CA3d 1414, 1421, 285 CR 507. Failure to give notice as required by the ICWA may cause great delays later in the proceedings and may preclude services to Indian children. See §§100.12–100.14 for discussion of notice requirements. See generally Risling, California Judges Benchguide—The Indian Child Welfare Act (California Indian Legal Services, 2000) (available on the Internet at http://www.calindian.org/icwa.htm).

If a child resides on a reservation, the tribe has exclusive jurisdiction over the dependency proceeding. 25 USC §1911(a). When an Indian child who lives on a reservation has been removed from custody of the parents or Indian custodian, notice of the removal must be given to the tribe no later than the next working day. Welf & I C §305.5(a). If the tribe determines that the child is an Indian child, the custody proceeding must be transferred to the tribe within 24 hours after receipt of written notice from the tribe. Welf & I C §305.5(a).

If the child does not reside on a reservation, the state juvenile court may hear the proceeding unless there is a request to transfer the case to the tribe, in which case the court must make the transfer unless either parent objects or there is good cause to the contrary. See 25 USC §1911(b); Cal Rules of Ct 1439(c)(2); *In re Larissa G.* (1996) 43 CA4th 505, 515, 51 CR2d 16. However, if the state court hears the case, it must ensure that the

tribe is given notice and an opportunity to intervene at each stage. See Cal Rules of Ct 1439(f); *In re Junious M.* (1983) 144 CA3d 786, 792, 193 CR 40.

Notice is required when the DSS and the court know or have reason to know that an Indian child is involved. 25 USC §1912(a); see Cal Rules of Ct 1439(d), (f); *In re Junious M., supra.* When there is even a possibility that the child who is the subject of a dependency proceeding has Indian heritage, the court must proceed as if the child is an Indian child and hold the dependency hearings under the Welfare and Institutions Code timelines while complying with ICWA. Cal Rules of Ct 1439(e); *In re Samuel P.* (2002) 99 CA4th 1259, 1267, 121 CR2d 843. When a dependency petition notes the possible application of ICWA, it is the responsibility of DSS to notify the tribe under 25 USC §1912(a). *In re Desiree F.* (2000) 83 CA4th 460, 471, 99 CR2d 688. The notice requirement of ICWA cannot be waived by the parents' failure to raise it. *In re Marinna J.* (2001) 90 CA4th 731, 739, 109 CR2d 267; but see *In re Pedro N.* (1995) 35 CA4th 183, 189–190, 41 CR2d 819 (when all parties were aware of possible application of ICWA, parents waived notice by waiting until after termination of parental rights to raise the issue).

☛ JUDICIAL TIP: Unless the child's family is actively involved with a local tribe, it is almost never practical to continue a detention hearing pending notification of the proper tribe. Many judges will go forward with the detention hearing, while simultaneously attempting to notify the tribe. If and when the tribe appears or takes a position, the judge may then reevaluate the procedures to be followed.

Determination by the tribe that a child is either a member of a tribe or eligible for membership in a tribe and a biological child of a member requires that ICWA be applied to the proceedings. Welf & I C §360.6(c); Cal Rules of Ct 1439(g)(5). A determination by the tribe of the child's tribal membership is conclusive. Cal Rules of Ct 1439(g); *In re Junious M., supra,* 144 CA3d at 793. See also *Santa Clara Pueblo v Martinez* (1978) 436 US 49, 55, 98 S Ct 1670, 56 L Ed 2d 106 (Indian tribes are independent political entities retaining natural rights in questions of self-government). Despite Welf & I C §360.6, the statutory provisions of the ICWA do not apply to remove a multi-ethnic partially Indian child from his prospective adoptive parents; the child's minimal relationship to his biological parents, who themselves have had virtually no relationship with their tribes, is not sufficient to overcome the child's constitutional right to remain in a home where he is loved and well cared for. *In re Santos Y.* (2001) 92 CA4th 1274, 1315–1316, 112 CR2d 692.

The child need not be formally enrolled in the tribe in order to invoke ICWA because the child is an "Indian child" for purposes of the ICWA if the child is eligible for membership in a tribe or a biological child of a member. See *In re Desiree F., supra* 83 CA4th at 470.

Notice must be given to the Indian parent and the tribe or the Bureau of Indian Affairs at the time of the filing of the petition. See 25 USC §1912; Cal Rules of Ct 1439(f). Notice to some but not all possible tribes in which a dependent child may be eligible for membership does not violate ICWA when notice is also given to the Bureau of Indian Affairs. *In re Edward H.* (2002) 100 CA4th 1, 4, 122 CR2d 242.

The child's tribe has a right to intervene at any time in an Indian child custody proceeding. See 25 USC §1911(c); Cal Rules of Ct 1412(i), 1439(h). If the state fails to comply with any provisions of the ICWA, the proceedings may be dismissed on petition of the parent or the tribe. 25 USC §1914; Cal Rules of Ct 1439(n). In *In re Samuel P, supra,* 99 CA4th at 1267, it was reversible error to fail to notify the tribe that a dependency proceeding was underway when there had been clear indications of Indian ancestry.

If the child is to be placed in foster care or adoption, the court must place the child with the child's extended family, another Indian family, or the tribe, unless good cause is shown for another placement. 25 USC §1915; Cal Rules of Ct 1439(j)–(k).

☛ JUDICIAL TIP: Some judges recommend that DSS always notify the Bureau of Indian Affairs because notifying the tribe is subject to the risk that the notice is sent to the wrong branch of the tribe.

Under Cal Rules of Ct 1439(e), if the court has reason to know that the child is an Indian child, the court must proceed with all dependency hearings, observing the timelines of the Welfare and Institutions Code, while complying with ICWA.

☛ JUDICIAL TIP: When the court has reason to know that the child is an Indian child, the court should not grant a continuance to determine status; instead, the court must proceed as if the child is an Indian child until the tribe or the Bureau of Indian Affairs makes a determination to the contrary.

IV. SAMPLE FORMS

A. [§100.49] Script: Conduct of Initial or Detention Hearing

(1) *Introduction*

[*Mr./Ms.*] [*name of clerk*], please swear all persons who may wish to speak during the proceedings.

Note: Often this step is omitted because in most counties parents speak through their attorneys, and social workers rarely testify at detention hearings.

(2) *Appointment of attorney for parent(s) or guardian(s)*

[*If parents are unrepresented by counsel*]

You have a right to be represented by an attorney during this detention hearing, and during all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so.

☛ JUDICIAL TIP: Judges often explain to the parents the importance of hiring an attorney with experience in juvenile court.

[*Or*]

The court has reviewed the financial declaration of [*name of parent or guardian*] and finds that [*he/she*] is entitled to appointment of counsel. At this time, the court appoints [*name of attorney*] to represent [*him/her*].

[*If parents waive counsel*]

This is a serious and important matter. If the court finds that grounds for detention exist, this hearing could result in [*name of child*] being placed [*with* [*name of parent or guardian*]*/in a foster home/in the shelter*] from today until the jurisdiction hearing on [*date*]. Ultimately parental rights may be terminated and the child may be placed for adoption. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

☛ JUDICIAL TIP: Many judges also inform parents of the applicable time frames and emphasize the complexity of the law and the difficulty of the procedure before accepting a waiver.

[*When applicable, add*]

The court now finds that the parents have intelligently waived their right to counsel at this hearing.

(3) *Attorney for child*

The court has read and considered the documentary material submitted by the Department of Social Services (the Department) for the limited purpose of assessing whether to appoint counsel for the child. Would anyone like to be heard on this issue?

[*After hearing evidence, if any, on issue of child's need for attorney*]

The court finds, based on the facts of this case, that there is a need to appoint counsel for the child at this time. The court appoints [*name of attorney*] as the child's CAPTA guardian-ad-litem to represent the child.

[*Or*]

The court finds, based on the facts of this case, that there is no identifiable benefit to the child that would require appointment of counsel at this time because [*give reason*].

☛ JUDICIAL TIP: It is advisable to ask counsel for DSS if there are any potential conflicts of interest among the children (if multiple siblings are involved) and, if so, to appoint separate counsel for siblings. See discussion in §100.20.

(4) *Paternity inquiry, if applicable*

The court needs to know the name and address of the child's father, as well as names and addresses of any men who might claim to be fathers.

☛ JUDICIAL TIP: It is important to question the mother with as much delicacy as possible, possibly beginning with the question of whether she is or was married to the father.

[*If no answers appear to be forthcoming, the court may ask the mother or other participant who might know the answers (see Cal Rules of Ct 1441(b)(1)–(6))*]

1. Has there been a paternity judgment?
2. Were you [*the mother*] married or did you believe yourself to be married, at the time of conception?
3. Were you [*the mother*] living with a man at the time of conception?
4. Did you [*the mother*] receive support or promises of support during the pregnancy?
5. Has a man formally acknowledged paternity?
6. Have paternity tests been administered and, if so, what were the results?

(5) *Explanation of procedure*

I am going to explain to you what happens at these juvenile court proceedings. These proceedings are divided into several separate hearings.

First, there will be an initial or detention hearing. That is what is happening here today.

[*If child is detained*]

The purpose of this hearing is for the court to inform you of the contents of the petition and of what to expect in juvenile court, as well as for the court to decide whether [*name of child*] should remain in protective custody [*in the shelter*] from today until the date of the jurisdiction hearing, which has been set for [*date*]. The jurisdiction hearing may be similar to a trial. It is the hearing at which the court decides whether what the petition says is true.

[*If child is not detained*]

The purpose of this hearing is for the court to inform you of the contents of the petition and of what to expect in juvenile court.

[*Continue*]

When you appear in court on [*date*], for the jurisdiction hearing, the court will decide whether the statements contained in the petition that has just been read are true. If the court finds them to be not true, the court will dismiss the petition. If the court finds them to be true, the court will conduct a disposition hearing.

The purpose of a disposition hearing is to decide what action, if any, the court should take in view of what has been found to have happened. If [*name of child*] is not able to be returned home at the disposition hearing, there may be later hearings that may culminate in the termination of parental rights.

If the court sustains the petition at the jurisdiction hearing and if [*name of child*] is declared a dependent of the court and removed from the custody of [*his/her*] parent or guardian, court-ordered reunification services may not be provided for more than 12 months for a child who is over three years old at the time of removal or six months for [*a child who was/*all *the children if there was any one child who was*] under three years old at the time of removal if [*the parent or guardian does/you do*] not participate regularly in a court-ordered treatment program.

Note: Very often, the attorney for the parent(s) or guardian(s) will state that he or she has explained these matters to the parent or guardian and will waive formal advisement. Many judges encourage attorneys who appear in their courts to take this responsibility because it can be helpful in streamlining judicial proceedings.

(6) *Notice*

(a) *One parent not present:*

[*If one parent is not present, make sure that the absent parent received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear.

(b) *Both parents present:*

The court finds that the [*mother/father/guardian(s)*], the child, and all counsel were notified of this hearing and served with the petition as required by law.

(c) *One or both parents or guardian(s) not present and notice attempted:*

The court finds that the following attempts were made to locate the [*mother/father/guardian(s)*]: [*List attempts.*] The court has reviewed the declaration of search and finds that the efforts made to locate and serve the [*parent(s)/guardian(s)*] were reasonable.

(d) *Insufficient attempts at notice:*

The court finds that the Department has not used due diligence in attempting to locate the [*parent(s)/guardian(s)*]. The case is therefore continued for one day. The Department must take the following steps to locate the [*parent(s)/guardian(s)*]: [*List them, e.g., check with Department of Corrections, check with child's school*].

Note: Only rarely will a judge need to dictate to the DSS the search efforts that are needed.

(7) *Waiver of reading of petition and advisement of rights*

[*To each counsel*]

Does your client waive reading of the petition and advisement of rights?

(8) *Reading the petition*

[*If not waived, read the petition*]

Do each of you understand the petition just read, or do you have any question about it you would like to have answered by the court?

Are there any changes to names, addresses, or ages in the petition that should be corrected?

(9) *Advisement re addresses under Welf & I C §316.1 and Cal Rules of Ct 1412(k)*

The address that [*is in the petition/you have given the court today*] will be used by the court and the social worker for all further notices unless you advise the court and the social worker in writing of any changes in address. [*There is a form available in the courtroom for this purpose.*]

(10) *Advisement of rights*

As you are aware, [*name of child*] has been placed in protective custody because of the circumstances stated in the petition that was just read to you.

You have certain rights at this hearing. You have the right to:

1. Be represented by counsel as already explained;

2. See, hear, and question all witnesses who may be examined at this hearing;

3. Cross-examine, which means ask questions of, any witness who may testify at this hearing; and

4. Present to the court any witnesses or other evidence you may desire.

In the case of reports submitted by the Department of Social Services, you also have the right to cross-examine the social worker who prepared the reports. Further, you have the right to present evidence and to use the court's subpoena power to bring witnesses to court to testify on your behalf. Finally, you have a right against self-incrimination, which means that no one can force you to say anything that might be used against you as the basis for, or in connection with, criminal proceedings. I would advise you, however, that you also have "use immunity" for any testimony you give in these proceedings. This means that your testimony here cannot be used in a criminal proceeding against you.

If you have any questions regarding immunity, I suggest that you discuss the issue further with your attorney. Now, do you understand each of these rights that I have explained to you?

(11) *Evidence*

[*Court reads any written reports, which the parties should have had an opportunity to review, and states for the record all material read by the court.*]

The court receives into evidence the report of [*date*].

Note: The term for the social worker's report varies from county to county. Whatever the local usage is, the court must indicate which documents it is relying on.

[*Court should orally examine child, if present, and parents or other persons for relevant knowledge bearing on grounds for detention. (Child is often not present at a detention hearing.) Court allows cross-examination of any witness who may testify.*]

Now is the time for you to present any evidence or make any statement you may wish to make before the court decides whether [*name of child*] should remain in protective custody.

B. [§100.50] Script: Findings and Orders

(1) *Introduction*

The court has read and considered [*name the documents, e.g., the petition or the social worker's report of* [*date*], *and attached documents, or local name for social worker's report, e.g., social study*]. The court has also considered the testimony of the witnesses and their demeanor on the stand, as well as the arguments of counsel.

(2) *Parties*

The court finds that the legal status of [*name of party*] is [*describe*].

Note: The court may make a finding of whether each man who claims or is alleged to be the father is a biological, alleged, or presumed father (unless there is a legal father by virtue of the conclusive presumption of Fam C §7540) if the court has sufficient information to do so. See §§100.32–100.33.

(3) *Detention*

[*No prima facie case*]

The court finds that no prima facie case has been made that [*name of child*] is a person described by Welfare and Institutions Code section 300, nor do any of the circumstances outlined in Welfare and Institutions Code section 319 subsections (b)(1) through (4) apply. [*Name of child*] should not remain in protective custody in the shelter pending the jurisdiction hearing and is hereby released to the custody of [*his/her*] [*mother/father/guardian(s)*] on the following conditions: [*state conditions*].

[*Prima facie case*]

Good cause appearing, the court finds that a prima facie case has been made that [*name of child*] is a person described by Welfare and Institutions Code section 300 because of [*list facts*]. In addition, [*this/these*] circumstance(s) outlined in Welfare and Institutions Code section 319, subsections (b)(1) through (4), [*applies/apply*]: [*List one or more and provide reasons for the conclusions.*]

- [*There is substantial danger to the physical health of the child/The child suffers from severe emotional damage*] and there are no reasonable means by which the child's [*physical/emotional*] health may be safeguarded without removal.

Note: All findings must be made on the record and in the written orders. Cal Rules of Ct 1444(b).

- There is substantial evidence that the [*parent(s)/guardian(s)/custodian(s)*] [*is/are*] likely to flee the jurisdiction.
- The child has left placement in which [*he/she*] was placed by order of the juvenile court.
- The child is unwilling to return home, and it is alleged that [*he/she*] has been physically or sexually abused by a person in the home.

[*Under Cal Rules of Ct 1446(a), (d) when ordering detention, the court must make these additional findings*]

- The initial detention was justified because [*state reasons, e.g. substantial danger to physical health*].
- The child's continuing residence in the home of the parent or legal guardian is contrary to the child's welfare under California Rules of Court 1446(a)(2).
- The child is ordered detained and temporarily placed in the care of the Department of Social Services pending disposition or further court order. [*The court approves placement with* [*emergency shelter/foster care/name of relative who is willing and available to take the child*].]

The following services are ordered as soon as possible. [*List services; see* §100.38.]

Note: (1) The court may also announce any temporary restraining orders granted. (2) It is possible to find that a prima facie case was made, but that there are no grounds for continuing detention.

Do you have any questions about the court's order or what is going to take place in the future?

(4) *Preplacement preventive services*

The court finds that preplacement preventive efforts were made to avoid removing the child from the home. [*State facts.*] This finding is based on the [*name of the document, such as Declaration of Efforts*], dated _____.

[*Or*]

Reasonable efforts have not been made.

(5) *Jurisdiction hearing*

The jurisdiction hearing is scheduled for [*date*] at _____ [*a.m./p.m.*], in Department _____.

Note: The court might want to ask whether time is waived, although under Welf & I C §352(c), waiver is implied if a party is represented by counsel and no objection is made to a continuance.

(6) *Settlement/readiness/status conference (if jurisdiction is not contested)*

You are ordered to be present at the [*name of conference or hearing, e.g., settlement, readiness, status conference, or uncontested jurisdictional hearing*] on [*date*], at _____ [*a.m./p.m.*], in Department _____. If you fail to appear, your default will be entered and the court may make findings and orders affecting your parental rights.

Note: The judge should make it clear that, whatever this conference is called, it is also a jurisdictional hearing, and the court will be able to make jurisdictional findings even if the parties fail to appear.

C. [§100.51] Draft: Detention Hearing Minute Order

Prepared by the Center for Families, Children, and the Courts

"The court has read, considered, and admits into evidence:
social worker's detention report dated _____.

[*List other reports*]

_____

_____

_____

and makes the following findings and orders based on the information therein."

__1. Notice has been given as required by law.

__2. The court finds a prima facie showing has been made that the child comes within Section 300 of the Welfare and Institutions Code.

__3. The court finds that continuance in the parents' or guardians' home is contrary to the child's welfare AND (select at least one)

__(a) There is a substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parents' or guardians' physical custody.

__(b) There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court.

__ (c) The child has left a placement in which he or she was placed by the juvenile court.

__ (d) The child has been physically abused by a person residing in the home and is unwilling to return home.

__ (e) The child has been sexually abused by a person residing in the home and is unwilling to return home.

__4. The court finds reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home.

__5. The court finds reasonable efforts were not made to prevent or eliminate the need for removal of the child from his or her home.

__6. The court finds there are not available services that would prevent the need for further detention.

__7. The court finds there are available services that would prevent the need for further detention and orders the services provided and the child placed with his or her parent or guardian.

__8. The court finds there is a relative who is able, approved, and willing to care for the child.

__9. The court finds there is not a relative who is able, approved, and willing to care for the child.

__10. The court orders the child detained.

__11. The court orders temporary placement and care of the child vested with the county child welfare department pending the hearing held pursuant to Section 355 of the Welfare and Institutions Code or further order of the court.

__12. The court orders services to be provided as soon as possible to reunify the child and his or her family.

__13. The court orders the parent(s) to disclose to the social worker the names, residences, and any known identifying information of any maternal or paternal relatives of the child.

The child is ordered placed in

___the approved home of a relative

___an emergency shelter

___other suitable licensed place

___ a place exempt from licensure designated by the juvenile court

___in the approved home of a nonrelative extended family member as defined in Section 362.7 of the Welfare and Institutions Code

The facts on which the decision to order the child detained are

_____

The initial removal of the child from the home was necessary because

_____

Visitation orders— with parents

— with siblings

Order _____appointed as guardian ad litem

V. [§100.52] ADDITIONAL REFERENCES

Seiser & Kumli, California Juvenile Courts: Practice and Procedure (Matthew Bender 2003).

California Juvenile Dependency Practice (Cal CEB 2002).

VI. APPENDIX I: PREHEARING DETENTION

This appendix sets out the grounds for taking the child into temprary custody by a police officer or social worker and the procedure that is followed until the detention hearing is held.

A. Grounds for Initial Detention

1. [§100.53] By Peace Officer

Under Welf & I C §305(a), a peace officer may detain a child who, the officer has reasonable cause to believe, is a person described by Welf & I C §300, and in addition:

- Has immediate need for medical care;
- Is in immediate danger of sexual or physical abuse;
- Is in a physical environment that imposes an immediate threat to the child's health or safety; or
- Has been left unattended, which poses an immediate threat to the child's health or safety.

In cases in which the child has been left unattended, the peace officer must attempt to contact the parent or guardian, and if that is not possible, the officer must notify a social worker from the county child welfare department to assume custody. Welf & I C §305(a).

In addition, an officer may detain a child when:

- The child is in the hospital and release of the child to the parent poses an immediate threat of danger to the child's health or safety (Welf & I C §305(b)).
- The officer has reasonable cause to believe that the child has violated a juvenile court order or left a placement when that child had been a dependent child or has been the subject of an order under Welf & I C §319 (Welf & I C §305(c)).
- The child is found on a street or in a public place, suffering from a condition that requires medical treatment, hospitalization, or other care (Welf & I C §305(d)).

2. [§100.54] By Social Worker

Under Welf & I C §306(a), a social worker in a county welfare department (or Indian tribe that has entered into an agreement under Welf & I C §10553.1) may receive and maintain temporary custody of a child in any of the following circumstances:

- The child has been delivered by a peace officer, pending investigation.
- The child has been declared a dependent child under Welf & I C §300.
- The social worker has reasonable cause to believe that the child comes under Welf & I C §300(b) (parent unable to protect child from serious physical harm) or §300(g) (child left without provision for support, or physical custody of the child has been voluntarily surrendered under Health & S C §1255.7 and the child has not been reclaimed during the specified 14-day period), and that the child (1) has immediate need for medical care, (2) is in immediate danger of physical or sexual abuse, or (3) lives in a

physical environment that poses an immediate threat to health or safety.

Before taking a child into custody, the social worker must consider whether there are reasonable services that, if made available to the child's parent or guardian, would eliminate the need for detention. Welf & I C §306(b).

B. [§100.55] Grounds for Continuing Detention

When a child has been detained, the social worker must immediately investigate the circumstances and release the child to the custody of the parent, guardian, or responsible relative under Welf & I C §307(a) unless (Welf & I C §309(a)):

- There is no parent, guardian, or responsible relative;
- The parent, guardian, or responsible relative is not willing to provide care;
- Continued detention is needed for the protection of the child and there are no alternative ways to protect the child in the home;
- There is substantial evidence that a parent or guardian may flee the court's jurisdiction;
- The child has left a placement in which he or she had been placed by the juvenile court; or
- The parent or other custodian had voluntarily surrendered custody under Health & S C §1255.7 and did not reclaim the child during the specified 14-day period.

C. Notification re Detention

1. [§100.56] In General

Any peace officer or social worker who takes a child into temporary custody under Welf & I C §§305–307 must immediately inform the parents (or guardian or responsible relative if appropriate) that the child has been detained, let them know the child's whereabouts, and inform them that a written statement explaining their procedural rights is available. Welf & I C §307.4(a). Under Welf & I C §308(a), regular telephone contact between the parent and child must be instituted unless the contact would be detrimental to the child. If the peace officer determines that the child need not remain in custody, the officer may prepare a written notice to appear before a social worker. On execution by the parents of a promise to appear, the officer must release the child to the parents. Welf & I C §307(b). See also Welf & I C §310 (as a condition for child's release, social worker may require child, as well as parent,

guardian, or responsible relative, to sign a written promise that either or both of them will meet with social worker).

An operator of a community service program that has temporary custody of the child must also attempt to notify the parents (Welf & I C §307.5), and the person in charge of a day-care facility from which the child has been taken must provide the officer who detains the child with the parents' names and addresses so that the parents may be notified (Health & S C §1596.876). A child taken into detention has the right to make telephone calls. Welf & I C §308(b).

Failure to notify the proper parties as required, if due to circumstances beyond the control of the peace officer or social worker after good faith efforts, shall not be the basis of an objection to juvenile court jurisdiction. Welf & I C §307.4(b).

2. [§100.57] Court Order re Notification

The confidentiality of the foster family's address must be maintained until the disposition hearing, at which time the judge may authorize disclosure of the address on a showing of good cause. Welf & I C §308(a). If the disposition hearing is to be delayed beyond 60 days, the court may order the foster family's address released to the parent or guardian. Welf & I C §308(a).

3. [§100.58] Written Statement of Procedural Rights

The written statement of procedural rights required to be provided by the officer or social worker should explain the preliminary stages of the dependency proceeding and should include (Welf & I C §307.4):

- Conditions under which the child can be released, ways of obtaining further information about the child's case, and information on required hearings.
- Right to counsel and appeal (for child and parents, guardian, or responsible relative) and privilege against self-incrimination.

D. [§100.59] Placement Options for Initial Detentions

Children who are taken into custody and suspected of or adjudicated as being abused or neglected (Welf & I C §300) must be detained in a separate location from children who are alleged or found to be described by Welf & I C §601 (status offenders) or §602 (delinquents). Welf & I C §206. An officer who detains a child under Welf & I C §300 may take the child to a community service program for abused or neglected children. Welf & I C §307.5. Under these circumstances, the admitting organization must immediately attempt to notify the child's parent, guardian, or

responsible relative of the place to which the child was taken. Welf & I C §307.5.

The officer must give preference to the alternative that least interferes with the parents' custody if compatible with the child's safety, and must also consider the child's needs for the least restrictive environment and the need to protect the community. Welf & I C §307.

E. [§100.60] Time Limitations on Detention

Under Welf & I C §313(a) and Cal Rules of Ct 1442(b), detention must not exceed 48 hours, excluding noncourt days, unless a petition has been filed within the 48 hours to declare the child a dependent child. However, if a petition is filed after the 48-hour period, Welf & I C §313 does not preclude the court from continuing the detention. *Los Angeles County Dep't of Children's Servs. v Superior Court* (1988) 200 CA3d 505, 508, 246 CR 150. Once a petition has been filed, the controlling statute becomes Welf & I C §315 (requiring the holding of a detention hearing), which is directed to the juvenile court and is mandatory. 200 CA3d at 508–509.

However, if no petition is filed, the agency must release the child. 200 CA3d at 508.

VII. [§100.61] APPENDIX II: UCCJEA

The following appendix has been taken from a memo to the Judicial Council Family and Juvenile Law Advisory Committee, prepared by the Center for Families, Children, and the Courts by Corby Sturges.

In 1973, California adopted the Uniform Child Custody Jurisdiction Act (UCCJA) (now former), in part to avoid jurisdictional conflict and promote interstate cooperation in custody proceedings involving multiple states. Stats 1973, ch 693, §1 (codified as CC §5150 et seq (now former)). The UCCJA was incorporated into the Family Code on its enactment. (Stats 1992, ch 162, §10 (codified as Fam C §3400 et seq).) In 2000, California adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which superseded the UCCJA and clarified many of its provisions. (Stats 1999, ch 867, §3 (codified as Fam C §3400 et seq).)

The UCCJEA is the exclusive jurisdictional basis for making a child custody determination in California. (Fam C §3421(b).) Satisfaction of the UCCJEA's requirements is a necessary prerequisite to a custody determination under substantive family or juvenile law.

If it appears that the child has lived out of state, the court may wish to ask the parents, the social worker, or even the child the following six questions to elicit the information sought by Fam C §3429:

1. Where does the child live now? If the child has been detained, where did the child live before he or she was detained? If the child has no address, where is the child now or where was the child when he or she was detained?

2. Please tell me the address of every place the child has lived for the past five years.

3. Please tell me the name of every person with whom the child has lived for the past five years.

4. Have you ever participated as a party or a witness or in any other capacity in another case or custody proceeding, in California or elsewhere, concerning the custody of a child in this proceeding?

5. Do you know about any custody proceedings, other than those we've already talked about, going on in any court concerning a child in this proceeding?

6. Do you know of any person who is not a party to this proceeding who has physical custody or claims to have custody or visitation rights concerning any child in this proceeding?

CALIFORNIA

CALIFORNIA CONSTITUTION
Art VI
1
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21
100.15

CIVIL CODE
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100.61

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Editorial comments and inquiries: Ellen Matthews, Editor 415/865-7794
fax 415/865-4335

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I. [§101.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency jurisdiction hearings, held generally under Welf & I C §§300 and 325–356 and Cal Rules of Ct 1400–1452. This benchguide includes two procedural checklists, a brief summary of the applicable law, and spoken and written forms. The discussion covers grounds for jurisdiction, contested and uncontested hearing procedures, and required findings and orders.

Throughout this benchguide, the agency that handles abused or neglected children will be referred to as the Department of Social Services (DSS) and the person who investigates and resolves dependency cases will be called the social worker. See Welf & I C §215.

The purpose of the jurisdiction hearing is for the court to determine which of the allegations of the petition, if any, have been proved by a preponderance of evidence. See Welf & I C §355(a); discussion in §101.4.

II. PROCEDURAL CHECKLISTS

A. [§101.2] Uncontested Hearing

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties, following the procedures set out under* Cal Rules of Ct 244. If it is desired that a referee (or commissioner assigned as a referee) hear a case as a temporary judge, a written stipulation must be obtained from the parties. See discussion in §101.34.

(2) *Call the case.* In many counties, the social worker assigned to the case as court officer or the deputy county counsel calls the case and announces the appearances.

Note: Some judicial officers will first call the entire calendar to determine which cases are ready and in what order they will be taken.

(3) *Determine the identity of those present and each person's interest in the case before the court.* Welf & I C §§346, 349; Cal Rules of Ct 1410(b).

- *Exclude all persons from the court except parties (including the child), counsel for the parties, or anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court.* Welf & I C §§345–346, 349.

- *Ask each parent or guardian to confirm for the court his or her permanent mailing address.*
- *Remind each parent or guardian that the designated mailing address will be used by the court and the social services agency for notification purposes until the parent or guardian provides a new address in writing to the court or social services agency.* Welf & I C §316.1(a); Cal Rules of Ct 1412(*l*). Judges should also advise the parents that they may change the addresses by written notice as often as they need to.

Note: The steps that follow (including appointment of counsel) will normally have been done at the detention hearing, and therefore may not have to be repeated at the jurisdiction hearing.

(4) *Make a finding whether notice has been given or attempted as required by law.* See Cal Rules of Ct 1412(k).

(5) *If a parent or guardian has been notified and fails to appear, make a finding to that effect and indicate that the hearing is going to proceed in the absence of that parent or guardian.* See, *e.g., In re Christopher A.* (1991) 226 CA3d 1154, 1162, 277 CR 302. There is no "default" procedure in juvenile dependency hearings. See *In re Stacy T.* (1997) 52 CA4th 1415, 1422 n4, 61 CR2d 319.

(6) *Unless the inquiry was conducted and resolved at the initial or detention hearing, the court must ask the mother about the identities and addresses of the presumed or alleged fathers.* If a paternity inquiry was made at the initial or detention hearing and the question of paternity was not fully resolved, the judge should inquire as to the progress made to resolve the issue (*e.g.,* whether there are results of paternity tests, etc.). Welf & I C §316.2. See discussion in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.26 (Cal CJER).

(7) *Inquire whether the child has American Indian heritage and, if so, take steps to ensure that proper notice is given.* See California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.41.

(8) *Ask whether the factual information (names, dates, addresses, ages, etc.) on the petition is correct.* The judge should order that the petition be corrected by interlineation if, on inquiry, any of the participants provides corrections to the names, dates, addresses, ages, or other factual information in the petition. If one of the parents is a victim of domestic violence and is living apart from the batterer-parent, the address of the victim parent must remain confidential. Welf & I C §332(e).

(9) *If a parent or guardian is not already represented by counsel, advise him or her of the statutory right to counsel, including appointed counsel if appropriate.* The judge should appoint counsel for the parent or

guardian as warranted, including any incarcerated or institutionalized parent. Welf & I C §317(a).

(10) *If child is unrepresented, determine if it is still the case that the child would not benefit from appointment of counsel, and, if so, make findings as to why.* Welf & I C §317(c). Otherwise appoint counsel to represent the child, and designate the attorney as the Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem. Welf & I C §317; Cal Rules of Ct 1412(g)–(h).

(11) *Unless waived by counsel, read, or have the clerk read, a copy of the petition to those present.* Unless waived by counsel, the judge should explain the meaning and content of the allegations, as well as the nature of the hearing, procedures, and possible outcomes. Welf & I C §353; Cal Rules of Ct 1449(a).

(12) *Advise the parties of their hearing rights, and inquire whether they understand and wish to waive those rights.* Cal Rules of Ct 1449(b). If the parties did not attend the initial or detention hearing, the judge should give the advisements discussed in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.21.

(13) *Ask whether the parent or guardian wishes to admit, plead no contest, or deny the allegations in the petition, or submit the matter on the reports.* Cal Rules of Ct 1449(c), (e).

(14) *If the parent or guardian denies the allegations and does not submit the matter on the reports, follow the checklist in* §101.3, *Contested Hearing.* Cal Rules of Ct 1449(c).

(15) *If the parent or guardian neither admits nor denies the allegations, state on the record that the parent or guardian does not admit the allegations and follow the checklist in* §101.3, *Contested Hearing.* Cal Rules of Ct 1449(c).

(16) *If the parent or guardian wishes to admit the allegations, plead "no contest," or submit the matter based on the social worker's reports, determine whether the parent or guardian understands the allegations, knowingly and intelligently waives the right to a contested hearing on the petition, and understands the consequences of the admission, plea of "no contest," or submission.* Cal Rules of Ct 1449(c). Judicial Council Waiver of Rights form JV-190 is available for taking this waiver. See discussion in §101.32.

☛ JUDICIAL TIP: If the parent or guardian has submitted the matter, the judge should ask each attorney (including the child's attorney) whether cross-examination of the social worker is waived and ask the parent and attorney to complete JV-190.

(17) *If there is an admission, plea of "no contest," or submission, make a finding on the record that the parent or guardian understands the*

allegations and understands and waives hearing rights. Cal Rules of Ct 1449(c). See script in §101.52.

☛ JUDICIAL TIP: If the parent or guardian is submitting the matter, the judge should inquire whether the submission is on the reports or on the reports *and* recommendation. See *In re Richard K.* (1994) 25 CA4th 580, 589–590, 30 CR2d 575; discussion in §101.26. The court should also inquire as to whether any submission is the result of a negotiated settlement and, if so, have the terms set forth on the record.

(18) If the parent or guardian has pleaded no contest or has submitted the jurisdictional determination based on information provided in the social worker's report, review the report and any attached documents to determine if they support the allegations in the petition. If the parent or guardian has admitted the allegations, the judge should review the social worker's reports and any attached documents to determine a factual basis for the plea.

☛ JUDICIAL TIP: In some counties, attorneys will stipulate to the allegations in the pleading. When there is such a stipulation, the best approach is for the attorneys to stipulate (1) to the truth of the allegations in the pleading and (2) that those allegations constitute a "cause of action." However, it is still the court's duty to ensure that there is a factual basis for jurisdiction. See Cal Rules of Ct 1449(f)(6).

(19) *If the positions of all parents and guardians have been considered, make findings of whether the child is described by Welf & I C §300 and, if so, under which specific subsections; make additional findings required in uncontested cases under Cal Rules of Ct 1449(f).*

(20) *If jurisdictional findings have been made, proceed to a disposition hearing or continue the matter for a disposition hearing under Cal Rules of Ct 1451 and 1455.* Welf & I C §358; Cal Rules of Ct 1449(g).

(21) *If DSS had alleged that Welf & I C §361.5(b)* or *(e)(1) (no reunification services) may be applicable, continue the disposition hearing for a period not to exceed 30 calendar days.* Welf & I C §358(a)(3); Cal Rules of Ct 1451(b). The court must order DSS to notify each parent of Welf & I C §361.5(b) and must inform each parent that if no reunification is ordered at the disposition hearing for any parent or guardian, a .26 hearing (a hearing held under Welf & I C §366.26) will be held and parental rights may be terminated. Welf & I C §358(a)(3); Cal Rules of Ct 1451(b). When the parent is present at the hearing and has had an opportunity to review the recommendations, the court need not continue

the matter if the parent waives that right and permits disposition to proceed. See generally discussion in §101.50. If the parent or guardian was not present at the detention hearing, the court should also give the more detailed advisements noted in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.19 (Cal CJER).

B. [§101.3] Contested Hearing

(1) *Follow steps (1) through (14) from checklist in* §101.2, *Uncontested Hearing.*

(2) *Receive the evidence, including the social worker's report and attachments, the report of any court-appointed special advocate, and any testimony.* Except as provided in Welf & I C §355.1 and subdivisions (c), (d), and (e) of Cal Rules of Ct 1450, judges should rule on admission or exclusion of evidence according to the Evidence Code as it applies to civil cases. Cal Rules of Ct 1450(b). The social worker who prepared the report must be available for cross-examination. Cal Rules of Ct 1450(c)(2). The preparer may be on telephone standby if the preparer can be present in court within a reasonable time. Cal Rules of Ct 1450(c)(2).

- *If the child's testimony is required, plan for and facilitate the child's testimony as appropriate.* See Welf & I C §350; Cal Rules of Ct 1412(c). See also §§101.42–101.46
- *Receive the social worker's report and any attachments if the social worker is available for cross-examination or is on telephone standby and can be present in court within a reasonable time.*
- *Do not base jurisdiction findings or any other finding of ultimate fact on which a jurisdiction finding is made on hearsay contained in the report if a party objects to particular hearsay in the report and provides DSS a reasonable period to meet the objection unless:*
  - — *The hearsay is admissible under any statutory or judicial hearsay exception;*
  - — *The hearsay declarant is a child under 12 years of age who is the subject of the petition, except if the objecting party establishes that the statement was produced by fraud, deceit, or undue influence and is therefore unreliable;*
  - — *The hearsay declarant is a peace officer, health practitioner, social worker, or teacher and the statement would be admissible if the declarant were testifying in court; or*

— *The hearsay declarant is available for cross-examination.* Welf & I C §355(c); Cal Rules of Ct 1450(d). See also discussion in §§101.40, 101.43.

- *Consider the operation of any applicable presumptions.* Welf & I C §355.1; see discussion in §101.19.

(3) *Make findings as to whether the child is one described by Welf & I C §300 as alleged in the petition* or find, based on proof, that the child is described by a different subsection of Welf & I C §300 than that alleged in the petition. The court may amend the petition to conform to the evidence if necessary, including striking any portion of the petition found to be not proved. See Welf & I C §348. The allegations must be proved by a preponderance of the evidence. Welf & I C §355(a).

(4) *If the child is found to come within Welf & I C §300, make findings required by Welf & I C §356 and Cal Rules of Ct 1450(f).* See discussion in §101.48 and form in §101.53.

(5) *If the child is not found to come within Welf & I C §300, dismiss the petition, order that any previously ordered detention be terminated, and make findings required by Cal Rules of Ct 1450(h).* See Welf & I C §356.

(6) *If jurisdictional findings have been made, proceed to a disposition hearing or continue the matter for a disposition hearing under Cal Rules of Ct 1451 and 1455.* See Welf & I C §358(a); Cal Rules of Ct 1450(g).

(7) *If DSS had alleged that Welf & I C §361.5(b) or (e)(1) (no reunification services) may be applicable, the disposition hearing must be continued for a period not to exceed 30 days.* The court must order DSS to notify each parent of Welf & I C §361.5(b) and must inform each parent that if reunification is not ordered at the disposition hearing, a .26 hearing will be held, and parental rights may be terminated. Welf & I C §358(a)(3); Cal Rules of Ct 1451(b). See discussion in §10[illegible]50. If the parent had been present at the hearing and has had an opportunity to review the recommendations, the court need not continue the matter if the parent waives that right and permits disposition to proceed, with the understanding that a .26 hearing may result.

III. APPLICABLE LAW

A. [§101.4] Purpose of Jurisdiction Hearing

The purpose of the jurisdiction hearing is for the court to determine whether the allegations in the petition should be sustained and, therefore, whether the child is a person described by Welf & I C §300. See Welf & I C §355(a). The court does not adjudge the child a dependent of the court at this hearing or decide where the child will live. *In re Heather B.* (1992) 9 CA4th 535, 543, 11 CR2d 891. These decisions are made at the

disposition hearing if jurisdiction is found. See Welf & I C §§360, 361, 361.2; *In re La Shonda B.* (1979) 95 CA3d 593, 599, 157 CR 280.

The goal of Welf & I C §300 is to provide maximum safety and protection for children who have been or are currently being physically or sexually abused; who are being emotionally abused, neglected, or exploited; or who are at risk of being so harmed. Welf & I C §300.2. Nothing in Welf & I C §300 is intended to disrupt the family unnecessarily or to intrude inappropriately into family life. Welf & I C §300.

B. Background Issues

1. [§101.5] Focus of Dependency Petition

Dependency petitions are brought on the child's behalf and not to punish the parent. *In re La Shonda B.* (1979) 95 CA3d 593, 599, 157 CR 280. Therefore, if the child comes within the Welf & I C §300 description, the petition is simply "sustained"; it is not sustained against a parent or as to one or both parents. Because the focus of the petition is the child, there may be situations in which a petition is sustained, but DSS is required to pursue its case plan with minimal disruption to the family. See, *e.g.*, *In re Matthew S.* (1996) 41 CA4th 1311, 1321, 49 CR2d 139 (children were reasonably well adjusted and close to mother who was conscientious but delusional).

Previous case law required that the jurisdictional allegations be proved to exist as of the date of the jurisdiction hearing. See, *e.g.*, *In re Melissa H.* (1974) 38 CA3d 173, 175, 113 CR 139, requiring that the court make a finding that the parent's home is unfit. As a result, parents would often clean their home, stop using physical discipline, or otherwise claim to have changed in an effort to defeat the taking of juvenile court jurisdiction. However, most of the current subdivisions of Welf & I C §300 now provide for the assumption of jurisdiction in one of two ways: (1) The child has already suffered serious physical harm, illness, or sexual abuse, or (2) the child is at substantial risk of suffering such harm. Although evidence of current circumstances is still relevant to allegations based solely on substantial risk, such as in the case of siblings, this type of evidence is not relevant to a jurisdictional finding based on harm already suffered by the child. Nevertheless, in cases in which there is evidence of changed circumstances, the current circumstances remain relevant to dispositional considerations, such as whether to remove the child.

2. [§101.6] Child in Custody of One Parent

Jurisdiction can be established without regard to custody orders or arrangements concerning the child. In fact, there is no need to have allegations relating to both parents. If conditions arise or acts occur that

place the child at risk, those allegations will support a petition, regardless of whether the child was in the physical custody of both parents or was in the sole legal or physical custody of only one parent at the time that the conditions giving rise to jurisdiction occurred. Welf & I C §302(a). A petition may be sustained even when one parent is capable of providing for the child and there is no mention of that parent in the allegations. *In re Jeffrey P.* (1990) 218 CA3d 1548, 1552–1554, 267 CR 764. Under these facts, the circumstances of the noncustodial parent may be relevant as a dispositional consideration. See Welf & I C §361.2(a).

Because jurisdictional allegations concern the child and not any particular parent, jurisdictional findings cannot be made until the court has dealt with all parents and guardians on the subject of jurisdiction. See Welf & I C §§332(e), 291(a)(1)–(3). Even a parent or guardian who is not alleged to have done anything to contribute to the harm or risk of harm to the child has the right to contest whether the child is described by Welf & I C §300, and each parent is entitled to notice, an attorney, and the right to contest proceedings, whether or not that person is mentioned in the allegations of the petition. See Welf & I C §§317, 291(a)(1)–(3), 353; Cal Rules of Ct 1450.

☛ JUDICIAL TIP: Frequently, social workers, attorneys, and judges speak of parents as "offending" and "nonoffending." These generalizations may be misleading and are inconsistent with the intent of the legislature to concentrate on the child's needs. A "nonoffending" parent might often be characterized more accurately as "nonprotecting." It is best to limit the use of such terms and use instead only "custodial" and "noncustodial."

For an in-depth discussion of this issue, see Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases,* 27 Santa Clara L Rev 241–245 (1987) and, in particular, the comparison between *In re Jennifer P.* (1985) 174 CA3d 322, 219 CR 909 (custodial parent who becomes aware of abuse may take sufficient steps to render juvenile court jurisdiction unnecessary), and *In re Nicole B.* (1979) 93 CA3d 874, 881–882, 155 CR 916 (nonabusing custodial parent cannot prevent juvenile court from taking jurisdiction when that parent has not taken adequate steps to prevent further abuse).

The court must ask the mother the names and addresses of all possible fathers of the child, who must then be provided notice of the proceedings and the right to appear. Welf & I C §316.2(a)–(b). In certain cases, counsel must be appointed for a possible father. See *In re Zacharia D.* (1993) 6 C4th 435, 451, 24 CR2d 751 (parent is defined as a mother or a presumed father as used in dependency statutes). Judicial officers should

appoint counsel for a biological father who has established paternity and has taken steps toward filling a parental role in the child's life.

☛ JUDICIAL TIPS:

- Once a possible father appears and requests custody of the child, paternity should generally be determined, unless a judgment of paternity already exists. Only presumed fathers are entitled to reunification services. If an alleged father has been determined to be a biological, although not presumed, father, the court has discretion to order services if the child's best interests will be served. See Welf & I C §361.5(a). If an alleged father is eliminated by testing or other evidence, he will not have standing to contest the proceedings nor will he be entitled to the appointment of counsel.
- Issues of paternity should be resolved at the earliest possible stage in the proceedings. Identifying a presumed, biological, or alleged father at an early stage may eliminate unnecessary delay that would be caused by the father appearing at a later stage, and may additionally provide the court with other resources, including another placement option.
- Any alleged father should be required to complete and submit Judicial Council Statement Regarding Paternity form JV-505.

3. [§101.7] Independence of Jurisdictional Allegations

Each jurisdictional allegation brought under a different subdivision of Welf & I C §300 must stand on its own to justify an assumption of jurisdiction under that particular subdivision. A simple test to determine this is to ask whether the allegations under one subdivision would be sufficient to support a jurisdictional finding if the allegations under the other subdivisions were found to be untrue. For example, if the father beat the child causing serious injury and the mother's whereabouts were unknown, an allegation under Welf & I C §300(a) could be sustained because the only necessary finding is that the child was seriously injured by the father. This would be true whether or not the mother's whereabouts were known. However, an allegation under Welf & I C §300(g) (no parent or guardian able to care for child) could not be sustained merely because the mother's whereabouts are unknown, because if the allegation that the father had beaten the child were found to be untrue, there would be no need to assume jurisdiction.

4. [§101.8] Issues Previously Raised in Family Court

There has been a split of authority on whether a juvenile court may hear a case in which the same or similar issues were already litigated or are being litigated in the family law court. Compare *In re Brendan P.* (1986) 184 CA3d 910, 920, 230 CR 730 (suggesting that it could not), with *In re Travis C.* (1991) 233 CA3d 492, 503, 284 CR 469 (holding that it could). The Fourth District Court of Appeal, Division One, which rendered the decision in *Brendan P.* has since held that a juvenile court is not collaterally estopped from reconsidering the same question of abuse that had been decided in family law court. *In re Desiree B.* (1992) 8 CA4th 286, 293, 10 CR2d 254.

The juvenile court has exclusive jurisdiction and is the only division of the superior court that may hear proceedings relating to issues of child custody once a petition has been filed. Welf & I C §304. If the same or similar issues are being or have been litigated in the family or probate division of the superior court, the juvenile court is not collaterally estopped from "relitigating" those same issues. See *In re Desiree B., supra.* The issues before the family law or probate court are different even if some or all of the facts of abuse or neglect adduced in the other proceedings are the same. *In re Desiree B., supra,* 8 CA4th at 292. The purpose and interests of the juvenile court are different from those of the family or probate court and because the juvenile court includes the state (DSS) as a litigant and provides for representation of children when appropriate, it is generally "the best forum for considerations of issues concerning custody." *In re Desiree B., supra,* 8 CA4th at 293.

Juvenile court is not the best forum, however, when each parent's sole aim is to take custody from the other. See *In re John W.* (1996) 41 CA4th 961, 976–977, 48 CR2d 899. Moreover, a court should not sustain a petition based on an ongoing custody dispute unless the child shows severe anxiety, depression, withdrawal, or untoward aggressive behavior. See *In re Brison C.* (2000) 81 CA4th 1373, 1379, 97 CR2d 746.

Courts around the state and nation have begun experimenting with consolidating the juvenile, family, probate, and domestic violence "divisions" to avoid inconsistent or contradictory orders, eliminate or reduce duplication of services, reduce the number of court appearances, and provide a more "holistic" approach to dealing with families in crisis. For more information on the concept, endorsed by the American Bar Association, see *Symposium on Unified Family Courts,* 32 Fam LQ 1 (1998).

C. Grounds for Jurisdiction

1. [§101.9] Serious Physical Harm by Parent or Guardian—Welf & I C §300(a)

A child who has suffered or is at substantial risk of suffering serious physical harm inflicted nonaccidentally by a parent or guardian is described by Welf & I C §300(a). In this regard, "nonaccidentally" does not mean that the parent must have intended the serious injury to occur. It means only that the act that caused the injury must be a nonaccidental act. Expert medical testimony that the injury was inconsistent with an accident shifts the burden to the parent or guardian of proving that the injury was a result of an accident. Welf & I C §355.1(a); see *In re Richard H.* (1991) 234 CA3d 1351, 1363, 285 CR 917 (nonaccidental injury). "Serious physical harm" does not include reasonable and age-appropriate spanking on the buttocks when there is no evidence of serious physical injury. Welf & I C §300(a).

A court may find a child to be described by this section when it finds a substantial risk of future serious injury based on the manner in which a less serious injury was inflicted, a history of repeated infliction of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm. Welf & I C §300(a). For example, allegations based on this subsection were properly sustained when a child had been pinched in anger, the father was indifferent to the child's pain, and the father had previously injured the mother and stepbrother. See *In re Benjamin D.* (1991) 227 CA3d 1464, 1472, 278 CR 468.

See also Welf & I C §355.1(d) (prior conviction for sexual abuse is prima facie evidence that child is described by Welf & I C §300(a)) and discussion in §101.19.

2. [§101.10] Failure To Protect From Serious Harm or Illness—Welf & I C §300(b)

A child is described by Welf & I C §300(b) when he or she has suffered, or is at substantial risk of suffering, serious physical harm or illness because of the parent's or guardian's failure to provide for the child's needs or to protect and adequately supervise the child. This is the broadest of the jurisdictional subdivisions. The failure to protect may have been due to inadequate supervision or the fact that the parent or guardian has been unable to provide for the child's care because of his or her own mental illness, developmental disability, or substance abuse. For example, a mother's refusal to believe that the child was molested, coupled with proof that the father physically assaulted the child were found to support Welf & I C §300(b) jurisdiction. *In re Katrina W.* (1994) 31 CA4th 441,

447, 37 CR2d 7 (petition was sustained based on Welf & I C §300(b), (i), and (j)). But see *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1752–1754, 53 CR2d 687 (confronted with a somewhat similar fact pattern, the court discussed the "confession dilemma" faced by a parent who is falsely accused of molesting his or her child).

The presence of dangerous drugs in a child's body at birth is not by itself a basis for a suspected child abuse report, but with other factors would be considered in determining if the child is at risk. Pen C §11165.13 Depending on the totality of the circumstances, even an older child exposed to a parent's drug use may come within Welf & I C §300(b) if that child has been placed in an environment permitting access to drugs. *In re Rocco M.* (1991) 1 CA4th 814, 825, 2 CR2d 429.

Moreover, although failing to send children to school may cause psychological, emotional, financial, and social harm, it is not by itself a basis for sustaining a petition under Welf & I C §300(b). *In re Janet T.* (2001) 93 CA4th 377, 388–389, 113 CR2d 163.

In addition, children may be found to be described by Welf & I C §300(b) although they have suffered no direct harm, when there is a pattern of domestic violence that has not been corrected. In such situations of "secondary abuse," evidence that the child was present and witnessed domestic violence with the expected result that the child suffered emotional abuse is sufficient to sustain a petition. *In re Heather A.* (1996) 52 CA4th 183, 194, 60 CR2d 315. See also *In re S. O.* (2002) 103 CA4th 453, 461–462, 126 CR2d 553 (mother had permitted unsupervised visit with perpetrator of domestic violence). However, if the evidence does not establish that the child was present and witnessed the violence, the fact of domestic violence in the home may not be sufficient to sustain the petition. See, *e.g., In re Alysha S.* (1996) 51 CA4th 393, 398, 58 CR2d 494.

Although domestic violence that endangers children is often filed as a Welf & I C §300(b), in appropriate cases it may also be filed as a Welf & I C §300(a) or (c). For further discussion of domestic violence in dependency cases, see Seiser & Kumli, California Juvenile Courts: Practice and Procedure §2.33[14] (Matthew Bender, 2003). See also Fam C §§3011(b) (history of domestic abuse is a factor in determining child's best interest), 3020(a) (domestic violence in a household in which a child resides is detrimental to the child), and 6203 (defines abuse).

Spanking children with a wooden paddle, hitting children on the head, face, and arms, and verbally abusing them may constitute a risk of serious physical harm under Welf & I C §300(b). *In re Tania S.* (1992) 5 CA4th 728, 734, 7 CR2d 60. Likewise, a risk of harm under §300(b) may arise because the parent is unable to meet a child's needs or respond to emergency situations because of developmental disability. *In re Diamond H.* (2000) 82 CA4th 1127, 1136, 98 CR2d 715. There must be a causal

connection, however, between the parent's conduct and the child's serious emotional problems. *In re Nicholas B.* (2001) 88 CA4th 1126, 1136, 106 CR2d 465 (father's inappropriate and threatening physical demeanor seemed to be unconnected to child's problems).

When there is testimony of a competent medical professional that the injury sustained by the child is of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, that is prima facie evidence that the child is a person described by Welf & I C §300(b). Welf & I C §355.1(a). This presumption may be rebutted by evidence that the injury could have been caused accidentally, such as in an athletic contest. See *In re Esmeralda B.* (1992) 11 CA4th 1036, 1040, 14 CR2d 179.

In making a finding that the child comes within Welf & I C §300 because he or she is in need of medical care, the court must give consideration to treatment provided through spiritual means. Welf & I C §300.5. When it is alleged that the child comes within the court's jurisdiction because the parent's spiritual beliefs have prevented the parent from obtaining standard medical treatment, the court must not assume jurisdiction unless necessary to protect the child from serious harm. Welf & I C §300(b). Under this subsection, in making its decision, the court must consider

- The nature of the treatment proposed by the parent;
- The risks to the child posed by the treatment or nontreatment proposed by the parent;
- The risk, if any, of the treatment proposed by DSS; and
- The likely success of the various courses of proposed treatment.

Cases involving parental religious beliefs forbidding blood transfusions fall under this subsection.

Prior conviction for sexual abuse is prima facie evidence that child is described by Welf & I C §300(b). See Welf & I C §355.1(d) and discussion in §101.19.

3. [§101.11] Serious Emotional Damage—Welf & I C §300(c)

The juvenile court may take jurisdiction of a child who is suffering or is at substantial risk of suffering serious emotional damage as evidenced by severe anxiety, depression, untoward aggressive behavior, or withdrawal, if this damage is caused by the parent's or guardian's conduct or the child has no parent or guardian who is able to provide suitable care. Welf & I C §300(c). This subdivision authorizes the taking of jurisdiction under three types of situations:

(1) When the parent's actions are responsible for the initial onset of the emotional damage, such as when the parent seriously abuses the child resulting in emotional damage;

(2) When the parent's actions are responsible for the child continuing to suffer the emotional damage, such as when the parent minimizes or denies the seriousness of the child's emotional damage and refuses to seek appropriate care for the child's emotional suffering; and

(3) When the parent is unable, because of the lack of financial resources or insurance, to provide suitable care for the child's emotional suffering. Welf & I C §300(c).

Serious emotional harm under Welf & I C §300(c) can occur when the child is emotionally fragile and the parent is unable to put the child's needs above his or her own. *In re Amy M.* (1991) 232 CA3d 849, 869–870, 283 CR 788. However, when the allegations in the petition are solely that the parent caused the initial onset of the emotional damage, but the evidence focuses only on the child's reactions and not on the parent's initial causal conduct, a finding that the child comes within Welf & I C §300(c) is improper. See *In re Alexander K.* (1993) 14 CA4th 549, 557, 18 CR2d 22.

A case involving an acrimonious custody dispute that causes a child great emotional stress or psychological harm may justify the assumption of jurisdiction. See, *e.g., In re Anne P.* (1988) 199 CA3d 183, 244 CR 490 (jurisdiction taken under former Welf & I C §300(a)). However, the court should be cautious in such cases and, unless there is evidence that the child has suffered serious emotional damage, should not assume jurisdiction merely because the parties cannot work together or desire juvenile court involvement. *In re John W.* (1996) 41 CA4th 961, 977, 48 CR2d 899. When a child is well-adjusted except for a deep fear and dislike of one parent, there is no basis for taking jurisdiction under §300(c) even when the parents have subjected the child to a rancorous family law dispute. *In re Brison C.* (2000) 81 CA4th 1373, 1381–1382, 97 CR2d 746.

A court may sustain a petition under Welf & I C §300(c) even when the child is reasonably well adjusted and has a close relationship with the mother but the mother's mental illness and delusions confuse the child. *In re Matthew S.* (1996) 41 CA4th 1311, 1320, 49 CR2d 139. The court cautioned DSS to pursue its case plan in an unobtrusive manner with minimal disruption to this loving but marginally functional family. 41 CA4th at 1321.

If the failure to provide suitable mental health care is based on a sincerely held religious belief and if a less intrusive judicial intervention is available, the juvenile court must not find the child to be described by this section. Welf & I C §300(c).

See also discussion in §101.19.

4. [§101.12] Sexual Abuse—Welf & I C §300(d)

When a child has suffered or is at risk of suffering sexual abuse as defined by Pen C §11165.1 and the parent or guardian either caused the abuse or failed to protect the child from the abuse, the child is subject to juvenile court jurisdiction under Welf & I C §300(d).

One appellate court has held that a child may be found to be sexually abused under Welf & I C §300(d) when it was a sibling, rather than the child, who was abused, and the child did not actually witness the abuse; there must be evidence, however, that a child would be disturbed or offended by the conduct directed at the sibling. See *In re Karen R.* (2001) 95 CA4th 84, 89–91, 115 CR2d 18 (the child, who was male, did witness his sister being physically abused and humiliated). A child may also be adjudged a dependent under this section when there is evidence that the custodial parent failed to protect a sibling from abuse by the other parent and that the custodial parent is still dependent on the alleged abuser. See *In re Tiffany Y.* (1990) 223 CA3d 298, 303, 272 CR 733.

The identity of the person who molested the child need not be ascertained in order to sustain a petition; the facts that the child was a victim of sexual abuse and that the parent was unable or unwilling to protect the child are sufficient for jurisdiction. *In re Christina T.* (1986) 184 CA3d 630, 640, 229 CR 247. See also Welf & I C §355.1. However, the perpetrator's identity may be relevant to dispositional findings and orders. See also discussion in §101.19 of Welf & I C §355.1(d) (prima facie evidence that a child is described by Welf & I C §300(d) if a parent, guardian, or custodian has previously been convicted of sexual abuse in California or out-of-state (see Pen C §11165.1), has been found in a prior dependency proceeding to have committed sexual abuse, or has been required to register as a sex offender). The mere failure of the parents to confess to abuse (and therefore to protect the child from it) may be insufficient evidence on which to sustain a petition; the court must be sensitive to the fact that the denial may be legitimate. See *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1752–1754, 53 CR2d 687. See discussion of the "confession dilemma" situation in §101.10.

5. [§101.13] Severe Physical Abuse of Child Under the Age of Five—Welf & I C §300(e)

When a child who is under the age of five has suffered severe physical abuse by a parent or by someone known to the parent and the parent knew or should have known of the abuse, the child is subject to juvenile court jurisdiction under Welf & I C §300(e). "Severe physical abuse" means any one of the following:

- A single act of abuse causing such trauma that, if left untreated, would cause permanent disability, disfigurement, or death.
- A single act of sexual abuse that has caused significant bleeding, deep bruising, or significant external or internal swelling.
- More than one instance of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.
- The willful, prolonged failure to provide adequate food.

To sustain a petition under Welf & I C §300(e), it is not necessary that the parent personally inflicted the severe physical abuse. It is enough that the parent knew the abuser and knew or reasonably should have known that the person was physically abusing the child. *In re Joshua H.* (1993) 13 CA4th 1718, 1729, 17 CR2d 282. It is also not necessary that the parent had knowledge of the severity of the abuse the child was suffering, because many of the injuries described in this subdivision are internal and may only be discovered after medical examination. *In re Joshua H., supra.*

☛ JUDICIAL TIP: In smaller counties in which doctors do not often see shaken baby cases and other types of child abuse injuries, some courts request that x-rays and other information on injuries be sent to teaching hospitals where doctors are more likely to have experience in these areas.

6. [§101.14] Causing Death of Another Child—Welf & I C §300(f)

A petition under subdivision (f) may be sustained because a parent or guardian has been convicted of causing the death of another child through abuse or neglect. See Welf & I C §300(f). The appellate court in *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 282 CR 303, held that a trial judge may properly find that a mother's nolo contendere plea to felony child endangerment (Pen C §273a), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child through abuse or neglect under Welf & I C §300(f). The appellate court held that, in this situation, the trial court must look beyond the bare facts of the conviction to the circumstances giving rise to the prosecution.

☛ JUDICIAL TIP: Frequently, pleas are entered to lesser charges in criminal cases because the evidence will not support a conviction for the greater charge. The judge should therefore not presume that a plea to a charge reduced from murder or manslaughter will

automatically be sufficient to support a finding under Welf & I C §300(f). Careful consideration must be given to the underlying facts and any defenses.

7. [§101.15] Child Left Without Provision for Support—Welf & I C §300(g)

The child is subject to juvenile court jurisdiction under Welf & I C §300(g) in the following situations:

- When a child has been left without provision for support,
- When physical custody of the child has been voluntarily surrendered under Health & S C §1255.7 and the child has not been reclaimed within a 14-day period.
- When the parent has been institutionalized or incarcerated and cannot arrange for care,
- When the adult with whom the child resides or has been left is unable to provide care, or
- When the parents' whereabouts are unknown and efforts to locate the parents are unsuccessful.

Allegations under this section cannot be sustained unless the child is left without provision for support by *both* parents. In *In re Matthew S.* (1996) 41 CA4th 1311, 1320, 49 CR2d 139, the court noted that because there was an absent father in Brazil and because the somewhat delusional mother had been supporting the child for years and there was no evidence that the child suffered from malnutrition or deprivation of shelter, clothes, or medical care, the petition could not be sustained under this subdivision. The fact that a father's whereabouts are unknown cannot, by itself, be a basis for sustaining a petition under Welf & I C §300(g). *In re Janet T.* (2001) 93 CA4th 377, 392, 113 CR2d 163.

If the parent is incarcerated but is able to arrange for the child's care, Welf & I C §300(g) is inapplicable. *In re S. D.* (2002) 99 CA4th 1068, 1077, 121 CR2d 518. The issue is whether the parent *could* arrange for the child's care and DSS has the burden of proof on this issue; there is no "Go to jail, lose your child rule" in California. *In re S. D., supra,* 99 CA4th at 1078. The parent has no obligation to affirmatively prove the suitability of her arrangements. *In re S. D., supra,* 99 CA4th at 1079.

In accord is *In re Aaron S.* (1991) 228 CA3d 202, 209, 278 CR 861, which held that Welf & I C §300(g) requires proof that an incarcerated parent was unable to arrange for care at the time of the hearing, not that he or she had failed to do so at some earlier point. Additionally, a subdivision (g) petition should not be sustained based on the fact that the incarcerated

parent's choice of a caretaker for the child during his or her incarceration might not be a suitable long-term placement, as long as the choice is "adequate," although only temporary. *In re Monica C.* (1995) 31 CA4th 296, 305, 36 CR2d 910.

8. [§101.16] Child Freed for Adoption—Welf & I C §300(h)

When a child has been freed for adoption from one or both parents for a period of one year and no adoption petition has been granted, the child is subject to juvenile court jurisdiction under Welf & I C §300(h). Such cases are generally those in which the child has been relinquished to an adoption agency for adoptive placement but the placement has not been successful or an adoption petition has not been granted. When a child is adjudged a dependent under this section, the court must not order reunification services. Welf & I C §300.1. No subsequent petition under this subdivision is required when the child is already a dependent of the juvenile court and has been freed for adoption under the Welfare and Institutions Code.

9. [§101.17] Child Subject to Acts of Cruelty—Welf & I C §300(i)

When a child has been subjected to an act or acts of cruelty by a parent or guardian or by a member of the household, or when the parent or guardian has failed to protect the child adequately from an act or acts of cruelty and the parent or guardian knew or reasonably should have known that the child was in danger of being so treated, the child is subject to juvenile court jurisdiction under Welf & I C §300(i). See, *e.g.*, *In re Benjamin D.* (1991) 227 CA3d 1464, 1472, 278 CR 468 (multiple severe pinchings causing physical pain). This section does not require evidence of an actual physical harm or illness to be suffered by the child, nor does it require evidence of emotional trauma. It is enough that the act or acts to which the child was subjected were cruel in nature. Welf & I C §300(i).

☛ JUDICIAL TIP: Although any serious abuse or neglect is generally seen as cruelty to a child, the creation of a separate subdivision covering this specific point suggests that jurisdiction under this subdivision is meant to be reserved for children who have been subjected to an act or acts that "shock the conscience."

10. [§101.18] Abuse or Neglect of Siblings—Welf & I C §300(j)

When a child's sibling has been abused or neglected as defined in Welf & I C §300(a), (b), (d), (e), or (i) and there is a substantial risk that

the child will be similarly abused or neglected, the child is subject to juvenile court jurisdiction under Welf & I C §300(j). This subdivision does not require that a dependency petition be filed or sustained concerning the sibling or that the sibling must still be a child. It is enough that the sibling had been abused or neglected as a minor and that the child who is the subject of the petition is at substantial risk of the same or similar abuse or neglect. Welf & I C §300(j). If there had been a finding of abuse of a sibling made in an earlier dependency proceeding, a parent is collaterally estopped from contesting this finding when it is part of an allegation under Welf & I C §300(j); however, the parent may still contest the question of whether the child is at substantial risk of the same or similar abuse or neglect. *In re Joshua J.* (1995) 39 CA4th 984, 993–994, 46 CR2d 491.

Subdivision (j) adds little or nothing for children who are at substantial risk under Welf & I C §300(a), (b), or (d) because petitions can be filed under those subdivisions as well. It is most significant when a sibling has been subjected to acts of cruelty that do not leave demonstrable evidence of physical injury or emotional trauma. In those cases, if the child is at risk of similar cruel acts, jurisdiction can be assumed under this subdivision even though there may be no evidence that the child is at risk under subdivisions (a), (b), or (d).

D. [§101.19] Applicable Presumptions

When the court finds, based on competent professional evidence, that an injury would not have been sustained without unreasonable or neglectful acts of the parent or guardian, it is prima facie evidence that the child is described by Welf & I C §300(a), (b), or (d). Welf & I C §355.1(a). The presumption affects the burden of producing evidence. Welf & I C §355.1(c). When the court finds that a parent, guardian, or custodian has previously been convicted of sexual abuse in California or out-of-state (see Pen C §11165.1), has been found in a prior dependency proceeding to have committed sexual abuse, or has been required to register as a sex offender, this will be prima facie evidence that the child is described by Welf & I C §355.1(a)–(d) and is at substantial risk of abuse or neglect. Welf & I C §355.1(d). This presumption affects the burden of producing evidence. Welf & I C §355.1(d). This presumption applies even if the registered sex offender is a parent with whom the child does not live. *In re John S.* (2001) 88 CA4th 1140, 1144–1145, 106 CR2d 476.

Evidence of nonaccidental head injuries is prima facie evidence that the child is described by Welf & I C §300. *In re Richard H.* (1991) 234 CA3d 1351, 1363, 285 CR 917 (a doctor testified that these injuries do not ordinarily occur in the absence of wrongful parental conduct and there was

no rebuttal). However, the presumption of Welf & I C §355.1 may not be used to establish jurisdiction unless (1) a professional testifies that the single incident does not ordinarily occur in absence of neglectful or unreasonable conduct, and (2) the presumption is not rebutted. *In re Esmeralda B.* (1992) 11 CA4th 1036, 1040, 1041, 14 CR2d 179. In that case, the child was held not to come under Welf & I C §300(b) although she had slight vaginal bleeding and a torn hymen. Because there was no evidence that these injuries could not occur in the absence of parental actions and there was evidence that these injuries could have been caused by athletic injuries, the presumption could not be invoked to find the allegations in the petition true.

☛ JUDICIAL TIP: When a young child has suffered serious nonaccidental injuries for which the parents have no reasonable explanation, jurisdiction is usually appropriate under this presumption under one of three theories: (1) The parent or guardian committed the injury; (2) the parent or guardian failed to protect the child from the injury; or (3) because the parent or guardian does not know who or what caused the injury, he or she will not be able to protect the child in the future, thereby placing the child at substantial risk. See, *e.g.*, *In re Christina T.* (1986) 184 CA3d 630, 640, 229 CR 247 (court need not determine perpetrator of abuse in order to sustain petition).

E. [§101.20] Initiating the Hearing

Whether or not a child is detained, the dependency case is initiated by the filing of a petition. If the child has been detained, there must first be a detention hearing, and the jurisdiction hearing should be scheduled at that time. See §101.24.

The contents of the petition are prescribed by Welf & I C §332 and Cal Rules of Ct 1407. An unverified petition may be dismissed without prejudice. Welf & I C §333. However, once a verified petition has been filed, it may not be dismissed by DSS without notification to all interested parties so that DSS and the child may have an opportunity to be heard and to object. *Allen M. v Superior Court* (1992) 6 CA4th 1069, 1074, 8 CR2d 259.

In the initial "pleading" stage, the function of the petition is to communicate the social worker's specific concerns to the parent. *In re Jessica C.* (2001) 93 CA4th 1027, 1037, 113 CR2d 597. After the hearing on the petition, however, the focus is on the substance of the allegations and, unless the variance is material, it is too late to challenge the "idiosyncratic particulars of the social worker's precise language." See *In re Jessica C., supra,* 93 CA4th at 1037–1038. When the court finds the

variance between the allegations in the petition and the proof to be material (misleading to the adverse party), the court may order the petition to be amended as set out in CCP §§469–475. Welf & I C §348; Cal Rules of Ct 1407(c).

☛ JUDICIAL TIP: If both sides stipulate to small changes in the petition and the court agrees, the court may treat the stipulation as a motion to amend the petition and grant the motion. The court should have the changes read into the record, make the changes on the written petition form, accept a written draft of the changes, and order DSS to prepare an amended petition for filing.

1. [§101.21] Notice of Hearing

Once the jurisdiction hearing is set, the juvenile court clerk must issue a notice of hearing to the child (if ten years old or older), the parents, guardians, or appropriate adult relative, the parties' attorneys, the foster parents, preadoptive parents, present caregiver, and any court-appointed special advocate. Welf & I C §291(a)(1)–(6); Cal Rules of Ct 1407(e). Notice is not required for a parent whose parental rights have been terminated. Welf & I C §291(b).

The Indian custodian and the tribe of that child must be notified if the court knows or has reason to know that an Indian child is involved. Welf & I C §291(a)(7). If the identity or location of the parent, Indian custodian, or the tribe cannot be determined, the Bureau of Indian Affairs must also be notified. Welf & I C §291(a)(7). Notice to some but not all possible tribes in which a dependent child may be eligible for membership does not violate the Indian Child Welfare Act (ICWA) when notice is also given to the Bureau of Indian Affairs. *In re Edward H.* (2002) 100 CA4th 1, 4, 122 CR2d 242.

The notice must include the name and address of the person to be notified, the nature of the hearing, the date, time, and place of the jurisdiction hearing, the name of the child on whose behalf the petition was brought; each code section and subdivision under which the proceeding was brought, and a copy of the petition. Welf & I C §291(d)(1)–(5), (7). The notice must also include a statement that the parents, guardians, or adult relatives and the child are entitled to have an attorney present at the jurisdiction hearing (including a court-appointed attorney for an indigent parent, guardian, Indian custodian, or adult relative if they notify the court that they cannot afford an attorney) and a statement that the parent, guardian, or adult relative may be responsible for the cost of any appointed counsel and for the child's support in out-of-home placement. Welf & I C §291(d)(6); Cal Rules of Ct 1407(d). Parents, custodians, and relatives must also be notified that if they fail to appear,

the court may proceed in their absence. Welf & I C §291(d)(6)(A). When the child is an Indian child, the notice must contain a statement that the parent or Indian custodian and the tribe may intervene in the proceedings and may be given an additional 20 days in order to do so. Welf & I C §291(d)(8).

2. [§101.22] Service of Notice and Petition

If the child is detained, the notice and petition must be served on all the persons required to receive notice as soon as possible and at least five days before the hearing, or at least 24 hours before the hearing if the hearing is set less than five days after the petition is filed. Welf & I C §291(c)(1) ; Cal Rules of Ct 1407(f). If the persons to be notified were not present at the initial hearing, they must be personally served or notified by certified mail, return receipt requested. Welf & I C §291(e)(1). If the persons to be notified were present at the initial hearing, notification may be by personal service or first-class mail. Welf & I C §291(e)(2).

If the child has not been detained, the notice and petition must be served on all persons required to receive notice at least ten days before the hearing. Welf & I C §291(c)(2); Cal Rules of Ct 1407(g). Notification may be by personal service or first-class mail unless the person to be served lives outside the county, in which case service must be by first-class mail. Welf & I C §291(e)(3). In the case of an Indian child, notice must be given no less than ten days before the hearing by registered mail, return receipt requested. Welf & I C §291(c)(3), (e)(4). If notice has been given to the Bureau of Indian Affairs, the bureau must have 15 days after receipt of notice to notify the Indian custodian or parent and the tribe. Welf & I C §291(c)(3).

Any of the required notices may be waived by a party in person, through counsel, or by signed written waiver filed on or before the hearing date. Welf & I C §291(f).

In locating a parent for notification purposes, DSS must use the information it has available to find a parent. See *In re Arlyne A.* (2000) 85 CA4th 591, 599, 102 CR2d 109 (due diligence declaration appeared valid on its face, but DSS had failed to check directory assistance for town of father's family residence when informed that the father lived there); *David B. v Superior Court* (1994) 21 CA4th 1010, 1016, 26 CR2d 586 (DSS failed to inquire about father's whereabouts in the armed services although his name and the fact that he was in the Marines was on the child's birth certificate). Once a parent has been located and notified of the proceedings, it becomes the obligation of that parent to inform DSS of further address changes. *In re Raymond R.* (1994) 26 CA4th 436, 441, 31 CR2d 551. See also Welf & I C §316.1 (parent must designate permanent

mailing address; the court must advise parent that designated address will be used for notice unless new address provided in writing).

3. [§101.23] Requiring Appearances

In addition to the notices required by Welf & I C §291and Cal Rules of Ct 1407, the court may also issue a citation ordering a parent or guardian to appear at the jurisdiction hearing. See Welf & I C §338; Cal Rules of Ct 1408(a). The citation must be personally served at least 24 hours before the time stated for appearance (Cal Rules of Ct 1408(a)(2)) and must state that the parent or guardian may be required to participate in a counseling program (Cal Rules of Ct 1408(a)(1)). Welf & I C §338. It also may direct the child's custodian to bring the child to court. Welf & I C §338; Cal Rules of Ct 1408(a)(1).

If the court finds that a citation cannot be served or that it will be ineffective, or if the parent, guardian, or other person having custody of the child fails to obey the citation, the court may issue a warrant for the arrest of the parent, guardian, or custodian. Welf & I C §339; Cal Rules of Ct 1408(b). The court may also issue a protective custody warrant for the child when the child's home environment endangers the child's health, person, or welfare; when the child has run away from a court-ordered placement; or when the parent, guardian, or custodian has absconded with or concealed the child. Welf & I C §340; see also Cal Rules of Ct 1408(c) (court may issue arrest warrant for child when child's actions endanger self or others).

☛ JUDICIAL TIP: Warrants of arrest for missing parents are frequently issued by juvenile courts under the mistaken belief that this in some way "preserves jurisdiction." However, the only purpose of an arrest warrant in a dependency proceeding is to locate parents when they have fled with the child or to prosecute parents for contempt of court when they have violated a juvenile court order.

In addition, on request of any party or attorney, or on its own motion, the court must issue subpoenas under CCP §1985 requiring attendance of witnesses and production of documents at the jurisdiction or other hearing. Welf & I C §341; Cal Rules of Ct 1408(d).

F. Time Limitations

1. [§101.24] Setting the Jurisdiction Hearing

The jurisdiction hearing must be set within 30 calendar days from the date the petition is filed if the child is not detained; if the child is detained,

the hearing must be set within 15 court days of the court order directing detention. Welf & I C §334; Cal Rules of Ct 1442(f).

If the time requirements are not met, the court is not deprived of jurisdiction. See *Los Angeles County Dep't of Children's Servs. v Superior Court* (1988) 200 CA3d 505, 509, 246 CR 150 (failure to observe time limits for filing of petition does not require that child be released from detention); *In re Charles B.* (1986) 189 CA3d 1204, 1209–1211, 235 CR 1 (juvenile court time requirements are generally not mandatory—review hearing).

A court may also schedule a jurisdiction hearing within ten days of the detention hearing instead of holding a prima facie detention hearing. See Welf & I C §321; Cal Rules of Ct 1447(d). See discussion in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearings* §100.38 (Cal CJER).

2. [§101.25] Continuances

The judge may grant a continuance if it would not be contrary to the child's best interests. Welf & I C §352; Cal Rules of Ct 1422(a)(1). In determining whether to grant a continuance, the judge must give substantial weight to the need for prompt resolution of the child's custody status, the need to provide the child with a stable environment, and the damage that could be caused by prolonged temporary placements. Welf & I C §352(a); Cal Rules of Ct 1422(a)(1). A grant of a continuance must be based on good cause (Welf & I C §352(a); Cal Rules of Ct 1422(a)(2)), which does not include convenience of parties or stipulation between counsel (Welf & I C §352(a); Cal Rules of Ct 1422(a)(2)), nor does it include the failure of an alleged father to return a certified mail receipt. See Welf & I C §316.2.

To request a continuance, written notice must be filed at least two court days before the date set for hearing. Welf & I C §352(a); Cal Rules of Ct 1422(a)(4). The party seeking a continuance must submit affidavits or declarations showing specific facts demonstrating that a continuance is necessary, unless the judge for good cause permits an oral motion. Welf & I C §352(a); Cal Rules of Ct 1422(a)(4). When granting a continuance, the facts that form the basis for the continuance must be entered in the court minutes. Welf & I C §352(a); see Cal Rules of Ct 1422(a)(5).

When the child, parent, or guardian is represented by an attorney and a hearing is continued beyond the time limit within which it would otherwise be required to be held, an absence of objection is considered to be consent. Welf & I C §352(c).

In addition to any continuance authorized by Welf & I C §352, the judge may also continue the jurisdiction hearing for not more than ten days

if the judge is satisfied that, within that time, a necessary and unavailable witness will become available (see Welf & I C §354), and may continue the hearing for not more than seven days to appoint counsel, allow counsel to become acquainted with the case, or to determine whether the party can afford counsel (Welf & I C §353). The court must also continue the jurisdiction hearing as necessary to provide reasonable opportunity for the child or other party to prepare for the hearing (Welf & I C §353) or for up to ten days if the social study report was not timely provided to the parties (Welf & I C §355(b)(3)).

Chronic court congestion in the juvenile court is not good cause for continuing the jurisdiction hearing; dependency cases demand priority. See, *e.g., Jeff M. v Superior Court* (1997) 56 CA4th 1238, 1242–1243, 66 CR2d 343. Without good cause for a continuance, a court may not schedule a trial for only a few hours per day, but must instead conduct trial all day every day until the conclusion. 56 CA4th at 1243. See also *Renee S. v Superior Court* (1999) 76 CA4th 187, 193–198, 90 CR2d 134 (continuing jurisdiction hearing to a date almost four months from removal and conducting trial only two days a week was held to be abuse of discretion; trial on continuous basis may be warranted in appropriate circumstances).

☛ JUDICIAL TIP: Every effort should be made to avoid continuances and to emphasize the importance of dependency proceedings and their precedence over other court matters. Welf & I C §345.

G. [§101.26] Pretrial Resolution

Under Welf & I C §350(a)(2), each court should be encouraged to institute a dependency mediation program. A number of courts have set up procedures for pretrial resolution of contested jurisdictional and other issues. See, *e.g.*, Los Angeles rule 17.22. There is a variety of ways in which such resolution may be attempted. Sometimes these involve settlement conferences with the court itself. See, *e.g.*, San Francisco Juvenile Dependency rules 12.29–12.31. Sometimes they involve trained mediators who are familiar with juvenile dependency issues and skilled in resolution methods. Involving the extended family through the use of family group conferencing, family unity meetings, or family decision-making meetings is also a way in which the extended family may assist in resolving a case. Other times the court simply directs that all parties will meet and confer to resolve issues. The requirement that counsel submit memorandums detailing the issues to be contested and the witnesses to be called can lead to improved settlement discussions. Even providing the parties with "intended decisions" such as is often done in a law and motion

department can sometimes be of assistance in encouraging resolution of cases. All these methods merit consideration, and the court may wish to consider using a combination of these procedures.

As a result of these various methods, parties often agree to amended language of the petition which they then admit or submit to the court. The case then proceeds to an uncontested jurisdiction hearing.

☛ JUDICIAL TIPS:

- Although a settlement is a negotiated resolution, sometimes the parties and the courts inadvertently term the presentation of the matter to the court as a "submission," thereby unintentionally leaving open the possibility of appeal. See, *e.g., In re Tommy E.* (1992) 7 CA4th 1234, 1237–1239, 9 CR2d 402. Negotiated settlements should be set forth on the record in a clear manner, indicating that the parent is agreeing with this resolution and waives the right to any appeal of the issue. See, *e.g., In re Richard K.* (1994) 25 CA4th 580, 589–590, 30 CR2d 575 (submitting on recommendation of the social worker waives right of appeal).
- Even if pretrial attempts to resolve the conflict fail, they may nonetheless be useful to narrow the issues and provide the court with an opportunity to inform the attorneys how the hearing will be conducted and what evidence will be relevant.

H. [§101.27] Prehearing Disclosure

The Department of Social Services must disclose any evidence or information that is favorable to the child, parent, or guardian (Cal Rules of Ct 1420(c)), and the parent or guardian must disclose to DSS relevant material on request (Cal Rules of Ct 1420(e)). These duties are continuing ones. Cal Rules of Ct 1420(k). Under Cal Rules of Ct 1420(d), the DSS must disclose the following information within its possession or control:

- Probation reports;
- Records of statements, admissions, or conversations by the child, parent, or guardian;
- Records of statements, admissions, or conversations by anyone alleged to be a participant;
- Names and addresses of those who were interviewed;
- Records of statements of anyone interviewed;
- Experts' reports;
- Photographs or physical evidence; and
- Felony conviction records of witnesses.

Based on its inherent power to manage its calendar under Cal Rules of Ct 1420, a juvenile court may require parties to submit witness lists shortly before trial without violating attorneys' work product protection. *In re Jeanette H.* (1990) 225 CA3d 25, 35–37, 275 CR 9.

☛ JUDICIAL TIP: Courts often specify procedures governing prehearing discovery using local rules; many of these rules require that discovery be conducted informally, permitting court intervention only after all informal means have been exhausted. See, *e.g.*, San Diego rule 6.7.

When jurisdiction is at issue, the court may not deny pretrial disclosure of documents in an ongoing investigation involving a sibling's death without at least conducting an in-camera review of the requested items. *Michael P. v Superior Court* (2001) 92 CA4th 1036, 1046, 113 CR2d 11.

If the court is requested to limit discovery, it may make protective orders or require that certain material be excised. See Cal Rules of Ct 1420(f)–(i). Sanctions may be imposed for failure to comply with discovery orders. Cal Rules of Ct 1420(j).

I. [§101.28] Psychological Evaluations

A court may not order a parent to undergo a psychological evaluation under Evid C §730 in preparation for a jurisdiction hearing; an assessment about whether a child is at substantial risk of harm under Welf & I C §300 is one that can be made without the assistance of an expert. *Laurie S. v Superior Court* (1994) 26 CA4th 195, 202, 31 CR2d 506 (once jurisdiction has been assumed, the parent's privacy and liberty interests yield to the child's interest in being protected).

☛ JUDICIAL TIPS:

- The parties may wish to agree to begin the process of psychological evaluation for a parent, stipulating that the results not be used for jurisdictional purposes. This reduces the potential delay at disposition when a psychological evaluation may be needed to assess placement and the granting or denial of services.
- Although appellate courts have not yet answered the question of whether the juvenile court can order the psychological evaluation of a *child* for use in a jurisdiction hearing under Welf & I C §300(c), some judges have made such orders when the child appears to be suffering or at risk of suffering serious emotional damage.

J. Conducting the Jurisdiction Hearing

1. [§101.29] In General

As with any juvenile court hearing, the jurisdiction hearing must be closed to the public, heard at a special or separate session of court, and granted precedence on the calendar. See Welf & I C §§345–346. No person on trial, accused of a crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is a parent. Welf & I C §345; Cal Rules of Ct 1410(a).

The hearing must be conducted in an informal, nonadversarial manner, unless there is a contested issue of law or fact. See Welf & I C §350(a)(1); Cal Rules of Ct 1412(b). Even then the court should be as informal as reasonably possible. The court must, however, control the proceedings with a view to expeditious and effective determination of the facts and to obtaining maximum cooperation of the child and persons interested in the child's welfare. Welf & I C §350(a)(1); Cal Rules of Ct 1412(a).

The proceedings must be transcribed by a court reporter if the hearing is conducted by a judge or referee, commissioner, or attorney acting as a temporary judge. Welf & I C §347; Cal Rules of Ct 1411(a). If the hearing is before a referee or commissioner assigned as a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 1411(b).

The child, who is the subject of the proceeding, is a party. Welf & I C §317.5(b). Welfare and Institutions Code §349 and Cal Rules of Ct 1410(b) permit the parent or guardian or, if none can be found or none reside within the state, other adult relatives to be present. Rule 1410(b) also permits the presence of attorneys for the parent or guardian, and other necessary persons such as the social worker and court clerk. See generally discussion in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearings* §100.20 (Cal CJER). The public is generally not admitted, but the judge has discretion to admit additional persons who have a direct and legitimate interest in the particular case or the workings of the court or to exclude nonparties. Welf & I C §346; Cal Rules of Ct 1410(e). This section has been interpreted to permit the court to allow members of the press to be present during dependency proceedings, similar to the provisions in Welf & I C §676 (delinquency proceedings), unless the court finds that such access would be harmful to the child's best interests. *San Bernardino County Dep't of Pub. Social Servs. v Superior Court* (1991) 232 CA3d 188, 194–195, 207, 283 CR 332.

a. [§101.30] Explanation of Allegations and Procedures

Unless waived, the judge or clerk must read a copy of the petition to those present at the beginning of the jurisdiction hearing. See Welf & I C §353; Cal Rules of Ct 1449(a). On request of the child, the child's attorney, the parent, guardian, or adult relative, the judge must explain the meaning and contents of the allegations in the petition, as well as the nature of the hearing, its procedures, and possible consequences. Welf & I C §353; Cal Rules of Ct 1449(a).

b. [§101.31] Right to Counsel and Guardian ad Litem

At each hearing, the judge must advise an unrepresented parent or guardian of the right to be represented by an attorney and the right of the indigent parent or guardian to have one appointed. Welf & I C §317; Cal Rules of Ct 1412(g). In particular, at the jurisdiction hearing, the judge must ascertain whether the parent or guardian, and, when appropriate, the child, have been represented by counsel, and if not, must advise them of the right to have counsel present. Welf & I C §§317, 353. The judge must advise the parties of their right to appointed counsel when they are presently financially unable to afford counsel. Welf & I C §353. However, the court has no obligation under Welf & I C §317 to appoint counsel for an indigent parent who has chosen not to appear and has made no request for counsel. *In re Ebony W.* (1996) 47 CA4th 1643, 1645, 55 CR2d 337.

The court must appoint a CAPTA guardian for *every* child who is the subject of a dependency petition. Cal Rules of Ct 1448(c). The court must also appoint an attorney for the child unless it finds under Cal Rules of Ct 1438(b) that the child would not benefit from the appointment of counsel. Welf & I C §§317(c), 326.5; Cal Rules of Ct 1438(b), 1448(c). If an attorney is appointed, he or she will serve as the CAPTA guardian ad litem. Cal Rules of Ct 1448(c). The court must identify the CAPTA guardian ad litem on the record. Cal Rules of Ct 1448(c).

☛ JUDICIAL TIP: It is a standard practice to appoint an attorney for the child in nearly every case.

If the court finds no benefit from appointment of counsel for the child, it must appoint a court-appointed special advocate (CASA) to serve as CAPTA guardian ad litem. Welf & I C §326.5; Cal Rules of Ct 1438(b)(3), 1448(c). The court may also appoint a CASA for a child who has an attorney. Cal Rules of Ct 1438(e)(4).

Each party who is represented by an attorney is statutorily entitled to competent counsel. Welf & I C §317.5(a); see Cal Rules of Ct 1438(c) (defining competence and discussing experience and education and standards of representation). The court must establish a complaint process

and inform parties of the procedure (Cal Rules of Ct 1438(d)) and may require evidence of competency (Cal Rules of Ct 1438(c)(2)). Once a court has determined that an attorney has acted improperly, it must take appropriate action. Cal Rules of Ct 1438(d). Counsel has an obligation to advocate for the protection, safety, and well-being of the child (Welf & I C §317(c)) and must not advocate for the return of the child if that course of action would endanger the child's safety (Welf & I C §317(e)). The child's counsel must not act as a mouthpiece for the child and espouse the child's wishes if that would endanger the child. *In re Alexis W.* (1999) 71 CA4th 28, 36, 83 CR2d 488.

The court must make a case-by-case determination as to whether the presence of counsel would make a "determinative difference" in deciding if a parent has a due process right to representation by counsel at a stage in the dependency proceeding in which parental rights may be terminated. *In re Ronald R.* (1995) 37 CA4th 1186, 1196, 44 CR2d 22. Once appointed, counsel may not withdraw because of lack of contact with the parent without establishing why the lack of contact prevents the performance of his or her duty (*In re Malcolm D.* (1996) 42 CA4th 904, 916, 50 CR2d 148) and must represent the client at all subsequent juvenile court proceedings (Welf & I C §317(d)).

Counsel should not be permitted to withdraw at the outset of a hearing at which the parent has failed to appear in the absence of a stated cause and without the appointment by the court of new counsel or a continuance. *In re Ronald R., supra,* 37 CA4th at 1194. Before counsel may be relieved, the court must conduct a hearing with notice to the concerned parents. *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1066, 50 CR2d 57. If counsel requests relief from duties at a hearing from which the parent is absent, the court may either deny the request or delay acting on it until the hearing is finished. *In re Andrew S.* (1994) 27 CA4th 541, 547, 32 CR2d 670.

The question of ineffective assistance of counsel is normally raised only at the appellate court level. However, it can be raised during the dependency proceeding in a *Marsden*-type hearing (in camera, on the record). See, *e.g., In re James S.* (1991) 227 CA3d 930, 934–936, 278 CR 295.

☛ JUDICIAL TIP: Generally, a parent may raise a claim that the child's counsel is ineffective only if the parent's and child's interests are intertwined and the parent is thus aggrieved by the actions of the child's attorney. See, *e.g., In re Frank L.* (2000) 81 CA4th 700, 703, 97 CR2d 88 (parent had no standing to claim that child's placement was not in his best interests because it would lead to impairment of child's relationship with siblings and

others). Nevertheless, if a parent claims that the child's counsel is ineffective, the court should consider it as a request for the court to invoke its own authority to oversee the competence of the child's counsel. An inquiry by the court on this issue may include speaking with the child in chambers, although most judges avoid this if at all possible. All inquiries and any determination of the issue should be made on the record.

An example of a local complaint process is found in San Mateo rule 6.3(d), which provides for complaints to be referred to the managing attorney of the Private Defender Program (panel of attorneys who are qualified to represent parties in juvenile court) who must then take appropriate action. If the issue remains unresolved, the party may submit the complaint to the juvenile court in writing, after which the court must make its own review and take appropriate action.

For a discussion of appointment of counsel for the parents, guardians, and the child, and for the handling of conflicts of interest, see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §§100.10–100.17 (Cal CJER).

An example of a local rule setting out duties of counsel for the child is Los Angeles rule 17.16(c), which includes such obligations as:

- Informing the child of the nature of the proceedings and the roles of the attorney and the judge in language a child can understand.
- Contacting each child within a family unit separately when the attorney is representing more than one child.
- Conducting investigations and making recommendations to the court, including recommendations on the child's interests that must be protected in other administrative or judicial proceedings.
- Checking on timely implementation of the court's orders.
- Determining whether the child wishes to attend each hearing and conveying that information to the court.

c. [§101.32] Advisement of Rights

At the jurisdiction hearing, the court must inform the parties of their rights, including the right to counsel, unless the advisement is waived. See Welf & I C §353; Cal Rules of Ct 1412(g), (j). Specifically, under Cal Rules of Ct 1412(j) the court must advise the child, parent, or guardian of any right to assert the privilege against self-incrimination. However, it may not be an abuse of discretion for a judge to omit this advisement because of the "use immunity" provided by Welf & I C §355.1(f) (testimony of parent or guardian in dependency proceeding may not be used against parent or guardian in any other action or proceeding). *In re Amos L.* (1981)

124 CA3d 1031, 1039, 177 CR 783. Although the court may wish to inform the parent or guardian of the "use immunity" conferred by Welf & I C §355.1(f), the court is not required to do so when parents are represented by counsel. *In re Candida S.* (1992) 7 CA4th 1240, 1250, 9 CR2d 521.

The court must also advise parties of the right, under Cal Rules of Ct 1412(j) and 1449(b), to

- Confront and cross-examine the preparers of reports and any witnesses called against them (see Welf & I C §355(b)(2));
- Use the court's process to bring witnesses to court, including witnesses whose hearsay statements are contained in the social worker's reports (see Welf & I C §§341, 355; see also *In re Malinda S.* (1990) 51 C3d 368, 272 CR 787); and
- Present evidence to the court.

A personal waiver by the parent of any of these rights is required. *In re Monique T.* (1992) 2 CA4th 1372, 1377, 4 CR2d 198. Judicial Council Waiver of Rights form JV-190 is approved for this purpose. If a local form is used, it should conform to JV-190 and should not contain ambiguities, or handwritten changes or notations, but should present a clear representation of what the party understands and intends. See *Rosa S. v Superior Court* (2002) 100 CA4th 1181, 1187–1188, 122 CR2d 866.

At the jurisdiction hearing, the court must inform the child of his or her right to seek modification under Welf & I C §388 and the procedure for securing those rights. Welf & I C §353.1(a). If the child is 12 years of age or older, the court must inform the child directly, using language appropriate to the child's development; if the child is under 12 years old, the court must inform the child through his or her guardian ad litem or attorney. Welf & I C §353.1(b).

In addition to the advisement of rights required by Cal Rules of Ct 1412(j), Rule 1449(b)(1) requires the court to advise the parent or guardian of the right to a hearing by the court on the issues raised in the petition.

d. [§101.33] Parent's or Guardian's Plea

The judge must inquire whether the parent or guardian intends to admit or deny the allegations contained in the petition. If the parent or guardian admits the allegations, pleads no contest, or submits the matter on the basis of the reports, the hearing will be an uncontested one (see §§101.35–101.37). If the parent or guardian denies or neither admits nor denies the allegations, the hearing will be a contested one (see §§101.38–101.47).

e. [§101.34] Referees and Commissioners Assigned To Sit as Referees

Jurisdiction hearings, like other juvenile court hearings, may be conducted by referees who meet the qualifications of Welf & I C §247 (five years of legal practice in California) or by superior court commissioners who are assigned to sit as referees. Referees may perform subordinate judicial duties assigned to them by the presiding judge of the juvenile court. Cal Rules of Ct 1415(a). They generally have the same power as judges (Welf & I C §248), except that the presiding judge of the juvenile court may require that certain referee's orders must be approved by a juvenile court judge before becoming effective (Welf & I C §251).

When a referee or commissioner who is assigned to sit as a referee receives a stipulation as a temporary judge under Cal Const art VI, §21, he or she is empowered to act fully as juvenile court judge (and thus his or her orders would require no approval by a judge). Cal Rules of Ct 1415(b). The orders of a subordinate judicial officer who sits as a temporary judge are as final and nonreviewable as those of a judge. *In re Brittany K.* (2002) 96 CA4th 805, 815, 117 CR2d 813. Procedures to follow in obtaining a stipulation are set out in Cal Rules of Ct 244 (applicable to referees and attorneys acting as pro tem judges under Cal Const art VI, §21, but not applicable to commissioners).

Failure to follow the procedures exactly will not void the stipulation and deprive the court of jurisdiction. *In re Richard S.* (1991) 54 C3d 857, 865, 2 CR2d 2. In fact, the failure to make a timely objection to a commissioner sitting as a judge is tantamount to an implied waiver of the required stipulation. *In re Brittany K., supra,* 96 CA4th at 813.

If a referee or commissioner assigned as a referee is not acting as a temporary judge, he or she must inform the child and parent or guardian that review by a juvenile court judge may be sought. Welf & I C §248; Cal Rules of Ct 1416(a)(2). A child, the parent or guardian, or DSS may apply for a rehearing at any time up to ten days after the service of a written order. Welf & I C §252; Cal Rules of Ct 1418(a). If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873. For decisions by a referee that do not require approval by a juvenile court judge to become effective, a judge may make an order for a rehearing within 20 judicial days of the hearing, but not more than ten days following the service of a written copy of the order. *In re Clifford C., supra* (delinquency case reconciling Welf & I C §§250 and 253). If the proceedings that were before a referee were recorded by a court reporter, the reviewing judge must rule on the request

for a rehearing on the basis of the transcripts. Welf & I C §252; Cal Rules of Ct 1418(c). Rehearings are conducted de novo before a juvenile court judge, and applications for hearing must be granted as a matter of right if the original hearing had not been reported. Welf & I C §252; Cal Rules of Ct 1418(e).

If a juvenile court judge denies application for rehearing directed partly or solely at issues that arose at a contested jurisdiction hearing, the judge must advise the parties orally or in writing of the following (Cal Rules of Ct 1418(f)):

- Right to appeal from court's judgment,
- Necessary steps and time for taking appeal,
- Right to appointed counsel for indigent appellant, and
- Right to free transcript for indigent appellant.

2. [§101.35] Uncontested Proceedings

The parent or guardian may admit the allegations in the petition, plead "no contest," or submit the jurisdictional determination based on information provided to the court and waive further jurisdiction hearing. Cal Rules of Ct 1449(e). For the court to accept an admission, submission, or "no contest" plea, the court must be satisfied that the party knowingly and intelligently understood and waived his or her rights and understands the consequences of the decision not to contest the petition. See Welf & I C §353 and Cal Rules of Ct 1449(a) (judge must explain possible outcomes of juvenile court proceedings), and Cal Rules of Ct 1449(c) (court must state on the record that the party understands and waives rights). See also *In re Monique T.* (1992) 2 CA4th 1372, 1377, 4 CR2d 198 (personal waiver required). Judges should ensure that Judicial Council form, Waiver of Reunification Services (JV-195), is filed after having been executed by the party and the party's attorney.

a. [§101.36] Admission or "No-Contest" Plea

An admission to the allegations in the petition must be made personally by the parent or guardian. Cal Rules of Ct 1449(d); *In re Monique T.* (1992) 2 CA4th 1372, 1377, 4 CR2d 198. When the parent or guardian admits the allegations of the petition at the jurisdiction hearing, he or she waives any objection to the petition based on inadequate notice of facts to be adduced at the jurisdiction hearing. *In re Rodger H.* (1991) 228 CA3d 1174, 1181, 279 CR 406.

If the parent or guardian wishes to admit the allegations in the petition, under Cal Rules of Ct 1449(c), the court may accept the

admission after finding and stating on the record that it is satisfied that the parent or guardian

- Understands the nature of the allegations,
- Understands the direct consequences of the admissions, and
- Understands and waives the rights outlined in Welf & I C §353 and Cal Rules of Ct 1449(b).

A plea of no contest or an admission (Cal Rules of Ct 1449(e)) at a jurisdiction hearing admits all matters essential to the court's jurisdiction over the child. When the parent knowingly acquiesces to the allegations of the petition, he or she waives the right to challenge the applicability of any of the allegations. *In re Troy Z.* (1992) 3 C4th 1170, 1181, 13 CR2d 724. Therefore, when parents plead "no contest" to a petition that alleges that the child comes under Welf & I C §300(e) (severe physical abuse), they may not contest the applicability of §300(e) on appeal. 3 C4th at 1170, 1172, 1180.

If the parent admits the allegations, the court must still find that there is a factual basis for the admission. Cal Rules of Ct 1449(f)(6). Normally, the finding is made based on the court's reading of the social worker's report.

☛ JUDICIAL TIP: If there are unsubstantiated allegations in the petition that are not borne out in the report or by DSS's answers to the court's questions, the court should strike those allegations and initial and date those strikeouts or state the changes on the record.

b. [§101.37] Submission on Social Worker's Report

The parent or guardian may also submit the jurisdictional determination based on information provided in the social services report. See Cal Rules of Ct 1449(e); Welf & I C §355(b). Submission is not the same as an admission. *In re Tommy E.* (1992) 7 CA4th 1234, 1238, 9 CR2d 402. For a submission, the court is required to weigh the evidence before determining jurisdiction. *In re Tommy E., supra.* As such, a submission on the reports should not be construed as a submission to the court's dependency jurisdiction. A parent may therefore appeal a jurisdictional decision even after agreeing to submit the jurisdictional determination on the information provided in the social services report under Cal Rules of Ct 1449(e). *In re Tommy E., supra.*

☛ JUDICIAL TIP: If there is a submission, the court should inquire as to whether it results from a negotiated settlement, which may include amendments being made to the petition. If this is the case, the court may want to ask whether the parent waives the right to

challenge the sufficiency of the evidence in return for the amendments or other benefits.

When a parent contends on appeal that the petition failed to state a cause of action, submission on the report (along with failure to raise the issue below) has been deemed to act as a waiver. *In re Shelley J.* (1998) 68 CA4th 322, 328, 79 CR2d 922. In accord is *In re S. O.* (2002) 103 CA4th 453, 459, 126 CR2d 553. But see *In re Alysha S.* (1996) 51 CA4th 393, 397, 58 CR2d 494 (which permitted an appeal in this situation, relying on CCP §430.80 and civil cases for the proposition that a claim challenging the sufficiency of the petition may be raised for the first time on appeal).

☛ JUDICIAL TIP: When the parties have submitted the matter on the social worker's report, they are not arguing the truth of the statements contained in the report, but may nevertheless question the import and meaning of the statements. Therefore, if the parties desire it, a judge should permit arguments in the case of a submission. If the submitted reports do not support the allegations of the petition by a preponderance of the evidence, the court should find that the petition has not been proved, and dismiss it.

3. [§101.38] Contested Proceedings

If the parent or guardian denies the allegations of the petition, the court must hold a contested hearing to determine whether the allegations are true. Cal Rules of Ct 1450(a); see Welf & I C §355(a). If the parent or guardian neither admits nor denies the allegations, the court must state on the record that the parent or guardian does not admit the allegations. Cal Rules of Ct 1449(c).

a. [§101.39] Presentation of Evidence

At the jurisdiction hearing, any information that is relevant to the question of whether the child is a person described by Welf & I C §300 is admissible and may be received in evidence. Welf & I C §355(a). The Department of Social Services has the burden of proof on each fact necessary to sustain the petition. *In re S. D.* (2002) 99 CA4th 1068, 1077–1078, 121 CR2d 518.

Generally, except for the admissibility of the social worker's report (see §101.40) and certain privileges (see §101.41), the admission and exclusion of evidence at a jurisdiction hearing must be in accordance with the Evidence Code as it applies to civil cases. Cal Rules of Ct 1450(b). A parent or guardian's failure to cooperate in the provision of services, except for good cause, may be used as evidence in a jurisdiction hearing. Evid C §1228.1(b).

Proof that a parent, a guardian, or another custodian of the child has abused, neglected, or cruelly treated another child is admissible. Welf & I C §355.1(b). But a parent or guardian has use immunity for any testimony given in a dependency proceeding. Welf & I C §355.1(f) (testimony given in a dependency proceeding cannot be used against the parent or guardian in any other proceeding).

From the time a §300 petition is filed until juvenile court jurisdiction is terminated, any interested person may advise the court of information relevant to the child's interests or rights. Cal Rules of Ct 1438(f). If the child's attorney or CASA acting as CAPTA guardian learns of any such interest or right, he or she must notify the court immediately and seek directions on appropriate procedures. Cal Rules of Ct 1438(f)(2).

If the court determines that further action is necessary to protect the child's rights or interests, it can (Cal Rules of Ct 1438(f)(3)):

- Refer the matter for investigation and require a follow-up report,
- Authorize and/or direct the child's counsel to take a particular action,
- Appoint a guardian ad litem who may be the CASA who was already appointed as a CAPTA guardian ad litem, or
- Take any other action to protect the child.

b. [§101.40] Social Worker's Report

Although they may contain hearsay and even multiple hearsay, social studies reports and their attachments are admissible and competent evidence on which to base findings in jurisdiction hearings if the preparer is present for cross-examination and the parent or guardian has the opportunity to subpoena and cross-examine the witnesses mentioned in the report. Welf & I C §§355(b), (d), 341; *In re Malinda S.* (1990) 51 C3d 368, 379, 385, 272 CR 787; Cal Rules of Ct 1450(c), 1408(d), 1449(b); see also Welf & I C §281 (court is authorized to receive and consider probation department reports on issues involving custody, status, or welfare of children). A "social study" is a written report furnished by DSS to the court, the parties, and counsel. Welf & I C §355(b)(1). This report must be provided to all parties or their counsel within a reasonable time before the hearing. Welf & I C §355(b)(3). If the report is not made available within a reasonable time before the hearing, the court may grant a continuance not to exceed ten days on request of any party. Welf & I C §355(b)(3).

The preparer of the report must be made available for cross-examination on a timely request of any party; being made available includes being on telephone standby if the person can be present in court

within a reasonable time. Welf & I C §355(b)(2); Cal Rules of Ct 1450(c)(2).

If DSS complies with those requirements, the report is admissible and sufficient to support a finding that the child is described in Welf & I C §300. Cal Rules of Ct 1450(c). However, if any party raises a timely objection to the admission of specific hearsay in the report, that evidence alone will not be sufficient to support a jurisdictional finding or any ultimate fact on which a jurisdictional finding is based *unless* DSS establishes one or more of the following exceptions:

- The hearsay evidence would be admissible in any criminal or civil proceeding as a statutory or case law hearsay exception. Welf & I C §355(c)(1)(A); Cal Rules of Ct 1450(d)(1).
- The hearsay declarant is the child who is the subject of the proceeding and is under 12 years old. This exception may be defeated if the objecting party establishes that the statement is unreliable in that it is the product of fraud, deceit, or undue influence. Welf & I C §355(c)(1)(B); Cal Rules of Ct 1450(d)(2).
- The hearsay declarant holds a certain position such as peace officer, social worker, or teacher and the statement would be admissible if the declarant were testifying. See Welf & I C §355(c)(1)(C); Cal Rules of Ct 1450(d)(3).
- The hearsay declarant is available for cross-examination. Welf & I C §355(c)(1)(D); Cal Rules of Ct 1450(d)(4).

A court must permit cross-examination of the social worker on the parent's attorney's request, even in the parent's absence. *In re Dolly D.* (1995) 41 CA4th 440, 444–446, 48 CR2d 691 (determination of jurisdiction based on the social worker's report in this situation is a denial of due process). Because there is no "default procedure" in dependency proceedings, even if the parent fails to appear for the hearing, counsel for the parent has the right to cross-examine witnesses. *In re Stacy T.* (1997) 52 CA4th 1415, 1426, 61 CR2d 319.

☛ JUDICIAL TIP: Except as provided in Welf & I C §355(c)(1) concerning timely objections to specific hearsay contained in the social study, any objections to the contents of a social study or its attachments go to the weight that the court should give to that evidence and not to the admissibility.

c. [§101.41] Privileges

In addition to the admissibility of the social worker's report, the other exceptions to the rule that evidence may be admitted in accordance with the Evidence Code as it applies to civil cases are:

- The privilege not to testify and not to be called as a witness against the spouse under Evid C §972 is not available to the parent or guardian. Cal Rules of Ct 1450(e).
- The confidential marital privilege under Evid C §980 is not available to the parent or guardian. Cal Rules of Ct 1450(e); see Evid C §986.

Under Welf & I C §317(f), either the child or his or her counsel may invoke a privilege such as the psychotherapist-patient privilege; if the child invokes it, counsel may not waive it, but if counsel invokes it, the child may waive it. Counsel is the holder of the privilege if the child is neither old nor mature enough to consent to the invocation of the privilege. Welf & I C §317(f). Although the child may invoke the privilege, the court may order the child's therapist to disclose limited information that would help the court to evaluate whether further orders are needed while still preserving the confidentiality of the details of therapy. *In re Kristine W.* (2001) 94 CA4th 521, 528, 114 CR2d 369. The privilege does not preclude the court from ordering circumscribed information to accomplish the information-gathering purpose of therapy. *In re Mark L.* (2001) 94 CA4th 573, 584, 114 CR2d 499.

d. [§101.42] Child's Testimony

There are certain recurrent issues that arise with children and certain ways of accommodating a child witness's needs that judicial officers have available to them. For example, a court may refuse to permit a child to testify if it determines that such testimony would cause psychological stress and injury and the potential benefit derived from testifying would not outweigh the injury it would cause. *In re Jennifer J.* (1992) 8 CA4th 1080, 1086, 10 CR2d 813, distinguishing *In re Amy M.* (1991) 232 CA3d 849, 283 CR 788, in which the child's testimony could have assisted in resolving a disputed issue. Although nothing in the statutes or case law specifically authorizes a court to exclude a child's testimony in order to avoid psychological harm, the court nevertheless has such power based on the overriding objective of the dependency hearing—to preserve and promote the best interests of the child. *In re Jennifer J., supra,* 8 CA4th at 1089 (judge must weigh whether testimony would materially affect the issues to be resolved against potential psychological injury to child). Moreover, the court has the inherent authority to take steps necessary to

facilitate the child's testimony. *In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404 (court had inherent authority to utilize both in-chambers and closed-circuit television testimony to ensure truthfulness of child's testimony).

Because children may not have made complete disclosure of the extent of abuse initially because of shyness and understandable reticence, the doctrine of collateral estoppel may not be used to preclude them from telling their stories at the jurisdiction hearing. See *In re Jessica C.* (2001) 93 CA4th 1027, 1039–1040, 113 CR2d 597.

For a discussion of handling child witnesses in court generally, see THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002).

(1) [§101.43] Hearsay Statements of Children

Hearsay statements of a child who is under the age of 12 and who is the subject of the jurisdiction hearing may be included within the social study report and may be sufficient to sustain a jurisdictional finding unless the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence. Welf & I C §355(c)(1)(B); Cal Rules of Ct 1450(d)(2). See discussion in §101.40.

Hearsay statements of a child may also be admissible under a judicially-created hearsay exception called the "child dependency hearsay exception" first articulated in the case of *In re Carmen O.* (1994) 28 CA4th 908, 33 CR2d 848, and subsequently adopted, with modification, by the California Supreme Court in the case of *In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803. The foundational requirement for admission under this hearsay exception is a finding that the hearsay statements are reliable. The *Cindy L.* decision makes clear that regardless of whether the child would be competent to testify as a witness, the child's reliable hearsay statement is admissible; however, if the child is not available for cross-examination, his or her hearsay statements must be corroborated. 17 C4th at 29. The term "corroboration" means evidence that "would support a logical and reasonable inference that the act of abuse described in the hearsay statement occurred." 17 C4th at 35. Corroboration of children's statements of abuse, particularly regarding molestation, is frequently circumstantial. Direct corroboration, such as diagnostic medical evidence, is often not available. For a discussion of the factors courts have considered in finding the hearsay statements of children reliable and corroborated, see 2 Myers, Evidence in Child Abuse and Neglect Cases §§7.51–7.52 (3d ed 1997).

The Supreme Court has further held that a child's out-of-court statements contained in a social study are admissible even if they do not meet the requirements of the child dependency hearsay exception and even

if the child is incompetent to testify. *In re Lucero L.* (2000) 22 C4th 1227, 1242–1243, 96 CR2d 56. A petition may be sustained based solely on the social worker's report containing statements of a child who is incompetent to testify if these statements bear indicia of reliability; corroboration of the child's statements is not required under the social study exception. *In re Lucero L., supra*, 22 C4th at 1247–1249. If the court does not find such indicia, there needs to be additional evidence to support the finding of jurisdiction. *In re Lucero L., supra*

Moreover, a statement made by a child victim of abuse or neglect when that child was under 12 years old may be admissible despite the hearsay rule if the statement was made for medical diagnosis or treatment. Evid C §1253. Statements of an unavailable witness who is the victim of physical abuse or the threat of abuse may also be admissible under Evid C §1370. In addition, although hearsay statements made by a child witness who was held to be incompetent are inadmissible for the truth of the matters asserted, they may be admissible for other purposes, such as the mother's understanding of what she needed to do to protect the child. See *In re Clara B.* (1993) 20 CA4th 988, 998, 25 CR2d 56.

(2) [§101.44] Competency

Generally, any person is qualified to be a witness, regardless of age. Evid C §700. However, a person who is incapable of expressing himself or herself so that he or she will be understood, or is incapable of understanding the duty to tell the truth must be disqualified as a witness. Evid C §701(a).

Even a child who makes some bizarre statements might be competent to testify if he or she is otherwise well-oriented, lucid, and not easily led. *In re Amy M.* (1991) 232 CA3d 849, 858, 283 CR 788 (11-year-old child was competent to testify at jurisdiction hearing when she had testified for almost eight hours in great detail about the years of molestation by her father, despite the fact that she testified that her guinea pig had told her things, that she had imagined seeing blood in the bathtub, and that she said she would lie about her father because he had lied about her). Inconsistencies in a child's testimony generally go to credibility, not competency. *In re Katrina L.* (1988) 200 CA3d 1288, 1299, 247 CR 754. Indeed, credibility is determined by more than just words transcribed by a court reporter; a judge may disbelieve even an uncontradicted witness if there is a rational ground for doing so. *In re Jessica C.* (2001) 93 CA4th 1027, 1043, 113 CR2d 597. The court may defer its determination of the child's competency until the completion of the child's direct testimony. Evid C §701(b).

Even if a child is found incompetent to testify, the prior statements of the child may be admissible as discussed in §101.43.

☛ JUDICIAL TIPS:

- A traditional voir dire of a witness is not required when determining whether or not a child is competent to testify.
- A person who is conducting a voir dire of a child to determine competency should ask short, open-ended questions that are appropriate to the child's age, using words the child will understand (see script in §101.52 and suggestions in THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002)). The court may wish to have the person with the greatest rapport with the child conduct the initial voir dire on competency.

(3) [§101.45] Testifying in Chambers

The child may testify in chambers outside the presence of the parents if the parents' counsel is present and any one of the following conditions exists:

- The court determines that testimony in chambers is necessary to ensure truthful testimony. Welf & I C §350(b)(1); Cal Rules of Ct 1412(c)(1).
- The child is likely to be intimidated in the more formal courtroom setting. Welf & I C §350(b)(2); Cal Rules of Ct 1412(c)(2).
- The child is frightened to testify in front of the parent or parents. Welf & I C §350(b)(3); Cal Rules of Ct 1412(c)(3).

In determining whether to permit in-chambers testimony, the court may rely on the social studies report or other offers of proof. Cal Rules of Ct 1412(c)(3); *In re Katrina L.* (1988) 200 CA3d 1288, 1297, 247 CR 754 (court properly relied on statements in social worker's report that child would probably be intimidated in the courtroom setting; social worker was available for cross-examination).

Counsel for the parent or guardian must be present during in-chambers testimony. It may be prejudicial error for the court to question the child in chambers with only a reporter present even when the parent appears to have acquiesced to the procedure. See *In re Laura H.* (1992) 8 CA4th 1689, 1697, 11 CR2d 285. Disagreeing with *In re Laura H., supra*, is *In re Jamie B.* (2001) 90 CA4th 766, 771, 109 CR2d 123, which held that a parent who keeps silent and otherwise acquiesces to the questioning of the child in chambers without counsel waives the statutory right to have counsel at the in-chambers proceeding (.26 hearing). See also *In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404, in which the

procedure by which even the judge viewed the in-chambers testimony via closed-circuit television was upheld

When the child testifies in chambers, the testimony must be recorded and the parent or guardian may request the reporter to read back the testimony. See Cal Rules of Ct 1412(c)(3). The parent may also elect to have counsel summarize testimony. A parent's due process rights are not violated when the child has testified in chambers as long as the parent's counsel is present and the parent had testimony read back. *In re Mary S.* (1986) 186 CA3d 414, 422, 230 CR 726.

When a child testifies in chambers, the court must first administer an oath to the child or obtain a satisfactory promise from the child to tell the truth. See *In re Heather H.* (1988) 200 CA3d 91, 95–97, 246 CR 38 (failure to administer oath rendered testimony inadmissible). See also Evid C §710 (witnesses who are under ten years old need only promise to tell the truth). The requirement is deemed waived if an objection is not raised at trial. *In re Katrina L., supra,* 200 CA3d at 1299. The court may permit the child to testify in chambers even when the child does not expressly state a fear of testifying in open court. *In re Katrina L., supra,* 200 CA3d at 1297–1298 (requirements of Welf & I C §350 were otherwise met).

☛ JUDICIAL TIP: Some judges conduct "in-chambers" proceedings in the courtroom without the parents because some chambers become too crowded and therefore too overwhelming for the child with so many people in attendance. The judge may come down from the bench to listen to the child's testimony, and to remove his or her robe, which may be a frightening symbol of formality for the child. Before doing so, however, it may be advisable to check with the case worker, child's attorney and/or CASA representative. The child may have been previously introduced to the standard courtroom setting and may feel uncomfortable or threatened with the less formal approach. Different approaches may work in different situations.

(4) [§101.46] Additional Ways To Accommodate Child Witness

There are a number of additional ways in which the court may accommodate the needs of the child witness who testifies in a jurisdiction hearing. See generally THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002).

The court should consider the scheduling of the child's testimony to accommodate the need for frequent breaks. The court might also permit a child to bring a favorite object or toy to the stand. The use of a support person with whom the child is comfortable, such as a foster parent, social

worker, relative, or court-appointed special advocate should also be considered.

Moreover, when a child is unwilling to testify even at an in-chambers hearing because of the presence of so many adults (the judge, many attorneys, social worker, and court reporter), a court is entitled to use its inherent powers to carry out its duties and ensure the orderly administration of justice (derived from Cal Const art VI, §1) and may permit the testimony of the child by closed-circuit television, even in the absence of any express statutory authority for this procedure. *In re Amber S.* (1993) 15 CA4th 1260, 1266, 19 CR2d 404 (court may use new procedure to protect best interests of child because parents' rights are at least as protected as they would have been under Welf & I C §350(b)).

e. [§101.47] Testimony of Parents and Others

The privilege not to testify and not to be called as a witness against the spouse under Evid C §972 and the confidential marital privilege under Evid C §980 is not available to the parent or guardian. Cal Rules of Ct 1450(e); see Evid C §986. See also discussion in §101.41.

A parent may be called to testify under Evid C §776 as an adverse witness. In such cases the use immunity granted by Welf & I C §355.1(f) protects the parent regarding any incriminating statements. See discussion in §101.32 and §101.39.

Although a parent may present evidence at the jurisdiction hearing on the question of whether the child is described by Welf & I C §300 and on the parent's mental state (see, *e.g.*, Welf & I C §300(j)), testimony regarding future risk to children may be more valuable at the disposition rather than at the jurisdiction hearing stage. *In re Mark C.* (1992) 7 CA4th 433, 445–446, 8 CR2d 856.

☛ JUDICIAL TIP: There are times when evidence of future risk is relevant and should be received at the jurisdictional stage.

The court is required to advise any person called as a witness of the privilege against self-incrimination if it appears that the testimony or other evidence may tend to incriminate that witness. Cal Rules of Ct 1421(a). If a witness refuses to answer a question, the judge may grant immunity. Cal Rules of Ct 1421(b); see Cal Rules of Ct 1421(d) for procedure.

☛ JUDICIAL TIP If the court is considering granting immunity, it may want to give that witness time to consult with counsel and may also wish to communicate with the prosecutor about possible consequences of granting immunity.

A court may prohibit telephonic presentation of evidence as long as there are other means of receiving testimony. See *In re Nada R.* (2001) 89 CA4th 1166, 1176, 108 CR2d 493.

☛ JUDICIAL TIP: A court may also permit telephonic testimony. See, *e.g.*, Fam C §3411(b) (authorizing telephonic testimony in custody proceedings to receive the testimony of witnesses in other states). A court may also wish to use it when all parties agree or when the court determines that the use of telephonic testimony for a particular witness does not offend due process

K. Findings and Orders

1. [§101.48] After Contested Hearing

After hearing the evidence, the court must make a finding in the court minutes whether the child is described by Welf & I C §300 and note the specific subsections of Welf & I C §300 under which the petition is sustained. Welf & I C §356. If the court finds the allegations to be true, it must make the following findings in the minutes (Welf & I C §356; Cal Rules of Ct 1450(f)):

- Notice has been given as required by law;
- The child's birthdate and county of residence are included;
- The allegations of the petition are true; and
- Specific subsections of Welf & I C §300 that describe the child are included.

To support a finding that the child is described by Welf & I C §300, the court must find that there is proof by a preponderance of the evidence that the allegations in the petition are true. Welf & I C §355(a). However, the court need not make specific findings; general findings that the allegations of the petition are true will be sufficient as long as the petition states ultimate facts that set forth the specific allegations on which adjudication is sought. *In re J.T.* (1974) 40 CA3d 633, 640, 115 CR 553. If the court believes that the child has suffered criminal abuse or neglect, it may direct a representative of the child protective agency to take action under Pen C §11166(h). Welf & I C §355.1(e).

Despite the fact that jurisdictional findings are often made under extreme time pressures, it is important to have accurate and reliable findings of fact. See, *e.g.*, *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1754, 1757–1759, 53 CR2d 687 (because the judge was under a misunderstanding about allegations of molestation, the court of appeal ordered the juvenile court to fully explore and resolve the issue at a new 18-month hearing).

If the court determines that the allegations of the petition have not been proved by a preponderance of the evidence, it must dismiss the petition, order that any previously ordered detention be terminated, and make the following findings (Welf & I C §356; Cal Rules of Ct 1450(h)):

- Notice has been given as required by law,
- The child's birthdate and county of residence are included, and
- Allegations of the petition are not proved.

At the conclusion of the case for DSS and presentation of evidence by the child, the court may on its own motion or on the motion of any party, order whatever action the law requires if it concludes that DSS has not met its burden of proof. See Welf & I C §350(c); Cal Rules of Ct 1412(d). If the motion is denied, the child or parent or guardian may offer evidence. Cal Rules of Ct 1412(d). However, a parent or guardian may not present evidence if a motion to dismiss has been granted. See *In re Eric H.* (1997) 54 CA4th 955, 965, 63 CR2d 230.

Among the actions the court may take is termination of proceeding (Welf & I C §350(c)), although the juvenile court has no discretion to dismiss a dependency petition if it concludes that DSS has met its burden. *In re Sheila B.* (1993) 19 CA4th 187, 198, 23 CR2d 482.

2. [§101.49] After Uncontested Hearing

Even when there has been an uncontested hearing, a finding that a child is described by Welf & I C §300 requires proof by a preponderance of the evidence. See Welf & I C §355(a); Cal Rules of Ct 1449(f). When the parents have admitted the allegations, the court should look to evidence in the social worker's reports to determine if there is a factual basis for the admission. See Cal Rules of Ct 1449(f). When the parents have pleaded "no contest" or submitted the case, the court should make its jurisdictional findings based on the reports it has received.

If the court finds that the petition should be sustained, then under Cal Rules of Ct 1449(f), on admission, plea of no contest, or submission, the court must make the following findings, which must be noted in the court's order:

- Notice has been given as required by law;
- The child's birthdate and county of residence are included;
- The parent or guardian has knowingly waived the rights to
  - — Trial on the issues,
  - — Assert any privilege against self-incrimination,
  - — Confront and cross-examine adverse witnesses, and

— Use the court's process to compel attendance of witnesses;

- The parents or guardians understand the nature of the conduct alleged in the petition and the potential consequences of their admission, plea of no contest, or submission;
- The admission, plea of no contest, or submission has been made voluntarily and freely;
- There is a factual basis for the admission, plea of no contest, or submission;
- The admitted allegations of the petition are true as alleged; and
- The child is described by one or more subsections of Welf & I C §300.

See §101.48 for actions the court may take if it believes that the child has suffered criminal abuse or neglect.

After accepting admission, submission, or plea of no contest, the court must proceed according to Cal Rules of Ct 1451 and 1455 and hold a disposition hearing. Cal Rules of Ct 1449(g).

L. [§101.50] Setting Case for Disposition

Once the juvenile court finds that the child is within its jurisdiction, it must hold a disposition hearing at which it must consider several dispositional alternatives, including orders for services to the family if the child is declared a dependent and removed from the home. *In re Cicely L.* (1994) 28 CA4th 1697, 1701–1702, 34 CR2d 345. Often the disposition hearing will immediately follow the jurisdiction hearing if the parties wish to proceed at that time and stipulate that the report submitted for the jurisdiction hearing may be received as the dispositional report. See Welf & I C §§358 (court may hear evidence on disposition after finding that child is described by Welf & I C §300), 358.1 (requirements for dispositional report). However, the disposition hearing may be continued for a period not to exceed ten court days if the child is detained or a period not to exceed 30 calendar days from the time the jurisdictional findings and orders were made if the child is not detained. Welf & I C §358(a)(1)–(2); Cal Rules of Ct 1451(a). If the child is not detained, the hearing may be further continued for an additional 15 calendar days for good cause. Welf & I C §358(a)(2); Cal Rules of Ct 1451(b).

The court may make orders for continuing detention or for the child's release during the continuance. Welf & I C §358(a)(1); Cal Rules of Ct 1451(c).

If the social worker alleges that Welf & I C §361.5(b) (no reunification services) is applicable, the court must continue the proceedings for not more than 30 days. Welf & I C §358(a)(3); Cal Rules

of Ct 1451(b). The court must direct the social worker to notify each parent of the application of Welf & I C §361.5(b) and must inform each parent that unless reunification is ordered at the disposition hearing, an implementation hearing under Welf & I C §366.26 will be held and parental rights may be terminated. Welf & I C §358(a)(3); Cal Rules of Ct 1451(b).

☛ JUDICIAL TIP: If the case involves a child who was under three years old at the time of initial removal, it is a good idea for the court to advise the parent and remind the social worker to let the parent know about the more rigorous time frames.

M. [§101.51] Appeals and Reviews

There is no appeal from a jurisdictional finding that a child is described by Welf & I C §300 (*In re Candida S.* (1992) 7 CA4th 1240, 1249, 9 CR2d 521) although jurisdictional findings can be appealed as part of the appeal from the disposition hearing (see *In re Jennifer V.* (1988) 197 CA3d 1206, 1209–1210, 243 CR 441). However, an order dismissing a petition after a contested hearing is a final judgment on the merits and is thus appealable. *In re Sheila B.* (1993) 19 CA4th 187, 197, 23 CR2d 482. By stipulating that "conditions still exist which would justify initial assumption of jurisdiction under Welf & I C §300," a parent has waived the right to complain on appeal. *In re Eric A.* (1999) 73 CA4th 1390, 1394–1395, 87 CR2d 401.

There is a split of opinion whether a parent has standing to challenge a court's decision to dismiss a dependency petition. Compare *In re Lauren P.* (1996) 44 CA4th 763, 770, 52 CR2d 170 (parent may appeal from dismissal on the merits) with *In re Carissa G.* (1999) 76 CA4th 731, 736, 90 CR2d 561 (parent has no standing). One court has held that if a parent is dissatisfied with the court's dismissal of jurisdiction and consequent exit orders, he or she must seek recourse in family law court. *In re Alexis W.* (1999) 71 CA4th 28, 37, 83 CR2d 488.

IV. SAMPLE FORMS

A. [§101.52] Script: Conduct of Jurisdiction Hearing

(1) *Introduction*

[Mr./Ms.] [name of clerk], please swear all persons who may wish to speak during the proceedings.

(2) *Appointment of attorney for parent(s) or guardian(s)*

[If parent(s) or guardian(s) is/are unrepresented by counsel]

You have a right to be represented by an attorney during this jurisdiction hearing, and during all other hearings in the juvenile court. [*If you want to employ a private attorney, the court will give you an opportunity to do so./The court has reviewed the financial declaration of [parent(s)/guardian(s)] and finds that [he/she/they] [is/are] entitled to appointment of counsel. At this time, the court appoints [name of attorney] to represent [him/her/them].*]

☛ JUDICIAL TIP: When the attorney is on the staff of a government agency, it is the office, not the individual attorney, who is being appointed.

[*If parent(s) or guardian(s) waive(s) counsel*]

This is a serious matter. If the court finds that the allegations in the petition are true, there is a possibility that [*name of child*] may be placed outside your home and that, eventually, your parental rights may be terminated. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

[*When applicable, add*]

The court now finds that the [*parent(s)/guardian(s)*] [*has/have*] intelligently waived [*his/her/their*] right to counsel at this hearing.

(3) *Attorney for child*

The court has read and considered the documentary material submitted by the Department of Social Services for the limited purpose of assessing whether to appoint counsel for the child. Would anyone like to be heard on this issue?

[*After hearing evidence, if any, on issue of child's need for attorney*]

The court finds, based on the facts of this case, that [*there is no identifiable benefit to the child that would require appointment of counsel at this time because [give explanation from Cal Rules of Ct 1438(b)]./there is a need to appoint counsel for the child at this time. The court appoints [name of attorney] to represent the child*].

(4) *Explanation of procedure*

I am going to explain to you what happens at these juvenile court proceedings. These proceedings are divided into several separate hearings. You have already participated in an initial or detention hearing. Today's hearing is a jurisdiction hearing. This hearing will determine whether there will need to be a third hearing, called a disposition hearing.

If [*name of child*] is not able to be returned home at the disposition hearing, there may be later hearings that may result in the termination of parental rights.

You are in court today for a jurisdiction hearing. The purpose of this hearing is to decide whether the facts contained in the petition, which [*has been/will be*] read to you, are true. If the court finds that the facts are not true, the court will dismiss the case. If the court finds them to be true, the court will then conduct a disposition hearing. The purpose of a disposition hearing is to decide what action, if any, the court should take in view of what has been found to have happened.

If the petition is sustained today (that is, if the court finds that the facts are true) and if [*name of child*] is declared a dependent of the court and removed from the custody of his or her parent or guardian, court-ordered reunification services may not be provided for more than 12 months for a child who is over three years old at the time of removal or six months for a child who was under three years old at the time of removal if the parent or guardian does not participate regularly in a court-ordered treatment program.

Because your child is ___ years old, reunification services are limited to [*six/12*] months.

Note: See Cal Rules of Ct 1441(a) (applicable to detention hearings). Often the attorney for the parent(s) or guardian(s) will state that he or she has explained these matters to the parent(s) or guardian(s) and will go on to explain the position of the parent(s) or guardian(s). Many judges train attorneys who appear in their courts to take this responsibility.

(5) *Notice*

[*One parent or guardian not present; make sure that the absent parent or guardian received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear.

[*Both parents or guardian(s) present*]

The court finds that the [*mother/father/guardian(s)*], the child, and all counsel were notified of this hearing and served with the petition as required by law.

[*Notice attempted*]

The court finds that the following attempts were made to locate the [*mother/father/guardian(s)*]: [*List attempts.*]. The court has reviewed the

declaration of search and finds that the efforts made to locate and serve the [*parent(s)/guardian(s)*] were reasonable.

[*Insufficient attempts at notice*]

The court finds that the Department has not used due diligence in attempting to locate the [*parent(s)/guardian(s)*]. The case is therefore continued for one day. [*The Department must take the following steps to locate the* [*parent(s)/guardian(s)*]: [*List them, e.g., check with Department of Corrections or with child's school.*].

Note: Only rarely should a judge dictate to DSS specific search efforts that must be undertaken.

(6) *Waiver of reading of petition and advisement of rights*

[*To each counsel*]

Does your client waive reading of the petition and advisement of rights?

(7) *Reading the petition*

[*If not waived, read the petition.*]

Does each of you understand the petition just read, or do you have any question about it that you would like to have answered by the court?

Are there any changes to names, addresses, or ages in the petition that should be corrected?

(8) *Advisement re addresses under Welf & I C §316.1*

The address that [*is in the petition/you gave the court* [*at the detention hearing/today*]] will be used by the court and the social worker for all further notices unless you advise the court and the social worker of any changes in address.

(9) *Advisement of rights*

You have certain rights at this hearing. These are the right to (1) see and hear all witnesses who may be examined by the court at this hearing; (2) cross-examine, which means ask questions of, any witness who may testify at this hearing; (3) present to the court any witnesses or other evidence you may desire; and (4) have a hearing on the issues raised in the petition. You have the right to assert the privilege against self-incrimination [*but anything you say in this or in any other dependency proceeding may not be admissible as evidence in any other action or proceeding*].

(10) *Parent's or guardian's plea*

Do you intend to admit or deny the statements contained in the petition?

☛ JUDICIAL TIP: Many judges consciously refrain from using language that might frighten the parents. They therefore use the phrase "statements contained in the petition," rather than "allegations."

(11) *Parent or guardian admits or pleads "no contest"*

If you admit or do not contest the facts stated in the petition, the court must make its findings on the basis of the petition and any evidence presented by the Department whether those facts are true or not. Do you understand this situation?

Would you like any further explanation concerning the petition or any of the facts stated in it?

Do you understand that by [*admitting/not contesting*] the facts contained in the petition, the court has only the petition and any evidence presented by the Department on which to base its decision?

Do you have any questions about your right to contest the petition?

Do you understand that if the court takes jurisdiction, it may declare your child a dependent of the court and may then remove [*him/her*] from your home? Do you also understand that if this happens and you are not successful in reunifying within the time limits we discussed previously that your parental rights may be terminated? Do you have any questions about this process?

☛ JUDICIAL TIP: Some judges add here that "termination of parental rights means that some other parents may adopt your child and that you will no longer be the mom or dad. Therefore, it is important to participate fully in the case plan that you have been given."

Understanding this right and the possible consequences, do you want to proceed at this time to [*admit the allegations/plead no contest*]? Do you admit the truth of the statements contained in the petition?

The court now finds that the parents understand the allegations, have intelligently waived their right to contest the petition, and understand the consequences of their decision.

(12) *Parent or guardian denies the allegations or neither admits nor denies them*

The [*parent/guardian*], [*name of parent or guardian*], does not admit the allegations.

(13) *The parent or guardian submits the jurisdictional determination based on information provided in the social worker's report*

[*To parent or guardian*]

If the court makes findings solely on the basis of the evidence in the social worker's report, do you understand that you will have given up your right to cross-examine those who prepared the report and to deny the statements found in the report?

The court now finds that the parents understand the allegations, have intelligently waived their right to contest the petition, and understand the consequences of their decision.

[*To parent, guardian, and the attorneys*]

May the court base its findings solely on the social worker's report and other documents that it has received?

The court receives into evidence the report dated [*date*].

Note: The term for the social worker's report varies from county to county. Whatever the local usage, the court must indicate which documents it is relying on.

[*Court reads any written reports and attachments and states for the record all material read.*]

(14) *Parent or guardian denies the allegations or neither admits nor denies them*

Now is the time for you to present any evidence or make any statement you may wish to make before the court decides whether allegations in the petition are true.

Note: The judge should orally examine the child, if present, and the parents or other persons with relevant knowledge bearing on the allegations in the petition. The judge should allow cross-examination of any witness who may testify.

(15) *Introduction of court process to child witness*

Hello. I am Judge [*name*]. I am in charge of this courtroom, My job is to make sure that everything is fair and that everyone else here does his

or her job correctly. This is Bailiff [*name*]. [*He/She*] is here to make sure that no one gets hurt. [*Mr./Ms.*] [*name*] is the court reporter. [*He/She*] will write down everything that people say so that if anyone later forgets what was said, we can look it up. It is important to speak loudly and clearly so that [*Mr./Ms.*] [*name*] can hear you.

[*Mr./Ms.*] [*names*] are the lawyers. They will be asking you some questions. Their job is to help you tell what you saw and heard so that we can find out the truth.

It is very important to tell the truth, because if I do not understand the whole truth, I may not be able to make the plan that is best for everyone.

You will be answering questions this afternoon. We will stop often so that everyone may have a rest. If you have any problems before the next break, let [*name of support person/name of attorney/me*] know.

Also, you may not understand all the questions. We are used to talking to other adults and not to children. When you don't understand a question, raise your hand and let me know that you don't understand. If you don't know the answer to a question, just say "I don't know" or "I don't remember."

(16) *Assessing child's competency*

Judges and child development experts suggest assessing a child's communication skills and other aspects of competency by determining whether the child's speech is intelligible and whether the child can stay on a topic. See THE CHILD VICTIM WITNESS BENCH HANDBOOK APPENDIX A (CJER 2002). Following are some suggested conversational openers designed to permit this determination:

Here we are in the courtroom. What do you see here?

What did you do this morning?

[*For school-age children*]

Tell me about your school.

What do you do when you first get to school?

What do you do after lunch?

— Tell me more about [*specify activities*].

What is your favorite part of the day?

— Tell me more about it.

What is your favorite television program?

— Tell me about it.

— Who is in it?

— What happens in the program?

(17) *Right to seek modification*

[*Once a child has been adjudged a dependent, to the child if at least 12 years old*]

You have a right to ask for changes in any of these juvenile court orders by filing a petition for modification under Welfare and Institutions Code section 388. The forms for filing such a petition are available here in the courtroom (see Welf & I C §353.1). Once you file this petition, you will need to come to court for a hearing.

B. [§101.53] Script: Findings and Orders

(1) *Introduction*

The court has read and considered [*name the documents, which might be the petition, the social worker's report (specify date), and attached documents or whatever the local nomenclature is*]. The court has also considered the testimony of the witnesses and their demeanor on the stand, as well as the arguments of counsel.

(2) *Parties*

The court finds that the legal status of [*name*] is [*status of man who claims or is claimed to be the father*].

Note: As to each man who claims to be (or is alleged by others to be) the father, the court may make a finding as to whether he is a biological or presumed father after holding a hearing on the issue. If the evidence does not establish that he is the biological or presumed father, the court may find that he is not the father of the child or that he remains only an alleged father. See Benchguide 100: *Juvenile Dependency Initial or Detention Hearings* §100.26 (Cal CJER).

(3) *After uncontested hearing*

[*If allegations are not sustained*]

a. Notice has been given as required by law.

b. The birthdate of the child is [*date*], and the child's county of residence is [*state name of county*].

c. The parents or guardian(s) have knowingly waived the rights to

- Trial on the issues,
- Assert any privilege against self-incrimination,
- Confront and cross-examine adverse witnesses, and
- Use the court's process to compel attendance of witnesses.

d. The parents or guardian(s) understand the nature of the conduct alleged in the petition and the potential consequences of their admission, plea of no contest, or submission.

e. The admission, plea of no contest, or submission has been made voluntarily and freely.

The court finds that the allegations in the petition have not been sustained. The case is dismissed [*and any previously ordered detention is terminated*].

[*If allegations are found to be true*]

The court finds that the allegations in the petition are sustained by a preponderance of the evidence and that [*name of child*] is a child described by Welfare and Institutions Code section 300, subsections ____.

☛ JUDICIAL TIP: Some judges make these findings by clear and convincing evidence whenever warranted.

The court also finds that:

a. Notice has been given as required by law.

b. The birthdate of the child is [*date*], and the child's county of residence is [*state name of county*],

c. The parents or guardian(s) have knowingly waived the rights to

- Trial on the issues,
- Assert the privilege against self-incrimination,
- Confront and cross-examine adverse witnesses, and
- Use the court's process to compel attendance of witnesses.

d. The parents or guardian(s) understand the nature of the conduct alleged in the petition and the potential consequences of their admission, plea of no contest, or submission.

e. The admission, plea of no contest, or submission has been made voluntarily and freely.

f. There is a factual basis for the admission.

g. The admitted allegations of the petition are true as alleged.

(4) *After contested hearing*

The court finds that the allegations in the petition have not been proved by a preponderance of the evidence. The court also finds that notice has been given as required by law and that the birthdate of the child is [*date*], and the child's county of residence is [*state name of county*]. The case is dismissed [*and any previously ordered detention is terminated*].

[*Or*]

The court finds that the allegations in the petition have been proved by a preponderance of the evidence and that [*name of child*] is a child described by Welfare and Institutions Code section 300, subsections _____.

The court also finds that:

a. Notice has been given as required by law.

b. The birthdate of the child is [*date*], and the child's county of residence is [*state name of county*].

(5) *Disposition hearing*

The disposition hearing is scheduled for [*date*], at _____ ___.m. in Department _____. [*Name of parent(s), guardian(s), etc.*] [*is/are*] ordered to attend.

Note: The court may order the disposition hearing to be continued. Under Welf & I C §352(c), waiver is implied if a party is represented by counsel and no objection is made to a continuance.

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CALIFORNIA JUDGES BENCHGUIDES

Benchguide 102

JUVENILE DEPENDENCY DISPOSITION HEARING

[REVISED 2003]

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JUVENILE DEPENDENCY DISPOSITION HEARING

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TABLE OF CASES

I. [§102.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency disposition hearings, held generally under Welf & I C §§358–364 and Cal Rules of Ct 1455–1459. The benchguide covers the conduct of the hearing

and possible findings and orders; it contains a procedural checklist, a brief summary of the applicable law, and spoken and written forms.

Throughout this benchguide the agency responsible for abused or neglected children will be referred to as the Department of Social Services ("DSS") and the person who investigates and supervises dependency cases will be called the social worker. See Welf & I C §215.

II. [§102.2] PROCEDURAL CHECKLIST

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 244.* If it is desired that a referee (or commissioner assigned as a referee) hear a case as a temporary judge, a written stipulation must be obtained from the parties. See discussion in §§102.23–102.25.

(2) *Call the case.* In many counties, the social worker serving as court officer or the deputy county counsel calls the case and announces the appearances. Some judicial officers first call the entire calendar to determine which cases are ready and in what order they will be taken.

(3) *Determine the identity of those present and each person's interest in the case before the court.* Welf & I C §§346, 349; Cal Rules of Ct 1410(b), (d)–(e).

- *If requested, determine whether anyone requesting de facto parent status or any other member of the public should be present.* Welf & I C §349; Cal Rules of Ct 1401(a)(8), 1410(b), (e), 1412(e)–(f).
- *If not handled at an earlier hearing, inquire about the identity and address of a presumed or alleged father.* Welf & I C §316.2; Cal Rules of Ct 1413.
- *Exclude all persons from the court except the parties, persons declared to be de facto parents, counsel, and anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court.* Welf & I C §§345–346, 349.
- *Ask each parent or guardian to confirm for the court his or her permanent mailing address.*
- *Remind each parent or guardian that the designated mailing address will be used by the court and the social services agency for notification purposes until the parent or guardian provides a new address in writing to the court or social services agency.* Welf & I C §316.1(a); Cal Rules of Ct 1412(*l*).

Note: The steps above concerning notice and determination of paternity and some of those that follow (including appointment of counsel) will usually have been taken at the detention or jurisdiction hearing and therefore will not have to be repeated at the disposition hearing unless the parent is appearing for the first time.

☛ JUDICIAL TIP: Judges should ensure that the clerk places the addresses and the advisement into the minute order and that DSS gets the order.

(4) *If no parent or guardian is present:*

- *Determine whether the parent or guardian received actual notice of the hearing.* In addition to the notice to appear made under Welf & I C §§297 (supplemental and subsequent petitions) and 332, the juvenile court may issue a citation directing any parent, guardian, or foster parent to appear and bring the child to the hearing. Welf & I C §362.3.
- *If not, determine whether due diligence efforts to serve them were made.*
- *If due diligence efforts are not found, continue the hearing for a reasonable time to permit proper service.*
- *Make a finding that notice has or has not been given or attempted as required by law.* See Cal Rules of Ct 1412(k).

☛ JUDICIAL TIP: If the disposition hearing followed immediately after the jurisdiction hearing, it is not necessary at the disposition hearing to check that notice was properly given. However, it may still be good practice for judges to do so. If there is a finding of notice at this hearing, the judge should ensure that the clerk enters it, and all findings, in the minute order.

(5) *If a parent is present for the first time, inquire whether the child has American Indian heritage and, if so, the nature of that heritage, including whether the parent or child is a member of a recognized tribe and the name of the tribe if known. The court must take steps to ensure that proper notice is given.* See Welf & I C §360.6; Cal Rules of Ct 1412(i), 1439; discussion in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.41 (Cal CJER).

(6) *Advise any unrepresented parent or guardian of the right to retain counsel and the right to appointed counsel if he or she desires counsel and cannot afford to retain one.* If counsel has been retained or appointed to represent more than one parent or guardian, the court must examine the parties to determine if a present or potential conflict exists. If there has been no prior resolution of this issue and therefore no conflict of interest statement is on file, the court should obtain a personal waiver of conflict of interest from each of the affected parties or take steps to ensure that the rights of all parties are protected. The court must appoint counsel for an unrepresented parent or guardian as warranted, including any incarcerated parents. Welf & I C §317(a); Cal Rules of Ct 1412(g)–(h).

Note: Counsel will usually have been appointed for the parents and the child at the earlier detention or jurisdiction hearings

☛ JUDICIAL TIP: If the parents had waived their right to counsel earlier, the judge may check to see if a valid waiver is in the file. If the parent is in custody, the social worker or other appropriate person should be directed to contact the parent to ask whether he or she desires counsel.

(7) *If the child is not represented by counsel, appoint one unless the child would not benefit from the appointment.* The court must state on the record the reasons for any finding that the child would not benefit from counsel. Welf & I C §317(c); Cal Rules of Ct 1412(g)–(h). See also Cal Rules of Ct 1438 (standards for appointment, required findings when child would not benefit from counsel, and use of CASA (court-appointed special advocate) as guardian ad litem, alternative to counsel).

☛ JUDICIAL TIPS:

- If there are siblings, the court should consider appointing separate attorneys for each sibling when they have different interests. See *In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778. When there is a reasonable likelihood that a conflict of interest among siblings will arise, the court must appoint separate counsel. *Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891.
- Some judges will also appoint a CASA to advocate for the child's interests. See Welf & I C §356.5; Cal Rules of Ct 1424.

(8) *Advise the parties of their hearing rights or obtain a waiver.* Cal Rules of Ct 1412(j). The judicial officer should ask the attorneys whether they have explained these rights to their respective clients and then should ask the parties to confirm that they have had the rights explained to them, that they understand them, and that they waive formal reading of them. If the disposition hearing followed immediately after the jurisdiction hearing, the court need not re-advise the parties of their rights or obtain a new waiver at this time. See discussion in §102.27.

(9) *Review the documentary evidence and read and consider any reports prepared by DSS, including recommendations contained in the reports and attachments; state on the record that the reports have been read, considered, and received into evidence.* See Welf & I C §§358(b), 358.1; Cal Rules of Ct 1455. The social study (see §§102.28–102.30) must be submitted to the clerk at least 48 hours before the disposition hearing is scheduled to begin. Cal Rules of Ct 1455(a)(2).

(10) *Read and consider the reports or testimony of any court-appointed special advocate (CASA).* Welf & I C §358(b).

(11) *Consider the testimony provided and other items offered.* See Welf & I C §358(a); Cal Rules of Ct 1455(b).

(12) *Plan for facilitating child's testimony if one or more parties request that the child testify.* See Welf & I C §350(b); Cal Rules of Ct 1412(c). Usually the child has testified at the jurisdiction hearing and will not testify further at the disposition hearing.

(13) *Dismiss the petition or declare dependency if appropriate* (see §102.37). If the court does not declare dependency, it must dismiss the petition or place the child under informal DSS supervision. See Welf & I C §§360(b), 390; Cal Rules of Ct 1456(a)(1)–(2).

(14) *Order the child to remain in or be returned to the home, or make an out-of-home placement order if the court makes required findings.*

- Child to remain in custody of parent or guardian (see §§102.44–102.50)—with appropriate services such as:
  - — Case management
  - — Counseling
  - — Emergency in-home caretakers
  - — Respite care
  - — Homemaking classes
  - — Parenting classes
  - — Any other services authorized by Welf & I C §§16500–16521.5
- Need for removal (see Welf & I C §361(c); §§102.38–102.43)—findings by clear and convincing evidence that
  - — Leaving the child in or returning the child to the home would cause a substantial danger to the child's physical health, safety, protection, or physical or emotional well-being and there are no reasonable means by which the child's health can be protected without removal. The court must also consider whether to remove from the home the parent who has caused the harm or to permit the other parent to retain custody on the condition that the parent explain to the court how he or she will protect the child from further harm.
  - — The parent or guardian is unwilling to assume physical custody of the child and has been notified that the child might be declared permanently free from parental custody and control if he or she remains outside the home.
  - — The child is suffering severe emotional damage and there are no reasonable means to protect the child's emotional health without removal.

  - The child or a sibling has been sexually abused, or is at substantial risk of abuse, by the parent, guardian, or member of the household, and removal is the only means of protecting the child.
  - The child has been left without provision for support, an incarcerated parent cannot arrange for the child's care, or an adult custodian with whom the child was left is unable or unwilling to care for the child and the parent cannot be located.
- Order of placement preference if child must be removed (see Welf & I C §361.2(e)). See §§102.45–102.56.
- Whether reasonable efforts to prevent or eliminate the need for removal were made (see Welf & I C §361(d); §102.94).
- Placement with relative (see §§102.53–102.55)—considerations:
  - Safety of the child if placed with the relative
  - Best interests of the child
  - Parent's wishes
  - Provisions of Fam C §7950 (preferential consideration) with respect to placement with relative
  - Placement of siblings and half-siblings in the same home
  - Good moral character of the relative
  - Whether the relative can:
    - provide a secure, stable environment
    - exercise care and control
    - provide a home and necessities of life
    - protect the child from the parents
    - facilitate court-ordered reunification efforts
    - facilitate visitation with other relatives
    - facilitate implementation of the case plan
    - provide legal permanence for the child if reunification fails
- Placement with nonrelative (see §§102.51–102.52, 102.56).
- Placement with extended family member (see §§102.53–102.55).
- Placement with noncustodial parent (see §§102.45–102.50).
- Placement and visitation with siblings, including suspension of sibling interaction (see §§102.43, 102.93, 102.97).
- Guardianship (see §§102.57–102.59).

(15) *Order reunification services and visitation as appropriate.*

- Provision of reunification services (see §§102.60–102.73). The court must advise the parent about time limitations on reunification services. Welf & I C §361.5(a); Cal Rules of Ct 1456(f).
- Determination of when provision of reunification services would be in best interests of child in a Welf & I C §361.5(b) situation (see §102.75).
- Visitation with incarcerated parent (see §§102.88–102.89).
- Reunification services for incarcerated or institutionalized parents (see §§102.71–102.73)

(16) *If appropriate, find by clear and convincing evidence one or more of the circumstances by which the court may deny reunification services.* See §102.74. A judge should require DSS to designate the code sections under which it is requesting denial of services. See Welf & I C §361.5(a)–(b), (e)(1); Cal Rules of Ct 1456(f)(5); §§102.74–102.83).

(17) *On making appropriate findings, order services in a situation in which services might otherwise be denied.*

- The court may order reunification services in situations described by Welf & I C §361.5(b)(3)–(4), and (6)–(15) if it finds by clear and convincing evidence that reunification is in the child's best interest. Welf & I C §361.5(c).
- The court may also determine that reunification services would benefit the child who would otherwise be denied services under Welf & I C §361.5(b)(6) or §361.5(b)(7) (relating to severe sexual abuse of child or to not receiving services for siblings) on consideration of relevant information, such as that set out in Welf & I C §361.5(h) and Cal Rules of Ct 1456(f)(10).
- The court may order services in a situation governed by Welf & I C §361.5(b)(5) (severe physical abuse under the age of five) if it finds by competent evidence that services are needed to prevent further abuse or continued neglect of the child or that failure to attempt reunification is likely to be detrimental to the child because of a close attachment to the parent. Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(11).

(18) *Make orders regarding child's needs and treatment.*

- Mental health counseling or therapy (see §102.98).
- Treatment for abuse of alcohol and other drugs (see §102.96).
- Visitation with parents and others (see §§102.84–102.93).
- Sibling visitation and interaction (see §§102.93, 102.97).
- Mental health evaluation of child and parents (see §102.98).

- Child's educational needs (see §102.99).
- Restraining orders (see §102.100).
- Subsequent periodic reports (see §102.101).
- Custody and visitation orders enforceable in family court when juvenile court jurisdiction is terminated (see §102.105).
- Requests for disclosure (see §102.106).
- Paternity testing.

(19) *Rule on any additional requests.*

- Notice (see §102.26).
- Paternity (see §102.102).
- Joinder of private service providers (see §102.36).
- Continuation of prior out-of-home placement (see §102.102).

(20) *Set further hearings as necessary.*

- Continuation of disposition hearing for receipt of new case plan.
- Review hearing within six months from the date the child entered foster care (if child removed) or dependency declared (if child not removed) (see Welf & I C §366.21(e); Cal Rules of Ct 1460(a)).
- .26 hearing under Welf & I C §361.5(f) if reunification services are not ordered.

☛ JUDICIAL TIPS:

- Some judges set the 12-month permanency hearing and any interim hearings deemed necessary at the disposition hearing. The 12-month hearing must be held within 12 months from the date the child entered foster care. Welf & I C §366.21(f). This date is defined as the earlier of the date the petition is sustained at the jurisdictional hearing or the date that is 60 days after removal from the custody of the parent or guardian. Welf & I C §361.5(a); Cal Rules of Ct 1401(a)(7)(A).
- The case file should be prominently marked with the last date for the 18-month permanency review hearing, which is 18 months from the date the child was removed from the custody of the parent or guardian, unless the child is under the age of three and the 12-month time frame applies. The file should also be marked with the presumptive duration of services, which is six months for a child under three years old and 12 months for a child three years or older. See Welf & I C §361.5(a)(1)–(2).
- The Juvenile Law Advisory Committee of the Judicial Council strongly recommends that for cases involving children who are

under three years old at the time they are initially removed, a progress review appearance hearing be set within 90 days of disposition. The purpose of this hearing would be to confirm that services as ordered are being offered or provided and that the parent or guardian is participating in those services. The hearing would provide an opportunity for the court to remind the parties of the short time period available to achieve reunification and the risk of the termination of reunification services at the six-month review if the parent has failed to participate in those services.

Any change in the disposition orders would be considered only if a properly noticed petition under Welf & I C §388 is presented and granted or set for hearing.

III. APPLICABLE LAW

A. [§102.3] Purpose of Disposition Hearing

Once the allegations in the petition are sustained at a jurisdiction hearing, a disposition hearing is held to determine whether the child should be declared a dependent child. *In re Heather B.* (1992) 9 CA4th 535, 543–544, 11 CR2d 891; Welf & I C §360(d); Cal Rules of Ct 1456(a). If dependency is declared, the court must determine the proper home for the child and appropriate orders for the child and family. Welf & I C §358(a). An important goal is to permit the child to remain with his or her family, preferably with a parent. See discussion in §§102.38–102.40. However, if the child must be removed from the home to ensure the child's safety, the purpose of the disposition hearing is to make orders facilitating the reunification plan and to ensure that the child's physical and psychological needs are met during the period of reunification. See *In re Baby Girl D.* (1989) 208 CA3d 1489, 1493, 257 CR 1. During this period of reunification, the court must be engaged in concurrent planning for a permanent placement should reunification efforts fail. See Welf & I C §§358.1(b), 16501.1(f)(9).

B. Calendaring the Hearing

1. [§102.4] Time Limitations

The disposition hearing will generally be held immediately after the jurisdiction hearing. Often the social study prepared for use at the jurisdiction hearing will contain dispositional recommendations. In this situation, the disposition hearing can go forward immediately after the finding of jurisdiction. See Welf & I C §358(a) (court must hear evidence on disposition after finding that child is described by Welf & I C §300).

If the disposition hearing is not held immediately following the jurisdiction hearing (often the case when the disposition hearing is

contested), it must be held within ten days of the jurisdiction hearing if the child is detained (Welf & I C §358(a)(1); Cal Rules of Ct 1451(a)) or within 30 days of the jurisdiction hearing if the child is not detained (Welf & I C §358(a)(2)).

If the child has been removed from the parents' or guardians' custody, the court may not grant a continuance that would cause the disposition hearing to be completed more than six months after the detention hearing, nor should the disposition hearing be continued to a date more than 60 days after the detention hearing unless there are exceptional circumstances. Welf & I C §352(b); Cal Rules of Ct 1422(a)(3). See §§102.5–102.7 generally for a discussion of continuances. Even though failure to comply with these time limits does not deprive the court of jurisdiction (*In re Richard H.* (1991) 234 CA3d 1351, 1362, 285 CR 917), the court should do everything in its power to ensure that the matter is heard as quickly as possible.

☛ JUDICIAL TIP: Although there are many ways to manage a juvenile dependency calendar, several effective general rules appear to be somewhat universal:

- Ongoing trials have priority over trials that have not yet started.
- Once begun, trials should be heard on consecutive days until completed.
- Cases in which children have been placed outside the home have priority over cases in which the children have been placed with a parent.
- Cases that are in the prepermanency planning stage have priority over cases that are in postpermanency planning.

Statutory time frames serve a purpose and should be adhered to as much as possible. Adherence to these rules may help ensure that disposition hearings are heard in a timely fashion.

In many counties, services are provided as soon as a child is detained (see Welf & I C §319(e)), so that parents are working towards return at the earliest possible opportunity. Sometimes this allows the child to be returned home at the disposition hearing.

2. Continuances

a. [§102.5] Grounds for Continuance

The disposition hearing may be continued for the preparation of a report, a contested hearing, or for other good cause on either the court's own motion or on motion of the parent, guardian, or child, as follows:

- Up to ten judicial days if the child is detained and Welf & I C §361.5(b) (conduct or situation of the parent warrants no

reunification services) is not alleged. Welf & I C §358(a)(1); Cal Rules of Ct 1451(a).

- Up to 30 days if the child is not detained, with an additional 15-day period for good cause. Welf & I C §358(a)(2); Cal Rules of Ct 1451(a).
- Up to 30 days if the social worker has alleged that Welf & I C §361.5(b) is applicable. Welf & I C §358(a)(3); Cal Rules of Ct 1451(b). This continuance is mandatory. See Welf & I C §358(a)(3).

In addition to the rules governing continuances in disposition hearings, the general rules governing continuances in juvenile dependency proceedings apply. Under these rules, the judge may grant a continuance if it would not be contrary to the child's best interests. Welf & I C §352; Cal Rules of Ct 1422(a)(1). In determining whether to grant a continuance, the judge must give substantial weight to the need for prompt resolution of the child's custody status, the need to provide the child with a stable environment, and damage that could be caused by prolonged temporary placements. Welf & I C §352(a); Cal Rules of Ct 1422(a)(1). A grant of a continuance must be based on good cause. Welf & I C §352(a); Cal Rules of Ct 1422(a)(2). As with all other hearings in dependency cases, requests to continue disposition hearings should be scrutinized closely, granted only when necessary, and granted for the shortest time possible. The court in *In re Emily L.* (1989) 212 CA3d 734, 743, 260 CR 810, stated: "Throughout the dependency and parental termination statutes, we find the admonition to accelerate proceedings so that the child is not kept 'in limbo' any longer than necessary. Continuances are expressly discouraged." See also §102.4 for a discussion of time limits in scheduling or continuing a disposition hearing.

Failure of a party in a dependency proceeding to receive a social study at least 48 hours before the disposition hearing is a ground for a continuance, but the continuance must be within statutory limits. Cal Rules of Ct 1455(a)(2).

☛ JUDICIAL TIP: Even if the parents receive the social study within the 48-hour statutory time limit, it may sometimes be advisable to grant the parents a short continuance to prepare for the hearing. A continuance might be justified when there is a particularly complex case or when the report reveals the need for witnesses not previously contemplated.

b. [§102.6] No Good Cause

Chronic court congestion in the juvenile court is not good cause for continuing the hearing; dependency cases demand priority. See, *e.g.*, *Jeff*

M. v Superior Court (1997) 56 CA4th 1238, 1242–1243, 66 CR2d 343 (after more than a year from the filing of the petition, jurisdiction hearing had still not been completed). Because the juvenile court had continued the case many times, placing it far beyond statutory guidelines, the court of appeal directed it to conduct trial all day every day until the conclusion unless good cause for a continuance was actually shown. *Jeff M. v Superior Court, supra,* 56 CA4th at 1243. In addition, the court of appeal found that continuing a jurisdiction hearing to a date almost four months from removal and conducting trial only two days per week was an abuse of discretion because, under a Welf & I C §352(b) analysis, there were no extraordinary circumstances to justify holding the disposition hearing more than 60 days from the detention hearing. *Renee S. v Superior Court* (1999) 76 CA4th 187, 193–198, 90 CR2d 134.

A stipulation between counsel, the convenience of parties, or pending criminal or family law cases involving the same family do not constitute good cause for a continuance. Cal Rules of Ct 1422(a)(2). An alleged father's failure to return a certified receipt of notice (see Cal Rules of Ct 1440) is also not good cause to continue a hearing. See Welf & I C §316.2(c); Cal Rules of Ct 1422(a)(6).

☛ JUDICIAL TIP: Some judges advise attorneys that they are reluctant to find good cause for a continuance when an attorney has a conflict. Dependency cases should have priority over other kinds of cases.

Moreover, although sudden illness or unforeseen circumstances that prevent a party from appearing may amount to good cause, the party who has adequate notice of the proceedings and fails to adjust personal plans to permit attendance at trial is not justified in requesting a continuance. See, *e.g.*, *Young v Redman* (1976) 55 CA3d 827, 831, 128 CR 86 (civil case); see also *Marriage of Teegarden* (1986) 181 CA3d 401, 405–406, 226 CR 417 (no continuance should be granted for a situation that could have been anticipated or avoided).

☛ JUDICIAL TIPS:

- Requests are frequently made by attorneys or DSS to continue disposition hearings for extended periods of time to complete psychological evaluations or paternity testing. Unless the psychological evaluations are necessary to establish the risk posed to the child by the parent (Welf & I C §361(c)) or to deny reunification services (Welf & I C §361.5(b)(2)), these evaluations can usually be completed after the disposition hearing. If reunification services are ordered and later psychological evaluations show that the parent suffers a mental disability that renders the parent incapable of utilizing services, a petition under

Welf & I C §388 can be used for the modification of the disposition order and denial of services. *Sheila S. v Superior Court* (2000) 84 CA4th 872, 877–879, 101 CR2d 187.

- If an alleged father has not previously sought to establish his paternity, the child's disposition hearing should not have to wait for him to do so. The disposition hearing should normally go forward and, if a change of orders is necessary after disposition as a result of the psychological evaluation or paternity testing, the case can be brought back for the court's consideration. See Welf & I C §388.
- Motions for continuances are sometimes based on the fact that a parent is awaiting trial or sentencing on a related criminal matter. This is not good cause and is expressly prohibited by Welf & I C § 352(a).
- If there is reason to believe that the child may be an Indian child under the Indian Child Welfare Act (ICWA) and there has not been a response from the designated tribe or tribes, or from the Bureau of Indian Affairs, rather than continue the matter, the best course of action is to proceed under the provisions of the Act.

c. [§102.7] Procedure

Written notice requesting a continuance must be filed at least two court days before the date set for hearing. Welf & I C §352(a); Cal Rules of Ct 1422(a)(4). The party seeking a continuance must submit affidavits or declarations showing specific facts demonstrating that a continuance is necessary, unless the judge for good cause permits an oral motion. Welf & I C §352(a). When granting a continuance, the facts that form the basis for the continuance must be entered in the court minutes. Welf & I C §352(a); Cal Rules of Ct 1422(a)(5).

When the child, parent, or guardian is represented by an attorney and a hearing is continued beyond the time limit within which it would otherwise be required to be held, an absence of objection is considered a consent to the continuance. Welf & I C §352(c).

C. Appearances

1. [§102.8] Generally

In addition to notices to appear made under Welf & I C §§297 (supplemental and subsequent petitions) and 332 , the juvenile court may issue a citation directing any parent, guardian, or foster parent to appear and bring the child to the hearing. Welf & I C §362.3. The notice must state that the parent, guardian, or foster parent may be required to

participate in a counseling or educational program with the child. Welf & I C §362.3.

At the disposition hearing, as with any juvenile court hearing, the child, who is the subject of the proceeding, is a party (Welf & I C §317.5(b)) and is therefore entitled to be present. Welf & I C §349. In addition to the child, Welf & I C §349 and Cal Rules of Ct 1410(b) permit the following persons to be present:

- Counsel for child, counsel for parent or guardian, de facto parent, and Indian custodian.
- Parents or guardians.
- De facto parents (see §§102.10–102.15).
- Adult relatives residing in the county or nearest to the court (if no parent or guardian can be found or none reside within the state).
- Social worker.
- Court clerk.
- Court reporter.
- Bailiff, at the court's discretion.
- Representative of an Indian child's tribe.
- Interpreters, as required.
- Any court-appointed special advocate (see also Cal Rules of Ct 1424 for program guidelines for recruiting, selecting, and training these advocates).

The child's current caregiver is also entitled to attend under 42 USC §675(5)(G). In addition, at the request of a parent, guardian, child, or social worker, or on the court's own motion, the court may issue a subpoena under CCP §1985 to compel the attendance and testimony of a witness. Welf & I C §341; Cal Rules of Ct 1408(d).

The court may also permit any of the child's relatives to be present at the detention hearing on a sufficient showing. See Cal Rules of Ct 1412(f). A relative who is not accorded de facto parent status may be present at the hearing and address the court if he or she can show a bond with and concern for the child, but does not have a right to counsel, to participate as a party, or to present evidence. *In re Patricia L.* (1992) 9 CA4th 61, 68, 11 CR2d 631; see Cal Rules of Ct 1412(f). For a discussion of de facto parents, see §§102.10–102.15.

Although parents are permitted to attend, it is not necessarily a denial of due process for the hearing to proceed without them, as long as they are represented by counsel. See *In re Axsana S.* (2000) 78 CA4th 262, 268–270, 92 CR2d 70 (parent was incarcerated but had received all notices). Moreover, a court need not appoint a guardian ad litem for an alleged

father who was himself a minor and who has not appeared. *In re Emily R.* (2000) 80 CA4th 1344, 1358, 96 CR2d 285. Before appointing a guardian ad litem for a parent, the court must explain the purpose of the appointment and, if the parent does not consent, conduct an informal hearing to determine the need for an appointment. *In re Sara D.* (2001) 87 CA4th 661, 671–672, 104 CR2d 909.

2. [§102.9] Others

All others must be excluded from the courtroom, unless a parent or guardian requests that the public be admitted and this request is consented to by the child or the child requests an open hearing. Welf & I C §346. The court may also admit anyone who it determines has a direct and legitimate interest in the case or in the work of the court. Welf & I C §346. In any event, no person on trial, accused of a crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is a parent. Welf & I C §345; Cal Rules of Ct 1410(a). A stepparent is not entitled to be present, and one who is accused of a crime must generally be excluded from the proceedings; however, some judges permit stepparents whose crime is unrelated to the dependency to attend if the child has been living with that stepparent.

3. [§102.10] De Facto Parents

Courts have long recognized the need for special status for those who have a significant, but unofficial, relationship with the child. See, *e.g.*, the decision in *In re B.G.* (1974) 11 C3d 679, 692, 693, 114 CR 444, holding that a person, who is not a parent but who raises the child, need not have applied for guardianship or have any other formal association with the child in order to assert and protect his or her own interest in the child's "companionship, care, custody, and management." A de facto parent is a person who the court determines has assumed the role of parent by fulfilling the child's physical and psychological needs for care for a lengthy period on a day-to-day basis. Cal Rules of Ct 1401(a)(8). The doctrine of de facto parent status is judicially created and set out in Cal Rules of Ct 1412. *In re Brandon M.* (1997) 54 CA4th 1387, 1398–1400, 63 CR2d 671. It is consistent with the Indian Child Welfare Act (ICWA). *In re Brandon M., supra.*

a. [§102.11] Determination of De Facto Status

Generally, there have been two approaches to the granting of de facto parent status. The traditional approach has been to limit such status to cases in which it is established that there is a current, positive psychological parent-child relationship and the person seeking the status has cared for the child in a wholesome and stable environment. See, *e.g.*,

Guardianship of Phillip B. (1983) 139 CA3d 407, 416–422, 188 CR 781. Other courts have looked to the information that the individual seeking the status might have that would aid the court in making a decision in the child's best interest, in addition to the relationship with the child. See, *e.g.*, *In re Rachael C.* (1991) 235 CA3d 1445, 1452, 1 CR2d 473 (juvenile court can only benefit from having all the information available including the information that a de facto parent might present), disapproved on other grounds in 6 C4th at 80. See also *In re Patricia L.* (1992) 9 CA4th 61, 67, 11 CR2d 631, holding that "because a court can only benefit by having all relevant information, it should liberally grant de facto parent status."

☛ JUDICIAL TIP: Although some judges grant de facto status liberally, other judges do not agree that de facto parent status should be freely granted because the existing rules allow relatives and foster parents to have their views and information heard without the need for de facto parent status (see Cal Rules of Ct 1412(f); Welf & I C §346) and because every added party means additional hearings and hearing time.

(1) [§102.12] Factors To Consider

Some of the factors that courts have considered in deciding whether to grant de facto parent status are whether (*In re Patricia L.* (1992) 9 CA4th 61, 66–67, 11 CR2d 631):

- The child is psychologically bonded to the person;
- The person has assumed a parental role on a day-to-day basis for a substantial period;
- The person has information about the child that may not be obtained from other participants in the juvenile court process;
- The person regularly attends juvenile court proceedings; and
- Without this status, this person's relationship with the child might be permanently foreclosed at a future hearing.

A person who has substantial and regular contact with the child even when the child lives with someone else may be considered a de facto parent. *In re Hirenia C.* (1993) 18 CA4th 504, 514, 22 CR2d 443 (person seeking de facto parent status, former partner of a foster parent, had been primary caregiver for first five months of child's life and had thereafter cared for child on part-time basis). The focus of the de facto parent's interest should be the relationship of that person with the child, not that person's relationship to, or advocacy of, the parent. *In re Daniel D.* (1994) 24 CA4th 1823, 1835–1836, 30 CR2d 245.

Not every caretaker who meets the criteria listed above deserves de facto parent status. A nonparental caretaker may forfeit the privilege of

participation as a de facto parent if "there is an adjudication that a child is within the jurisdiction of the juvenile court because [the person seeking de facto parent status] committed a substantial harm [to that child], such as sexual or other serious physical abuse." *In re Kieshia E.* (1993) 6 C4th 68, 78, 23 CR2d 775. Under *Kieshia E.*, the court has no discretion to balance all the factors and grant de facto status to a person who is the cause of the dependency even if the child was bonded to that person and that person caused no direct harm to the child. *In re Leticia S.* (2001) 92 CA4th 378, 381, 383, 111 CR2d 810. Thus, a mother's boyfriend was denied de facto parent status when the drugs left out by the mother and boyfriend were the primary reason for the underlying dependency. 92 CA4th at 382–384. See also discussion of *In re Michael R.* (1998) 67 CA4th 150, 78 CR2d 842, in §102.13.

Nomination as a guardian by a deceased parent has been held by one court of appeal to automatically entitle a person to de facto parent status, unless the child is abandoned by the nominee or the court has denied the appointment after a hearing. *In re Vanessa P.* (1995) 38 CA4th 1763, 1770, 45 CR2d 760.

☛ JUDICIAL TIP: In according de facto status to a person who has been nominated as a guardian, judges should look to the factors listed in *In re Patricia L., supra,* in addition to the person's position as nominee.

(2) [§102.13] Grandparents

Grandparents who have previously cared for the child are often granted de facto parent status, even though they are not able to provide permanent care for the child. This may be appropriate even if DSS or the parents have taken issue with the care the grandparent provided the child. See, *e.g., In re Ashley P.* (1998) 62 CA4th 23, 27–30, 72 CR2d 383 (grandmother may be accorded de facto status when she provided an appropriate and loving home for the children, had strong psychological bonds with them, and supported court-ordered therapy for them, although she did not get along with their father). Indeed, when a grandparent or other close relative has conscientiously cared for the children and the children are bonded to that person, the court must have a good reason for denying de facto status. *In re Vincent C.* (1997) 53 CA4th 1347, 1358, 62 CR2d 224. De facto status may, however, properly be denied to a grandmother who, despite significant involvement with the grandchildren, causes substantial potential harm to them by refusing to recognize the physical abuse that her son perpetrated and by allowing him unlimited access. *In re Michael R.* (1998) 67 CA4th 150, 157–158, 78 CR2d 842.

b. Procedure

(1) [§102.14] Establishing De Facto Status

The person who seeks de facto parent status has the burden of proving by a preponderance of the evidence that he or she is entitled to that status. See *In re Joshuia S.* (1988) 205 CA3d 119, 125, 252 CR 106. The court may not declare a person to be a de facto parent unless that person requests the status or indicates a willingness to be identified as such. *In re Jody R.* (1990) 218 CA3d 1615, 1627, 267 CR 746 (involuntary conferral of such status is improper).

A child does not have standing to appeal a denial of de facto status because the denial of the motion has no effect on the child's rights. *In re Crystal J.* (2001) 92 CA4th 186, 191–192, 111 CR2d 646.

Generally, a court should not grant the request ex parte. See *Christina K. v Superior Court* (1986) 184 CA3d 1463, 1469 n9, 229 CR 564. Some courts require the person seeking de facto status to make the request in writing. See, *e.g.*, San Diego Super Ct, 6.3(c). Once the court receives the request, it should give notice to all the parties. In some courts, a motion under Welf & I C §388(a) (using Judicial Council forms JV-100 and JV-180) may be used for this request; this procedure may be encouraged by local rule or practice. If these forms are used and all parties agree to the request, the request may be granted without a hearing, but if the parties do not agree, the court must hold a hearing.

Someone who has been granted de facto status may participate as a party in the disposition and subsequent hearings. See Cal Rules of Ct 1412(e).

☛ JUDICIAL TIP: Because there is often not enough time for the parties to request and establish de facto status if the disposition hearing immediately follows the jurisdiction hearing, courts must schedule the disposition hearing so that there is sufficient time to hear these requests.

(2) [§102.15] Consequences of De Facto Status

Once de facto status is established, the de facto parent may appear and present evidence at the disposition hearing. Cal Rules of Ct 1412(e)(1), (3). The de facto parent is entitled to be represented by retained counsel or, at the court's discretion, by appointed counsel. Cal Rules of Ct 1412(e)(2). An indigent de facto parent, however, is not entitled to court-appointed counsel on appeal. *In re Joel H.* (1993) 19 CA4th 1185, 1196, 1199, 23 CR2d 878.

☛ JUDICIAL TIP: The court's authority to exercise its discretion to appoint counsel for de facto parents is found solely in the California Rules of Court. See Cal Rules of Ct 1412(e)(2). There

is no statutory authority for the court to compensate such an attorney. Thus, appointments of counsel for de facto parents must be pro bono appointments, unless other arrangements for compensation are made. See *J.W. v Superior Court* (1993) 17 CA4th 958, 970, 22 CR2d 527, citing *Payne v Superior Court* (1976) 17 C3d 908, 920, 924, 132 CR 405 (court not required to pay for counsel in paternity proceeding). The juvenile court judicial officer may wish to develop a list of qualified attorneys who are willing to be appointed for de facto parents on a pro bono basis.

Once de facto standing is established, it may continue even after the biological parent regains custody. See, *e.g., In re Robin N.* (1992) 7 CA4th 1140, 9 CR2d 512. It generally continues until the dependency itself is terminated. *In re Patricia L.* (1992) 9 CA4th 61, 67, 11 CR2d 631. To terminate this status, the court must hold an evidentiary hearing in which the proponent of the termination has the burden of showing that circumstances have changed. 9 CA4th at 67. A hiatus in the child's relationship with the de facto parent will not automatically constitute a change of circumstances sufficient to terminate de facto parent status if the person continues to have a strong psychological bond with the child. 9 CA4th at 68.

☛ JUDICIAL TIP: When the court grants a de facto parent access to information under Welf & I C §827 (see §§102.20, 102.106), it should only grant access to information that is relevant to issues in which the de facto parents are involved. For example, they should not be entitled to parents' psychological evaluations, but may receive reports regarding the abuse they allegedly committed.

4. Attorneys

a. [§102.16] Appointment

At the disposition hearing stage in juvenile court proceedings, most parents and guardians will already be represented by retained or appointed counsel. Generally, the court will have already appointed counsel for the child. If the child is not represented by counsel, the court must appoint an attorney for him or her unless it finds on the record that the child would not benefit from this appointment. Welf & I C §317(c). See also Welf & I C §326.5 (Judicial Council to promulgate rule for appointment of CASA or attorney as guardian ad litem); Cal Rules of Ct 1438 (standards for appointment, required findings when child would not benefit from counsel, and use of CASA as guardian ad litem, alternative to counsel).

Once appointed, counsel must represent the child, parent, or guardian at all juvenile court proceedings (Welf & I C §317(d)), including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1402, 25 CR2d 259) and proceedings following the first review of a permanent placement plan (*In re Tanya H.* (1993) 17 CA4th 825, 827, 21 CR2d 503). But see *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1065–1066, 50 CR2d 57 (parents' counsel may be relieved at a later stage if the parents have failed to keep both counsel and the court apprised of their whereabouts or to maintain an interest in the proceedings).

At the disposition hearing, the court may be requested to appoint counsel for a de facto parent once that status has been established. Cal Rules of Ct 1412(e)(2). See discussion in §§102.10–102.15.

For a discussion of appointment of counsel for the parents, guardians, and the child, and for the handling of conflicts of interest, see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearings* §§100.10–100.17 (Cal CJER), and Seiser & Kumli, California Juvenile Courts: Practice and Procedure §§2.61–2.66 (Matthew Bender 2003). For a discussion of the importance of a comprehensive system for the representation of children, see Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council,* 27 Family LQ 417 (Fall 1993).

b. [§102.17] Competency

All parties represented by an attorney are statutorily entitled to competent counsel. Welf & I C §317.5(a); see Cal Rules of Ct 1438(c) (defining competence and discussing standards of representation, experience, and education). Under Rule 1438(d), the court must establish a complaint process, inform parties of the procedure, and require evidence of competency; it must take appropriate action when it has determined that an attorney acted improperly.

There may also be a constitutional right to effective assistance of counsel at any hearing at which reunification services may be terminated, such as a hearing based on Welf & I C §361.5(b). *In re Arturo A.* (1992) 8 CA4th 229, 239, 10 CR2d 131. If DSS is seeking to deny the parent reunification services under Welf & I C §361.5(b) at the disposition hearing, it is possible that a constitutional right to effective assistance of counsel would arise at this hearing if the issues are complex and the assistance of counsel is likely to sway the outcome.

c. [§102.18] Responsibilities

Because a primary responsibility of counsel is to advocate for the child's safety and protection (Welf & I C §317(c)), counsel must not

advocate for the return of the child to the home if the return is antithetical to the child's safety (Welf & I C §317(e)). Attorneys must have sufficient contact with the child to establish and maintain an attorney-client relationship. Cal Rules of Ct 1438(c)(4).

d. [§102.19] Withdrawal

When counsel seeks to withdraw, the court must require an explanation for the record why he or she cannot proceed; if the attorney has been unable to contact the parent, counsel must inform the court how this lack of contact has an adverse impact on the client's representation. *In re Malcolm D* (1996) 42 CA4th 904, 915, 50 CR2d 148. Before counsel may be relieved under Welf & I C §317, the court must conduct a hearing with notice to the concerned parents. *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1066, 50 CR2d 57.

☛ JUDICIAL TIP: If the court relieves counsel when it is not clear that parents are receiving notice at their designated address, some judges ask DSS to file a statement of efforts to provide notice so that there is a record of the process.

D. [§102.20] Prehearing Disclosure

The social study prepared by DSS (see discussion in §§102.28–102.30) must be submitted to the clerk at least 48 hours before the disposition hearing is scheduled to begin. Cal Rules of Ct 1455(a). The clerk must make copies available to the parties and attorneys. Cal Rules of Ct 1455(a). In addition, DSS must disclose any evidence or information that is favorable to the child, parent, or guardian (Cal Rules of Ct 1420(c)), and the parent or guardian must disclose to DSS relevant material on request (Cal Rules of Ct 1420(e)). These duties are continuing ones. Cal Rules of Ct 1420(k). Under Cal Rules of Ct 1420(d), DSS must disclose the following information within its possession or control:

- Probation reports.
- Records of statements, admissions, or conversations by the child, parent, or guardian.
- Records of statements, admissions, or conversations by anyone alleged to be a participant.
- Names and addresses of those who were interviewed.
- Records of statements of anyone interviewed.
- Experts' reports.
- Photographs or physical evidence.
- Felony conviction records of witnesses.

California Rules of Court 1420 authorizes disclosure of the records, reports, and evidence listed above only to parents, guardians, or the child and not to de facto parents. Presumably Welf & I C §827 would permit disclosure of certain reports and evidence to de facto parents at the judge's discretion. See discussion in §§102.10–102.15.

Based on its inherent power to manage its calendar under Cal Rules of Ct 1420, a juvenile court may require parties to submit witness lists shortly before trial without violating attorneys' work product protection. *In re Jeanette H.* (1990) 225 CA3d 25, 35–37, 275 CR 9.

The court may be requested to compel or limit discovery. See Cal Rules of Ct 1420(f)–(i). Sanctions may be imposed for failure to comply with discovery orders. Cal Rules of Ct 1420(j).

E. Conducting the Disposition Hearing

1. [§102.21] In General

As with any juvenile court hearing, a disposition hearing must be conducted in an informal, nonadversarial manner unless there is a contested issue of law or fact. See Welf & I C §350(a)(1); Cal Rules of Ct 1412(b). The court must control the proceedings with a view to expeditious and effective determination of the facts, as well as obtaining maximum cooperation of the child and persons interested in the child's welfare. Welf & I C §350(a)(1); Cal Rules of Ct 1412(a). The disposition hearing must be closed to the public and heard at a special or separate session of court; if the child is detained, the hearing must be granted precedence on the calendar for the day set. See Welf & I C §§345–346.

A waiver of the right to a contested disposition hearing is valid when the waiver form specifies that the court may assume custody of the child and that reunification services may not be offered or provided, even though the court does not specifically advise the parent that he or she may lose custody of the child. *In re Patricia T.* (2001) 91 CA4th 400, 407, 109 CR2d 904.

The DSS has the burden of proof on aspects of disposition recommendations. See generally Welf & I C §§361, 361.5. If the court orders the child to be removed from the custody of the parent or guardian, it must make the required findings by clear and convincing evidence. Welf & I C §361(c). If, after presentation of evidence by DSS and the child, the court finds that the required burden has not been met, it may nevertheless order "whatever action the law requires," based on the motion of any party or on its own motion; if the motion is denied, additional evidence may be introduced. Welf & I C §350(c); Cal Rules of Ct 1412(d).

2. [§102.22] Recording the Hearing

The hearing must be recorded by a court reporter or by any other authorized means if the hearing is conducted by a judge or by a referee, commissioner, or attorney acting as a temporary judge. Welf & I C §347; Cal Rules of Ct 1411(a). If the hearing is before a referee or commissioner assigned as a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 1411(b).

3. [§102.23] Judicial Officers Who May Conduct Hearing

Disposition hearings may be conducted by referees who meet the qualifications of Welf & I C §247 (five years of legal practice in California or admitted to practice in any other state and California for a combined minimum of 10 years) or by superior court commissioners who are assigned to sit as referees. Referees may perform subordinate judicial duties assigned to them by the presiding judge of the juvenile court. Welf & I C §247; Cal Rules of Ct 1415(a). They generally have the same power as judges (Welf & I C §248), except that the presiding judge of the juvenile court may require that certain of a referee's orders must be approved by a juvenile court judge before becoming effective (Welf & I C §251). No order of a referee removing a child from his or her home becomes effective until expressly approved by a judge of the juvenile court within two days. Welf & I C §249; Cal Rules of Ct 1417(b).

A referee or commissioner assigned as a referee who is not acting as a temporary judge must inform the child and parent or guardian that review by a juvenile court judge may be sought. Welf & I C §248; Cal Rules of Ct 1416(a)(2). A child, DSS, or the parent or guardian may apply for a rehearing at any time up to ten days after the service of a written order. Welf & I C §252; Cal Rules of Ct 1418(a); *Southard v Superior Court* (2000) 82 CA4th 729, 733, 98 CR2d 733 (DSS, as well as the child and parents, may seek a rehearing under Welf & I C §252). If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873. For decisions by a referee that do not require approval by a juvenile court judge to become effective, a judge may make an order for a rehearing within 20 judicial days of the hearing, but not more than ten days following the service of a written copy of the order. *In re Clifford C., supra* (delinquency case harmonizing Welf & I C §§250, 253).

a. [§102.24] Obtaining Stipulations

To avoid the necessity of approval by a judge, a referee may obtain a stipulation to act as a temporary judge. Cal Rules of Ct 1415(b). A referee who has received such a stipulation is empowered to act fully as a juvenile court judge. Cal Const art VI, §21; Cal Rules of Ct 1415(b). Procedures to follow in obtaining a stipulation are set out in Cal Rules of Ct 244 (applicable to referees and attorneys acting as pro tem judges under Cal Const art VI, §21, but not applicable to commissioners). Failure to follow the procedures exactly will not void the stipulation and deprive the court of jurisdiction. *In re Richard S.* (1991) 54 C3d 857, 865, 2 CR2d 2. A stipulation is necessary to give the court's acts finality in a dependency hearing, but the absence of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551, 18 CR2d 555.

A stipulation to a temporary judge for the "within action . . . until the final determination thereof" entered into before the jurisdiction hearing is sufficiently ambiguous to permit a parent to withdraw the stipulation after the disposition hearing, although the parent may not withdraw the stipulation in the intervening time between the jurisdiction and the disposition hearing. *In re Steven A.* (1993) 15 CA4th 754, 772, 19 CR2d 576.

b. [§102.25] Commissioners

The superior court is not required to designate commissioners as juvenile court referees and, in some jurisdictions, commissioners are appointed as temporary judges and not as referees. As such, their decisions and orders are not subject to rehearing. California Rules of Court 244, relating to the required stipulations for temporary judges, specifically states that it does not apply to court commissioners sitting as temporary judges. A stipulation to a commissioner acting as a temporary judge need not be in writing or express; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98, 284 CR 305; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–1228, 45 CR2d 560.

4. [§102.26] Determination of Notice; Notification re Welf & I C §361.5

At the disposition hearing, as with other dependency hearings, the court must determine whether notice was given or attempted as required by law, and must make an appropriate finding in the minutes. Cal Rules of Ct 1412(k).

The court must also determine whether the social worker has given appropriate notice of the consequences if DSS has alleged that Welf & I C §361.5(b) (circumstances under which reunification services should not be

offered) is applicable. If there is such an allegation, the social worker must have notified each parent of the content of the allegation and have informed each parent that, unless the court orders reunification, the next hearing will be a permanency planning hearing and that parental rights may be terminated. Welf & I C §358(a)(3). The court must ensure that the social worker has made this notification. Cal Rules of Ct 1451(b). Notice in the social worker's report is sufficient; separate notification is not necessary. *In re Jessica F.* (1991) 229 CA3d 769, 782, 280 CR 349.

Finally, the court must notify the parent in cases in which reunification services are ordered, that if the child is not returned within 6 or 12 months of the date he or she entered foster care (depending on whether or not the child was under three years old at the time of removal or was a member of a sibling group in which one member was under three years old), parental rights may be terminated under Welf & I C §366.26. See Welf & I C §§361, 361.5(a); Cal Rules of Ct 1456(g)(2).

☛ JUDICIAL TIP: Because parental rights of both custodial and noncustodial parents may be terminated if a permanent plan of adoption is later selected, the court should ensure that all parents are given this notification. This notification could be accomplished by (1) the judge giving notification in court, or (2) the social worker's verbal notice to the parent, with proof filed in the court file.

A court may not turn a settlement conference, in which the parent has not appeared, into a disposition hearing if the parent is not informed of the consequence of the failure to appear. *In re Stacy T.* (1997) 52 CA4th 1415, 1424–1425, 61 CR2d 319 (violation of due process). It is also a violation not to permit the parent's attorney to cross-examine the social worker who prepared the report. *In re Stacy T., supra.*

5. [§102.27] Advisement of Rights

At each hearing, the court must advise an unrepresented parent or guardian of the right to be represented by an attorney and the right of the indigent parent or guardian to have one appointed. Welf & I C §317; Cal Rules of Ct 1412(g). See also Cal Rules of Ct 1421(a) (court must advise witnesses of right to counsel when it appears to the court that testimony or other evidence is sought that might incriminate them). The court must also inform the parties of their hearing rights, unless the advisement is waived. See Cal Rules of Ct 1412(j). Specifically, under Cal Rules of Ct 1412(j), the court must advise the child, parent, or guardian of any right to assert the privilege against self-incrimination. However, it may not be an abuse of discretion for a judge to omit this advisement because of the "use immunity" provided by former Welf & I C §355.1(d) (now Welf & I C §355.1(f)) (testimony of parent or guardian in dependency proceeding may

not be used against parent or guardian in any other action or proceeding). *In re Amos L.* (1981) 124 CA3d 1031, 1039, 177 CR 783. Although the court may wish to inform the parent or guardian of the "use immunity" conferred by Welf & I C §355.1(f), the court is not required to advise parents of this immunity when parents are represented by counsel. See *In re Candida S.* (1992) 7 CA4th 1240, 1250, 9 CR2d 521. For a discussion of immunity, see §102.35.

The court must also advise parties of the right to (Cal Rules of Ct 1412(j))

- Confront and cross-examine the preparers of reports and any witnesses called against them;
- Use the court's process to bring witnesses to court, including the witnesses whose hearsay statements are contained in the social worker's reports (see Welf & I C §§341, 355(b)); and
- Present evidence to the court.

If the disposition hearing takes place at a separate session from the jurisdiction hearing, the court must either re-advise the parties of their rights at this hearing or take a personal waiver. See Cal Rules of Ct 1412(j); *In re Monique T.* (1992) 2 CA4th 1372, 1377, 4 CR2d 198 (personal waiver by the parent of any of these rights is required).

6. Presentation of Evidence

a. [§102.28] Social Worker's Report

The DSS must prepare a social study of the child, including all factors relevant to disposition, a recommendation for disposition, and the child's case plan developed under Welf & I C §16501.1. Welf & I C §358(b); Cal Rules of Ct 1455(a). See also Welf & I C §280 (social worker must furnish the court with information and assistance and must prepare recommendations for disposition hearings). These reports are admissible as competent evidence in hearings held subsequent to the jurisdiction hearing in dependency court. *In re Jeanette V.* (1998) 68 CA4th 811, 816, 80 CR2d 534 (.26 hearing).

(1) [§102.29] Contents

If DSS recommends removal of the child from the home, the social study must contain all the requirements listed in Welf & I C §§358 and 358.1 (see Cal Rules of Ct 1455(a)(1)(D)), including the following:

- Discussion of reasonable efforts to prevent or eliminate removal of the child from the home and plans for visitation and reunification. Cal Rules of Ct 1455(a)(1)(B)(i).

- Whether reunification services are to be provided. See Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(6)–(7); 42 USC §§671–672 (federal legislation requiring certain findings if federal funds for foster care are to be made available).
- Whether the county DSS has considered child protective services and has offered these services to qualified parents. Welf & I C §358.1(a).
- What plan is to be considered for return of the child and for achieving legal permanence should reunification efforts fail. Welf & I C §358.1(b); Cal Rules of Ct 1455(a)(1)(B)(ii) (concurrent planning). See discussion in Seiser & Kumli, California Juvenile Courts: Practice and Procedure §§2.12[9], 2.129[3] (Matthew Bender 2003).

☛ JUDICIAL TIP: Sometimes, parents will be motivated to work on reunification when they know there are efforts being made concurrently to achieve a stable permanent placement for the child.

- A statement that each parent has been advised that he or she may participate in adoption planning and may voluntarily relinquish the child if an adoption agency is willing to accept this relinquishment. Cal Rules of Ct 1455(a)(1)(B)(iii). Also to be included is the parent's response to this advisement. Cal Rules of Ct 1455(a)(1)(B)(iii).
- A statement as to why reunification services should not be provided if DSS alleges that Welf & I C §361.5(b) applies. Cal Rules of Ct 1455(a)(1)(C).
- Whether visitation with grandparents is in the child's best interests. Welf & I C §358.1(c); see Cal Rules of Ct 1456(a)(7)(C), 1429.1(c).
- Whether the child has siblings and, if so, the nature of the sibling relationship, whether it is appropriate to develop and maintain the relationship, and the impact of the relationship on placement and permanency planning. Welf & I C §358.1(d).
- Whether the right of the parent or guardian to make educational decisions for the child should be limited and, if so, which responsible adult, if any, is available to make these decisions under Welf & I C §361(a). Welf & I C §358.1(e). See discussion in §102.99.

- Whether the child appears to be eligible for further court action to free the child from parental custody and control. Welf & I C §358.1(f).
- Whether the parent has been advised of the option to participate in adoption planning, including the option to enter into a postadoption agreement under Fam C §8714.7. Welf & I C §358.1(g).
- The appropriateness of placement with a relative under Welf & I C §361.3. Welf & I C §358.1(h).

If DSS recommends guardianship, it must include an assessment under Welf & I C §360(a) (covering the qualifications of the proposed guardian among other factors). Cal Rules of Ct 1455(a)(1)(A). See discussion in §102.58.

(2) [§102.30] Right To Cross Examine Preparers

The statutory right to cross-examine the preparer of the report applies only to the jurisdiction hearing. *In re Jeanette V.* (1998) 68 CA4th 811, 816, 80 CR2d 534. At the *disposition* hearing, the parent's due process rights to confront the social worker who prepared the report are satisfied as long as the social worker is available on request or by service of process; the social worker need not actually be present. *In re Corey A.* (1991) 227 CA3d 339, 347–348, 227 CR 782. A court must permit cross-examination of the social worker on the parent's attorney's request even in the parent's absence. *In re Dolly D.* (1995) 41 CA4th 440, 444–446, 48 CR2d 691.

The parent must be afforded the opportunity to subpoena and cross-examine the persons whose statements are contained in the social study and attachments (Welf & I C §341) and must be afforded the opportunity to present rebuttal evidence (see Cal Rules of Ct 1412(j)(4)). A parent's submission on the social worker's *recommendation* (and not just the report) waives that parent's right to contest the disposition. *In re Richard K.* (1994) 25 CA4th 580, 590, 30 CR2d 575.

For a discussion of the admissibility of a child's statements contained in the report when the child has been found to be incompetent to testify, see California Judges Benchguide 101: *Juvenile Dependency Jurisdiction Hearing* §101.41 (Cal CJER).

b. [§102.31] Other Evidence

In addition to the social study, the court may appoint experts (see Evid C §730) and may require production of other evidence on its own motion (Cal Rules of Ct 1455(b)). The child, parents, guardians, or other witnesses may also testify. Under Welf & I C §350(b) and Cal Rules of Ct 1412(c), the court may permit a child's testimony in chambers if this

arrangement is necessary to ensure truthful testimony, if the child is frightened to testify in front of the parent or guardian, or if the child is frightened by the courtroom setting. In addition to chambers testimony, the court may make other arrangements to accommodate the child witness. See, *e.g., In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404, which held that the court had inherent power to use both in-chambers testimony and closed circuit television to ensure truthfulness. In addition, under Evid C §1293, a child's preliminary hearing transcript may be used in a proceeding to declare a minor a dependent child (*i.e.,* in a jurisdiction or disposition hearing), even without a showing of unavailability, if the issues are similar. *In re Elizabeth T.* (1992) 9 CA4th 636, 642, 12 CR2d 10.

For a discussion of handling child witnesses in court generally, including use of child's out-of-court statements, see THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002), and California Judges Benchguide 101: *Juvenile Dependency Jurisdiction Hearings* §§101.40–101.44 (Cal CJER).

A parent's or guardian's failure to cooperate, except for good cause, in the provision of services may be used as evidence in any jurisdiction, disposition, or review hearing, or hearing on a request for modification. Evid C §1228.1(b).

(1) [§102.32] Expert Testimony and Character Evidence

Expert testimony and character evidence may also be offered at a disposition hearing. Character evidence regarding sibling abuse is admissible at the disposition hearing phase on the question of the future risk to the child from a particular placement. *In re Mark C.* (1992) 7 CA4th 433, 446, 8 CR2d 856. Despite Evid C §1101 (making character evidence inadmissible to prove misconduct), an expert may testify to a parent's mistreatment of a sibling under former Welf & I C §355.5 (now Welf & I C §355.1(b)) to support the removal of the child from the parent's home. *In re Dorothy I.* (1984) 162 CA3d 1154, 1158–1159, 209 CR 5. In addition, the court must receive in evidence any evaluation made by a court-appointed special advocate and consider this evidence in making its disposition orders. Welf & I C §358(b); Cal Rules of Ct 1455(b).

At the disposition hearing, a court may order a parent to undergo a psychological evaluation under Evid C §730 because an expert opinion on the cause and extent of mental illness may be needed to further the goal of reunification. An evaluation may also be needed to establish and ameliorate the conditions that caused the dependency. *Laurie S. v Superior Court* (1994) 26 CA4th 195, 202–203, 31 CR2d 506.

(2) [§102.33] Additional Grounds for Removal

If evidence is presented regarding problems to be addressed or providing grounds for removal that go beyond facts alleged in the petition, a new petition need not be filed if the new facts merely tend to explain the conduct alleged in the petition. When the sustained petition apprises the parents of the declaration of dependency and, if recommended, of the grounds for the removal, it provides adequate notice to the parents even though some of the facts proving the parent's inability to care for the child (without intervention) are not contained in the petition. *In re Rodger H.* (1991) 228 CA3d 1174, 1183–1184, 279 CR 643 (petition alleged that parents were unable to care for child's medical needs, but did not allege that they had inadequate housing and transportation, all of which provided grounds for removal).

c. [§102.34] Evidentiary Privileges

Under Welf & I C §317(f), either the child or his or her counsel may invoke a privilege such as the psychotherapist-patient privilege. If the child invokes the privilege, counsel may not waive it, but if counsel invokes it, the child may waive it. Welf & I C §317(f). Counsel is the holder of the privilege if the court finds that the child is neither old nor mature enough to consent to the invocation of the privilege. Welf & I C §317(f).

The court may order the therapist to disclose limited information, despite the child's invocation of the privilege, if the information would help the court to evaluate whether further orders are needed. *In re Kristine W.* (2001) 94 CA4th 521, 528, 114 CR2d 369. Once the child has begun therapy, the privilege does not preclude the court from ordering this circumscribed information so it can make reasoned decisions regarding the child's welfare. *In re Mark L.* (2001) 94 CA4th 573, 584, 114 CR2d 499.

d. [§102.35] Immunity

A parent or guardian has immunity for any testimony given in a dependency hearing. See Welf & I C §355.1(f); *In re Jessica B.* (1989) 207 CA3d 504, 517–521, 254 CR 883 (requirement that parents admit abuse as part of the reunification plan does not impair the privilege against self-incrimination). The court may also order a witness who is not a parent or guardian to testify over a claim of self-incrimination by granting immunity. Cal Rules of Ct 1421(b), (d). When a witness refuses to answer a question or produce evidence, DSS, alone or with the district attorney, may make a written or oral request on the record to require a response. Cal Rules of Ct 1421(d). If the request is jointly made, the judge must comply with the request by granting immunity unless such a grant would clearly

be contrary to the public interest. Cal Rules of Ct 1421(d). If the request is not jointly made, the judge must permit argument as to why immunity should not be granted before ruling. Cal Rules of Ct 1421(d).

The scope of the immunity must be stated in the record. Cal Rules of Ct 1421(d). Once immunity has been granted, information obtained from the immunized witness may not be used against him or her in any juvenile or criminal proceeding (Cal Rules of Ct 1421(d)), except that the immunized witness will still be subject to liability for contempt or perjury (Cal Rules of Ct 1421(e)).

☛ JUDICIAL TIP: Although the rules of court for dependency proceedings do not require notice to the district attorney before immunity is granted, such notice would appear to be appropriate in any case in which criminal prosecution is pending or might result but for the grant of immunity. See Pen C §§1324, 1324.1.

F. [§102.36] Disposition Orders Generally

Under Welf & I C §245.5, the juvenile court may make any orders it considers necessary for the best interests of the child. When a child is adjudged a dependent child, these orders might concern the child's care, custody, conduct, supervision, maintenance, and support, and may relate to education and medical care. Welf & I C §§362(a), (d), 245.5. To facilitate coordination among government agencies and/or private service providers, the court may also order that any agency that has failed to meet a legal obligation to provide services for the child be joined as a party to the proceedings. Welf & I C §362(a); Cal Rules of Ct 1434(a). On request by a party or a CASA or on the court's own motion, the court may set a hearing on joinder and notify the agency or provider. Cal Rules of Ct 1434(b). Notice must be on form JV-540 and the hearing must take place within 30 days of the signing of the notice by the court. Cal Rules of Ct 1434(b)(1)–(2). The hearing must be conducted like a hearing for modification. Cal Rules of Ct 1432(f), 1434(c).

A party may only join an agency under this section, however, if the agency has failed to meet a legal obligation; it may not join an agency preemptively in order to ensure that funding is available and that the agency performs its obligations. *Southard v Superior Court* (2000) 82 CA4th 729, 734, 98 CR2d 733. Moreover, the court may not impose duties on an agency or provider that are beyond those required by statute. Cal Rules of Ct 1434(c).

The court may decline to declare dependency. See Cal Rules of Ct 1456(a)(1)–(2). For an analysis of whether to declare dependency, see §102.37.

If the court chooses to declare dependency, it may, under Welf & I C §§360, 361, 361.2, and Cal Rules of Ct 1456(a)(5)–(7), (c)(1):

- Permit the child to remain at home and order that services be provided;
- Permit the child to remain at home, order that services be provided, and limit the parents' control; or
- Remove the child from the home, and
  - — Order custody to the noncustodial parent and terminate jurisdiction as part of the custody order;
  - — Order custody to the noncustodial parent together with services to one or both parents and not terminate jurisdiction; or
  - — Make a general placement order, with orders regarding visitation with parents, guardians, grandparents, and others as appropriate.

See also Cal Rules of Ct 1429.1(c).

In addition, the court may appoint a legal guardian for the child whether or not dependency is declared. Welf & I C §360(a); Cal Rules of Ct 1456(a)(3)–(4), (b).

For a discussion of custody and placement options, see §§102.44–102.56.

G. [§102.37] Decision Process—Declaring Dependency

At the disposition hearing, the court has a number of options under Welf & I C §360; Cal Rules of Ct 1456(a)). It may:

- Dismiss the petition despite the fact that it has jurisdiction; if the court dismisses the petition, it must state specific reasons for the dismissal in the minutes. Cal Rules of Ct 1456(a)(1); Welf & I C §390; or
- Without declaring dependency, place the child in informal supervision under terms consistent with Welf & I C §301 and order that services be provided. Cal Rules of Ct 1456(a)(2); Welf & I C §360(b);
- Declare the child a dependent child; or
- Establish a guardianship. For discussion of guardianships, see §§102.57–102.59.

Only rarely will the court dismiss the case at disposition. A court may make such an order when it determines that, although it has jurisdiction, the welfare and best interest of the child do not require protection or orders of the court. See Welf & I C §390. See, *e.g.*, *In re Jennifer P.* (1985) 174 CA3d 322, 327, 219 CR 909 (court of appeal ordered dismissal although jurisdictional allegations had been found to be true because

custodial parent who became aware of abuse took steps to render juvenile court supervision unnecessary). The facts on which such a determination is based must be stated on the record. Cal Rules of Ct 1456(a)(1).

As a second option, the court may determine that, although it has jurisdiction, the family is willing and able to cooperate with DSS in a program of informal services (without court supervision) that can be successfully completed within 6 to 12 months and that such a program does not place the child at an unacceptable level of risk. In this situation, the court may order this type of program without declaring the child a dependent. See Welf & I C §360(b). However, once it does so, it has no authority to take any further role in overseeing the services or the family unless the matter is brought back before the court under Welf & I C §360(c).

A declaration of dependency under Welf & I C §360(d) is the most common disposition. The declaration of dependency takes place at the disposition hearing, not at the earlier jurisdiction hearing in which the court finds that conditions exist that meet the statutory conditions set out in Welf & I C §300. See *In re Candida S.* (1992) 7 CA4th 1240, 1249, 9 CR2d 521.

The court should adjudge the child a dependent of the court if it determines that court supervision is necessary, because court supervision is not authorized under the other dispositions. Occasionally, the court may declare dependency with appropriate orders even if the parents appear to be conscientious and loving. See, *e.g., In re Petra B.* (1989) 216 CA3d 1163, 1168, 265 CR 342 (when parents inappropriately treated child's wound with herbal medicine and did not recognize the seriousness of her condition, the court was justified in taking jurisdiction under prior law). See also *In re Matthew S.* (1996) 41 CA4th 1311, 1321, 49 CR2d 139 (children were reasonably well adjusted and close to mother who was conscientious but delusional). Indeed, when necessary, "[s]tate officials may interfere in family matters to safeguard the child's health, educational development, and emotional well-being." *In re Phillip B.* (1979) 92 CA3d 796, 801, 156 CR 48 (decided under prior law).

☛ JUDICIAL TIP: Although the court may be requested by counsel for the parents or other professionals to give special deference to parents who do not fit a stereotype of abusive or neglectful parents, the court must always consider the needs of, and risks to, the child. In making this consideration, the court should also consider cultural backgrounds and customs, particularly in weighing the likelihood of further abuse and assessing the safety of the child.

H. [§102.38] Decision Process—Removing the Child

If the court declares the child to be a dependent child of the juvenile court, it must then consider whether the child can safely remain in the home of the custodial parent or guardian. Before removing a child from the home, a court must make findings supporting that decision. Welf & I C §361(d); Cal Rules of Ct 1456(g)(1); *In re Jason L.* (1990) 222 CA3d 1206, 1218, 272 CR 316. Failure to state the factual basis for removing a child is reversible error (*In re Basilio T.* (1992) 4 CA4th 155, 171, 5 CR2d 450), although such findings may be implied by a reviewing court when a factual basis exists in the record (*In re Corienna G.* (1989) 213 CA3d 73, 83, 261 CR 462; *Marriage of Arceneaux* (1990) 51 C3d 1130, 1138, 275 CR 797 (litigant waives errors by not objecting)). Under the juvenile dependency system, a child's removal from the parent's home has serious consequences because termination of parental rights becomes a real possibility. *In re Paul E.* (1995) 39 CA4th 996, 1001, 46 CR2d 289.

If the child is being removed for the first time, see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.36 (Cal CJER), on the Title IV-E findings that judges must make on removal.

1. [§102.39] Findings

In order to remove the child from the custody of the parent or guardian, the court must find one or more of the following by clear and convincing evidence:

- Leaving (or returning) the child home would cause a substantial danger to the child's physical health and there are no reasonable means by which the child's health can be protected without removal. Welf & I C §361(c)(1); Cal Rules of Ct 1456(d)(1). As an alternative to the child's removal, the court must consider the option of removing the offending parent or guardian from the home, or permitting the nonoffending parent or guardian to retain custody as long as that person presents the court with an acceptable plan demonstrating that he or she will be able to protect the child from further harm. Welf & I C §361(c)(1).
- The parent or guardian is unwilling to assume physical custody of the child and has been notified that the child might be declared permanently free of parental custody and control if he or she remains outside the home for the time specified in Welf & I C §366.26. Welf & I C §361(c)(2); Cal Rules of Ct 1456(d)(2).
- The child is suffering severe emotional damage (anxiety, depression, aggressive behavior, withdrawal), and the child's

emotional health requires removal from the home. Welf & I C §361(c)(3); Cal Rules of Ct 1456(d)(3).

- The child or a sibling has been sexually abused, or is at substantial risk of abuse, by the parent, guardian, or member of the household, and removal is the only means of protecting the child. Welf & I C §361(c)(4); Cal Rules of Ct 1456(d)(4).
- The child has been left without provision for support, an incarcerated parent cannot arrange for the child's care, or an adult custodian with whom the child was left is unable or unwilling to care for the child and the parent cannot be located. Welf & I C §361(c)(5); Cal Rules of Ct 1456(d)(5).

2. [§102.40] Standard of Proof

The standard of proof required to remove custody from a parent or guardian at the disposition phase is clear and convincing evidence. Welf & I C §361(c); Cal Rules of Ct 1456(d)). This standard is substantially greater than that required either at the jurisdiction phase when finding the child is described by Welf & I C §300 (preponderance of the evidence—*In re Basilio T.* (1992) 4 CA4th 155, 169, 5 CR2d 450) or when declaring dependency at the disposition phase when the child remains with the custodial parent or guardian (also preponderance—*In re Cheryl H.* (1984) 153 CA3d 1098, 1114, 200 CR 789, disapproved on other grounds in 2 C4th at 893). The clear and convincing standard applies even when custody of the child is taken from a custodial parent and awarded to a noncustodial parent. *In re Katrina C.* (1988) 201 CA3d 540, 549, 247 CR 784.

3. [§102.41] Removal Not Warranted

The burden of proof for removal is not met simply by a showing of violence between the parents that was not directed at the children when the children were not harmed. *In re Basilio T.* (1992) 4 CA4th 155, 171, 5 CR2d 450. Similarly, when a child's unhappiness reflects the doubts, dissatisfaction, and confusion that is a hallmark of adolescence, it does not rise to the level of extreme anxiety, depression, withdrawal, or aggression contemplated by Welf & I C §361(c)(3) that would justify removal. *In re James T.* (1987) 190 CA3d 58, 65, 235 CR 127. Nor is removal from the parents appropriate when:

- The father had molested the child, but the parents were separated and the mother sought medical treatment for the child's symptoms (*In re Tasman B.* (1989) 210 CA3d 927, 935, 258 CR 716);

- The home is unkempt and unsanitary, but the child has suffered no ill effects (*In re Paul E.* (1995) 39 CA4th 996, 1005, 46 CR2d 289);
- The parents are narcissistic or self-centered but no showing is made of a tendency to harm children (*In re Kimberly F.* (1997) 56 CA4th 519, 527, 65 CR2d 495—consideration of best interest and detriment in context of Welf & I C §388 petition); or
- The parents are extremely strict, unable to understand teenage issues, and have values that greatly differ from those prevailing in society, but there is no showing of detriment (*In re Jasmine G.* (2000) 82 CA4th 282, 288–290, 98 CR2d 93).

☛ JUDICIAL TIP: In making the decision to remove a child from a parent's custody, it is not sufficient to look solely to the risk posed to the child by the parent. The emotional harm to the child that may occur as a result of the removal if the child is strongly bonded to the parent must also be considered, and the court should take steps to ensure that any harm caused by removal is not greater than the harm from which the child is to be protected.

4. [§102.42] Removal Warranted

A child's adjudication as a dependent under Welf & I C §300(e) (severe physical abuse), is prima facie evidence that removal is necessary. Welf & I C §361(c)(1).

When a court finds that the only services that could have been offered that would have obviated the need for removal, while avoiding danger to the child, is 24-hour in-home supervision, the court is justified in ordering removal. *In re Stephen W.* (1990) 221 CA3d 629, 646, 271 CR 646. However, if intensive family preservation services are available within the county, the court may be able to keep the child in the home.

A court may remove a child from the custody of a developmentally disabled parent under Welf & I C §361(c)(1) if the parent has received many services and still cannot safely parent the child on a full-time basis. *In re Diamond H.* (2000) 82 CA4th 1127, 1136–1137, 98 CR2d 715, disapproved on other grounds in 26 C4th 735, 739.

5. [§102.43] Sibling Considerations

If the court has ordered the child removed from the parents' custody under Welf & I C §361, it must consider whether the child has siblings under the jurisdiction of the court and, if so, the nature of the sibling relationship, whether it is appropriate to develop and maintain the relationship, and the impact of the sibling relationships on placement and

permanency planning. Welf & I C §361.2(i). The court should make orders regarding sibling placement, visitation, and interaction as appropriate. See Welf & I C §16002(b).

I. Parental Custody

1. [§102.44] Custodial Parent

If the court does not remove the dependent child from the custodial parent, it must leave the child in that parent's home under a family maintenance plan. The court may order services to help ensure the success of the placement. Possible services are:

- Case management,
- Counseling,
- Emergency in-home caretakers,
- Respite care,
- Homemakers for teaching and demonstrating,
- Parenting classes, and
- Any other services authorized by Welf & I C §§16500–16521.5.

If the child has been declared a dependent and remains in the custodial home under the supervision of DSS, the parent or guardian must be required to participate in child welfare services or programs provided by the social worker or an agency designated by the court. Welf & I C §362(b); Cal Rules of Ct 1456(c)(2). The parent or guardian may also be required to ensure the child's regular school attendance and to make reasonable efforts to obtain educational services tailored to the specific needs of the child. Welf & I C §361.2(d). The parent may choose a surrogate parent to advocate for the child's educational needs. See Govt C §7579.5.

In order to protect the child, the court must consider the option of keeping the child in the home and removing from the home the parent or guardian who caused the harm. Welf & I C §361(c)(1). The court may condition this continuing custody on the other parent's presentation of an acceptable plan, demonstrating that that parent will be able to protect the child from future injury. Welf & I C §361(c)(1).

In addition to services, the court may also order limitations on the parents' exercise of control of the child. Welf & I C §361(a); Cal Rules of Ct 1456(a)(6), (c)(1). Limitations may relate to medical or educational decisions, visitation with other adults including the noncustodial parent, disciplinary policies, or any other limitation that is necessary to protect the child, as long as the limitations do not exceed those necessary for the child's protection. See Welf & I C §361(a). See discussion in §102.99. However, there are no limitations on the parents' ability to relinquish the

child to the State DSS or licensed adoption agency while the child is a dependent, if the agency is willing to accept the relinquishment. Welf & I C §361(b).

If a child is "placed" with a parent at the original disposition hearing and then later removed under a supplemental petition, reunification services must be ordered, no matter how many months of family maintenance services had been previously received unless a §361.5(b) situation prevails. *In re Joel T.* (1999) 70 CA4th 263, 268, 82 CR2d 538.

The court may not order the child removed from the custody of the parents and then physically detain or place the child back in the home under a "detention with parent" order. *In re Andres G.* (1998) 64 CA4th 476, 481, 75 CR2d 285 (placement occurred after disposition hearing). A "trial placement" with a parent following removal order is not authorized. *In re Damonte A.* (1997) 57 CA4th 894, 899–900, 67 CR2d 369. The juvenile court should comply with the governing statutes and rules by ordering physical removal of dependent children who would not be safe if left unsupervised in their parents' custody. *Savannah B. v Superior Court* (2000) 81 CA4th 158, 162, 96 CR2d 428.

2. [§102.45] Noncustodial Parent

If the child is removed from the custodial parent as a dependent of the court and a previously noncustodial parent desires custody, the court must place the child with the noncustodial parent unless to do so would be detrimental to the child's safety, protection, or physical or emotional well-being. Welf & I C §361.2(a), (e)(1).The standard of proof for a finding of detriment that would result in not placing the child with the noncustodial parent is clear and convincing evidence. *In re Marquis D.* (1995) 38 CA4th 1813, 1829, 46 CR2d 198. The court of appeal implied its disapproval of the custom of "detaining" the child with the noncustodial parent, rather than following the requirements of Welf & I C §361.2 and actually placing the child with that parent, noting that this procedure creates a potential for termination of the noncustodial parent's rights without complying with the statutory requirements for placement and removal provided by the Legislature. 38 CA4th at 1823–1824.

The presumption of former CC §4600.5(a) (now Fam C §3080), that joint custody is in the best interest of the child when parents agree to it, does not apply in juvenile court. *In re Jennifer R.* (1993) 14 CA4th 704, 712, 17 CR2d 759.

a. [§102.46] Possible Orders

If the court places the child with the noncustodial parent, it may

- Award physical and legal custody of the child to that parent and terminate dependency after stating on the record the factual basis

for the order (Welf & I C §361.2(b)(1); Cal Rules of Ct 1456(a)(7)(A), 1429.1(c)); or

- Award custody to that parent but continue dependency and order services for the parent assuming custody, the parent from whom custody was removed, or both after stating on the record the factual basis for the order (Welf & I C §361.2(b)(2); Cal Rules of Ct 1456(a)(7)(B), 1429.1(c)).
- Provide visitation for the parent from whose home the child was removed. See Welf & I C §§361.2(b)(1), 362.1; Cal Rules of Ct 1457(a).

If the court continues to supervise the child as a dependent child, any visitation order for the parent from whose home the child was removed may be part of a reunification plan. See Welf & I C §361.2(b)(2).

b. [§102.47] Requirements for Custody Order

California Rules of Ct 1457 sets out the requirements for preparation and transmission of a custody order. If the court terminates jurisdiction, the custody order will be in effect until modified by the family law court and must be filed in any existing domestic relations proceeding between the parents. Welf & I C §361.2(b)(1); see §§102.103, 102.105 for a discussion of the transmission of orders to the family law court.

The court may also order services solely for the parent to whom physical custody was given. Welf & I C §361.2(b)(2). If the court orders services for both parents, it may determine at later review hearings which (if either) should ultimately have custody. Welf & I C §361.2(b)(2).

c. [§102.48] Placement With Biological Father

Welfare and Institutions Code §361.2 (placement with noncustodial parent) is not applicable to a biological father who is not the presumed father. *In re Zacharia D.* (1993) 6 C4th 435, 453–454, 24 CR2d 751 (biological father waited until the 18-month hearing to establish paternity and assert his status as a father). Nor is Welf & I C §362.1 applicable to an alleged father. Only a presumed father (Fam C §7611) has a right to custody of his child. 6 C4th at 454. However, a biological father may request and receive custody if it is in the child's best interest. See 6 C4th at 449, 450.

If the child is placed with the biological father, the father may subsequently become a presumed father by virtue of that placement. 6 C4th at 449, 454. See also *Adoption of Kelsey S.* (1992) 1 C4th 816, 842, 4 CR2d 615 (court may grant custody to biological father, who may later be able to qualify as presumed father, even over mother's objection). Indeed, one court has held that *Kelsey S.* status may apply to men who have demonstrated commitment to parental responsibility but who are not

biological parents. *In re Jerry P.* (2002) 95 CA4th 793, 816, 116 CR2d 123.

☛ JUDICIAL TIP: Before placing a child with a noncustodial father, the court should determine whether or not he is a presumed father. If he is not, then the court must not place the child with him unless there has been a previous judgment of paternity or the court makes such a judgment at the hearing.

If there is more than one presumed father under Fam C §§7541–7644, the court must weigh the considerations of "policy and logic," and identify only one as the presumed father. See *Brian C. v Ginger K.* (2000) 77 CA4th 1198, 1220, 92 CR2d 294.

d. [§102.49] Reunification Services

Although the court may order services for the noncustodial parent with the goal of strengthening contact with the child with no contemplation of reunification, it may also decline to order services altogether. See *In re Sarah M.* (1991) 233 CA3d 1486, 1501, 285 CR 374, disapproved on other grounds in 13 C4th at 196.

☛ JUDICIAL TIP: When the court orders services for the parent from whom custody was removed, it should clearly state the nature of those services and whether they are designed to help reunify the child with that parent or merely to help develop, maintain, or improve the parent-child relationship despite the intention to leave the child with the parent with whom he or she has been placed. The court should not imply that it is working toward reunification when it is actually working only toward a stabilization of the overall family in separate homes.

A court may deny reunification services to a former custodial parent when placing the child with a noncustodial parent under Welf & I C §361.2, even though the court may not have been able to deny services to the former custodial parent under Welf & I C §361.5 if there had not been another parent to assume custody; in the limited situation in which custody is transferred to a noncustodial parent, Welf & I C §361.2, rather than Welf & I C §361.5, applies. *In re Erika W.* (1994) 28 CA4th 470, 475, 33 CR2d 548. When a court places the child with a noncustodial parent without ordering reunification services with the former custodial parent, it should make it clear that it has discretion in the matter and make findings supporting the denial of services. *In re Katrina C.* (1988) 201 CA3d 540, 550, 247 CR 784.

e. [§102.50] Out-of-State Placements

If the court places the child with an out-of-state noncustodial parent and retains jurisdiction or maintains dependency in order to provide services to or to impose conditions on the noncustodial out-of-state parent, the Interstate Compact on Placement of Children (ICPC) must be applied, except when the "placement" is for a short period such as a school vacation or a period that is less than 30 days. Cal Rules of Ct 1428(b)(1). See Fam C §§7900–7912 and Cal Rules of Ct 1428 generally for procedures to apply when placing the child out of state under the ICPC. An ICPC evaluation that found an out-of-state parent's home unsuitable for placement does not preclude the court from permitting the child to visit that home. *In re Emmanuel R.* (2001) 94 CA4th 452, 463, 114 CR2d 320.

Two cases hold that the ICPC applies only to interstate foster care placements or to placements preliminary to adoption, not to placements with a noncustodial parent. *Tara S. v Superior Court* (1993) 13 CA4th 1834, 1837–1838, 17 CR2d 315; *In re Johnny S.* (1995) 40 CA4th 969, 977, 47 CR2d 94. However, the continuing viability of these cases is unclear, given the promulgation of Cal Rules of Ct 1428, which was adopted as a model for other ICPC states and was designed to clarify any confusion about when the compact applies.

☛ JUDICIAL TIP: If a child is with a parent in another state, and dependency in California is continued, the compact provisions must be observed. The court must maintain supervision over the dependent child who resides in another state.

On the issue of applicability of the ICPC to placement with an out-of-state, noncustodial parent, a joint committee, with representation from the National Council of Juvenile and Family Court Judges, the National Association of Public Child Welfare Administrators, and the ICPC Administrators noted (ICPC Administrators' Memorandum, *Joint Committee's Recommendations to Improve the Placement of ICPC Children,* p 8 (May 8, 1996)):

> Obviously, the standing of a non-custodial parent to have custody of his/her own child would appear on the surface to be absolute. However, there are circumstances in which a judge may want to have a home study for a non-custodial parent. The need for a home study could include situations where the non-custodial parent has never had contact with the child, or has had such infrequent contact as to be considered a stranger to the child. Other situations could include allegations of a history of alcohol and/or drug abuse, domestic violence or criminal history. The subject of the inviolability of a parent to care for his/her child is highly controversial. This committee believes that the court is ultimately responsible for

determining if the child should be placed with the non-custodial parent and the necessity for a home study prior to any such placement.

For further discussion of the ICPC, see Seiser & Kumli, California Juvenile Courts: Practice and Procedure §2.128 (Matthew Bender 2003).

J. [§102.51] Placement With Nonparent

When the court removes the child from the legal custodians (one or both parents or guardians), both physical and legal custody reside with the social worker under the court's supervision, unless the court places the child with the noncustodial parent and orders custody awarded to that parent. See Welf & I C §361.2(a)–(b), (e); *In re Robert A.* (1992) 4 CA4th 174, 189, 5 CR2d 438. The court retains jurisdiction to oversee administration by DSS in its choice among placement alternatives enumerated in Welf & I C §361.2. The authority of DSS is limited by the court's interpretation of the child's best interests under Welf & I C §202(b). 4 CA4th at 189.

1. [§102.52] Options

The social worker may place the child in

- The approved home of a relative (Welf & I C §361.2(e)(1); Fam C §7950(a)(1); see also Welf & I C §§281.5 (DSS must recommend placement with relative if it is in child's best interest and is conducive to reunification), 361.3(a) (preferential consideration must be given to a request by relative for placement); *In re Baby Girl D.* (1989) 208 CA3d 1489, 1493, 257 CR 1 (relative more likely to support reunification efforts while providing psychological and physical care)).
  - — The social worker must investigate any interested relative. Fam C §7950(a)(1).
  - — If, after investigation by the social worker and a possible hearing on this issue, the court does not place the child with a relative, it must state reasons on the record why placement with a relative was denied. Welf & I C §361.3(e).
- The approved home of a nonrelative extended family member (see Welf & I C §362.7) (Welf & I C §361.2(e)(3)).
- A foster home that had been a previous placement if in the child's best interests (Welf & I C §361.2(e)(4)).
- A suitable licensed community care facility, except that a child under six years old may not be placed in such a facility except under limited circumstances (Welf & I C §361.2(e)(5), (8)).

- A foster family agency for placement in a foster family home or certified family home (Welf & I C §361.2(e)(6)).
- A home or facility in compliance with the Indian Child Welfare Act (ICWA) (Welf & I C §361.2(e)(7)).

When reunification services have been in place and have been terminated, but parental rights have not yet been terminated, the relative placement preference of Welf & I C §361.3 still applies if the child needs to be moved. Cesar V. v Superior Court (2001) 91 CA4th 1023, 1032, 111 CR2d 243.

There are numerous restrictions on case plans that require out-of-county placement. See Welf & I C §361.2(f). Unless the child is placed with relatives, placement within the parent's or guardian's county of residence is greatly preferred so that reunification efforts may be facilitated; however, such a placement should not be made if it would unnecessarily disrupt the child's life. Welf & I C §361.2(f)–(g).

2. Relative Placement

a. [§102.53] Factors To Consider

In removing the child from the physical custody of the parents and evaluating placement with a relative, the court and the social worker must consider the following factors:

- The best interests of the child. Welf & I C §361.3(a)(1).
- The parent's wishes. Welf & I C §361.3(a)(2).
- Provisions of Fam C §§7950–7952 with respect to priority given to relative placement. Welf & I C §361.3(a)(3).
- Placement of siblings and half-siblings in the same home. Welf & I C §361.3(a)(4).
- Good moral character of the relative. Welf & I C §361.3(a)(5).
- The nature and duration of the relationship with the relative and the relative's interest in caring for the child. Welf & I C §361.3(a)(6).
- Whether the relative can (Welf & I C §361.3(a)(7)):
  - — Provide a secure, stable environment;
  - — Exercise care and control;
  - — Provide a home and necessities of life;
  - — Protect the child from the parents;
  - — Facilitate court-ordered reunification efforts;
  - — Facilitate visitation with other relatives;

— Facilitate implementation of the case plan; and

— Provide legal permanence if reunification fails (concurrent planning).

☛ JUDICIAL TIP: Although it is frequently stated that one reason for relative placement is that relatives are more likely to support reunification with the parents than are foster parents, relatives can also be very hostile to the parents and antagonistic to the goal of reunification. Therefore, the court should look closely at individual relative placements to ensure that the relatives will work with the court and the family toward reunification.

- The safety of the relative's home which must be approved under Welf & I C §309(d). Welf & I C §361.3(a)(8).
- Likewise, now that planning for an alternative permanency placement must be done concurrently with reunification efforts, the court should also look closely at individual relative placements to determine if the relatives are willing and able to provide the appropriate level of permanent care should reunification efforts prove unsuccessful. Welf & I C §361.3(a)(7)(G)–(H).

The preference for placement with a relative may be outweighed by the child's best interests even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321, 27 CR2d 595. Moreover, placement with relatives under Welf & I C §361.3 (preferential consideration) that would result in the child residing at a considerable distance from the parents has to be balanced against the parents' reasonable opportunity to pursue reunification. *In re Luke L.* (1996) 44 CA4th 670, 681, 52 CR2d 53.

The court may not refuse placement with relatives based on a past adversarial relationship between the relatives and the parents when the relatives are loving caretakers and there is no evidence that they will impede reunification efforts. See *In re Robert L.* (1993) 21 CA4th 1057, 1068, 24 CR2d 653.

b. [§102.54] Who Qualifies as Relative

Only aunts, uncles, siblings, or grandparents qualify as relatives who must be given preferential consideration for placement under Welf & I C §361.3; cousins do not qualify. Welf & I C §361.3(c)(2); *In re Luke L.* (1996) 44 CA4th 670, 680, 52 CR2d 53. Preferential consideration means that the relative who has requested custody should be the first to be considered and investigated. Welf & I C §361.3(c)(1).

All adults who are related to the child by blood, adoption, or affinity within the fifth degree of kinship, which include stepparents, stepsiblings,

and all relatives whose status is preceded by the words "great," "great-great" or "grand" or the spouse of any of these persons even if the marriage has been terminated by dissolution or death, are "relatives" for purposes of relative placement, even if they are not entitled to preferential consideration. Welf & I C §361.3(c)(2).

☛ JUDICIAL TIPS:

- Many judges will consider all individuals who have been verified as relatives if the statutorily defined persons are not available or suitable.
- Until paternity is determined, the court should not detain or place a child with anyone claiming relative status through the child's alleged father. If there is more than one presumed father, the court must weigh policy and logic to recognize only one, whose relatives could then be considered for placement of the child.

c. [§102.55] Procedure/Investigations

A timely request by a parent or other relative made in open court should be sufficient to trigger the investigation and evaluation of relatives required by Welf & I C §361.3. *In re Rodger H.* (1991) 228 CA3d 1174, 1185, 279 CR 643.

Before placing a child with a relative or someone who is not a licensed or certified foster parent, the social worker must visit the home to ensure the appropriateness of the placement and must make certain criminal checks on the occupants of the home. See Welf & I C §361.4. The court has no discretion to ignore the mandatory language of Welf & I C §361.4(d)(2), prohibiting the child from being placed in a home in which the child would have contact with an adult who has been convicted of a crime. *Los Angeles County Dep't of Children & Fam. Servs. v Superior Court* (2001) 87 CA4th 1161, 1166, 105 CR.2d 254. The only exception occurs when the State DSS has granted a criminal records exemption and has determined that the person being considered for the placement does not present a risk of harm to the child. See Welf & I C §361.4(d)(2)–(6).

If, after investigation and a hearing, the court declines to place the child with a relative, it must state its reasons on the record. Welf & I C §361.3(e).

3. [§102.56] Foster Care Placement

When a child is placed in foster care, full consideration should be given to the proximity of the foster family to the natural parents. Fam C §7950(a)(2). The DSS may not delay or deny foster care placement or otherwise discriminate in making a placement decision solely on the basis

of race or national origin of the child or foster parent (Fam C §7950(a)(2)), although it may consider the ethnic background of the child or foster parent as a factor in determining the best interest of the child (Fam C §7950(b)). The foregoing restrictions do not apply if the placement is to be for less than 30 days. Fam C §7951. A child who is ten years old or older may make a statement to the court regarding the placement decision although the court is free to disregard the child's preferences. Fam C §7952. See also Welf & I C §361.2(e) and discussion in §102.52 on permissible foster care options.

Placement in a foster home that is located a considerable distance from the parent's residence may not be an insurmountable barrier to the use of reunification services when this is the only foster home available and DSS has provided funds for transportation. See *James B. v Superior Court* (1995) 35 CA4th 1014, 1020, 41 CR2d 762. But see *In re Luke L.* (1996) 44 CA4th 670, 681, 52 CR2d 53 (twice monthly visits over hundreds of miles were held not sufficient to foster reasonable reunification efforts even with DSS paying for bus, meals, and lodging).

K. Guardianship

1. [§102.57] In General

The court may establish a legal guardianship, appoint a guardian, and issue letters of guardianship after receiving evidence on disposition whether or not the child is declared a dependent. Welf & I C §360(a); Cal Rules of Ct 1456(b)(3), 1429.1(d). A guardianship is appropriate when the court has found that the child is described by Welf & I C §300 and the parent has advised the court that he or she is not interested in reunification or family maintenance services. Welf & I C §360(a); Cal Rules of Ct 1456(b)(1)(A). The court must also find that the guardianship is in the child's best interests (Cal Rules of Ct 1456(b)(1)(C)), and the parent and the child must knowingly waive reunification services and agree to the appointment of a guardian unless the child's age or mental condition would prevent a meaningful response. Welf & I C §360(a); Cal Rules of Ct 1456(b)(1)(B).

☛ JUDICIAL TIPS:

- In view of Welf & I C §361.5(b)(14), which permits a parent to waive reunification services and the court to then set a hearing under Welf & I C §366.26, some judicial officers decline to appoint a legal guardian at disposition and instead set a .26 hearing under these circumstances. Moreover, if the court does appoint a legal guardian at disposition, it should proceed with great caution because, in that situation, both adoption and reunification are precluded, and the child may be deprived of both reunification and

the kind of permanent placement that would otherwise be available.

- Occasionally, a parent will waive services and agree to a guardianship with a relative on the expressed or tacit understanding that the relative guardian will return the child to the parent. The court needs to proceed with caution on this alternative disposition.

Although Welf & I C §903 makes a parent liable for costs of out-of-home placement, this liability does not extend to legal guardians. *In re Jason V.* (1991) 229 CA3d 1168, 1172, 280 CR 562.

2. [§102.58] Assessment

Under Welf & I C §360(a) and Cal Rules of Ct 1455(a)(1)(A), a court may not appoint someone as a guardian until it reads and considers an assessment as specified under Welf & I C §361.5(g), including such factors as:

(1) Efforts to find and notify noncustodial parent as specified in Welf & I C §291.

(2) Nature and amount of contacts between parent and child since filing of petition.

(3) Child's medical, developmental, educational, mental, and emotional status, and the effect of this status on adoptability.

(4) Preliminary assessment of eligibility and commitment of prospective guardian and caretaker, including screening for criminal history.

(5) Child's relationship to any prospective guardian and child's perspective, if appropriate.

The preparer of the assessment may be called and examined by any party to the guardianship proceeding, and consideration of the assessment must be reflected in the minutes. Welf & I C §360(a).

3. [§102.59] Procedure

Under Cal Rules of Ct 1456(b)(2), if appointing a legal guardian at the disposition hearing, the court must

(a) State on the record that it has read and considered the assessment (see also Welf & I C §360(a)).

(b) State findings on the record and the factual basis for them.

(c) Advise the parent that there will be no reunification services (see also Welf & I C §360(a)).

(d) Make visitation orders as appropriate, including sibling visitation.

(e) Order that letters of guardianship be issued (see also Welf & I C §360(a)).

L. Reunification Services

1. [§102.60] In General

Reunification with the family is a primary objective when the child has been removed from the family's custody. Welf & I C §202(a); see *In re Zacharia D.* (1993) 6 C4th 435, 447, 24 CR2d 751 (at the disposition hearing stage, reunification is given precedence over child's need for stability). When a child is removed from a parent's or guardian's custody, the court must order reunification services for both the child and the parent or guardian to facilitate reunification of the family within a limited time. Welf & I C §361.5(a); Cal Rules of Ct 1456(f)(1). The statutory scheme contemplates immediate and intensive support services to reunify a family when the dispositional order removes the children from the home. *In re Kristin W.* (1990) 222 CA3d 234, 254, 271 CR 629. It also contemplates the formulation of a plan that is specifically tailored to each family and designed to eliminate those conditions leading to the finding of jurisdiction. *In re Dino E.* (1992) 6 CA4th 1768, 1777, 8 CR2d 416. However, there is no constitutional entitlement to reunification services *(In re Joshua M.* (1998) 66 CA4th 458, 472–477, 78 CR2d 110), nor is there a requirement that a parent accept such services. A parent may waive reunification services, using Judicial Council form JV-195.

A parent who rejects reunification services waives the right to complain of their inadequacy. *In re Joanna Y.* (1992) 8 CA4th 433, 442, 10 CR2d 422. Noncustodial parents who do not want to assume custody need not be given reunification services. *In re Terry H.* (1994) 27 CA4th 1847, 1856, 34 CR2d 271. Courts sometimes give services to such parents, however, in order to enhance their relationships with their children.

Reunification services are only mandated at the original disposition hearing; if the court later holds a hearing on a subsequent petition under Welf & I C §342 alleging additional bases for jurisdiction, the court is not required to order additional services if the previously ordered services are sufficient to address all bases for jurisdiction. *In re Barbara P.* (1994) 30 CA4th 926, 934, 36 CR2d 27. Even if additional services are ordered, the time limitation for reunification is not necessarily extended. See 30 CA4th at 933.

2. [§102.61] Length of Services

For a child who is three years old or older on the date of initial removal, reunification services must not exceed 12 months from the date the child entered foster care. Welf & I C §361.5(a)(1). The period is six months for a child who was under three years old at the time of removal. Welf & I C §361.5(a)(2). When children are members of a sibling group (full or half-siblings) in which one sibling was under three years old at the time of removal, the period may also be set at six months for all the

children if the children are to be maintained and placed together in a permanent home should reunification efforts fail. Welf & I C §361.5(a)(3).

Despite these limitations, reunification services may be extended for a period not to exceed 18 months from the date of removal if the parents can show that there is a substantial probability that the goals of the reunification efforts may be reached within that extended time. Welf & I C §361.5(a). If the period is extended, the court must specify the factual basis for its conclusion that there is a substantial probability of reunification with the parents within the extended time period. Welf & I C §361.5(a).

3. [§102.62] Advisements

When the child was under three years old at the time of removal or is a member of a sibling group with one sibling under three years old at that time, the court must inform the parent or guardian that if the parent or guardian does not participate regularly in any court-ordered treatment program or cooperate or use the services, efforts to reunify may be terminated after six months. Welf & I C §361.5(a); Cal Rules of Ct 1456(f)(2). If the child is a member of a sibling group as described above, the court must inform the parent or guardian of the factors that led to the decision to limit services to six months. Welf & I C §361.5(a).

The presumptive time limits for reunification services begins on the date the child entered foster care. Welf & I C §361.5(a)(1)–(2). This date is defined as the earlier of the date on which the court sustained the petition at the jurisdictional hearing or the date that is 60 days after removal from the custody of the parent or guardian. Welf & I C §361.5(a); Cal Rules of Ct 1401(a)(7)(A). The maximum 18-month reunification period begins, however, on the date the child is removed from the physical custody of the parent or guardian. Welf & I C §361.5(a).

4. [§102.63] Formulating Reunification Plans

Although it is generally stated that the reunification plan should address the issues that caused the child to come within the jurisdiction of the juvenile court, the plan actually should include more. The goal of the plan is to facilitate the reunification of the family within a short period. See Welf & I C §361.5(a). As such, the plan should also address the reasons the child was removed from the custodial parent's home. Welf & I C §361(c).

☛ JUDICIAL TIP: Although case plans are formulated by DSS, rather than by the court, the court should ensure that the plans are tailored to meet the needs of individual families as closely as possible.

Reunification services must be sufficiently comprehensive to permit parents to learn new skills and put them into practice. See *In re Kristin W.* (1990) 222 CA3d 234, 255, 271 CR 629. It is insufficient to order that the parent be offered a parenting class and counseling, and require the parent to show an ability to maintain an appropriate home, if there is only limited provision for visitation and the parent has not been clearly apprised of what was needed in order to regain custody of the children. 222 CA3d at 254–255. Nor is a reunification plan reasonable when compliance with the plan is impossible because the parent is deported before the plan begins. *In re Maria S.* (2000) 82 CA4th 1032, 1039–1040, 98 CR2d 655 (child was born while mother was incarcerated and she was deported on release from prison). See discussion of case-specific plans in §102.64.

When out-of-home services are used and the goal is reunification, the plan must consider the importance of developing and maintaining sibling relationships. Welf & I C §16501.1(f)(9).

a. [§102.64] Case-Limited and Case-Specific Plans

Consistent with the requirement that the plan be tailored to the individual case, reunification plans should be both "case limited" and "case specific." Case-limited plans limit the services ordered to those actually needed in a particular case to achieve reunification. For instance, all parents would no doubt benefit from both counseling and parenting classes. However, not all parents, even those of dependent children, actually need counseling and parenting classes to have their child placed safely with them. Therefore, many judges believe that the ordering of services must be limited to those services actually needed in the particular case to achieve reunification. By limiting the plan in this way, the court can ensure that both DSS and the parent will be able to fulfill their respective roles within the plan. Without these limitations the plan might be more than the parent could physically complete or DSS could reasonably provide.

Case-specific plans ensure that the specific type of service needed is that which is ordered. For instance, a parenting class for parents with teenage children will not normally meet the needs of parents whose children are infants. Thus a plan that calls for a "parenting class" may be insufficient or be misinterpreted. Instead, the plan should require that the parent "participate in and complete a parenting class designed to address the parenting of infants, including nutrition, medical follow-through, and psychological support, and thereafter demonstrate an ability to care for the infant in a safe and nurturing manner."

☛ JUDICIAL TIP: When one parent has been abusive towards the other, the court should consider ordering that parent into a certified domestic violence batterers' treatment program as part of

a case-specific plan and should postpone couples' counseling until the batterer has participated in such a program.

Another example of the need for case-specific plans is an order that simply requires "counseling" or "therapy." Instead, the order should indicate the type of therapy, the nature of the issues to be addressed, and the goal to be achieved. For example, a case-specific order might read "participate and make progress in individual and group therapy to deal with issues surrounding the molestation of his daughter, to recognize his role in that molestation and the emotional trauma suffered by his daughter, and remain in therapy until he poses no further danger of sexual molestation to his daughter."

☛ JUDICIAL TIPS:

- Many judges require a separate case plan for each parent.
- It is a good idea to find out if a parent is on probation and, if so, the conditions of that probation. The services can then be tailored to dovetail with those conditions.

b. [§102.65] Family Dynamics and Issues

In crafting an appropriate plan for a family, DSS and the court should not overlook the role that the "non-protecting" parent played in the abusive or neglectful situation, and should address the requirements for that parent separately. For instance, in a substance abuse case one parent may be required to go to Narcotics Anonymous to deal with her drug problem while the other parent is required to go to Al-Anon to deal with his codependency problems.

☛ JUDICIAL TIP: When substance abuse is one of the core problems in a case, it may often be appropriate to require that the parent find a "sponsor" with a minimum number of years of recovery (usually at least two) who is willing to be identified within the confidential juvenile court proceedings and to relate the progress of the parent in his or her own "program." Many sponsors are willing to do this and it may be a crucial step in facilitating the parent's recovery.

Many judges have found it effective to schedule regular checks on attendance in a treatment program because the constant monitoring assists parents who are motivated to recover and have their children returned. See also discussion in §102.96.

It is a rare case that has only one limited problem to be addressed by the reunification plan. Accordingly, although the plan should be case-limited and case-specific, it still must be thorough enough to include all

the issues that must be addressed for the child to be returned safely to the home.

☛ JUDICIAL TIP: To avoid overwhelming parents with necessary services, some judges provide them with services, one step at a time. The problem with this approach is that the parents may feel as if the plan is endless. To prevent this problem, judges can provide the parents with the entire plan and advise them to work with the social worker to break it into manageable parts.

In addition, reunification plans should include a release to the social worker of limited information, including attendance at programs, addresses, and other information, that would aid in assessing the appropriateness of reunification.

5. Who Is Entitled to Services

a. [§102.66] Generally

If the court orders counseling or treatment services, it must order the parent or guardian to participate in those services unless this participation would be inappropriate or harmful to the child. Welf & I C §361.5(a). See also Welf & I C §362(c) (dispositional orders are to be directed to the parent or guardian). Other adults in the child's life are generally not entitled to reunification services.

b. [§102.67] Stepparents, Foster Parents, and De Facto Parents

Courts are generally not required to provide reunification services for stepparents because they do not have the legal status of parents or guardians for the purposes of juvenile court dependency proceedings, nor does a stepparent have a right to custody or reunification services that is independent of the right of the parent. *In re Jodi B.* (1991) 227 CA3d 1322, 1329, 278 CR 242 (permanency planning order made under former Welf & I C §366.25). See also *In re Jody R.* (1990) 218 CA3d 1615, 1628, 267 CR 746 (no statutory authority to order reunification services for a de facto parent). Denial of reunification services to de facto parents is not a due process violation. *In re Jamie G.* (1987) 196 CA3d 675, 680, 241 CR 869. But see *In re Venus B.* (1990) 222 CA3d 931, 936, 272 CR 115, disagreeing with *Jody R.*, and holding that the court may order counseling for a stepfather under Welf & I C §362(c). Under this section, a foster parent or relative with whom a child is placed, although not necessarily entitled to services, may be required to participate in a counseling or educational program if participation is appropriate and it is in the child's best interest.

☛ JUDICIAL TIP: A parent who resides with the perpetrator of child abuse has the responsibility to ensure that the perpetrator makes the progress necessary to allow the child to be returned to the home. Thus, while the perpetrator, who may be a stepparent, may have no independent right to services, such services may flow through the parent. In such a case the plan might read: "If the mother continues to reside with the stepfather, she shall ensure that the stepfather participate in and complete a course in appropriate disciplinary techniques and that he demonstrate an ability and willingness to use alternative forms of discipline so as to allow the child to be returned to the home safely."

It may be helpful in this type of situation to have the perpetrator appear in court and be advised that, without his or her compliance with the plan, the custodial parent may have to choose between the perpetrator and the child.

Many judges feel that a parent who has lost custody of his or her child is entitled to know what is required of a stepparent or partner living in the home in order to achieve reunification. Therefore, when the court orders a case plan for that partner, the parent has measurable criteria to use in deciding whether to stay with that partner in attempting to reunify.

c. [§102.68] Services for Biological Fathers

A biological father who is not a presumed father is not entitled to reunification services under Welf & I C §361.5. *In re Zacharia D.* (1993) 6 C4th 435, 451–453, 24 CR2d 751. See also *In re Sarah C.* (1992) 8 CA4th 964, 976, 11 CR2d 414 (a man has no right to reunification services based on his status as the child's biological father when he is not the presumed father, has not been thwarted by the mother in his efforts to become a presumed father, and has not stepped forward at an early stage to take an active role in his child's life). Nevertheless, the court may order services for a man declared by the juvenile court or by a previous court to be the child's biological father when such services are in the child's best interest and the time for the provision of reunification services has not ended. See Welf & I C §361.5(a); *In re Zacharia D.*, *supra*, 6 C4th at 452–456.

An alleged father who has not established that he is the biological father of the child and who does not take the child into his home or remain out of prison long enough to establish a home does not attain presumed father status. Thus he is not entitled to reunification services, even though he maintained contact with the child during part of the incarceration, diligently attended a parenting program, and held the child out as his own. *Glen C. v Superior Court* (2000) 78 CA4th 570, 585–586, 93 CR2d 103.

d. [§102.69] Noncustodial Parents and Grandparents

A noncustodial parent may be entitled to services even if that person does not immediately assume custody. See Welf & I C §361.2(b)(2). However, a court is not required to provide reunification services to a noncustodial parent who has no interest in custody. *Robert L. v Superior Court* (1996) 45 CA4th 619, 628, 53 CR2d 41; *In re Terry H.* (1994) 27 CA4th 1847, 1856, 34 CR2d 271 (Welf & I C §361.5 does not require services in such a situation).

There is no statutory authority giving grandparents the right to reunification services. *In re Albert B.* (1989) 215 CA3d 361, 381, 263 CR 694.

e. Incarcerated or Institutionalized Parents

(1) [§102.70] In General

The court must order reunification services for an incarcerated or institutionalized parent unless the court determines by clear and convincing evidence that these services would be detrimental to the child. Welf & I C §361.5(e)(1); Cal Rules of Ct 1456(f)(12). One of the services that must generally be offered to an incarcerated parent is visitation. *In re Brittany S.* (1993) 17 CA4th 1399, 1407, 22 CR2d 50.

In determining whether there is detriment to the child, the court must consider the following factors under Welf & I C §361.5(e)(1):

- Age of the child,
- Degree of parent-child bonding,
- Length of the sentence,
- Nature of treatment,
- Severity of crime or illness,
- Detriment should services not be offered,
- Wishes of the child who is ten years old or older, and
- Other appropriate factors (such as the nature of any in-custody visits).

A parent who is incarcerated while awaiting trial, as well as one who is already serving a sentence, may be denied reunification services under Welf & I C §361.5(e)(1). *Edgar O. v Superior Court* (2000) 84 CA4th 13, 18, 100 CR2d 540. The court need not make a specific finding regarding the term of incarceration in order to apply Welf & I C §361.5(e)(1). *Edgar O. v Superior Court, supra.*

Under Welf & I C §361.5(e)(1), examples of services include the following:

- Phone contact using collect phone calls,

- Transportation,
- Visitation (see *In re Brittany S., supra),* and
- Reasonable services to the child's caretakers if not detrimental to the child.

(2) [§102.71] Incarcerated Parents

An incarcerated parent may be required to attend parenting or vocational training classes if these are available. Welf & I C §361.5(e)(1). There must be *some* effort to reunify a child with an incarcerated parent unless the court finds detriment to the child under Welf & I C §361.5(e)(1); this effort must include at a minimum contacting the institution to learn if there are programs in which the parent may participate. *Mark N. v Superior Court* (1998) 60 CA4th 996, 1013–1015, 70 CR2d 603. Reunification services may not be feasible, however, when the child is very young and the parent places himself or herself beyond the reach of meaningful rehabilitative services by pursuing criminal activities that caused the incarceration out of state. *Elijah R. v Superior Court* (1998) 66 CA4th 965, 971, 78 CR2d 311.

If an incarcerated mother would like to participate in the community treatment program operated by the Department of Corrections under Pen C §§3410–3424, the judge must determine whether she should be permitted to do so based on the best interest of the child and the suitability of the program to the needs of both the child and the parent. Welf & I C §361.5(e)(3).

It is not sufficient merely to provide the parents with stamped envelopes as a means of keeping in contact with the child; DSS must also: (1) provide the parent with requested parenting pamphlets, (2) determine whether requested visits can take place, and (3) review the service plan with the parent or give the parent advice on how to secure parental rights. See *Robin V. v Superior Court* (1995) 33 CA4th 1158, 1165, 39 CR2d 743.

☛ JUDICIAL TIP: Some judges order incarcerated parents, who cannot take parenting courses, to read books on this subject from the prison library and to write reports on those books. Additionally, DSS can be directed to send this type of book to an incarcerated parent, together with a return mail envelope. However, judges need to be sure the parent is able to read and understand the material for this order to be useful. If not, DSS might work with a prison counselor to have another inmate read the material to or translate it for the parent. The Department of Corrections makes available a list of state prison facilities and the services that are offered to inmates at each site.

(a) [§102.72] Facilitation of Court Appearances

To facilitate court appearances by incarcerated or institutionalized parents, the presiding juvenile court judge may convene a meeting with representatives of the county welfare department, sheriff's department, and other appropriate entities to develop procedures for ensuring that those parents are notified of hearings and transported to the court under Pen C §2625. Welf & I C §361.5(e)(2). Under Pen C §2625, the juvenile court must order notification to prisoners of any proceedings in which their children may be adjudicated dependents of the court and must also order their temporary removal from the penal institution to be present before the court at those proceedings. Judicial Council approved form JV-450 should be used to notify prison authorities.

☛ JUDICIAL TIP: It is recommended that DSS arrange a safe place for the child to visit the parent somewhere in the court facility if this is desirable.

Unless waived, an incarcerated parent's appearance is required if the hearing is one involving termination of parental rights or declaration of dependency. See *In re Barry W.* (1993) 21 CA4th 358, 370, 26 CR2d 161. The court may not, however, order the appearance of an incarcerated parent who has been sentenced to death, regardless of whether that sentence is being appealed. Pen C §2625(g).

(b) [§102.73] Visitation

As a possible exception to the general rule favoring reunification services with an incarcerated parent, visitation with a parent who has been incarcerated because of sexual offenses in which the child was a victim is generally prohibited. Pen C §1202.05; Welf & I C §362.6(a). Contact or visitation in these cases may be ordered by the juvenile court only if it is in the best interests of the child. Welf & I C §362.6(a). If the court orders such visitation, it must notify the Department of Corrections and may impose appropriate restrictions or safeguards. Welf & I C §362.6(b). Whether this section prevails over Welf & I C §361.5(e)(1) (generally requiring visitation) is not clear. For a more comprehensive discussion of visitation as it relates to incarcerated parents, see §§102.88–102.89.

☛ JUDICIAL TIP: The judge should check to see if there are any protective orders under Pen C §136.2 that also might restrict visitation with an incarcerated parent.

The absence of an equivalent to Pen C §2625 (providing for transportation of prisoners to dependency hearings) for facilitating visitation with out-of-state or federal prisoners does not deprive the court

If the court makes any one or more of the findings under Welf & I C §361.5(b)(2)–(15), the burden shifts to the parent for whom services may be denied to show why the exception should not be imposed. See, *e.g.*, Welf & I C §361.5(c).

Services may not be denied unless they come within one of these exceptions. *Rosa S. v Superior Court* (2002) 100 CA4th 1181, 1188, 122 CR2d 866. A parent may not be precluded from receiving reunification services solely because he or she had previously received 18 months of services in a prior dependency proceeding that temporarily resulted in a successful reunification. 100 CA4th at 1188.

Reunification services need not be ordered when the parent has voluntarily relinquished the child and the relinquishment has been filed with the state DSS. Welf & I C §361.5(a); Cal Rules of Ct 1456(f)(5). Nor need reunification services be ordered if the court finds that the parent (and child if old enough) agree to the appointment of the guardian and waive the right to reunification services, and the court appoints the guardian at the disposition hearing. See Welf & I C §361.5(a); Cal Rules of Ct 1456(b)(1)(B). See discussion in §§102.57–102.59.

☛ JUDICIAL TIP: If the case comes under ICWA and the court is denying reunification services, it is a good idea to find that active efforts have been made to prevent the breakup of the Indian family. See 25 USC §1912(d). The standard of proof for this finding is "clear and convincing." *In re Michael G.* (1998) 63 CA4th 700, 711, 74 CR2d 642. For a discussion of ICWA, see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.48 (Cal CJER).

Before denying reunification services, the court must hold a hearing after DSS has had time to investigate whether reunification is likely to be successful. Welf & I C §361.5(c); *In re Rebekah R.* (1994) 27 CA4th 1638, 1656, 33 CR2d 265 (DSS must investigate the circumstances leading to the child's removal and advise the court whether reunification would be successful or whether it would be detrimental to the child).

When reunification services are not ordered, the permanency plan must include consideration of whether there are siblings and, if so, the child's relationship to them and the impact of these considerations on placement and visitation. Welf & I C §362.1(b). See discussion on setting a .26 hearing in §102.108

b. [§102.75] Exceptions

If the court finds by clear and convincing evidence that reunification is in the child's best interests, it may order reunification services in situations described by Welf & I C §361.5(b)(3)–(4), and (6)–(15). Welf & I C §361.5(c). In addition, if the court finds by competent evidence that

services are needed to prevent further abuse or continued neglect of the child or that failure to attempt reunification is likely to be detrimental to the child because of a close attachment to the parent, it may order services in a situation governed by Welf & I C §361.5(b)(5) (severe physical abuse under the age of five). Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(11). See summary of statutory exceptions in the Appendix.

c. [§102.76] Denial of Services to One Parent Only

When a child has been adjudged a dependent child because of Welf & I C §300(h) (parental rights of one or both parents have been relinquished or terminated), reunification services may not be ordered to the person whose rights have been terminated, although the other parent may still be entitled to appropriate services. See Welf & I C §300.1. When custody is transferred from one parent to the other, a court may deny reunification services to the former custodial parent under Welf & I C §361.2, even though the court may not have been able to deny services to the former custodial parent under Welf & I C §361.5 had there not been another parent to assume custody. In the limited situation in which custody is transferred to a noncustodial parent, Welf & I C §361.2, rather than Welf & I C §361.5, applies. *In re Erika W.* (1994) 28 CA4th 470, 475, 33 CR2d 548.

d. [§102.77] Severe Sexual or Physical Abuse

A denial of reunification services under Welf & I C §361.5(b)(5) for severe physical abuse of a child under the age of five may be appropriate when someone other than the parent perpetrates the abuse and the parent knew or should have known about it. *In re Joshua H.* (1993) 13 CA4th 1718, 1731–1732, 17 CR2d 282. Under Welf & I C §361.5(b)(6) (severe abuse of child or sibling), a parent who deliberately inflicts severe physical harm on one child, whether by act or omission, is not necessarily entitled to reunification services with respect to any of that parent's other children who have been adjudicated dependents because of the abuse of their sibling (*Deborah S. v Superior Court* (1996) 43 CA4th 741, 748, 50 CR2d 858) because an abusive parent's risk of re-abusing is not limited to the child who was the subject of the abuse (*Pablo S. v Superior Court* (2002) 98 CA4th 292, 302, 119 CR2d 523). On the other hand, the fact that a person's ward or foster child was abused or injured is not grounds for denial of reunification services under Welf & I C §361.5(b)(6) with respect to other nonrelated wards or foster children. In re Tanyann W. (2002) 97 CA4th 675, 679, 118 CR2d 596 (the term "sibling" in Welf & I C §361.5(b)(6) means a child with a parent in common with the abused or injured child).

To determine whether reunification services would benefit the child who would otherwise be denied services under Welf & I C §361.5(b)(6) (severe abuse) or §361.5(b)(7) (services have been denied with respect to a sibling because of Welf & I C §361.5(b)(3), (5), or (6)), the court must consider any relevant information including (Welf & I C §361.5(h); Cal Rules of Ct 1456(f)(10)):

(1) The act or omission comprising the severe sexual abuse or physical harm inflicted on the child or a sibling.

(2) The circumstances under which the harm was inflicted.

(3) The child's emotional trauma.

(4) History of abuse of other children.

(5) Likelihood that the child might safely be returned to the offending person's care within 12 months.

(6) The child's desires for reunification.

The analysis required by Welf & I C §361.5(h) in deciding whether to grant or deny reunification services is only required when the court is assessing whether to deny services under Welf & I C §361.5(b)(6). *In re Rebekah R.* (1994) 27 CA4th 1638, 1651, 33 CR2d 265. When services are denied because of severe sexual or physical abuse, the court must read into the record the basis for the finding of the abuse and the factual findings that are used to determine that reunification services would not benefit the child. Welf & I C §361.5(i).

Once DSS has proved by clear and convincing evidence that the child falls under Welf & I C §300(e) (see Welf & I C §361.5(b)(5)), the general rule favoring granting reunification services no longer applies; at that point, the *parents* have the burden of proof by "substantial evidence" that services are likely to prevent reabuse. *Raymond C. v Superior Court* (1997) 55 CA4th 159, 163–164, 64 CR2d 33.

e. [§102.78] Whereabouts of Parent or Guardian Unknown

The court need not provide reunification services to a parent or guardian if the court finds by clear and convincing evidence that the whereabouts of the parent or guardian are unknown. Welf & I C §361.5(b)(1); Cal Rules of Ct 1456(f)(5)(A). When making a finding under this section, the court must support the finding with an affidavit or proof that the parent or guardian cannot be found after a reasonably diligent search. Welf & I C §361.5(b)(1); Cal Rules of Ct 1456(f)(5)(A). Neither posting of notices nor publication is required to be part of that search. Welf & I C §361.5(b)(1); Cal Rules of Ct 1456(f)(5)(A).

Due diligence statements by DSS can constitute clear and convincing evidence that that parent's whereabouts were unknown. *In re Baby Boy L.* (1994) 24 CA4th 596, 605, 29 CR2d 654. If the whereabouts of a parent

for whom reunification services were not ordered under Welf & I C §361.5(b)(1) become known within six months of the out-of-home placement of the child, the court must order DSS to provide services. Welf & I C §361.5(d).

☛ JUDICIAL TIP: If the parents had not previously been ordered to apprise the court of their changes of address and if their whereabouts are unknown at the disposition hearing, many judges will order a new "due diligence" search for the parents within the next six months.

f. [§102.79] Previous Failures With Respect To Siblings

A court need not provide reunification services when the child has siblings or half-siblings with respect to whom reunification services have been denied under Welf & I C §361.5(b)(3), (5), or (6). Welf & I C §361.5(b)(7). Nor need reunification services be provided when services for siblings had been terminated or when parental rights had been terminated with respect to siblings and the parents have not subsequently made reasonable efforts to treat the problems that led to removal. See Welf & I C §361.5(b)(10)–(11). The legislative change in Welf & I C §361.5(b)(10), following *Renee J. v Superior Court* (2001) 26 C4th 735, 110 CR2d 828, is retroactive. *Renee J. v Superior Court* (2002) 96 CA4th 1450, 1461, 118 CR2d 118.

When deciding not to provide services under these sections, the issue raised by a number of published cases is whether a parent's attempts at reunification with the child in question are sufficient to overcome past failures with other children. Holding that the parent's recent efforts have been insufficient in light of past failures are:

- *Randi R. v Superior Court* (1998) 64 CA4th 67, 71–72, 74 CR2d 770 (former Welf & I C §361.5(b)(10)(A) (now Welf & I C §361.5(b)(10)) may apply even when the parent has made *some* efforts to cure the problem; it is intended to prevent parents from causing additional harm to successive children when this type of harm has prevented the return of a child).
- *In re Baby Boy H.* (1998) 63 CA4th 470, 475, 73 CR2d 793 (reunification services properly denied when mother had made some attempts to reunify with some children, but had failed to reunify with others, resulting in termination of parental rights with respect to those children).
- *In re Jasmine C.* (1999) 70 CA4th 71, 76, 82 CR2d 493 (to provide parents with services when they have failed to make a reasonable effort to treat the problem would be an exercise in futility).

- *Letitia V. v Superior Court* (2000) 81 CA4th 1009, 1016, 97 CR2d 303 (when parent shows no interest in overcoming addiction despite extensive efforts, it is reasonable not to duplicate those efforts with respect to a second child, even if ICWA's requirement of "active efforts" (25 USC §1912(d)) applies). See discussion in §102.81.

There is no real distinction between a failure to make efforts to reunify and a failure to make efforts to address the cause of the removal; once a parent has failed to reunify, the emphasis changes to one in which offering services would generally be an unwise use of governmental resources. *Linda B. v Superior Court* (2001) 92 CA4th 150, 154–155, 111 CR2d 726.

A court may deny reunification services under Welf & I C §361.5(b)(10) even when the petition is filed before reunification services have been terminated with respect to other siblings. *Marlene M. v Superior Court* (2000) 80 CA4th 1139, 1148, 96 CR2d 104. The only requirement is that the orders terminating services with respect to siblings be made before disposition in the current case. *Riverside County Dep't of Pub. Social Servs. v Superior Court* (1999) 71 CA4th 483, 491, 83 CR2d 777.

g. [§102.80] When Parent Has Mental or Developmental Disability

The court may also deny reunification services if the parent is mentally disabled and therefore incapable of using these services. Welf & I C §361.5(b)(2); Cal Rules of Ct 1456(f)(5)(B). To deny reunification services based on the parent's disability, the court must also find that competent professional evidence establishes that the parent will be unlikely to be able to care for the child within 12 months even with the provision of services. Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(9). Competent professional evidence requires the opinions of two mental health professionals. *In re Catherine S.* (1991) 230 CA3d 1253, 1258, 281 CR 746.

One case has held that in denying reunification services under Welf & I C §361.5(b) and (c) because of a parent's mental illness, it is not necessary that the two psychologists' reports required by Fam C §7827 contain identical recommendations if the court can determine from their conclusions that it is unlikely that the parent will be able to reunify. *Curtis F. v Superior Court* (2000) 80 CA4th 470, 474, 95 CR2d 232. Nor need DSS affirmatively raise the issue of the qualifications of its mental health experts in proffering psychological testimony to support the denial of reunification services under Welf & I C §361.5(b)(2). *In re Joy M.* (2002) 99 CA4th 11, 19, 120 CR2d 714. But see *In re Rebecca H.* (1991) 227

CA3d 825, 841, 278 CR 185 (no denial of reunification services when psychologists did not agree).

When a parent has a mental disability that does *not* prevent him or her from utilizing reunification services, but it is unlikely that the parent would be capable of learning to care adequately for the child within six months, reunification may be denied under Welf & I C §361.5(c), rather than under Welf & I C §361.5(b) (reunification services need not be provided if parent suffers from mental disability). *In re Rebecca H.* (1991) 227 CA3d 825, 844, 278 CR 185. Harm to a child cannot be inferred from a parent's mental illness, and reunification services and visitation should not necessarily be denied because of a parent's suicide attempt when the parent is otherwise caring and responsible. See *In re David D.* (1994) 28 CA4th 941, 953, 33 CR2d 861.

In assessing the effect of a mental disability on the issue of reunification services, the court must address the following (*In re Rebecca H., supra,* 227 CA3d at 843):

(1) Does the parent suffer a mental disability as described in former CC §232(a)(6) (now Fam C §7824.1, §7826, or §7827)? If it is alleged that the parent is "mentally disabled," the evidence of any two experts as described in Fam C §7827(c) or (d) is required.

(2) If so, and the disability renders the parent incapable of using reunification services, reunification may be denied under Welf & I C §361.5(b)(2).

(3) If not, but the parent is unlikely to be capable of using services so as to be able to care for the child within 12 months, reunification may be denied under Welf & I C §361.5(c).

The court must not, however, deny reunification under Welf & I C §361.5(c) on the basis of a parent's lifestyle. *In re Rebecca H., supra,* 227 CA3d at 844.

h. [§102.81] Parents Resistant to Drug Treatment

Under Welf & I C §361.5(b)(13), resistance to treatment need not be shown by direct action. *Randi R. v Superior Court* (1998) 64 CA4th 67, 73, 74 CR2d 770. Resistance may also be passive as when the parent participates in a program but continues to abuse illicit drugs or alcohol or otherwise fails to benefit from the program. *Karen S. v Superior Court* (1999) 69 CA4th 1006, 1010, 81 CR2d 858. When a parent, while participating in treatment, has tested positive many times for multiple substances, this pattern constitutes resistance to treatment, not merely a relapse. *Karen H. v Superior Court* (2001) 91 CA4th 501, 504, 110 CR2d 665.

Courts have held that resistance may be shown by evidence that a parent enrolled in and then dropped out of programs or resumed regular drug use (*Laura B. v Superior Court* (1998) 68 CA4th 776, 780, 80 CR2d

472) or by the parent's failure to participate in a treatment program or to maintain long-term sobriety despite participation (*In re Levi U.* (2000) 78 CA4th 191, 200, 92 CR2d 948). Disagreeing with *Levi U.*, however, one court has held that mere nonparticipation in a treatment program is not tantamount to "resisting prior treatment"; instead, it must be shown that at some point the parent either started such a program or affirmatively refused to enter one. *In re Brian M.* (2000) 82 CA4th 1398, 1403, 98 CR2d 88.

When extensive unsuccessful efforts have been made to address a parent's well-established drug addiction in a case involving one child and the parent shows no interest in changing, it is reasonable under Welf & I C §361.5(b)(10), (13) not to duplicate those efforts with respect to a second child, even if ICWA's requirement of "active efforts" (25 USC §1912(d)) applies. *Letitia V. v Superior Court* (2000) 81 CA4th 1009, 1016, 97 CR2d 303.

i. [§102.82] Causing Death of Another Child

When a parent has caused the death of a child's sibling, it is not an abuse of discretion to deny reunification services; indeed, it may be an abuse of discretion to provide them. *In re Alexis M.* (1997) 54 CA4th 848, 850, 63 CR2d 356. The parent need not have directly caused the sibling's death. When a boyfriend inflicted the injuries that should have caused obvious symptoms and pain, and the mother had been told about the abuse but had done nothing to stop it, she was guilty of criminal neglect, which may warrant denial of reunification services under Welf & I C §361.5(b)(4). *Patricia O. v Superior Court* (1999) 69 CA4th 933, 942, 81 CR2d 662

A nolo contendere plea to felony child endangerment (Pen C §273), which was part of a plea bargain to an original charge of murder, may be equivalent to a conviction for causing the death of another child through abuse or neglect if the underlying facts of the case support that conclusion. *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 280 CR 349.

j. [§102.83] Waiver of Services

In order to deny reunification services because the parents or guardians have waived them, the parents or guardians must have been represented by counsel, and must have advised the court by executing the Judicial Council form, Waiver of Reunification Services (JV-195), indicating that they do not wish the child returned or placed in their custody and do not wish to receive family maintenance or family reunification services. Welf & I C §361.5(b)(14). If the court accepts the waiver of services, it must state on the record its finding that the parents or guardians knowingly and intelligently waived the right to services. Welf &

I C §361.5(b)(14). A request to withdraw a waiver may be granted only if the parent seemed to be confused at the time of waiver and acted expeditiously thereafter. See *Cynthia C. v Superior Court* (1999) 72 CA4th 1196, 1200–1201, 85 CR2d 669 (in this case, the court had held a hearing in which it found that the parent had not been confused, nor had she been coerced or misled into relinquishing the right to services; in addition, many months had passed before the parent reported a change of heart).

M. [§102.84] Visitation

To maintain the ties between the dependent child and the parents, guardians, and siblings, every order placing a child in foster care and ordering reunification services must provide for visitation between the child and the parent or guardian as long as the child's safety is protected (Welf & I C §362.1(a)(1) (child's address may be kept confidential)) and must provide for sibling visitation unless the court finds by clear and convincing evidence that sibling interaction is detrimental to either sibling. Welf & I C §362.1(a)(2); see discussion in §102.93. Visitation must be as frequent as possible, consistent with the child's welfare. Welf & I C §362.1(a)(1); Cal Rules of Ct 1456(f)(4). Every parent and child, nearly without exception, is entitled to a meaningful judicial evaluation of the question of visitation each time an order is made regarding reunification services. *In re Jonathan M.* (1997) 53 CA4th 1234, 1238, 62 CR2d 208.

When reunification services are not ordered, the permanency plan must include consideration of the existence of siblings and the child's relationship to them, as well as the impact of these considerations on placement and visitation. Welf & I C §362.1(b). See discussion in §§102.93, 102.97.

1. Drafting Visitation Orders

a. [§102.85] In General

In crafting visitation orders, a court must balance its obligation of finality in decision making against the need for flexibility in response to the changing needs of the child and changing family circumstances. To effect this balance, the system envisions a cooperative effort between DSS and the juvenile court, in which the department exercises its limited discretion in the administration of the court's visitation order. See *In re Moriah T.* (1994) 23 CA4th 1367, 1374, 28 CR2d 705, citing *In re Danielle W.* (1989) 207 CA3d 1227, 1234–1235, 255 CR 344. However, when the court places too much reliance on the discretion of DSS, it is an impermissible delegation of judicial power.

b. [§102.86] Impermissible Delegation

An order providing solely that "visitation with the mother and father be under the direction of the Department of Social Services" is an impermissible delegation. *In re Jennifer G.* (1990) 221 CA3d 752, 755, 270 CR 326. At the very least, the court must determine whether there is a right to visitation, although it may delegate the details of time, place, and manner of visitation to DSS. See *In re Jennifer G., supra,* 221 CA3d at 757. See also *In re Donnovan J.* (1997) 58 CA4th 1474, 1476, 68 CR2d 714 (visitation order that provides for no visitation with the parent "without permission of minors' therapists" is an invalid delegation of judicial authority).

Similar to *Jennifer G.* is *In re Shawna M.* (1993) 19 CA4th 1686, 1691, 24 CR2d 126, holding that an order that "supervised visitation . . . be arranged through, and approved by, the San Benito County Human Services Agency" is an improper delegation of judicial authority. While specifying the right to visitation, this order gives no guidance to the social service agency in exercising its discretion. 19 CA4th at 1690. In dicta, the court stated that the order might have been valid had it specified that the frequency of visitation be determined by DSS in consultation with the psychiatrist treating the child. *In re Shawna M., supra.*

☛ JUDICIAL TIP: Although case law is still developing as to an acceptable level of delegation, all cases are in agreement in allowing only the court to decide that a parent should be denied visitation on an ongoing basis and in requiring that when the court orders visitation, it should also provide parameters or guidelines necessary under the facts of the case. For example, the court might order a minimum number of hours per week for visitation under supervision with the proviso that the social worker has discretion to increase the hours and end the supervision requirement when it becomes appropriate to do so.

c. [§102.87] Permissible Delegation

Examples of valid orders permitting delegation to DSS of details concerning visitation are:

- Visitation to be facilitated by the child's therapist and to begin when father's therapist determined that father had made satisfactory progress. *In re Chantal S.* (1996) 13 C4th 196, 213, 51 CR2d 866.
- Monitored visitation with a proviso that DSS has "full discretion to liberalize the visitation" even when the length and time of visitation not specified. *In re Dirk S.* (1993) 14 CA4th 1037, 1045–1046, 17 CR2d 643.

- Visitation required to be at the discretion of the children and DSS, with the children choosing when they want to visit and DSS choosing the location to accommodate the needs of the mother and children. *In re Danielle W.* (1989) 207 CA3d 1227, 1237, 255 CR 344.
- Father required to have regular visitation with the child in such a way that the visitation be "at the discretion of Child Protective Services as to time, place, and manner." *In re Moriah T.* (1994) 23 CA4th 1367, 1374–1375, 28 CR2d 705 (disagreeing with *In re Jennifer G.* (1990) 221 CA3d 752, 755, 270 CR 326, insofar as it suggests that a court must specify the length and frequency of visitation).
- "Reasonable visitation." *In re Christopher H.* (1996) 50 CA4th 1001, 1009, 57 CR2d 861 (order was valid, because it did not delegate to DSS the discretion to determine whether or not visitation occurred and required that the court, not DSS, supervise the details of the visitation).

The child's wishes cannot be the *sole* factor in determining whether or not visitation should take place. *In re Julie M.* (1999) 69 CA4th 41, 51, 81 CR2d 354. In a situation in which the child's wishes are an issue, a good practice would be to provide an order for regular visits, with social workers or therapists being ordered to respond to the dynamics of the parent/child relationship in such a way as to cause increases or decreases in visits as the dynamics evolve. *In re Julie M., supra.*

2. Incarcerated Parents

a. [§102.88] In General

Visitation with an incarcerated parent is one of the kinds of reunification services that the court may order under Welf & I C §361.5(e). A parent who is incarcerated for reasons not involving abuse of the child should ordinarily be offered visitation. See, *e.g., In re Brittany S.* (1993) 17 CA4th 1399, 1407, 22 CR2d 50. Denial of visitation with an incarcerated parent may not be based solely on the child's age (*In re Dylan T.* (1998) 65 CA4th 765, 773–775, 76 CR2d 684) or on geography (*In re Jonathan M.* (1997) 53 CA4th 1234, 1237, 62 CR2d 208—DSS attempted to place a 50-mile limitation on prison visitation).

When the parent is incarcerated, a visitation plan should not depend on the parent's own efforts even if payment for visitation comes from DSS, nor should DSS delegate to the parent the responsibility of informing the social worker of the available services in prison. *In re Monica C.* (1995) 31 CA4th 296, 306–307, 36 CR2d 910. Moreover, a court cannot

condition personal contact between parent and child on acceptance of the parent into a prison program with limited availability. 31 CA4th at 307.

When the parent's prison sentence is longer than 18 months (necessitating keeping the child out of the home for the reunification period), DSS has an obligation to consider relative placement or guardianship in order to protect the parent's interest. 31 CA4th at 308–310. See also *In re Precious J.* (1996) 42 CA4th 1463, 1479–1480, 50 CR2d 385 (services are not reasonable for an incarcerated parent when DSS failed to arrange any visits or establish a visitation schedule despite court orders directing it to do so).

See discussion in §§102.70–102.73 regarding services for incarcerated parents.

☛ JUDICIAL TIP: If an incarcerated parent requests a hearing on visitation, the judge should ensure that DSS is notified and appears at the hearing.

b. [§102.89] When Incarceration Is for Sexual Abuse

Visitation with a person who has been incarcerated because of sexual offenses in which the child was a victim is generally prohibited under Pen C §1202.05. See §102.73. The parent or guardian of the child may request a hearing on this issue when it is referred to the Child Welfare Agency by the sentencing court. See Welf & I C §362.6(a). The agency must then initiate a hearing in the juvenile court (see Welf & I C §362.6(a); Pen C §1202.05(a)), which may order visitation if such a course of action is determined to be in the child's best interests. Welf & I C §362.6(a). If the court orders visitation, it must notify the Department of Corrections and may impose appropriate restrictions or safeguards. Welf & I C §362.6(b). Whether Welf & I C §362.6 applies in a situation in which a child is already a dependent is not clear. Even without this procedure, however, little or no visitation with an incarcerated parent may be reasonable when the parent is incarcerated because of abuse perpetrated against the dependent child and the prison is a long distance from the foster family's residence. In this situation, a visitation plan consisting of monthly overnight visits at the prison arranged and supervised by grandparents (with the child's consent) may be a reasonable arrangement under the circumstances. *In re Ronell A.* (1996) 44 CA4th 1352, 1362–1365, 52 CR2d 474.

3. [§102.90] Denying Visitation

Visitation with a parent may be denied if a preponderance of the evidence shows that it would be harmful to the child. See *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282 (review hearing). See

also *In re Cheryl H.* (1984) 153 CA3d 1098, 1133, 200 CR 789, disapproved on other grounds in 2 C4th at 893. In *Cheryl H.*, the court discontinued visitation because the child believed her father had molested her and was afraid of him, although the father denied any wrongdoing. The court held that visitation with the father was to be precluded until the father was "rehabilitated." *In re Cheryl H., supra.* See also *In re Chantal S.* (1996) 13 C4th 196, 213, 51 CR2d 866, noting that a court has two options when protecting a child from an abusive parent: (1) it may deny visitation altogether, or (2) it may restrict visitation to a time when the parent's therapist determines that the parent had made sufficient progress. Denial of visitation, the first option, would be proper when visitation would cause the child to experience great stress. *In re Daniel C. H.* (1990) 220 CA3d 814, 839, 269 CR 624. The court may also order supervised visitation. See §§102.85–102.87 for discussion of drafting visitation orders. For denial of reunification services generally, see §102.74.

4. [§102.91] Grandparents

Although only parents and guardians have a *right* to visitation (see Welf & I C §362.1), the court may order visitation with grandparents and others if it is in the child's best interests to do so. The court must consider whether visitation with the grandparents is in the child's best interests and will serve to maintain family ties when placing the child outside the home. Welf & I C §361.2(h); Cal Rules of Ct 1456(a)(7)(C). The judge must clearly specify these visitation rights to the social worker. Welf & I C §361.2(h).

5. [§102.92] De Facto Parents

Visitation may be ordered with de facto parents. See, *e.g., In re Hirenia C.* (1993) 18 CA4th 504, 514, 22 CR2d 443 (former partner of a foster parent should be permitted to bring a petition for visitation when he or she continues to have substantial and regular contact with the child). However, in ordering visitation with a de facto parent, even one with whom the child has had a deep, close, and continuing relationship, as well as with the mother and biological father, a court must be cautious not to require that a child be "shuffled about among several caretakers." *In re Robin N.* (1992) 7 CA4th 1140, 1147, 9 CR2d 512. A court should weigh visitation with people important to the child against the unsettling effects of frequent changes in the child's life. *In re Robin N., supra.*

When a de facto parent's request for visitation is denied, that person has no standing to challenge the court's failure to order these services because a de facto parent does not have a *right* to visitation or other reunification services. *Clifford S. v Superior Court* (1995) 38 CA4th 747, 752, 45 CR2d 333.

6. [§102.93] Siblings

Visitation with siblings must be ordered unless the court finds by clear and convincing evidence that this interaction would be detrimental to either child. Welf & I C §§362.1(a)(2), 16002(b). Siblings include any child related to the dependent child by blood, adoption, or affinity through a common biological or legal parent. Welf & I C §362.1(c).

Under Welf & I C §16501.1(f)(6), a case plan for a child for whom out-of-home services are ordered must include a recommendation regarding development and maintenance of sibling relationships. Indeed, DSS must make every effort to keep siblings together or at least to develop a case plan to provide for ongoing and frequent interaction among siblings. Welf & I C §16002(b). If the court orders suspension of visitation with siblings, it must note in the order the reason for the determination that sibling interaction would be harmful. See Welf & I C §362.1(b).

The issue of sibling visitation may be raised at any time by means of a petition for modification. See Welf & I C §388(b).

☛ JUDICIAL TIP: It would appear that siblings certainly have the right to raise sibling visitation matters. The answer to the question of who else has standing to raise such issues is not yet clear. Nevertheless, the court has the ability to consider sibling visitation matters on its own motion and thus may wish to be open to having the issue identified by any of the parties or participants

N. Other Findings and Orders

1. [§102.94] Reasonable Efforts To Prevent Need for Removal of Child From Home

At the conclusion of the disposition hearing, if the child is removed from the home, the court must make findings as to whether reasonable efforts were made to prevent or eliminate the need for removing the child. Welf & I C §361(d); see also Cal Rules of Ct 1401(a)(23) for definition. When removal is based on Welf & I C §361(c)(5) (child has been left without provision for support), the court must make a finding of whether it was reasonable *not* to make any such efforts. Welf & I C §361(d). When a court places the child with a noncustodial parent and does not order reunification services with the former custodial parent under Welf & I C §361.2, it must make findings supporting the denial of services. *In re Katrina C.* (1988) 201 CA3d 540, 550, 247 CR 784. A reasonable efforts finding should be tailored to the particular circumstances of the case. *In re Amy M.* (1991) 232 CA3d 849, 856, 283 CR 788.

☛ JUDICIAL TIP: Some judges require DSS workers to file a Declaration of Reasonable Efforts at each stage of the

proceedings. This requirement will ensure that there is a clearly documented factual basis for a ruling on this issue at any subsequent hearing. However, in some counties the social worker's statement of efforts is included within the DSS report. See §102.117 for a sample Declaration of Reasonable Efforts form.

In considering whether reasonable efforts to prevent or eliminate the need for removal have been made, the court must make one of the following findings under Cal Rules of Ct 1456(e) and record it in the court order:

- Reasonable efforts have been made, or
- Reasonable efforts have not been made.

☛ JUDICIAL TIP: A county is eligible to receive Title IV-E federal foster care funding if the judge makes specified reasonable efforts findings at the initial detention hearing and at subsequent hearings until the child is returned, or a hearing under Welf & I C §366.26 is conducted. See 45 CFR §1356.21(b)(2)(ii). It is strongly advised that the court find that "reasonable efforts to prevent removal were made" in a situation in which it might previously have found that the failure to make efforts was reasonable or that reasonable efforts were excused. If the court determines that DSS's concern for the child's safety was a valid basis for deciding not to provide services that would prevent or eliminate the need for removal, it may find that the level of effort was reasonable, and should thus make a finding that reasonable efforts were made.

2. [§102.95] Treatment of Child for Mental Disorders

If the court is in doubt concerning the child's mental health or believes the child is mentally ill, the court may order the child hospitalized for observation and for a recommendation for future care, supervision, and treatment. Welf & I C §357. This order may be made before or during the jurisdiction hearing. It is not clear that hospitalization after disposition is authorized by §357. However, Welf & I C §§6550–6552 permit psychiatric treatment and evaluation after jurisdiction has been established. See discussion of case-specific orders in §102.64.

If a child has been adjudged a dependent and removed from the parent's or guardian's custody, only a juvenile court judicial officer has the authority to make orders regarding psychotropic medication for that child. Welf & I C §369.5(a); Cal Rules of Ct 1432.5(b). The court may delegate this authority to a parent on a finding that the parent has the capacity to make a decision in this area and that the parent poses no danger to the child (Welf & I C §369.5(a); Cal Rules of Ct 1432.5(e)) or

may permit the child to participate in the decision-making process if local rules permit (Welf & I C §369.5(c)). If there is opposition to the request for authorization to administer psychotropic medications, the court may need to hold a hearing on this issue. See generally Cal Rules of Ct 1432.5(c) for procedures to follow in this situation.

3. [§102.96] Treatment of Child or Parent for Addiction

When a child appears to be a danger to himself or herself or to others because of his or her use of narcotics or restricted dangerous drugs, the judge may order a continuance and direct the child to be evaluated at a facility that has been approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation. Welf & I C §359. The professional person in charge of the facility must make a written evaluation to the court. Welf & I C §359.

If the professional in charge of the facility reports that the child is not a danger to himself or herself or others as a result of drug use and that the child does not require 14-day intensive treatment, or if the child has been certified for that treatment but the certification has been terminated, the child must be released if the juvenile court proceedings have been dismissed. Welf & I C §359. If the proceedings are ongoing, the child is subject to the court's disposition and may be referred for further treatment on a voluntary basis. Welf & I C §359. See discussion in §§102.64–102.65 and the form in §102.116.

A requirement that a parent or guardian be tested for alcohol and other drugs is reasonable when that parent's use of these substances has the potential to negatively affect his or her ability to care for the child, even if DSS does not prove that use has already had this effect. *In re Christopher H.* (1996) 50 CA4th 1001, 1006–1007, 57 CR2d 861. An order for testing of a parent or guardian must be based on more than unsupported allegations that the parent is using drugs; DSS is required to investigate those allegations. *In re Sergio C.* (1999) 70 CA4th 957, 960, 83 CR2d 51.

4. [§102.97] Siblings

Placement of siblings and half-siblings in the same home is a factor to consider under Welf & I C §361.3(a)(4). However, because such placement is not mandatory, the juvenile court order may eventually order long term foster care for one sibling and adoption for another, even over objection. *In re Gerald J.* (1991) 1 CA4th 1180, 1187–1188, 2 CR2d 569 (siblings were nearly nine years apart in age; case arose before the existence of the "substantial interference with a sibling relationship" exception to adoption).

☛ JUDICIAL TIP: The damage to a child from separation from a sibling can be mitigated by having the social worker try to find an adoptive placement home in which the new parents will maintain sibling contact.

For discussion of the need for addressing sibling relationships in the case plan, see §102.93.

5. [§102.98] Psychological Evaluations and Therapy

A judge may order an evaluation by a psychologist, psychiatrist, or other clinical expert to help determine the appropriate treatment for the child. Welf & I C §370. See also Evid C §730 (court may appoint its own expert to make an evaluation or investigation). The selection of an evaluator may be delegated to DSS because choosing a psychologist is a ministerial rather than a judicial function. *In re Walter E.* (1992) 13 CA4th 125, 136, 17 CR2d 386. The court need not appoint a second psychologist at a parent's request when the first had been chosen by DSS. 13 CA4th at 137. Moreover, the court's decision on whether to appoint an expert is a matter of discretion, and the refusal to appoint a second expert to examine any particular issue will ordinarily not be an abuse of discretion. *In re Jennifer J.* (1992) 8 CA4th 1080, 1084, 10 CR2d 813.

☛ JUDICIAL TIP: Many judges permit all counsel to select and agree on an evaluator who is chosen from an approved list to help ensure cooperation with later recommendations and prevent a later challenge. Judges should ensure that the parties know that the evaluators are reporting to the court, not to DSS.

Although the statements that a parent or child makes to a treating psychologist are privileged, the statements made to a court-appointed psychologist for evaluation purposes are not. See *In re Eduardo A.* (1989) 209 CA3d 1038, 1042, 261 CR 68; Evid C §§730, 1017. The court may not obtain a psychological evaluation from a treating psychologist without obtaining a waiver of the privilege. 209 CA3d at 1044. If the psychological evaluation is to be obtained from the child's therapist, either the child or the child's counsel may invoke the psychotherapist-patient privilege and if the child invokes the privilege, counsel may not waive it, but if counsel invokes it, the child may waive it. Welf & I C §317(f). If the child is neither old nor mature enough, counsel is the holder of the privileges. Welf & I C §317(f). See discussion of exception to the privilege in §102.34.

☛ JUDICIAL TIP:

- If the parent or child will not waive the privilege, the court may, in its order referring the parent for counseling, further order the

treating psychologist to report on the parent's or child's participation and progress for the court's use at a review hearing. This method will alert both the therapist and the parent or child to the fact that some accounting is required and will ensure that there is no expectation of confidentiality in the therapeutic relationship. See *In re Eduardo A., supra,* 209 CA3d at 1044.

- When there is no waiver, the court should order the psychological evaluation to be made by an independent evaluator.

A parent who refuses to comply with a court order to participate in a psychological evaluation because of pending criminal proceedings or for any other reason gives up the right to complain of the inadequacy of the reunification services of which the evaluation was a part. *In re Joanna Y.* (1992) 8 CA4th 433, 442, 10 CR2d 422. Any statements that a parent makes during the course of treatment or evaluation ordered as part of a reunification plan would be immune from use in future criminal proceedings. See *In re Joanna Y., supra,* 8 CA4th at 441. See form in §102.114.

6. [§102.99] Orders Relating to Education

In making its disposition orders, the court may limit the control to be exercised over the child by any parent or guardian, including the right to make educational decisions concerning the child. Welf & I C §361(a); Cal Rules of Ct 1499(a). When the court limits the right of the parent or guardian to make educational decisions, the court must appoint a responsible adult to make these decisions until one of the following occurs (Welf & I C §361(a)(1)–(5)):

- The child turns 18 unless he or she chooses not to make these decisions or is deemed incompetent by the court,
- Another responsible adult is appointed for this purpose,
- The court restores the parent's or guardian's right to make educational decisions,
- The court appoints a successor guardian or conservator, or
- The child is placed in long-term foster care.

The court may not appoint anyone to make educational decisions who has a conflict of interest, such as those who are receiving attorney's fees or other compensation for making educational decisions. Welf & I C §361(a).

Limitations on the right of the parent or guardian to make educational decisions must be specifically made in the court order, and Judicial Council form, Order Limiting Parents' Right to Make Educational

Decisions for the Child and Recommendation for Surrogate Parent (JV-535), must be completed and transmitted to the educational agency. See Welf & I C §361(a); Cal Rules of Ct 1456(c)(3).

The court may also direct all reasonable orders to the parents or guardians to ensure the child's regular school attendance and to make reasonable efforts to obtain the services necessary to meet the child's educational needs. Welf & I C §362(d).

The policies underlying the juvenile court's involvement in meeting the child's educational needs are set out in Standards of Judicial Administration 24(g)–(h).

☛ JUDICIAL TIP: The court may use Standards of Judicial Administration 24(h) and Welf & I C §362(a) to join the local educational agency to ensure that the child's educational needs are met.

7. [§102.100] Restraining Orders

At any time after a petition has been filed, and until it is dismissed or dependency is terminated, the court may issue temporary and permanent restraining orders to any person as described in Welf & I C §213.5, and Cal Rules of Ct 1429.1(b), 1429.5. Applications for these orders may be made orally at any scheduled hearing, or in writing submitted on Judicial Council form, Juvenile Dependency Petition (JV-100), accompanied by Judicial Council form, Application and Declaration for Restraining Order (JV-245). The order must be prepared on Judicial Council form Restraining Order—Juvenile (JV-250.) Copies of these orders must be transmitted to local law enforcement agencies. See Welf & I C §213.5(j); Fam C §6380.

The court may issue these orders after notice and a hearing and, once issued, should state the time for the order on its face. Welf & I C §213.5(b), (d) (not to exceed three years). Willful and knowing violations of a restraining order issued under Welf & I C §213.5, §304, or §362.4 are misdemeanors punishable under Pen C §273.65. Pen C §273.65(a). See also Welf & I C §213.5(h) (willful and knowing violation may constitute misdemeanor).

In addition, the court may restrain the parents of a dependent child from threatening physical harm to a social worker assigned to provide services or any member of the social worker's family. Welf & I C §340.5.

☛ JUDICIAL TIP: The court should check to see if there are existing family law restraining orders so that there is no contradiction.

8. [§102.101] Periodic Reports by Social Worker

The court may require the social worker to make periodic reports concerning children who are under the supervision of DSS. Welf & I C §365. The court may also require that DSS visit a child who is under its supervision. Welf & I C §365. See also Welf & I C §366 (status of every child in foster care is to be reviewed periodically as ordered by the court).

9. [§102.102] Miscellaneous Findings

If the court holds a paternity hearing as part of the disposition hearing, it must make a finding of paternity based on presentation of evidence by testimony, declaration, or tests. See Welf & I C §316.2; Cal Rules of Ct 1413. See also discussion of paternity finding in California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.26 (Cal CJER). In addition, at each hearing, after a determination that proper notice has been given, the court must make a finding that notice has been given as required by law and note the finding in the minutes. Cal Rules of Ct 1412(k). For discussion of notification requirements, see §102.26.

☛ JUDICIAL TIP: It is rare that notice is an issue in this determination. Most such hearings are conducted with both the mother and alleged father present and represented, or with genetic test evidence, of which the alleged father clearly had knowledge (because he would have provided a blood or tissue sample). Most judicial officers would not conduct such a hearing based only on the mother's statement or even on a birth certificate. In addition, judges should check with the Family Support Division to determine if a paternity order had already been made and to notify that division when the juvenile court makes such an order. Mandatory Judicial Council forms, Paternity Inquiry—Juvenile (JV-500) and Paternity—Finding and Judgment (JV-501), should be completed and transmitted to the appropriate agency or court.

If the child had previously been living in an out-of-home placement voluntarily or after the detention hearing under Welf & I C §319, the court must also make findings concerning the following under Welf & I C §§366(a)(1), 361(e):

- Necessity for and appropriateness of the placement.
- Extent of DSS compliance with the case plan in making reasonable efforts to return the child home and finalize permanent placement.
- Extent of progress toward alleviating or mitigating causes requiring foster care.

- Whether the child has siblings under the jurisdiction of the court and, if so (Welf & I C §366(a)(1)(D)):
  - — The nature of the sibling relationship and whether to develop and maintain it,
  - — Efforts to place the siblings together and, if appropriate, nature of sibling visits, and
  - — Impact of sibling relationships on placement and permanency planning.
- Continuing need to suspend sibling interaction, if applicable.
- Whether there should be limitations on the parent's or guardian's right to make educational decisions for the child.
- Likely date on which the child may be safely returned home or placed for legal guardianship, adoption, or other permanent placement.

At this hearing, the court must also determine whether the parent or guardian has provided health and educational information to DSS as ordered at the initial hearing. See Welf & I C §16010(e); Cal Rules of Ct 1441(c).

O. Relationship of Juvenile Court to Other Courts

1. [§102.103] Family Law Court

Once a petition has been filed to have a child declared a dependent child of the juvenile court, that court has exclusive jurisdiction over custody issues. Welf & I C §§302(c), 304; Cal Rules of Ct 1429.1(a). Juvenile court orders and proceedings take precedence even when the case has been before the family law court. Therefore, prior litigation of custody issues in family court, resulting in a determination that no abuse had occurred, does not estop the juvenile court from reconsidering those issues. *In re Desiree B.* (1992) 8 CA4th 286, 293, 10 CR2d 254. The precedence of juvenile court over other courts is the one exception to the rule that among courts of concurrent jurisdiction, the court taking jurisdiction first in time has exclusive jurisdiction. *In re Travis C.* (1991) 233 CA3d 492, 500, 284 CR 469. Moreover, subsequent rulings made in another part of the superior court may not invalidate juvenile court orders. *Slone v Inyo County Juvenile Court* (1991) 230 CA3d 263, 268, 282 CR 126 (plaintiffs sought to invalidate juvenile court orders on theory that they violated Indian Child Welfare Act).

For an in-depth discussion of the different functions of the two court systems, see Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, Santa Clara L Rev, p 201 (1987). See also discussion in *In re Chantal S.* (1996) 13 C4th 196, 201–202, 209–211, 51 CR2d 866,

and *Marriage of Seaman & Menjou* (1991) 1 CA4th 1489, 1499, 2 CR2d 690, holding that because of the different emphases and objectives of the two court systems, a family law court may not order one parent to pay the other parent's attorneys' fees under the Family Law Act when those fees were incurred for a dependency proceeding occurring simultaneously with a dissolution action

2. [§102.104] Criminal Court

Formerly, the relationship between criminal court and juvenile court was problematic, with possible conflicts in the criminal court orders for conditions of probation and the juvenile court disposition orders. For example, a criminal court might require no contact with the child (see, *e.g.*, Pen C §136.2(d)) while the juvenile court orders frequent monitored contact as a component of the reunification plan. Juvenile court judicial officers suggest that, when a child or family is involved in the two courts, there be frequent communication between the juvenile and criminal court benches so that conflicts do not occur. Judges in criminal court may choose to add "compliance with all juvenile court orders" as a condition of probation or of release on bail or OR (own recognizance).

Under Pen C §136.2(i), the Judicial Council will be promulgating a protocol for timely coordination of all protective or restraining orders against the same defendant and same named victims. The safety of all parties must be the court's paramount concern in issuing these orders. Pen C §136.2(i)(2). Under the protocol, custody and visitation with respect to the defendant's children may be ordered by a juvenile court. Pen C §136.2(h)(3).

☛ JUDICIAL TIP: Until this protocol is established, judges suggest that the social worker (in juvenile court) and the probation officer (in criminal court) also communicate so that their recommendations do not conflict.

3. [§102.105] Filing Juvenile Court Orders in Family Law Court

Once jurisdiction has been terminated, juvenile court custody and visitation orders must be filed in an existing proceeding for nullity, dissolution, guardianship, or paternity with no filing fee; if no family law proceeding had been filed, the juvenile court order may be used as the sole basis for opening a file. Welf & I C §362.4; Cal Rules of Ct 1457(a)(1). The court must complete Judicial Council forms, Custody Order—Juvenile (JV-200) and Visitation Order—Juvenile (JV-205), for transmission to the appropriate family court. A juvenile court may order that its records and reports be made available to a family law court when

jurisdiction is terminated under Welf & I C §362.4. *In re Michael B.* (1992) 8 CA4th 1698, 1704, 11 CR2d 290. Procedures for preparation and transmission of the order by the clerk, parent, parent's counsel, or county counsel are set out in Cal Rules of Ct 1457(a)(2). The court may order the same procedures to be followed if it orders custody to a parent but does not terminate jurisdiction. Cal Rules of Ct 1457(b). A juvenile court custody and visitation order made at the time the juvenile court terminates jurisdiction under Welf & I C §362.4 is a final judgment that remains in effect after dependency jurisdiction is terminated. Welf & I C §302(d). It may only be changed by the family court based on a finding that there has been a significant change of circumstances since the juvenile court made the order, and that modification of the order is in the child's best interests. Welf & I C §302(d).

☛ JUDICIAL TIP: Judges should consider suggesting criteria that must be met before the custody order is changed.

Because a court may make custody and visitation orders that will be transferred to a family court file and that will remain in effect until changed by the family court when terminating jurisdiction under Welf & I C §§362.4 and 364, the juvenile court should hear evidence regarding those orders when making custody orders that will be transferred. *In re Roger S.* (1992) 4 CA4th 25, 30, 5 CR2d 208, disagreeing with *In re Elaine E.* (1990) 221 CA3d 809, 814, 270 CR 489 (holding that Welf & I C §364 only permits presentation of evidence on whether conditions for continuing supervision exist). Following *Roger S.* is *In re Michael W.* (1997) 54 CA4th 190, 194–196, 62 CR2d 531, holding that the noncustodial parent is entitled to an evidentiary hearing before a dependency court makes its custody and visitation orders, terminates jurisdiction, and transfers the case to the family law court.

☛ JUDICIAL TIP: A juvenile court order made on termination of jurisdiction may be too restrictive if the custodial parent is prevented from removing the child from the state in order to permit visitation with the other parent. A better practice would be to conform with Fam C §3024 and authorize the custodial parent to change the child's residence on notice to the noncustodial parent of the intent to move. *In re Maribel T.* (2002) 96 CA4th 82, 85, 116 CR2d 631.

A juvenile court may make an open-ended counseling order on termination of jurisdiction as a condition of visitation under Welf & I C §362.4, although such an order would not be permissible under the Family Code. *In re Chantal S.* (1996) 13 C4th 196, 203–204, 51 CR2d 866.

☛ JUDICIAL TIP: It may be a good idea for the presiding judge of the juvenile court to work with the family court to develop

procedures for opening files in family court under Welf & I C §362.4.

P. [§102.106] Confidentiality of Juvenile Court Records

Welfare and Institutions Code §827 limits the disclosure of documents filed in juvenile court cases to individuals specified in Welf & I C §827(a), including court personnel, the child, parents, attorneys for the parties, district attorneys and city attorneys, family law judges, commissioners, and mediators assigned to a case involving the dependent child, as well as counsel for the child, and members of child protective agencies, juvenile justice commissions, and multidisciplinary teams. Many courts have adopted local rules, specifying procedures for requesting access to documents.

Under Welf & I C §827(a), the juvenile court has discretion to determine whether members of the press may have access to juvenile court records and, if so, which of them. *In re Keisha T.* (1995) 38 CA4th 220, 238–239, 44 CR2d 220. In order to balance the best interests of the children against the interests of the public, the court must conduct an in camera hearing to determine what, if any, material should be disclosed. 38 CA4th at 239. The factors that the court should consider when determining the extent of disclosure are set out in Cal Rules of Ct 1423(b) (balance interests of child and other parties against interests of public and press). 38 CA4th at 240.

The procedure for determining access to juvenile court records is as follows:

(1) The petitioner applies for disclosure using Judicial Council form JV-570 and showing good cause. See *In re Keisha T., supra,* 38 CA4th at 240; Cal Rules of Ct 1423(c).

(2) Court may grant or deny the petition with no hearing if it determines no further action is required. See Cal Rules of Ct 1423(e).

(3) If the court needs more information, the petitioner must provide reasons for disclosure and a description of the records with some indication of their relevance to the purpose of their proposed use.

(4) Children and other interested parties (see Cal Rules of Ct 1423(d)) are given copies of the petition.

(5) If the court sets a hearing, it must provide notice and opportunity to be heard to all interested parties. *In re Keisha T., supra.*

(6) At the hearing, the court, in determining whether records may be disclosed, must review the records in camera and ensure that all claims of privilege are asserted. See Cal Rules of Ct 1423(e).

(7) The court makes appropriate orders concerning the portion of the records to be disclosed, specifying information to be disclosed (partial disclosure may be appropriate), protective orders, and the procedure for

access. Cal Rules of Ct 1423(e); *In re Keisha T., supra,* 38 CA4th at 240–241.

If the in camera hearing is to be conducted by a judge pro tem it must be on stipulation of the parties. 38 CA4th at 241.

Q. Setting Further Hearings

1. [§102.107] Detention Pending Execution of Disposition Order

When a child is detained in temporary care pending execution of the placement order, the court must periodically review the case to determine if the delay is reasonable. Welf & I C §367(b). The court must hold these reviews at least every 15 days and, at each hearing, the court must ask DSS what action it has taken to carry out the disposition order, the reasons for the delay, and the effect of the delay on the child. The reviews need not be appearance hearings. Welf & I C §367(b); Cal Rules of Ct 1456(i).

2. [§102.108] Selection and Implementation (.26) Hearings

If the court has not ordered reunification services because of the application of Welf & I C §361.5(b)(2)–(15) or §361.5(e)(1), it must consider conducting a selection and implementation hearing within 120 days from the disposition hearing, unless the whereabouts of the other parent are unknown or the other parent is being provided reunification services under Welf & I C §361.5(a). Welf & I C §361.5(f). Under Welf & I C §361.5(b)(10) and (11), prior termination of parental rights of an alleged or biological father of a sibling or half-sibling may serve as the basis for denying reunification services regarding another child, even if he is the presumed father of the child who is the subject of the newest petition. *Francisco G. v. Superior Court* (2001) 91 CA4th 586, 599, 110 CR2d 679.

See discussion in California Judges Benchguide 104: *Juvenile Dependency Selection and Implementation Hearings* §104.10 (Cal CJER). When ordering that such a hearing be held, the court must direct DSS to prepare an assessment, which will include:

- Current search efforts for the missing parent or parents. Welf & I C §361.5(g)(1).
- Review of the nature and numbers of contacts between parent and child during placement, and of the child's contact with extended family members, including siblings. Welf & I C §361.5(g)(2).
- Evaluation of the child's mental, emotional, developmental, medical, and scholastic status. Welf & I C §361.5(g)(3).
- Preliminary assessment of eligibility of prospective adoptive parent or guardian. Welf & I C §361.5(g)(4).

- Child's relationship with prospective adoptive parent or guardian, motivation for seeking adoption or guardianship, and a statement from the child (unless the child's age or condition precludes it) concerning the placement. Welf & I C §361.5(g)(5).
- An analysis of the likelihood that the child will be adopted if parental rights are terminated. Welf & I C §361.5(g)(6).

The court may continue to permit the parent to visit the child once it has set a selection and implementation hearing under Welf & I C §361.5(f), unless it finds that visitation would be detrimental to the child. Welf & I C §361.5(f).

If the court sets a .26 hearing, it must orally advise all parties who are present, and must advise those who are not present by first class mail, that if the party wishes to preserve the right to appeal the order, he or she must first seek an extraordinary writ using the proper Judicial Council forms. Cal Rules of Ct 1435(e), 1436.5(d). The forms must be available in the courtroom. Cal Rules of Ct 1435(e), 1436.5(d). The procedures are set out in Rule 1436.5(e)–(j).

If a parent is homeless or otherwise is not likely to have a permanent address, the court could comply with Welf & I C §316.1 by having the parent designate a permanent mailing address and advising the parent that the address will be used for notice purposes. See *In re Rashad B.* (1999) 76 CA4th 442, 450, 90 CR2d 462. In such an instance, the requirement to advise the parent of the need to seek an extraordinary writ can be satisfied by mailing the notice to the designated address. See 76 CA4th at 447–450. The court could also comply with notice requirements by designating a permanent mailing address for the parent, such as the address of the social worker or parent's counsel, and then requiring the parent to maintain close contact with that person. See 76 CA4th at 450.

☛ JUDICIAL TIP: Compliance with Welf & I C §316.1 is particularly important when the parent or guardian is homeless.

The court may not set a .26 hearing at the disposition hearing to consider terminating the rights of only one parent unless that parent is the sole surviving parent or the other parent's parental rights have previously been terminated. Cal Rules of Ct 1459.

3. [§102.109] Review Hearings

Unless the court goes directly to the .26 hearing at disposition (see §102.108), the court must set a review hearing for a specific future date not to exceed six months from the disposition hearing if the child remains with a parent or guardian. Welf & I C §§364(a), 366(a). If the child has been removed, the review hearing must be set within six months of the date the child is deemed to have entered foster care. See *In re Christina A.*

(2001) 91 CA4th 1153, 1163–1164, 111 CR2d 310; Cal Rules of Ct 1456(h), 1460(a).

☛ JUDICIAL TIPS:

- Some judicial officers advise setting the 12-month hearing at this time to ensure that everyone is on notice and that deadlines are met. If the 12-month date had not been placed prominently on the front of the file at the detention hearing, it should be placed there at this time.
- It may be advisable to set an informal 90-day "progress" review hearing (90 days after the disposition hearing) so that the judge may determine that services are indeed available to the parents. Judges most often take this extra step in the "under three" cases.

The court must advise all persons who are present of the date of the future hearing and of their rights to be present and represented by counsel. Welf & I C §§364(a), 366.21(a).

R. [§102.110] Appeals and Reviews

Parents generally have a right to challenge dispositional findings and orders on appeal. See Welf & I C §395; Cal Rules of Ct 1435(b); *In re Meranda P.* (1997) 56 CA4th 1143, 1150, 65 CR2d 913 (disposition order is the first appealable judgment in a dependency proceeding); see also *In re Candida S.* (1992) 7 CA4th 1240, 1249, 9 CR2d 521 (no appeal from jurisdictional finding that child is described by Welf & I C §300). De facto parents are entitled to appeal a judgment denying them the right to participate in the proceedings (*In re Rachael C.* (1991) 235 CA3d 1445, 1454, 1 CR2d 473, disapproved on other grounds in 6 C4th at 80), but not from an order denying them visitation or reunification services (*Clifford S. v Superior Court* (1995) 38 CA4th 747, 752, 45 CR2d 333 (no standing)).

If reunification services are denied to one parent but ordered for the other parent, the parent who was denied services may appeal that decision. See, *e.g., In re Nada R.* (2001) 89 CA4th 1166, 1178–1179, 108 CR2d 493. In such a case, the court cannot set a .26 hearing and, therefore, the decision is not subject to challenge by a Cal Rules of Ct 39.1B writ. 89 CA4th at 1178–1179; *Wanda B. v. Superior Court* (1996) 41 CA4th 1391, 1395, 49 CR2d 175. Although disposition orders not related to referral orders may be appealable, the preferred method of challenging orders denying reunification services or providing for reunification services that are perceived to be inadequate is application for a traditional extraordinary writ because writs are heard in an expedited fashion. *In re Brittany S.* (1993) 17 CA4th 1399, 1406, 22 CR2d 50. The parents may also indirectly challenge an order denying reunification services or providing for inadequate services by filing a petition under Welf & I C §388

showing changed circumstances. See *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 544. A parent may not, however, file an appeal from an order denying reunification services and also file a writ under Cal Rules of Ct 39.1B. *Joe B. v Superior Court* (2002) 99 CA4th 23, 120 CR2d 722.

Under the "disentitlement" doctrine, the appellate court may dismiss an appeal by a parent who has intentionally violated court orders, frustrating the purpose of the dependency law. *In re Kamelia S.* (2000) 82 CA4th 1224, 1229, 98 CR2d 816.

1. [§102.111] From an Order Setting a .26 Hearing

An order making a referral to a .26 hearing is only reviewable by writ. Welf & I C §366.26(*l*); Cal Rules of Ct 1436.5(b)–(c); see Cal Rules of Ct 39.1B. Orders made contemporaneous with referral orders and which are "integrally related" to the issues underlying the setting of the hearing are not appealable; they may only be challenged by writ. *In re Charmice G.* (1998) 66 CA4th 659, 671, 78 CR2d 212. The court of appeal has extended this holding to all orders entered at a hearing at which a .26 hearing is set, including an order based on a Welf & I C §388 motion. *In re Anthony B.* (1999) 72 CA4th 1017, 1024, 85 CR2d 594. When services are denied to both parents at the disposition hearing, all challenges to the dispositional judgment and underlying jurisdictional findings must be made by writ. *Anthony D. v Superior Court* (1998) 63 CA4th 149, 156, 73 CR2d 479. One exception might be when services are denied to both parents and the case referred to permanency planning, but the only issue the parent seeks to challenge is the visitation order. *Anthony D. v Superior Court, supra.* Nevertheless, following the *Anthony B.* decision, even this may need to be raised by way of a petition for extraordinary writ.

The timely filing of a writ is a prerequisite for an appeal when a .26 hearing is set, as are the requirements that (1) the writ petition must substantively address the issues to be challenged on appeal, and (2) the appellate court must summarily deny the petition or otherwise fail to decide the case on the merits. Welf & I C §366.26(*l*); Cal Rules of Ct 1436.5(b)–(c). If the court has ordered that a .26 hearing be held under Welf & I C §361.5(f), that order may be reviewed on appeal only if the procedures in Cal Rules of Ct 39.1B and 1436.5 (procedures for filing writ) have been met. Cal Rules of Ct 1435(b); see also Welf & I C §366.26(*l*). Parents must consent to the filing of a writ petition; consent may not be inferred from the parent's failure to appear for a crucial hearing. *Guillermo G. v Superior Court* (1995) 33 CA4th 1168, 1172, 39 CR2d 748. In addition, parents must sign the petition. See *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 787, 54 CR2d 25. See also §102.112 for the judge's obligation to notify parties of the procedures for seeking an extraordinary writ.

☛ JUDICIAL TIP: When the attorney is on the staff of a governmental agency, it is the *office*, not the individual attorney, that is being appointed.

[*If parents waive counsel*]

This is a serious matter. The court might determine that [*name of child*] will need to be placed outside your home and that, eventually, your parental rights may be terminated. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

[*When applicable, add*]

The court now finds that the parents have intelligently waived their right to counsel at this hearing.

[*If child is represented by counsel and there is no motion for separate counsel, go to (4) and/or (5).*]

(3) *Attorney for Child*

The court has read and considered the documentary material submitted by the Department of Social Services for the limited purpose of assessing the benefit, if any, of appointing counsel for the child. Would anyone like to be heard on this issue?

[*After hearing evidence, if any, on issue of child's need for attorney*]

The court finds, based on the facts of this case, that there is a need to appoint counsel for the child at this time. The court appoints [*name of attorney*] as the child's CAPTA guardian ad litem to represent the child.

[*Or*]

The court finds, based on the facts of this case, that there is no identifiable benefit to the child that would require appointment of counsel at this time because [*give reason*].

☛ JUDICIAL TIP: It is advisable to ask counsel for DSS if there are any potential conflicts of interest among the children (if multiple siblings are involved) and, if so, to appoint separate counsel for the siblings.

(5) *De Facto Parent*

Mr. and Ms. [*name of parents*], the court has received your request to be granted "de facto parent" status. With this status, you will be entitled

to be present and to present evidence at this hearing. A de facto parent is one who cares deeply for the child and who has assumed a parental role on a day-to-day basis for a substantial time. A de facto parent may also have information about the child that other participants in the juvenile court process might not have.

[*Testimony is presented on this issue with respect to each person claiming de facto status either at this time or at some later time. See form in §102.114 for findings of de facto status.*]

(6) *Explanation of Procedure/Notification of Consequences*

I am going to explain to you what happens at these juvenile court proceedings. These proceedings are divided into several separate hearings. You have already participated in a detention hearing and a jurisdiction hearing. At the jurisdiction hearing [*which just took place/which took place on* [*date*]], the court found that the facts set out in the petition filed by the Department of Social Services were true. This hearing will determine whether your child should be declared a dependent child of the court, that is, whether the court should take jurisdiction of your child's case in order to exercise supervision over the child. Also to be determined at this hearing is whether your child should [*remain in/be returned to*] your custody or should be removed from your custody until certain conditions are met and, if so, what services should be provided to help you meet these conditions.

If [*name of child*] cannot be returned home at the end of a ____-month period, your parental rights may be terminated. There will be further hearings before this happens.

☛ JUDICIAL TIP: Very often, the attorney for the parent or guardian will state that he or she has explained these matters to the parents and will go on to explain the position of the parents or guardians. Many judges train attorneys who appear in their courts to take this responsibility.

[*If Welf & I C §361.5(b) is applicable*]

By now, [*the social worker/your attorney*] should have informed you that the Department of Social Services is claiming that your child should be removed from your custody and that services that could help your family reunite (reunification services) should not be offered because of the seriousness of the [*abuse/neglect*] and the unlikelihood that you could become a fit parent. If it is found that it would not be worthwhile to offer you reunification services, I will set a hearing for 120 days from now to select and implement a permanent plan for your child. Your parental rights may be terminated at that hearing.

(7) *Notice of Hearing*

(a) *One Parent Not Present*

[*If one parent is not present, make sure that the absent parent received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear.

(b) *Both Parents Present*

The court finds that the [*mother/father/guardian(s)*], the child, and all counsel were notified of this hearing and served with the petition as required by law.

(c) *Notice Attempted*

The court finds that the following attempts were made to locate the [*mother/father/guardian(s)*]: [*List attempts*]. The court has reviewed the declaration of search and finds that the efforts made to locate and serve the [*parent(s)/guardian(s)*] were reasonable.

(d) *Insufficient Attempts at Notice*

The court finds that the Department has not used due diligence in attempting to locate the [*parent(s)/guardian(s)*]. The case is therefore continued for one day. The Department shall take the following steps to locate the [*parent(s)/guardian(s)*]: [*List steps, e.g., check with Department of Corrections; check with child's school*].

Note: Only rarely should a judge dictate to DSS specific search efforts that must be undertaken.

(8) *Waiver of Advisement of Rights*

[*To each participant*]

Did your attorney explain your rights to you? Do you waive advisement of rights?

[*If the answer to both is yes, go to (10).*]

(9) *Advisement of Rights*

You have certain rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing, (2) the right to cross-examine, which means ask questions of, any witness who may testify at this hearing, (3) the right to present to the court any witnesses or other evidence you may desire, and (4) the right to a hearing on the issues raised in the petition. You have the right to assert the privilege against self-incrimination [*but anything you say in this or in any*

disposition. The court must allow cross-examination of any witness who may testify.]

Now is the time for you to present any evidence or make any statement you may wish to make before the court decides on a placement for [*name of child*].

[*To persons seeking fifth amendment protection from testifying (see §102.27)*]

I am going to grant the [*joint*] request of the Department of Social Services [*and the district attorney*] for immunity and will order you to testify despite your claim of self-incrimination. However, anything you say here may not be used against you in any criminal court or juvenile court proceeding arising out of the same conduct we are discussing here today.

[*If there is no joint request, the judge must hear argument on why immunity should not be granted. Cal Rules of Ct 1421(d).*]

(12) *Introduction of Court Process to Child Witness*

Hello. I am Judge [*name*]. I am in charge of this courtroom, My job is to make sure that everything is fair and that everyone else here does his or her job correctly. This is Bailiff [*name*]. [*He/She*] is here to make sure that no one gets hurt. [*Mr./Ms.*] [*name*] is the court reporter. [*He/She*] will write down everything that people say so that if anyone later forgets what was said, we can look it up. It is important to speak loudly and clearly so that [*Mr./Ms.*] [*name*], the court reporter, can hear you.

Mr. [*name*] and Ms. [*name*] are the lawyers. They will be asking you some questions. Their job is to help you tell what you saw and heard so that we can find out the truth.

It is very important to tell the truth, because if I do not understand the whole truth, I may not be able to make the plan that is best for everyone.

You will be answering questions this afternoon. We will stop often so that everyone may have a rest. If you have any problems before the next break, let [*name of support person/name of attorney/me*] know.

Also, you may not understand all the questions. We are used to talking to other adults and not to children. When you don't understand a question, raise your hand and let me know that you don't understand. If you don't know the answer to a question, just say "I don't know" or "I don't remember."

(13) *Assessing Child's Competency*

Note: Judges and child development experts suggest assessing children's communication skills and other aspects of competency by determining whether the child's speech is intelligible and whether he or she can follow the discussion. Here are some suggested conversational openers designed to permit this determination.

Here we are in the courtroom. What do you see here?

What did you do this morning?

[*For school-age children*]

Tell me about your school.

What do you do when you first get to school?

What do you do after lunch?

—Tell me more about [*certain activities*].

What is your favorite part of the day?

—Tell me more about it.

What is your favorite television program?

—Tell me about it.

—Who is in it?

—What happens in the program?

√ (14) *Advisement on Reunification* [1]

At this time I am required to advise the parents of what happens if you fail to meet your reunification requirements. We review your progress on your reunification requirements in six months. If you have failed to meet your reunification requirements at that time, we review your progress on meeting your reunification requirements again in another six months. If you have still failed to meet your reunification requirements, the court may give you an additional six months or terminate all further reunification services. In no event can the court give you more than 18 months from the date of original detention to meet your reunification requirements. If reunification services are terminated, the court will ask the Department of Social Services to propose a long-term plan for the child. That plan can be long-term foster care, guardianship, or adoption. If the department recommends adoption, there is a possibility that your

parental rights will be terminated. I urge you to stay in touch with your social worker and your attorney, and to put forth every effort to meet your reunification requirements.

(15) *Advice to Child, Parent, and Guardian Concerning Right To Appeal*

You have the right to appeal the dispositional order. You have 60 days from today to file an appeal to the Court of Appeal and may use Judicial Council form JV-800, which is available here in the courtroom. If you do not have an attorney and cannot afford one, one will be appointed for your appeal. If you have appointed counsel, [*he/she*] will represent you for appeal. You will need to include a transcript of these hearings. If you are indigent, one will be provided to you free of charge.

Do you understand your appeal rights? Do you have any questions?

(16) *Advice to Attorneys, Child, Parent, and Guardian Concerning Right To Appeal the Setting of .26 Hearing*

To preserve your right to appeal from the order setting a .26 hearing, you must first seek an extraordinary writ using Judicial Council forms JV-820 and JV-825, which are available here in the courtroom. The writ petition must be filed with the Court of Appeal within seven days of the date of the order setting a .26 hearing. Under California Rules of Court 1436.5(d)–(h), you or your attorney must file the petition, after consulting experienced writ attorneys if necessary.

(17) *Final Question*

Do you have any questions about the court's order(s) or what is going to take place in the future?

B. [§102.114] Script: Findings and Orders

(1) *Introduction*

The court has read and considered [*name the documents, e.g., the sustained petition, the social worker's report of* [*date*], *and attached documents*].

[*Add, if applicable*]

The court has also considered the testimony of the witnesses and their demeanor on the stand, as well as the arguments of counsel.

Note: In the order of disposition, the court must state that it has read and considered the social study report. Welf & I C §358(b); Cal Rules of Ct 1455(b).

(4) *In-Home Placement of Child*

The court does not find by clear and convincing evidence that the child must be removed from the custody of [*his/her*] custodial parent. Therefore, the child is ordered to [*remain/be placed*] in the home with [*name of custodial parent*].

[*If limitations are to be placed on parents' control of child*]

The following limitations are to be placed on the parents' exercise of control of [*name of child*]. [*List limitations on medical, educational, disciplinary, or other decisions that are necessary for the child's protection (see Welf & I C §361(a); Cal Rules of Ct 1456).*]

Note: See discussion in §102.44. Limitations on the right of the parent to make educational decisions must be explicitly set out in the order whether the child remains at home or is removed from the home. Welf & I C §361(a); Cal Rules of Ct 1456(c)(3); see §102.99.

(5) *Out-of-Home Placement of Child*

The court finds clear and convincing evidence that the child must be removed from the custody of [*name(s)*] and orders that the child live with [*name(s)*]. The reason(s) for the removal [*is/are*]: [*Give reason(s).*]

[*Leaving/Returning*] the child home would cause a substantial danger to the child's physical health and there are no reasonable means by which the child's health can be protected without removal.

[*Or*]

The parent or guardian is unwilling to assume physical custody of the child and has been notified that the child might be declared permanently free of parental custody and control if he or she remains outside the home for the time specified in Welfare and Institutions Code section 366.26.

[*Or*]

The child is suffering severe emotional damage from [*specify anxiety, depression, aggressive behavior, withdrawal*], and the child's emotional health requires removal.

[*Or*]

The child or a sibling has been sexually abused, or is at substantial risk of abuse, by the parent, guardian, or member of the household, and removal is the only means of protecting the child.

[*Or*]

The child has been left without provision for support.

[*Or*]

An incarcerated parent cannot arrange for the child's care.

[*Or*]

An adult custodian with whom the child was left is unable or unwilling to care for the child and the parent cannot be located.

[*Or*]

[*State other reasons (see Welf & I C §361(c); Cal Rules of Ct 1456(d); see also Welf & I C §361(c); Cal Rules of Ct 1456(g)(1) (the court must state facts on which the removal is based)).*]

(a) *Placement With Relative (see Welf & I C §361.2)*:

The court has considered the following factors in making the placement: [*List applicable factors set out in Welf & I C §361.3(a). See* §102.53].

(b) *Placement With Nonrelative*

- The approved home of a nonrelative extended family member (see Welf & I C §362.7) (Welf & I C §361.2(e)(3)).
- A foster home that had been a previous placement if in the child's best interests (Welf & I C §361.2(e)(4)).
- A suitable licensed community care facility (Welf & I C §361.2(e)(5), (8)).
- A foster family agency for placement in a foster family home or certified family home (Welf & I C §361.2(e)(6)).
- A home or facility in compliance with the Indian Child Welfare Act (ICWA) (Welf & I C §361.2(e)(7)).

The court denies placement with a relative for the following reasons: [*List reasons*].

Note: The court must state reasons on the record why placement with a relative was denied. Welf & I C §361.3(e); see §102.52.

(c) *Voluntary or Temporary Out-of-Home Placement*

The child [*should/should not*] continue to live with [*name*] [*an out-of-home placement in which the child was placed voluntarily or after the*

detention hearing] because [*discuss appropriateness of the placement, extent of compliance with the case plan, and other factors set out in Welf & I C §366(a) (see Welf & I C §361(d))*].

(d) *Guardianship*

The court has read and considered the assessment and orders that letters of guardianship issue. [*Name*] is to be appointed guardian. The court finds that [*state findings and the factual basis for them, e.g., prospective guardian has had a close relationship with the child since birth, neither parent seeks reunification with the child, the child's medical status would weigh against adoptability (see Welf & I C §360(a); Cal Rules of Ct 1456(b); discussion in* §§102.57–102.59)].

[*To the parents*]

Once the guardianship is established, there will be no reunification services.

(6) *Siblings (Welf & I C §§362.1, 361.2(i))*

The court finds that the child [*does/does not*] have siblings under the court's jurisdiction.

The nature of the relationship between the child and siblings is [*describe relationship*].

Developing or maintaining the sibling relationships [*is/is not*] appropriate because [*state reasons*].

The siblings are not placed together because [*state reasons*].

Efforts being made to place the siblings together are [*describe*].

Efforts to place the siblings together are not appropriate because [*state reasons*].

(7) *Reasonable Efforts*

The court finds [*by a preponderance of the evidence*] that reasonable efforts were made to prevent or eliminate the need for removing the child from the home. [*State facts.*] This finding is based on the [*name the document, such as Declaration of Efforts*], of [*date*].

Note: If the child is an Indian child, active efforts must be made. See 25 USC §1912(d).

[*Or*]

The court finds that reasonable efforts have not been made.

(8) *Reunification*

(If there is a signed case plan)

- Did you review this case plan with your attorney (with the assistance of the interpreter if applicable)?
- Did you understand it?
- Did you sign it?

The court orders the Department of Social Services to provide the following reunification services for the following people: [*List the services that are offered and the people who are to participate in them, e.g., parents to visit the child once a week, father to participate in psychological evaluation and counseling, grandmother to attend parent support group meetings, etc. See discussion of case-limited and case-specific plans in* §102.64.]

The court finds by clear and convincing evidence that reunification services should be denied to the [*parent/guardian*] because [*list reasons, e.g., that the child has suffered severe sexual or physical abuse by the parent (see Welf & I C §361.5(b))*].

Note: If a parent's mental illness is the reason for the denial of services, the judge should make the sequential series of findings set out in *In re Rebecca H.* (1991) 227 CA3d 825, 843, 278 CR 185 (see §102.80).

☛ JUDICIAL TIP: Clear and convincing evidence is only required for a denial of reunification services under Welf & I C §361.5(b). However, many judges use this more stringent burden of proof when denying reunification services on any ground.

[*If child was adjudicated a dependent based on severe sexual abuse or physical harm*]

The court finds that it would not benefit the child and therefore orders no reunification services, based on the following findings: [*State findings based on factors in Welf & I C §361.5(h); Cal Rules of Ct 1456(f)(10)*].

Note: When services are denied because of severe sexual or physical abuse, the court must read into the record the basis for the finding of the abuse and the factual findings that are used to determine that reunification services would not benefit the child. Welf & I C §361.5(i).

[*If reunification services are ordered despite finding of presence of circumstance listed in Welf & I C §361.5(b)*]

Despite the circumstance that [*state circumstance as outlined in Welf & I C §361.5(b), e.g., parent has been convicted of causing death of*

another child through abuse or neglect], the court finds by a preponderance of the evidence that reunification services are necessary [*to prevent reabuse/to prevent further neglect/because of the child's positive attachment to the parent*].

[*If the parent is incarcerated or institutionalized*]

The court orders the following reunification services for [*name of parent*]: [*List services, e.g., maintenance of telephone contact, transportation, visitation, and services to extended family members who are caring for the child (see Welf & I C §361.5(e))*].

[*Or*]

The court finds by clear and convincing evidence that reunification services with [*name of parent*], [*an incarcerated parent,*] would be detrimental to the child because [*list reasons*].

Note: In giving reasons, the court must consider such factors as the age of the child, the degree of parent-child bonding, the length of the sentence, the severity of crime or illness, detriment if services are not offered, and the wishes of the child, if the child is ten years or older. Welf & I C §361.5(e).

(9) *Other Findings*

The court also finds that:

[*Add, if applicable*]

Notice has been given as required by law.

[*Name of parent/guardian*] has knowingly waived the following rights to:

- Trial on the issues.
- Assert the privilege against self-incrimination.
- Confront and cross-examine adverse witnesses.
- Use the court's process to compel attendance of witnesses.

Good cause is found for the issuance of restraining orders against [*name*] which are necessary because [*state reasons*].

Note: Restraining orders under Welf & I C §340.5 (threatening a social worker) and Fam C §6320 (order enjoining family member from harassment, etc.) must be based on a showing of good cause.

The court finds that [*name of person on behalf of whom the dwelling exclusion order is granted*] has a right to possession of the premises under color of law because [*state reasons*]. The court also finds that [*name of person to be excluded*] has [*assaulted/threatened to assault*] [*name of child/name of child's caretaker*] and that physical harm would result to [*name of child/name of caretaker*] if this restraining order is not granted.

Note: See Fam C §6321.

(10) *Visitation*

[*Name of parent/guardian/sibling/other*] may visit [*name of child*] [*give frequency, e.g., regularly, once a week, as frequently as possible as determined by the Department of Social Services*] at [*give location, e.g., the grandmother's house, a place convenient to the parent by public transportation to be determined by the Department of Social Services*].

[*Or*]

[*Name of parent/guardian/sibling/other*] may have full, unmonitored visitation with [*name of child*] at [*a place of* [*his/her*] *choosing/a place chosen by mutual agreement between the child and* [*name*]].

Note: Under Welf & I C §16501.1(f)(8), a case plan for a child for whom out-of-home services are ordered must include a recommendation regarding unsupervised sibling visitation. Visitation may be ordered even if the court has established a legal guardianship. Cal Rules of Ct 1456(b)(2)(D).

[*Or*]

Visitation with [*name of parent/guardian/other*] is to be monitored by a social worker and limited to [*specify frequency*] at [*place*].

☛ JUDICIAL TIP: If the court determines that visitation is likely to be harmful, it may require the order setting limited, monitored visitation to stand until a later court hearing. However, in an appropriate case, the court may modify the restricted visitation order with the statement that visitation may be increased and supervision eliminated as DSS finds appropriate.

[*Or*]

Sibling interaction is to be suspended.

(11) *Other Orders*

[*Add, if applicable*]

The court orders that [*name of child/parent/guardian/other*] receive an evaluation *for* [*mental health/addiction*] treatment. The case is continued until the court receives a report on the [*mental health/substance abuse*] regarding [*name*].

Note: For discussion of evaluation and treatment for mental disorders, see Welf & I C §§357, 370, 6550–6552, and of evaluation and treatment for addiction, see Welf & I C §359.

The court orders the Department of Social Services to make [*monthly/other* [*specify*]] reports on the status of [*name of child*] in [*foster care/*[*specify other out-of-home placement*] *(see Welf & I C §365)*].

The court hereby issues an order [*restraining the conduct of* [*name*] *in the following respects:* [[*specify*]*/excluding* [*name*] *from the residence of* [*name*]*/enjoining* [*name*] *from threatening* [*name of social worker assigned to the case/member(s) of social worker's family*]]. This restraining order is to be in effect for [*specify length of time*].

Note: See Welf & I C §340.5; Fam C §§6320, 6321, 6345 (duration may be a maximum of three years); Cal Rules of Ct 1429.5(h).

(12) *Review Hearing*

The first review hearing is scheduled for [*date*], at _____ __.m. in Department _____. All persons who are present today [*i.e., parent, guardian, etc.*] have the right to be present and to be represented by counsel.

Note: When a child is detained pending execution of the placement order, the court must periodically review the case (at least every 15 days) to determine if the delay was reasonable. Welf & I C §367(b); Cal Rules of Ct 1456(i); see §102.107. The standard review hearing must be set for a date not to exceed six months from the disposition hearing or the date the child entered foster care if applicable. Welf & I C §364(a), 366(a); Cal Rules of Ct 1456(h), 1460(a).

[*Or*]

A selection and implementation hearing is scheduled for [*date*], at _____ __.m. in Department _____. All persons who are present today [*e.g., parent, guardian*] have the right to be present and to be represented by counsel. The Department of Social Services shall prepare an assessment, including an analysis of the following factors: [*Set out the relevant factors from Welf & I C §361.5(g)*].

Note: If the court has not ordered reunification services because of the application of Welf & I C §361.5(b)(2)–(6) or §361.5(e)(1), it must conduct a selection and implementation hearing within 120 days of the disposition hearing, unless the other parent is provided with reunification services under Welf & I C §361.5(a). Welf & I C §361.5(f).

C. [§102.115] Written Form: Standing Order—Disclosure of Testimony and Psychological Evaluations

IN THE SUPERIOR COURT
JUVENILE DIVISION

STANDING ORDER

DISCLOSURE OF TESTIMONY AND
PSYCHOLOGICAL EVALUATIONS

ORDER

IT IS HEREBY ORDERED that, absent a waiver by a parent, neither the testimony of a parent nor the report from a psychological evaluation, provided in the context of a juvenile dependency proceeding, shall be discoverable by the district attorney. Welf & I C §355.1; *In re Jessica B.* (1989) 207 CA3d 504, 517–521, 254 CR 883.

In the event that a parent testifies in a criminal proceeding, or the district attorney anticipates such testimony, the district attorney can petition the Supervising Judge of the Juvenile Court to provide any relevant transcripts and psychological reports, under seal, to the Judge presiding over the criminal matter.

Dated: _____

_____
Judge of the Superior Court

D. [§102.116] Written Form: Order Approving Child's Application for Authorization of Inpatient Mental Health Services

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA JUVENILE DIVISION

In the Matter of **No. _____**

ORDER APPROVING CHILD'S APPLICATION FOR AUTHORIZATION OF INPATIENT MENTAL HEALTH SERVICE

FOR GOOD CAUSE SHOWN, and after consideration of the attached Declarations, the application for authorization of inpatient mental health services pursuant to Welfare and Institutions Code §6552 is hereby approved.

Accordingly, it is ordered that:

Should this child desire release from the hospital, the staff shall notify the child's attorney, Guardian Ad Litem (if appointed), and the child's social worker, and the social worker shall notify the court and the parents. If there are no other psychiatric holds on the child, the social worker shall return the child to [*e.g., shelter care*] within one working day if the child is housed locally or two working days if [*he/she*] is hospitalized outside [*name of county*].

Should the hospital initiate an involuntary hold after this child requests release, the hospital staff must immediately contact the child's attorney, Guardian Ad Litem (if appointed), and the child's social worker.

The child has a right to refuse medication.

[*Optional*]

This matter is continued for a progress report to [*date*], at _____ ___.m. in Department _____ of the above-captioned court.

Dated:_____

_____
Judge of the Superior Court

Exception (proved by petitioner by clear and convincing evidence) Welf & I C §361.5(b)(1)–(15)	***Order***
(9) The child was abandoned and thereby placed in serious danger, or child has been surrendered under Health & S C §1225.7.	Same as above.
(10) The court-ordered termination of reunification services for a sibling or half-sibling, AND the court finds that the [same] parent has not made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling.	Same as above.
(11) Parental rights of the same parent have been terminated AND the court finds that the [same] parent has not made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling.	Same as above.
(12) The parent has been convicted of a violent felony as described in Pen C §667.5(c).	Same as above.
(13) The parent has a history of extensive, abusive and chronic use" of alcohol and other drugs and (a) has resisted prior court-ordered treatment for this problem during a 3-year period immediately prior to the filing of the petition that brought the child to the court's attention, OR (b) has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Welf & I C §358.1 on at least 2 prior occasions, even though the programs identified were available and accessible.	Same as above.
(14) Parent has advised the court that he or she is not interested in family maintenance or reunification services or having child returned or placed in the parent's custody and does not wish services. Must have an attorney be advised by the court of rights and consequences, including	Same as above.

E. [§102.117] Written Form: Declaration of Reasonable Efforts

DEPARTMENT OF SOCIAL SERVICES AFFIDAVIT/REPORT OF REASONABLE EFFORTS ACTIVITIES

Instructions: Reportable activities include (a) parent-child visits, (b) face-to-face contacts between parent or child and social worker, (c) referrals to community resources, (d) telephone contacts, (e) contacts with other agencies.

I DECLARE THAT I AM THE SOCIAL WORKER ASSIGNED TO THIS CASE. I HAVE MADE THE FOLLOWING EFFORTS TO PREVENT OR ELIMINATE THE NEED FOR REMOVAL FROM THE HOME AND/OR TO RETURN THE CHILD TO THE HOME.

A. Case Name	Court No.	Case Name	Court No.
_____	_____	_____	_____
_____	_____	_____	_____

B. Activity Log

Date	Activity
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

C. DECLARATION: I declare under penalty of perjury that foregoing is true and correct. Executed at _____, California, on the _____ day of _____, 20____ , by _____, Social Worker.

V. [§102.118] REFERENCES

Seiser & Kumli, California Juvenile Courts: Practice and Procedure (Matthew Bender 2002).

Appendix: Summary of Statutory Exceptions to Reunification Services Orders—1/1/03

Prepared by Hon. Patricia Bresee (Ret.)

Welf & I C §361.5; Cal Rules of Ct 1456

Exception (proved by petitioner by clear and convincing evidence) Welf & I C §361.5(b)(1)–(15)	***Order***
(1) Whereabouts of parent or guardian unknown.	No services; set for 6-month review. Welf & I C §366(a).
(2) Parent mentally disabled (2 experts state parent incapable of caring for child).	*Services UNLESS* "competent evidence by mental health professionals" establishes that services are unlikely to enable the parent to care for the child within 12 months. Welf & I C §361.5(c).
(3) Child or sibling previously removed due to physical or sexual abuse; returned and now being removed again for physical or sexual abuse.	*No services UNLESS* by *clear and convincing evidence* that reunification is in the best interest of the child (burden on parent if court finds basis not to offer services). Welf & I C §361.5(c).
(4) Parent caused the death of another child through abuse or neglect.	Same as above.
(5) Petition based on Welf & I C §300(e) was sustained.	*No services UNLESS* parent proves by preponderance and based on "competent testimony that services are likely to prevent re-abuse, or that it would be detrimental to the child to not order services." Welf & I C §361.5(c).
(6) Severe sexual or physical abuse to the child, a sibling, or half-sibling, by the same parent, and court finds that reunification services would not benefit the child (abuse as defined in Welf & I C §361.5(b)(6)).	*No services UNLESS* parent proves by clear and convincing evidence that reunification is in the best interest of the child. Welf & I C §361.5(h) sets out factors the court is to consider. Welf & I C §361.5(c).
(7) The parent is not receiving services for a sibling or half-sibling because of subsections 3, 5, or 6, above.	Same as above. Welf & I C §361.5(h) sets out factors court is to consider.
(8) The child was conceived as a result of a violation of Pen C §288 or 288.5.	*No services UNLESS* parent proves by clear and convincing evidence that reunification is in the best interest of the child. Welf & I C §361.5(c).

Exception (proved by petitioner by clear and convincing evidence) Welf & I C §361.5(b)(1)–(15)	***Order***
possible termination of rights. Court must state its finding that	
(15) On at least one occasion, parent has abducted the child or sibling or half-sibling from placement and refused to reveal whereabouts, to return custody to placement or to social worker.	Same as above.

Parent or Guardian Incarcerated or Institutionalized (Welf & I C §361.5(e)(1)):

The court must order services unless it determines by clear and convincing evidence that services would be detrimental to the child.

In determining detriment, the court must consider the following:

a. Age of child
b. Degree of relationship
c. Length of sentence
d. Nature of the treatment
e. Nature of the crime or illness
f. Degree of detriment to child if services not offered
g. If child is age 10 or older, child's attitude towards implementation of reunification services
h. Any other appropriate factors

Services may include:

a. Collect phone calls
b. Transportation (where appropriate)
c. Visitation (where appropriate)
d. Services to extended family members or foster parents IF services not detrimental to child
e. Order to parent to attend counseling, parenting classes, vocational training—IF AVAILABLE

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CALIFORNIA JUDGES BENCHGUIDES

Benchguide 103

JUVENILE DEPENDENCY REVIEW HEARINGS

[REVISED 2003]

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I. [§103.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency review hearings under Welf & I C §§366, 366.21, 366.22, 366.3, and 364, and Cal Rules of Ct 1460–1466. Generally, review hearings are held to ensure periodic review of the child's status, the necessity for and appropriateness of the child's placement, and the extent of compliance with the case plan for the child. Welf & I C §366(a). Review hearings in dependency proceedings are mandated by both state (Welf & I C §§364–366.3) and federal law (Pub Law 96–272; 42 USC §670 et seq). This benchguide includes procedural checklists for review hearings, a brief summary of the applicable law, and spoken forms. Placement options, visitation, reunification services, and other dispositional alternatives are discussed in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearings* (Cal CJER). Selection and implementation hearings (.26 hearings) held under Welf & I C §366.26 are discussed in California Judges Benchguide 104: *Dependency Selection and Implementation (.26) Hearings* (Cal CJER).

Throughout this benchguide the agency responsible for abused or neglected children will be referred to as the Department of Social Services ("DSS") and the person who investigates and supervises dependency cases will be called the social worker. See Welf & I C §215.

II. PROCEDURAL CHECKLISTS

A. [§103.2] General Conduct of Review Hearing

This is a general checklist that may be used for any type of review

hearing. For a review hearing in a case in which the child has not been removed, see §103.3. For checklists to follow when the child was removed, see §§103.4–103.6. For a postpermanency planning review hearing, see the checklist in §103.7.

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 244.* If it is desired that a referee (or commissioner assigned as a referee) hear a case as a temporary judge, a written stipulation must be obtained from the parties. See discussion in §103.17.

(2) *Call the case.* In many counties, the social worker serving as court officer or deputy county counsel calls the case and announces the appearances. Some judicial officers will first call the entire calendar to determine which cases are ready and in what order they will be taken.

(3) *Determine the identity of those present and each person's interest in the case before the court.* Welf & I C §§346, 349; Cal Rules of Ct 1410(b).

- *If requested by a party, determine whether anyone other than a party should be admitted.* Welf & I C §§346, 349; Cal Rules of Ct 1410(a)–(b), 1412(e)–(f).
- *Exclude all persons from the court except parents, legal guardians, the child, anyone granted status as a de facto parent, counsel, any representative of an Indian child's tribe, any court-appointed special advocate, or anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court.* Welf & I C §§345, 346, 349, 356.5.
- *If this is a first appearance for parents or guardians, ask them to designate a mailing address for the court.*
- *Remind each parent or guardian that the designated mailing address will be used by the court and the social services agency for notification purposes until the parent or guardian provides a new address in writing to the court or social services agency.* Welf & I C §316.1(a); Cal Rules of Ct 1412(*l*). Judicial Council form JV-140, Notification of Mailing Address, should be provided to the party.

The steps above concerning notice and some of those that follow (including appointment of counsel) will usually have been taken at earlier hearings and will not have to be repeated at the review hearings.

☛ JUDICIAL TIP: Judges should ensure that the clerk places the addresses and the advisement into the minute order and that DSS gets the order. Some judges also give the parent or guardian an opportunity to correct the mailing address at each hearing. It is

recommended that Judicial Council form JV-140 be used and provided to parents and guardians.

(4) *If no parent or legal guardian is present:*

- *Determine whether the parent or guardian received actual notice of the hearing.* See Welf & I C §366.21(b); Cal Rules of Ct 1460(b).

☛ JUDICIAL TIP: Parties will have received actual notice if they were present at a previous hearing at which the review hearing was set. If there was actual notice, the court should make such a finding on the record.

- *If not, determine whether due diligence efforts to serve were made.* Service by first class mail to the parent's or guardian's last known address is sufficient if made at least 15 days but not more than 30 days before the hearing. Welf & I C §366.21(b).
- *If notice has not been received by the parent or guardian, service was not attempted in accordance with law, or an affidavit documenting reasonable and adequate unsuccessful search efforts for the parent or guardian is not presented to the court, continue the case for a reasonable time in order to permit service.*

(5) *Make a finding as to whether notice been given or attempted as required by law.* Cal Rules of Ct 1412(k).

(6) *If a parent is present for the first time, inquire whether the child has American Indian heritage and, if so, take steps to ensure that proper notice is given and provisions of the Indian Child Welfare Act (ICWA) (25 USC §§1901 et seq) were followed.* See Welf & I C §§292–294 for notice requirements and discussion in §103.16. See also discussion of ICWA in California Judges Benchguide 100: *Juvenile Dependency Detention Hearings* §100.48 (Cal CJER).

(7) *Advise any unrepresented parent or legal guardian of the right to retain counsel and the right to appointed counsel if he or she desires counsel and cannot afford to retain one.* If counsel has been previously retained or appointed to represent more than one parent or legal guardian, the court must examine the parties to determine if a present or potential conflict exists. If there has been no prior resolution of this issue and therefore no conflict of interest statement on file, the court should obtain a personal waiver of conflict of interest from each of the affected parties or take steps to ensure that the rights of all parties are protected. The court must appoint counsel for an unrepresented parent or guardian as warranted, including for any incarcerated parents who desire counsel and cannot afford one. Welf & I C §317(a); Cal Rules of Ct 1412(g)–(h).

Counsel will usually have been appointed for the parents and the child at an earlier hearing.

(8) *If the child is not represented by counsel, appoint an attorney for the child unless there are findings as to why the child would not benefit from appointment of counsel.* Welf & I C §317; Cal Rules of Ct 1412(g)–(h), 1438. See discussion in §103.20.

(9) *Advise the parties of their rights at this stage of the proceedings as specified in Cal Rules of Ct 1412(j), by either of the following:*

- *Obtain a waiver from this advisement requirement.* The judge should ask the attorneys if they have explained these rights to their clients. Some judges then ask the parties to confirm that their attorneys have explained these rights to them, that they understand these rights, and that they waive formal advisement of them.
- *Read these rights to the parties and confirm that they understand their rights.* See discussion in §103.25.

(10) *Deal with issues concerning paternity as may be necessary or appropriate.*

(11) *Receive documentary evidence produced by DSS as follows:*

- *Read and consider the reports prepared by DSS, including any attachment to the reports and any recommendations for court orders made by DSS contained in the reports.*
- *State on the record that the reports have been read and considered.* See Welf & I C §366.21(c) (review hearings generally); Welf & I C §366.21(e); Cal Rules of Ct 1460(c)–(d) (six-month review); Welf & I C §366.21(f); Cal Rules of Ct 1461(c) (12-month permanency hearing); Welf & I C §366.22(a); Cal Rules of Ct 1462(b) (18-month permanency review); Cal Rules of Ct 1466(a) (postpermanency planning review); and discussion in §103.26.

(12) *Read and consider the report of any court-appointed child advocate.* Cal Rules of Ct 1460(d) (six-month review), 1461(b)–(c) (12-month permanency hearing), 1462(b) (18-month permanency review), 1466(a)–(b) (postpermanency planning review).

(13) *If one or more parties request that the child's testimony be taken, consider granting this request and, if so, under what circumstances.* See discussion in §103.31.

(14) *If appropriate, receive testimony from the child.*

(15) *Receive other evidence, including testimony from the parents, the guardians, the social worker, and others with pertinent knowledge, as appropriate.* See Cal Rules of Ct 1460(c)–(d) (six-month review), 1461(c) (12-month permanency hearing), 1462(b) (18-month permanency review), and 1466(b) (postpermanency planning review).

(16) *Make findings and orders as appropriate.* See checklists in §§103.3–103.7 for findings and orders required in particular review hearings.

☛ JUDICIAL TIPS:

- In the event that reunification services fail, case plans must also contain strategies for alternative permanency planning (see Welf & I C §16501.1(f)(9)). It is therefore important for the court to make a finding as to whether concurrent permanency planning services for the child have been provided in all situations in which reunification services were ordered, and to make such orders as may be appropriate or needed to effect such services. See, *e.g.*, Welf & I C §§366.21(e), 16501.1(f)(9); Cal Rules of Ct 1460(e)(2).
- In an ICWA case, in addition to the "reasonable efforts" finding required by state law, the court must also find "active efforts" to meet the standards of ICWA, especially if it is terminating services and setting a .26 hearing. *In re Michael G.* (1998) 63 CA4th 700, 713–714, 74 CR2d 642; Cal Rules of Ct 1439(i).

(17) *Rule on any additional requests, including any request for restraining orders under Welf & I C §213.5 and/or §340.5, as may be appropriate.*

(18) *Schedule future hearings as necessary.* See Welf & I C §§366(a) (status of children in foster care to be reviewed at least every six months), 366.21, 366.22 (review hearings generally), and 366.3(d), and Cal Rules of Ct 1466(a) (postpermanency planning reviews). See also Cal Rules of Ct 1460(a) (six-month review), 1461(a) (12-month permanency hearing), and 1462(a) (18-month permanency review).

☛ JUDICIAL TIPS:

- The date of removal should be known to all parties at each hearing. Therefore, it is good practice to require that the removal date be stamped prominently on the file, together with the 12- and 18-month dates. See §103.13 for definition of these dates. If the child was under three or a member of a sibling group in which one sibling was under three at the time of removal, the six-month date should also be included. This should serve as a reminder of the limited time for reunification and will reduce the temptation to go beyond the statutory time.
- The court should advise the parents of these dates at each hearing or should obtain counsel's agreement to do so.

B. [§103.3] Checklist: When Child Is in Parent's or Guardian's Custody

(1) *Review the social worker's report, the report of any court-appointed child advocate, and other evidence presented by the social worker, parent, guardian, or child.* See Welf & I C §364(c).

(2) *Terminate dependency jurisdiction unless DSS establishes by a preponderance of the evidence that conditions still exist that would justify initial assumption of jurisdiction under Welf & I C §300, or that such conditions are likely to exist if supervision is withdrawn.* Welf & I C §364(c); see also Cal Rules of Ct 1460(e)(1), 1461(c)(2)(C), and 1462(b)(2). Failure of the parent or guardian to participate regularly in any court-ordered treatment program is prima facie evidence that the conditions that justified initial assumption of jurisdiction still exist and that continued supervision is necessary. Welf & I C §364(c).

(3) *Determine whether continued supervision is necessary.*

☛ JUDICIAL TIP: If the parent seeks termination of jurisdiction and DSS contests it, the usual practice is to set the hearing as a contested hearing. DSS has the burden of proving that continued jurisdiction is necessary. Welf & I C §364(c); Cal Rules of Ct 1460(e)(1).

(4) *If jurisdiction is retained, schedule a further review hearing for a specified date not more than six months from the time of the hearing.* Welf & I C §364(d).

☛ JUDICIAL TIPS:

- If the court decides that dependency jurisdiction should be terminated, it may make additional orders pertaining to custody and visitation. These orders may specify which parent has legal and/or physical custody, what visitation rights reside in the noncustodial parent, and other related matters pertaining to custody and visitation. See Welf & I C §362.4. The court must use Judicial Council forms JV-200, Custody Order—Juvenile, and JV-205, Visitation Order—Juvenile, for visitation orders.
- If terminating jurisdiction and ordering custody and visitation, it is good practice to notify all those who claim to be fathers, if there are not yet paternity findings and orders.
- If DSS recommends termination of dependency, and a party, including the child, opposes it, the court may wish to take offers of proof on the issue. The court may then terminate dependency, continue dependency with appropriate orders, or set the matter for hearing at which the opposing party bears the burden of proof.

- If both parents have completed their case plans and neither poses a risk, the court may consider sending them to mediation to work out their respective responsibilities.

C. When Child Declared Dependent and Is Removed

1. [§103.4] Checklist: Six-Month Review Hearing

The purposes of the six-month hearing are (1) to terminate jurisdiction if there are no longer grounds to continue, (2) to return the child unless there is a substantial risk of detriment, (3) to review the case plan and concurrent reunification and permanency services, and (4) to move expeditiously toward return of the child or to an alternative permanent plan (see §103.13). Occasionally a court will set an informal nonstatutory review of the child's case 60 or 90 days after disposition to be able to meet these goals more quickly. For possible findings and orders, see generally §§103.32–103.36.

(1) *Review the social worker's report, the report of any court-appointed child advocate, and other evidence.*

(2) *Consider the progress of the parent or guardian of a child who has remained in the home, and order jurisdiction terminated unless the court determines that continued supervision is necessary.* Welf & I C §364.

(3) *If the child has been removed, and unless the court has previously ordered that reunification services must not be provided for that parent under Welf & I C §361.5, consider the efforts and progress demonstrated by the parent or legal guardian and the extent to which the parent cooperated and made use of reunification services provided.* Welf & I C §366.21(e); Cal Rules of Ct 1460(c). See §103.54.

(4) *Order the return of the child to the physical custody of his or her parents or legal guardians, **or** find by a preponderance of the evidence that returning the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being, and order continued out-of-home placement.* Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2).

DSS bears the burden of establishing the existence of a substantial risk of detriment by a preponderance of the evidence. Evidence of a parent or guardian's failure to participate regularly and make substantive progress in court-ordered treatment programs, unless successfully rebutted, is sufficient to merit a finding that continued supervision is necessary and that return would be detrimental, thus justifying the continued removal of the child from the custody of the parents or

guardians. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(3). See §103.33.

☛ JUDICIAL TIPS:

- At this stage in the proceedings, if the child is to be returned home, some courts make orders for a "transition" plan that structures the return into a gradual process, starting with more lenient visitation during the day, then overnight visitation, and eventually actual return to parental custody.
- It is important to make all the review findings even if the court and DSS agree that permanent return home is imminent.

(5) *Make such findings specified in Welf & I C §366(a) concerning* (see *Welf & I C §§366(a), 366.21(e)):*

- The continuing necessity and appropriateness of the child's placement ("The child's placement is necessary and appropriate," or "Out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B));
- The extent of DSS compliance with the case plan in making reasonable efforts to return the child to a safe home and in completing any steps to finalize permanent placement;
- The extent of progress made toward alleviating or mitigating the causes necessitating placement in foster care; and
- A probable date by which the child may be safely returned to and maintained in the home or placed for adoption or in some other permanent living arrangement.
- Whether the child has siblings under the court's jurisdiction, and if so:
  - — The nature of the relationship with the siblings;
  - — The appropriateness of developing and maintaining sibling relationships;
  - — If siblings are not placed together, the reason for that placement, and efforts, if any, to correct it;
  - — The frequency and nature of sibling visitation;
  - — The impact of sibling relationship on placement and permanent planning; and
  - — The continuing need to suspend sibling interaction, if applicable.

(6) If appropriate, make findings by *clear and convincing evidence* of one or more of the following circumstances (*Welf & I C §366.21(e)*; *Cal Rules of Ct 1460(f)(1)*):

- The child was removed initially under Welf & I C §300(g), and the whereabouts of the parent are still unknown;
- The parent has failed for six months to contact and visit the child;
- The parent has been convicted of a felony indicating parental unfitness;
- The parent is deceased;
- The child was under three or a member of a sibling group in which one child was under three when initially removed from the home and the parent has failed to participate regularly and make substantive progress in any court-ordered treatment plan.

(7) *If any of the findings in step (6) above is made, terminate reunification services for that parent, and schedule a .26 hearing within 120 days unless one of the following circumstances applies: services are continuing for the other parent; reasonable services were neither offered nor provided; or, for a child under three years of age at removal, there is a substantial likelihood that the child will be returned within six months or within 12 months of the date the child entered foster care, whichever is sooner.* Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)(E). This date is defined as the earliest of the jurisdiction hearing or 60 days from the date of removal from the home. Welf & I C §361.5(a).

To find a substantial probability of return within six months, the court must make findings indicating that the parents are motivated and capable of solving the problems that led to removal. See Cal Rules of Ct 1460(f)(1)(E) and the discussion in §103.36. If there is a stipulation, the court may also terminate reunification services after finding that one of the conditions of Welf & I C §361.5(b)(2)–(15) or (e)(1) (basis for no reunification services at disposition) has arisen in the six months after the disposition hearing. If there is no stipulation, a Welf & I C §388 petition for modification of disposition orders is required before terminating services on Welf & I C §361.5 grounds. See Welf & I C §388.

A .26 hearing should be scheduled if reunification services have been denied or terminated for all living parents. Under Cal Rules of Ct 1459, a court must not set a .26 hearing as to only one parent unless the other parent is dead or that parent's rights have been terminated or he or she has relinquished custody of the child to DSS.

☛ JUDICIAL TIP: At this and other hearings, some courts set a hearing 30–45 days before the scheduled .26 hearing is to take place to ascertain whether service was sufficient. If service is

found to be lacking, there will often be time to remedy this within the 120-day period.

(8) *If setting a .26 hearing, order an assessment under Welf & I C §366.21(i) concerning search efforts to locate absent parents, prospects for adoption, review of parent-child contacts since the placement, and an evaluation of the child.* Welf & I C §366.21(i); Cal Rules of Ct 1460(f)(2).

(9) *Advise the parent or guardian of the writ remedy for review of the orders and make sure the parent or guardian receives the Notice of Intent to File Writ Petition (JV-820) and Petition for Extraordinary Writ (JV 825).* See Cal Rules of Ct 39.1B. See also Welf & I C §366.26(*l*); Cal Rules of Ct 1460(f)(3)–(8). If the parents or guardians are not present, the court should ensure that they receive this advice, with proof of notice to go in the file.

(10) *Order the parents to return on the date set for the .26 hearing.*

(11) *If the child had been placed under court supervision with a previously noncustodial parent under Welf & I C §361.2, determine whether supervision is still necessary.* In an appropriate case, court supervision may be terminated and custody transferred permanently to the previously noncustodial parent as provided in Welf & I C §361.2(a). Welf & I C §366.21(e); Cal Rules of Ct 1460(h). Judicial Council form JV-200, Custody Order, should be used. For orders determining custody, see Cal Rules of Ct 1457.

(12) *If the child is not ordered to return to the parents or legal guardians and a .26 hearing has not been ordered:*

- *Determine whether reasonable reunification services have been provided or offered to the parents or guardians and state what those services are;*

☛ JUDICIAL TIP: One practice recommended when the judge finds that the services have not been adequate is to announce, in an appropriate case, that the court will make a "no reasonable efforts" finding unless specified services are provided within the next day or two. For a discussion of the "art of the no reasonable efforts finding," see Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 Juvenile and Family Court Journal (No. 3) 17–19 (1994).

- *Order that reunification services be initiated, continued, or modified; or*
- *Inform the parent or legal guardian, if present, that if the child cannot be returned home by the 12-month permanency hearing, a proceeding for termination of parental rights under Welf & I C §366.26 may be instituted.* Welf & I C §366.21(g).

☛ JUDICIAL TIP: Some judges order DSS to notify absent parents or guardians that a .26 hearing may be set and to place that notice on the record.

- *Make other findings and orders as appropriate.*

(13) *Unless reunification services have been terminated for all parents and a .26 hearing has been ordered, set 12-month permanency hearing to be held within 12 months from the date the child entered foster care (see Welf & I C §361.5(a) for the definition of that date) and inform the parents or guardians, if present, of the date of the next hearing and of their right to be present and represented by counsel at that hearing.* Welf & I C §§366(a), 366.21(a); Cal Rules of Ct 1461(a), 1460(b). This hearing must be held within 12 months from the date the child entered foster care (see Cal Rules of Ct 1401(a)(7)) and no later than 18 months from the date of the initial removal. Cal Rules of Ct 1461(a).

2. [§103.5] Checklist: 12-Month Permanency Hearing

The purposes of the 12-month permanency hearing are: (1) to return the child unless there is a substantial risk of detriment, (2) to review the case plan and concurrent reunification and permanency planning services, or (3) to terminate services and facilitate an alternative permanent plan unless either there is a substantial probability that the child can be returned within 18 months from the date the child was originally removed from the physical custody of the parent or legal guardian or reasonable services have not been provided or offered. See §103.13 and discussion in §§103.37–103.42. For the county to be eligible for Title IV-E federal foster care funding, courts must select and identify a permanent plan at this hearing.

(1) *Review the social worker's report, the report of any court-appointed child advocate, and other evidence and, unless the court has previously ordered that reunification services must not be provided under Welf & I C §361.5 for that parent, consider the efforts and progress demonstrated by the parent or guardian and the extent to which the parent cooperated and made use of reunification services.* Welf & I C §366.21(f); Cal Rules of Ct 1461(c). See §103.54.

(2) *Order the return of the child to the physical custody of the parent or guardian* ***or*** *find by a preponderance of the evidence that returning the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being and order continued out-of-home placement.* Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1).

DSS bears the burden of establishing the existence of a substantial risk of detriment by a preponderance of the evidence. Evidence of a parent or guardian's failure to make substantive progress and participate

regularly in court-ordered treatment programs, unless successfully rebutted, is sufficient to merit a finding that continued supervision is necessary and that return would be detrimental, thus justifying the continued removal of the child from the custody of the parents or guardians. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1).

(3) *Make findings specified in Welf & I C §366(a) as appropriate concerning:*

- *The continuing necessity and appropriateness of the child's placement,*
- *The extent of compliance with the case plan,*
- *Plans for sibling interaction, and*
- *The extent of progress made toward alleviating or mitigating the causes necessitating placement in foster care.* Welf & I C §§366(a)(1)(E), 366.21(f).

(4) *Determine whether reasonable reunification services have been provided or offered to the parents or guardians.* See Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(4).

(5) *If the child is not returned to the custody of a parent or guardian, specify the factual basis for the conclusion that return would be detrimental, and proceed as set forth in steps (6) through (12).* Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(3).

(6) *Terminate reunification services and*

- *Set a .26 hearing within 120 days if the child should not be placed in long-term foster care, or*
- *On a finding by clear and convincing evidence that the child is not a proper subject for adoption and there is no one willing or available to assume legal guardianship, order the child to remain in long-term foster care and set a review hearing within six months.* Welf & I C §366.21(g); Cal Rules of Ct 1461(d)(2). A recommendation by DSS or a licensed adoption agency that adoption is not in the best interests of the child may be a compelling reason for the court's decision if supported by the evidence. Welf & I C §366.21(g)(2).

or

(7) *Continue reunification services and set an 18-month permanency review to be held no later than 18 months from the original removal of the child from the physical custody of the parent or guardian if it is found that (Welf & I C §366.21(g); Cal Rules of Ct 1461(d)(1)):*

- *Within 18 months of the original removal of the child from the custody of the parent or guardian, there is a substantial*

probability of return and that the child will be safely maintained in the home, or

- *Reasonable services were not provided or offered.*

In order to find a substantial probability of return and that the child will be safely maintained in the home, the court must find all the following (Welf & I C §366.21(g)):

- That the parent or legal guardian has consistently and regularly contacted and visited the child,
- That the parent or legal guardian has made significant progress in resolving the problems that led to the child's removal, and
- That the parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

A finding of substantial probability that the child will be returned home by the next review hearing is a compelling reason for the determination that setting a .26 hearing is not in the child's best interests. Welf & I C §366.21(g)(1).

(8) *If a .26 hearing is ordered, and the parent or guardian is present,*

- *Order the parent or guardian to return for the .26 hearing.* See Welf & I C §366.21(g); Cal Rules of Ct 1461(d)(3), (9).
- *Advise the parent or guardian of the writ remedy for review of the orders, and make sure the parent or guardian receives the Notice of Intent to File Writ Petition (JV-820) and Petition for Extraordinary Writ (JV-825).* See Cal Rule of Ct 39.1B, 1461(d)(6)–(9).

(9) *If a .26 hearing is ordered, direct DSS to prepare an assessment under Welf & I C §366.21(i), and order the termination of reunification services to the parent or guardian.* Cal Rules of Ct 1461(d)(4)–(5).

☛ JUDICIAL TIP: Many judges order DSS to notify absent parents or guardians in writing and to file a proof of service.

(10) *If a .26 hearing is ordered and the parent is absent, consider making an inquiry as to whether DSS has used due diligence in attempting to locate the parent.*

Once the finding of due diligence has been made, DSS need only submit an order for publication or other substituted service. See Cal Rules of Ct 1463(b)(2).

(11) *If a .26 hearing is ordered, order continued visitation between the child and the parent or legal guardian unless it is found that visitation would be detrimental to the child.* Welf & I C §366.21(h); Cal Rules of Ct

1461(d)(4). The court may adjust both the level and the frequency of visitation.

☛ JUDICIAL TIPS:

- If the parents have had notice, the judge may set the hearing early in the 120-day period, subject to the time requirements of Welf & I C §294 (notice must be completed at least 45 days before hearing) and the need for DSS to prepare a full report. If a contested hearing is expected, the scheduling should permit time for it.
- Some judges set a hearing 30–45 days before the scheduled .26 hearing is to take place to ascertain whether service was sufficient. If service is found to be lacking, there will often be time to remedy this within the 120-day period.

(12) *If reunification services are continued, advise the parent or legal guardian, if present, of the date of the 18-month hearing and that if the child cannot be returned at the 18-month permanency review hearing, an alternative permanent plan must be developed.* See Welf & I C §366.21(g); Cal Rules of Ct 1461(c)(3).

3. [§103.6] Checklist: 18-Month Permanency Review Hearing

The purposes of the 18-month hearing are: (1) to return the child unless there would be a substantial risk of detriment, or (2) to terminate reunification services and facilitate a permanent plan (see §103.13). See generally discussion in §103.43. The hearing is to be held 18 months from the initial removal. Welf & I C §366.22(a).

(1) *Review the social worker's report, the report of any court-appointed child advocate, and other evidence and, unless the court has previously ordered that reunification services must not be provided under Welf & I C §361.5, consider the efforts and progress demonstrated by the parent or legal guardian and the extent to which the parent cooperated and made use of reunification services provided.* See Welf & I C §366.22(a); Cal Rules of Ct 1462(b). See §103.54.

(2) *Order the child returned to the physical custody of the parents or guardians* ***or*** *find by a preponderance of the evidence that returning the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being.* Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1). DSS bears the burden of establishing the existence of a substantial risk of detriment by the standard of preponderance of the evidence. Evidence of a parent's or legal guardian's failure to participate regularly and make substantive progress in court-ordered treatment programs, unless successfully rebutted, is sufficient to

merit a finding that continued supervision is necessary and that return would be detrimental, thus justifying the continued removal of the child from the custody of parents or legal guardians. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1).

(3) *If the child is not returned to the custody of a parent or legal guardian, specify the factual basis for the conclusion that return would be detrimental, develop a permanent plan for the child, terminate reunification services, and*

- *Determine whether reasonable reunification services have been provided or offered to the parents or guardians during the time since the previous hearing.* Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(5). See discussion on failure to find that reasonable services were provided in §103.46.
- *Order that a .26 hearing be held within 120 days to determine whether the most appropriate alternative permanent plan for the child is adoption, guardianship, or long-term foster care.* Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)(B). The court must also order DSS to prepare an assessment. Welf & I C §366.22(b).
- *Terminate services and, if it is found by clear and convincing evidence that the child is not a proper subject for adoption and there is no one available to assume guardianship, order the child to remain in long-term foster care.* Cal Rules of Ct 1462(b)(3)(A). The court may order on-going counseling or treatment, visitation, and any other appropriate services for the child or caretaker. Welf & I C §366.22(a).
- *Order continued visitation between the child and the parent or legal guardian unless it is found that visitation would be detrimental to the child.* Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(4). The court may adjust both the level and the frequency of visitation, if warranted by the circumstances.

☛ JUDICIAL TIP: Frequently, parents request an increase in visitation pending the .26 hearing in order to better prepare to prove the beneficial relationship exception of Welf & I C §366.26(c)(1)(A), while DSS often requests a decrease in visitation so as to better prepare the child for the alternative permanent plan which may be selected at the .26 hearing. Many judges feel that it is a better practice to deny both requests and simply to continue existing visitation orders pending the .26 hearing, unless there has been a significant change of circumstances. In these circumstances, it is advisable for the court to make it clear that the continued visitation is not for the purposes of reunification.

(4) *When a .26 hearing is ordered and the parent or guardian is present:*

- *Order the parent or guardian to return for the .26 hearing.*
- *Advise the parent or guardian of the writ remedy for review of the orders, and make sure the parent or guardian receives the Notice of Intent to File Writ Petition (JV-820) and Petition for Extraordinary Writ (JV-825).* See Cal Rules of Ct 39.1B, 1462(b)(7)–(10).
- *Direct DSS to prepare an assessment under Welf & I C §366.21(i), and order the termination of reunification services to the parent or guardian.*

(5) *If the parent is absent, consider making an inquiry as to whether DSS has used due diligence in attempting to locate the parent.* If a finding of due diligence is made, DSS need only submit an order for publication or other substituted service. See Cal Rules of Ct 1463(b)(2).

4. [§103.7] Checklist: Postpermanency Planning Review Hearing

The purpose of the postpermanency planning review hearing is to ensure that all permanency planning options are considered (Welf & I C §366.3(g)) and that adoption or legal guardianship is completed as expeditiously as possible (Welf & I C §366.3(a)). See discussion in §103.48.

(1) *If the child has been adopted since the last review hearing, terminate juvenile court jurisdiction over the child.* Welf & I C §366.3(a); Cal Rules of Ct 1466(a). Following a termination of parental rights, the former parent is not a party to, and is not entitled to receive notice of, any subsequent proceedings regarding the child. Welf & I C §366.3(a). This is true even if the former parent has appealed the termination order. Once an order terminating parental rights has been made, the juvenile court has no power to set aside, change, or modify the order. Welf & I C §366.26(i); Fam C §7894; see *David B. v Superior Court* (1994) 21 CA4th 1010, 1018, 1020, 26 CR2d 586 (parents have no right to challenge juvenile court jurisdiction for lack of notice when order terminating parental rights is final before challenge is made).

(2) *If a legal guardianship of the child has been established but dependency had been continued, consider whether to*

- *Continue dependency jurisdiction over the child*, or
- *Terminate dependency jurisdiction.* The court continues to maintain jurisdiction only over the guardianship. Welf & I C §§366.3(a), 366.4; Cal Rules of Ct 1466(a), (c).

☛ JUDICIAL TIP: It is not often that dependency jurisdiction should be continued when a guardianship has been established. Because the court may retain jurisdiction over the child as a ward of the guardianship, the court has continuing authority to address any problems that may arise during the course of the guardianship without the necessity of maintaining dependency jurisdiction. However, dependency may be continued in an appropriate case to permit the guardian to have access to services such as counseling that are necessary to a successful guardianship.

If the guardians live out-of-state and the child is subject to the Interstate Compact on Placement of Children (ICPC) (Fam C §§7900–7910), it may be difficult to obtain permission to terminate jurisdiction.

(3) If a guardian is appointed and dependency is continued, continue to include the parent in the notice of review hearings.

(4) *If the child is in long-term foster care:*

- *Determine whether the parents of the child received notice of the hearing.* See Welf & I C §366.3(e). Notice of the hearing must be given to parents as specified in Cal Rules of Ct 1460(b) and to the guardian if one has been appointed. Cal Rules of Ct 1466(a).
- *Read and consider the report submitted by DSS.* Welf & I C §366.3(e); Cal Rules of Ct 1466(a)–(b).
- *Consider the following factors under Welf & I C §366.3(e):*
  - — The progress being made to provide a permanent home for the child;
  - — The continuing necessity for and appropriateness of the child's placement;
  - — The continuing appropriateness and extent of compliance with the permanent plan for the child;
  - — The extent of DSS compliance with the case plan in making reasonable efforts to return the child to a safe home and in completing plans for permanent placement;
  - — The adequacy of services provided to the child, including such documents as the birth certificate, relevant information including family and placement history, and services for a child who has reached the age of majority (see Welf & I C §391; Cal Rules of Ct 1466(d));
  - — The parents' progress toward alleviating the causes that required foster care;

— The probable date by which the child may be returned home or placed for adoption or in some other permanent living situation;

— Whether the child has siblings under the court's jurisdiction, and if so:

— The nature of the relationship with the siblings,

— The appropriateness of developing and maintaining sibling relationships,

— If siblings are not placed together, the reason for that placement, and efforts, if any, to correct it,

— The frequency and nature of sibling visitation, and

— The impact of sibling relationship on placement and permanent planning;

— The services, if any, needed to assist a child who is 16 years of age or older to make the transition from foster care to independent living (see Welf & I C §366.21(f)).

- *Order continued long-term care for the child.*
- *Order the matter set for a new .26 hearing if it has been 12 months since the permanent plan of long-term foster care was ordered and there is no compelling reason shown not to set a .26 hearing.* Welf & I C §366.3(g).

(5) *If the parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child, order that further reunification services be provided for a period not more than six months.* Welf & I C §366.3(e); Cal Rules of Ct 1466(b).

☛ JUDICIAL TIP: An order reinstating reunification services has the effect of removing the child's case from permanency planning and returning the case to a reunification mode. When such an order is made, the court may wish to simultaneously schedule a review and permanency hearing to follow in six months. At such a hearing, because these further reunification services are not to exceed six months (Welf & I C §366.3(e)), the court must determine whether reunification is possible at that time and, if it is not, the original alternative permanent plan may be reinstated or a new one developed.

To check on the progress of parents and give them encouragement, some judges ask parents to return at two-month intervals.

(6) Determine whether reasonable efforts to make and finalize a permanent placement have been made. See Welf & I C §366.3(d) (f).

(7) *Set a further review hearing as necessary and/or appropriate.* The court must continue to review the case at least every six months. Welf & I C §366.3(a), (d); Cal Rules of Ct 1466(a)–(b).

III. APPLICABLE LAW

A. [§103.8] General Background

Review hearings must be held periodically throughout the course of a child's dependency, generally at intervals of no more than six months. Welf & I C §366(a). They are held under Welf & I C §364 and Cal Rules of Ct 1460(e)(1) for children who remain at home during the dependency, under Welf & I C §§366–366.22 and Cal Rules of Ct 1460–1462 for out-of-home cases before the adoption of a permanent plan (the reunification and concurrent services period), as well as under Welf & I C §366.3 and Cal Rules of Ct 1466 (postpermanency planning period). Review hearings are held to ensure periodic review of the child's status, the necessity for, and appropriateness of, the child's placement, and the extent of compliance with the case plan for the child. Welf & I C §366(a).

If the child is in long-term foster care, the child's status must also be reviewed at least every six months. Welf & I C §366.3(d). See §103.48.

1. [§103.9] Federal and State Law Applicable to Review Hearings

The judge must make specified findings to render a county eligible for Title IV-E federal foster care funding. See, *e.g.,* 45 CFR §1356.21(b)(2)(ii). Under federal law, a judicial or administrative review of each dependent child's case be held no less than every six months (42 USC §675(5)(B)), and that a permanency hearing be held no later than 12 months from the date the child entered foster care and not less than every 12 months thereafter as long as the child is in out-of-home placement as a dependent child (42 USC §675(5)(C)). Federal law also requires that when a child has been in foster care for 15 out of 22 of the most recent months, a petition for termination of parental rights be filed (42 USC §675(5)(E)) and that foster parents be provided with notice and an opportunity to be heard in any hearing held with respect to the child (42 USC §675(5)(G)). See generally discussion in Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980,* 45 Juvenile and Family Court J (1994). For a county to be eligible for Title IV-E federal foster care funding, courts must comply with federal law. The juvenile court statutory scheme has been amended to conform with the federal Adoptions and Safe Families Act (AFSA) (42 USC §§670 et seq). *In re Christina A.* (2001) 91 CA4th 1153, 1159, 111 CR2d 310. See Appendix.

California law requires that the status of every dependent child in foster care be reviewed by the juvenile court at least every six months, as calculated from the date of the original dispositional hearing. See Welf & I C §366(a). Even after a permanent plan of adoption or legal guardianship has been ordered for a child under Welf & I C §366.26, or a permanent plan of guardianship has been ordered under Welf & I C §360 or §366.26, the court must retain jurisdiction over the child and must review the child's case every six months to ensure that the adoption or guardianship is completed as expeditiously as possible. Welf & I C §366.3(a). This extra review will only rarely be required with respect to guardianship cases because guardians are supposed to be appointed and letters of guardianship issued at the .26 hearing itself.

2. [§103.10] Common Issues

Issues that frequently arise at review hearings held during the reunification period (and, therefore, before the establishment of a permanent plan) include:

- The parents' progress, or lack of progress, in complying with the reunification plan;
- Whether reasonable reunification services have been provided or offered to the parents;
- Whether "active efforts" have been made to provide remedial services and rehabilitative programs to the parent in an ICWA case;
- Whether the concurrent permanency planning services provided for the child have been reasonable;
- Whether visitation has been adequate;
- Requests for authorization for medical treatment for the child;
- Requests for authorization of funding for therapy or other services for the child;
- Requests to change the child's placement; and
- Whether court-mandated reunification services should be continued or terminated.

An issue of primary importance concerns whether the child may safely be returned to the parents' custody. If return is not yet possible, but reunification services are to be continued, the court may need to resolve issues regarding the need for any changes in the reunification plan or in existing visitation orders and will need to reconsider the suitability of the child's current placement. For discussion of when a petition for modification is required to resolve these issues, see §103.15.

At a postpermanency planning review hearing, the appropriateness of the child's placement is almost certain to be an important concern. Other common issues at these hearings, like those that arise at the reunification phase, are requests for authorization for medical treatment for the child, requests for authorization of funding for therapy or other services for the child, determination of whether reasonable efforts to make and finalize a permanent placement have been made (see Welf & I C §366.3(d)–(f)), and, occasionally, requests for a change in the child's permanent plan (*e.g.*, from a plan of long-term foster care to one of guardianship or adoption). The focus of these hearings is more likely to be solely on the child's well-being, rather than on the child-parent relationship, which is often an important issue in the review hearings held during the reunification period.

3. [§103.11] Obligations of Court

The court must make a clear written record at review hearings to facilitate meaningful judicial review. See *In re Julie M.* (1999) 69 CA4th 41, 52, 81 CR2d 354 (the court had altered the visitation order at the six-month review but did not describe the mother's conduct to which it was reacting). Regardless of the type of review hearing, the court should view it as an important opportunity to be apprised of the child's current circumstances and to make necessary and appropriate orders to protect the child and promote his or her best interests.

4. [§103.12] Requirements for Periodic Review

The status of every dependent child in foster care must be reviewed periodically by the juvenile court at least every six months, from the date of the original dispositional hearing. Welf & I C §366(a). As long as the child remains a dependent of the juvenile court, the court must hold regular review hearings, whether or not there are pending appeals and even if the child has not been removed from the home. *In re Natasha A.* (1996) 42 CA4th 28, 35, 38–39, 49 CR2d 332. This scheme of periodic review hearings affords parents repeated opportunities to challenge detriment findings, which in turn helps diminish erroneous fact-finding. *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1757, 53 CR2d 687.

Review hearings must also be held every six months if a permanent plan of adoption or legal guardianship has been ordered under Welf & I C §360 or §366.26 and dependency is continued pending implementation of the plan. Welf & I C §366.3(a). Similarly, there may be a number of six-month reviews if the child remains at home as a dependent. See Welf & I C §364(d). Twelve-month permanency hearings and 18-month permanency reviews apply only to children who have been removed from parental custody and for whom reunification services have been ordered or

who are in long-term foster care. If a permanent plan of long-term foster care has been ordered or legal guardianship with continuing dependency has been established, the child's status must also be reviewed at least every six months. Although the review may be conducted by either the juvenile court or by an appropriate local agency, the court *must* conduct the review if any of the following circumstances exist (Welf & I C §366.3(d)):

- When the child, parents, or legal guardian request it,
- 12 months have elapsed since a .26 hearing has been held,
- 12 months have elapsed since an order was made that the child remain in long-term foster care, or
- 12 months have elapsed since a review was conducted by the court.

The reference to recurrent "six-month" hearings illustrates an intention to give parents time to benefit from the services during each period prior to the review. *In re Candace P.* (1994) 24 CA4th 1128, 1132–1133, 30 CR2d 1. Although the time between reviews should not be substantially shorter than six months, the statute was intended to ensure that the hearings are not scheduled for *longer* than six months between hearings; therefore a five-month lapse before a review hearing was not error. *In re Candace P., supra,* 24 CA4th at 1132.

5. [§103.13] Review Hearings Chart: When Child Was Removed at Disposition

6-Month Review	12-Month Permanency Hearing	18-Month Permanency Review Hearing
Purpose (1) To return the child unless there is a substantial risk of detriment, (2) To review the case plan, reunification services, and concurrent planning services, **and** (3) If the child is not returned at this hearing, to move expeditiously toward permanent plan of return to parent or alternative permanent plan.	**Purpose** (1) To return the child unless there is a substantial risk of detriment, (2) To review the case plan, reunification services, and concurrent permanency planning services, **and** (3) To terminate reunification services and, if the child is not returned to the parent, facilitate an alternative permanent plan unless reasonable services have not been offered or provided, or there is a substantial probability of return within 18 months from date of removal from home.	**Purpose** (1) To return the child, unless there is a substantial risk of detriment, **and** (2) To terminate reunification services and, if the child is not returned, to facilitate an alternative permanent plan.

6-Month Review	12-Month Permanency Hearing	18-Month Permanency Review Hearing
Time Limits Hearing must be set within six months of disposition for all dependent children, but not more than six months of the date the child entered foster care for children who are removed from parental custody. See Welf & I C §§366(a), 366.21(e); Cal Rules of Ct 1401(a)(7), 1460(a).	**Time Limits** Hearing must be set within 12 months from the date the child entered foster care as defined in Welf & I C §361.5(a); see also Cal Rules of Ct 1401(a)(7). Welf & I C §366.21(f); see Cal Rules of Ct 1401(a)(7), 1461(a).	**Time Limits** Hearing must be set within 18 months from date of initial removal from physical custody of parent or legal guardian. Welf & I C §366.21(g); Cal Rules of Ct 1401(a)(15), 1462(a).
Possible Findings and Orders (1) Child is returned home and dependency continued/not continued. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2). If dependency is continued, court sets review in six months. Welf & I C §364(d); Cal Rules of Ct 1460(e)(2). **or** (2) Continued removal is necessary because of substantial risk of detriment to child's safety, protection, or physical and emotional well-being. Welf & I C §366.21(e); Cal Rules of Ct 1460(e). Court must specify factual basis for conclusion that return would be detrimental **(preponderance)**. **or** (3) .26 hearing is scheduled if certain findings are made by **clear and convincing evidence**. See Welf & I	**Possible Findings and Orders** (1) Child is returned home and dependency continued/not continued. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1). If dependency is continued, court sets review in six months. Welf & I C §364(d). **or** (2) Continued removal is necessary because of substantial risk of detriment to child's safety, protection, or physical and emotional well-being. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1). Court must specify factual basis for conclusion that return would be detrimental. Cal Rules of Ct 1461(c)(3) **(preponderance)**. **and** (3) Order a .26 hearing to be held within 120 days. Welf & I C §366.21(g)(2); Cal Rules of Ct 1461(d)(3). **or** (4) Order long-term foster care if **clear and convincing evidence** that child not a proper subject for adoption and no guardian available. Welf & I C	**Possible Findings and Orders** (1) Child is returned home and dependency continued/not continued. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1). If dependency is continued, court sets review in six months. Welf & I C §364(d). **or** (2) Continued removal is necessary because of substantial risk of detriment to child's safety, protection, or physical and emotional well-being. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1). Court must specify factual basis for conclusion that return would be detrimental **(preponderance)**. **and** (3) Reasonable reunification services have/have not been offered/provided. Welf & I C §366.22(a) **(preponderance)**. **or** (4) If the child is not

6-Month Review	12-Month Permanency Hearing	18-Month Permanency Review Hearing
C §366.21(e); Cal Rules of Ct 1460(f). See also Welf & I C §361.5. Services are terminated and assessment is ordered. Welf & I C §366.21(h)–(i). **or** (4) Court continues, modifies, or initiates services and schedules 12-month permanency hearing. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2). (5) Reasonable reunification services have/have not been offered/provided. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2)(A) (**preponderance**). **Advisements to Parties** If the child cannot be returned at the 12-month permanency hearing, the court must (unless there are unusual circumstances) terminate reunification services and formulate an alternative permanent plan that may include termination of parental rights. Welf & I C §366.21(e).	§366.21(g)(3); Cal Rules of Ct 1461(d)(2). **or** (5) Continue case for 18-month permanency review hearing if there is substantial probability that the child can be returned. Welf & I C §366.21(g)(1); Cal Rules of Ct 1461(d)(1). (6) Reasonable reunification services have/have not been offered/provided. Welf & I C §366.21(f) (**preponderance**).	returned home, a .26 hearing is scheduled within 120 days to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)(B). (5) Only if child is not a proper subject for adoption and there is no one to serve as guardian (**clear and**

6. [§103.14] Need for Contested Hearing

Generally, parents who request a contested review hearing during the concurrent services phase of the dependency (reunification and concurrent permanency planning) are entitled to such a hearing. *In re Johnny M.* (1991) 229 CA3d 181, 190, 279 CR 693 (pre-1989 dependency case involved a combined review and permanency planning hearing under former Welf & I C §366.25). A contested hearing is particularly valuable when there are adverse witnesses and when the review hearing is the final

opportunity to reestablish custody. *Ingrid E. v Superior Court* (1999) 75 CA4th 751, 753, 758–759, 89 CR2d 407. A court may not require an offer of proof as a condition to obtaining a contested hearing. *In re James Q.* (2000) 81 CA4th 255, 266, 96 CR2d 595. The failure to permit a contested 18-month hearing may require reversal of a judgment terminating parental rights. See *In re Rubin P.* (1991) 2 CA4th 306, 311–312, 3 CR2d 301.

However, one court has held that a parent is not entitled to a contested review hearing in order to show substantial probability of return, but must seek modification under Welf & I C §388 when reunification services had not been ordered for her at disposition. *Kimberly H. v Superior Court* (2000) 83 CA4th 67, 69–70, 99 CR2d 344. See discussion in §103.15. See also *Andrea L. v Superior Court* (1998) 64 CA4th 1377, 1387, 75 CR2d 85 (error in not permitting contested permanency planning hearing was harmless when court accepted all aspects of the mother's offer of proof and still found no basis for changing its prior orders).

7. [§103.15] Need for Supplemental Petitions or Petitions for Modification

A court may change the permanent plan at a postpermanency planning review hearing in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890, 55 CR2d 396. Indeed, the court is obligated to proceed under the assumption that long-term foster care is not appropriate and to consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, in between postpermanency planning review hearings, as with review hearings held during the reunification phase of the case, a §388 petition is a vehicle for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388. A §388 petition is also the vehicle for requesting sibling visitation or obtaining orders requiring sibling considerations in making placements and permanent planning orders. Welf & I C §388(b).

Some examples of changes in orders that are authorized by review hearing statutes (and that therefore do not require supplemental petitions under Welf & I C §387 or petitions for modification under Welf & I C §388) are:

- Terminating dependency when the child had not been removed from or has been returned to parental custody. Welf & I C §364(c). See also Cal Rules of Ct 1460(e)(1), 1461(c)(1)–(2), 1462(b)(1).
- Ordering the child's return to parental custody when reunification services are still being provided. See, *e.g.*, Welf & I C §§366.21(e)–(f), 366.22(a).
- Ordering reunification services or the child's return to parental custody when the child has a plan of long-term foster care and the

parent establishes that return of the child or the resumption of services is in the child's best interest. See Welf & I C §366.3(e), (g); *Maricela C. v Superior Court* (1998) 66 CA4th 1138, 1147, 78 CR2d 488.

- Terminating supervision when the child is placed with a noncustodial parent. See Welf & I C §§361.2(b)(1), 366.21(e); Cal Rules of Ct 1460(h).
- Scheduling a .26 hearing. See, *e.g.*, Welf & I C §§366.21(e) (when reunification services are terminated), 366.3(g) (at postpermanency planning review hearing). See also *San Diego County Dep't of Social Servs. v Superior Court, supra,* 13 C4th at 887–892 (at postpermanency planning review hearing).
- Making such orders as are necessary to expedite the permanent placement and adoption of the child if parental rights have been terminated as well as terminating dependency jurisdiction once the adoption of the child has been finalized. See Welf & I C §366.3(a), (f) (postpermanency planning review hearing).
- Terminating dependency jurisdiction in cases in which a legal guardianship has been established. See Welf & I C §366.3(a) (postpermanency planning review hearing).

☛ JUDICIAL TIP: It is generally advisable to require DSS to prepare a complete review report, ensure that copies are provided timely to all parties (see Welf & I C §§366.21(c), 364(b)), and if there is a contest, proceed to hold a contested review hearing. If this procedure is followed, most issues should be resolvable at regular review hearings. However, if there are valid objections concerning lack of notice or the court determines that the changes involve new allegations that were not part of the original petition, the party seeking the changes should be required to file a §388 petition.

When the parent files a §388 petition, he or she must show by a preponderance of the evidence that there are changed circumstances under which modification of previous orders or a change in placement is in the best interest of the child. *In re Michael D.* (1996) 51 CA4th 1074, 1078, 59 CR2d 575 (court properly granted mother's motion to end legal guardianship and have child returned home after she demonstrated that she ended relationship with abusive boyfriend, stopped using drugs, started parenting classes, and submitted to drug testing). See also *In re Elizabeth M.* (1997) 52 CA4th 318, 323, 60 CR2d 557 (court properly denied mother's petition without a hearing because she failed to make a prima facie showing of changed circumstances); *In re Sylvia R.* (1997) 55 CA4th

559, 562, 64 CR2d 93 (prosecutor's dismissal of spousal abuse charges against father did not constitute changed circumstances).

A parent for whom reunification services were terminated is not entitled to a contested review hearing in order to show changed circumstances leading to a substantial probability of return; he or she must file a §388 petition. *Kimberly H. v Superior Court* (2000) 83 CA4th 67, 69–70, 99 CR2d 344.

B. Conducting Review Hearings

1. [§103.16] Notifying Parents, Guardians, and Counsel

Notice of the review hearing must be given to the following people:

- Mother and any presumed father or father receiving services
- Legal guardian
- Child if 10 years old or older
- Each attorney of record not present when the hearing was set
- Indian custodian and tribe if the court has reason to know that an Indian child is involved. If the tribe is not known, the Bureau of Indian Affairs must be notified.
- Foster parents or others with physical custody of the child if the child has been removed from the custody of the parent or guardian.

Welf & I C §§292(a) (review hearings held under Welf & I C §364; child not removed), 293(a) (review hearings held under Welf & I C §§366.21 and 366.22), 295(a) (postpermanency planning hearings held under Welf & I C §366.3). Notice is not required for a parent whose parental rights had been terminated. Welf & I C §§292(b), 293(b), 295(b).

The notice must include information on the nature of the hearing and recommendations by DSS for change in the child's status. Welf & I C §§292(d)(1), 293(d)(1). In addition to this information, for a postpermanency planning hearing held under Welf & I C §366.3, the notice must also contain information on any recommendations involving holding a new .26 hearing. Welf & I C §295(d)(1). If a new .26 hearing will be sought at a postpermanency planning hearing, the notice must also advise the child and parents of the right to be present; the court must also notify any alleged fathers of the hearing. Welf & I C §295(a)(7).

The notice must also advise the child and parents of the rights to be present, to counsel, and to present evidence. Welf & I C §§292(d)(1), 293(d)(1). Moreover, parents or guardians must be notified that if they fail to appear, the court may proceed in their absence. Welf & I C §§292(d)(1), 293(d)(1). Notice to a foster parent or others with physical custody of the

child must state that the person notified may attend all hearings or submit written information to the court. Welf & I C §293(f).

Service by first class mail or by certified mail to the recipient's last known address is sufficient if made at least 15 days, but not more than 30 days, before the hearing. Welf & I C §§292(c), (e)(1) and 293(c), (e)(1); see also Welf & I C §295(c), (e). When the child is an Indian, if notice had been given to the Bureau of Indian Affairs, that agency must have 15 days after receipt to notify the parent or Indian custodian and tribe. Welf & I C §§292(c), 293(c), 295(c). If service has not been made, the court should determine whether the parent or guardian received actual notice of the hearing. See Welf & I C §366.21(b). A total failure to give notice at a review hearing could require reversal of termination of parental rights even at the expense of a child's right to a stable home. *In re DeJohn B.* (2000) 84 CA4th 100, 438–440, 100 CR2d 649 (mother had abandoned child and appeared to be homeless, but DSS made no effort to find her).

If the parent or guardian has not received notice and service was not made or attempted in accordance with the law, the case should be continued for a reasonable time in order to permit service. See Welf & I C §352; Cal Rules of Ct 1422(a) (continuances generally).

For proceedings involving an Indian child, the notice must include the information that the custodian and tribe may intervene at any point and that the parent, tribe, or custodian may, on request, have up to an additional 20 days to prepare for the proceedings. Welf & I C §§292(d)(2), 293(d)(2), 295(d)(2). When notification is adequate but the Indian parent does not appear, the court's attempts to reach the parent may constitute "active efforts" under ICWA. *In re William G.* (2001) 89 CA4th 423, 428, 107 CR2d 436 (court learned that child had Indian heritage only after the reunification period had ended).

2. [§103.17] Judicial Officers

Review hearings, like other juvenile court hearings, may be conducted by referees who meet the qualifications of Welf & I C §247 (admitted to practice in California for a minimum of five years or admitted to practice in any other state and California for a combined minimum of ten years). Referees may perform subordinate judicial duties assigned to them by the presiding judge of the juvenile court. Welf & I C §247; Cal Rules of Ct 1415(a). They generally have the same power as judges and are entitled to hear dependency cases as a matter of right (*i.e.*, without a stipulation) (Welf & I C §248), except that the presiding judge of the juvenile court may require that certain referee orders be approved by a juvenile court judge before becoming effective (Welf & I C §251). Any orders by a referee requiring removal of a child from the physical custody of the person entitled to custody must be approved by a judge within two days in order to become effective. Welf & I C §249; Cal Rules of Ct

1417(b)(1). Nevertheless, a referee who has received a stipulation as a temporary judge under Cal Const art VI, §21, is empowered to act fully as a juvenile court judge. Cal Const art VI, §21; Cal Rules of Ct 1415(b).

Procedures to follow in obtaining a stipulation are set out in Cal Rules of Ct 244 (applicable to referees and attorneys acting as pro tem judges under Cal Const art VI, §21, but not applicable to commissioners). Failure to follow the procedures exactly will not void the stipulation nor deprive the court of jurisdiction. *In re Richard S.* (1991) 54 C3d 857, 865, 2 CR2d 2. A stipulation is necessary to give the court's acts finality in a dependency hearing, but the absence of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551, 18 CR2d 555.

The superior court is not required to designate commissioners as juvenile court referees and, in some jurisdictions, commissioners serve as temporary judges by express or implied stipulation. As such, their decisions and orders are not subject to rehearing. California Rules of Court 244(a), relating to the required stipulations for temporary judges, specifically states that it does not apply to court commissioners sitting as temporary judges. A stipulation to a commissioner acting as a temporary judge need not be in writing or express; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98, 284 CR 305; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–1228, 45 CR2d 500.

A referee or commissioner assigned as a referee who is not acting as a temporary judge must inform the child and parent or guardian that review by a juvenile court judge may be sought. See Welf & I C §248; Cal Rules of Ct 1416(a)(2). A child, parent, guardian, or DSS may apply for a rehearing at any time up to ten days after the service of a written order. Welf & I C §252; Cal Rules of Ct 1418(a). Also, a judge of the juvenile court may, on his or her own motion, order a rehearing within 20 judicial days after the hearing at which the referee made the order. Welf & I C §253.

If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873. For decisions by a referee that do not require approval by a juvenile court judge to become effective, a judge may make an order for a rehearing within 20 judicial days of the hearing, but not more than ten days following the service of a written copy of the order. *In re Clifford C., supra* (delinquency case harmonizing Welf & I C §§250 and 253).

If the proceedings before the referee were recorded by a court reporter, the judge may grant or deny the application for rehearing after reviewing the transcript. Welf & I C §252; Cal Rules of Ct 1418(c). If

there was no official report of the proceedings or if the judge fails to rule on the application within 20 days of receiving it (maximum of 45 days with an extension), the application for rehearing must be granted as a matter of right. Welf & I C §252; Cal Rules of Ct 1418(b)–(c). Rehearings of matters heard before a referee are conducted de novo before a juvenile court judge. Welf & I C §254; Cal Rules of Ct 1418(e). See discussion of rehearings in §103.57.

3. [§103.18] Right to Counsel

At a review hearing, as at any other hearing, the court must advise an unrepresented parent or guardian of the right to be represented by an attorney and the right of the parent or guardian, if indigent, to have an attorney appointed if the child is placed, or recommended to be placed, outside the home. Welf & I C §317; Cal Rules of Ct 1412(g)–(h). Each party who is represented by appointed counsel is statutorily entitled to competent counsel. Welf & I C §317.5(a). As to minimum standards for attorneys practicing dependency law, and issues regarding effective assistance of counsel, see California Judges Benchguide 100: *Juvenile Dependency Detention Hearings* §100.10 (Cal CJER).

Once counsel is appointed, he or she must represent the client in all proceedings (see Welf & I C §317(d)), including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1404–1405, 25 CR2d 259) and all subsequent proceedings (*In re Tanya H.* (1993) 17 CA4th 825, 827, 833 n7, 21 CR2d 503), unless the attorney is relieved for good cause or the parents demonstrate that they no longer desire further legal representation (*Janet O. v Superior Court* (1996) 42 CA4th 1058, 1065, 50 CR2d 57). Although the court should monitor the bills of appointed counsel, the court may not by local policy interfere with the statutory right of the parent to continued representation (Welf & I C §317(d)) by requiring that all counsel be relieved of the appointment after the first postpermanency planning review hearing, unless there is a showing of good cause. *In re Tanya H., supra,* 17 CA4th at 830–832. There is good cause within the meaning of Welf & I C §317(d) to relieve counsel at postpermanency planning hearings when the children are in adoptive placements and no legal issues remain. *In re Jesse C.* (1999) 71 CA4th 1481, 1491, 84 CR2d 609.

a. [§103.19] Parents or Guardians

Generally, the court may appoint counsel for an indigent parent or guardian if that person desires counsel. Welf & I C §317(a). If the child is being removed from the home or the petitioning agency is recommending removal, the court *must* appoint counsel for an indigent parent or guardian who wants to be represented by counsel. Welf & I C §317(b); see also *In*

re Ebony W. (1996) 47 CA4th 1643, 1647, 55 CR2d 337 (indigent mother who was voluntarily absent from the proceedings and never communicated a desire to be represented was not denied due process when juvenile court failed to appoint counsel). An alleged father, who is generally entitled to notice of hearings if known (see Welf & IC §§290.1–295), is not entitled to appointed counsel unless he appears in court; he is also not entitled to services unless he establishes that he is the presumed father of the child. See *In re Zacharia D.* (1993) 6 C4th 435, 448, 451–452, 24 CR2d 751.

A parent may waive the right to counsel at a review hearing (or other dependency hearing), whether that right is statutory under Welf & I C §317 or of constitutional origin. *In re Gilberto M.* (1992) 6 CA4th 1194, 1200, 8 CR2d 285 (waiver occurs when parent does not object to proceeding in absence of counsel).

After counsel has been appointed, the court may permit withdrawal only for cause or if substitute counsel is appointed. Welf & I C §317(d); *In re Ronald R.* (1995) 37 CA4th 1186, 1196, 44 CR2d 22 (court erred in allowing mother's counsel to withdraw at the six-month hearing without appointing substitute counsel); *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1065–1066, 50 CR2d 57 (juvenile court may, on notice, relieve counsel previously appointed for a parent when the parent manifests no further desire for legal representation).

A parent in a dependency proceeding who chooses self-representation is not necessarily entitled to full *Faretta* warnings. *In re Brian R.* (1991) 2 CA4th 904, 921–922, 3 CR2d 768.

If the parents desire to have the same attorney represent them and there is a potential conflict between the parents, the court should not allow the same attorney to represent both parents without the informed written consent of both parents. Cal Rules of Prof Cond 3–310(C)(1).

☛ JUDICIAL TIP: The better practice in juvenile court is to make parents aware of the dangers and disadvantages of self-representation and, when counsel represents both parents, to warn the parents about the possible dangers of dual representation.

b. [§103.20] Child

If, at any given review hearing, the court has previously declined to appoint counsel for the child, based on a finding that there would be no benefit to the child from having counsel appointed, the court should reevaluate these issues and determine anew whether appointment of counsel, or separate counsel, for the child is indicated. If the court continues to find that the child would not benefit from appointment of counsel, it must state on the record its reasons for that finding and appoint a CASA (Court Appointed Special Advocate) to serve as the Child Abuse

Prevention and Treatment Act (CAPTA) (42 USC §§5101 et seq) guardian ad litem to represent the child. Welf & I C §§317(c), 326.5; Cal Rules of Ct 1438(b)(3), (e). If the court does not find that there is "no benefit" from counsel, it must appoint an attorney to represent the child. Welf & I C §317(c).

Following appointment, the child's attorney must represent the child's interests at all subsequent hearings, including review hearings, until relieved by the court. Welf & I C §317(d)–(e). See California Judges Benchguide 100: *Juvenile Dependency Detention Hearings* §§100.12–100.17 (Cal CJER) regarding appointment of counsel for the child. In representing the child's interests, the child's attorney must make investigations on the child's behalf, examine and cross-examine witnesses appropriately, interview any child client who is four years of age or older, and make recommendations to the court concerning the child's welfare. Welf & I C §317(e). Because counsel for children must interview their clients to ascertain their wishes, one case has held that the judge may generally assume that an attorney who advocates for a certain disposition has previously consulted the child regarding that disposition. See *In re Jesse B.* (1992) 8 CA4th 845, 853, 10 CR2d 516. However, judges should be wary of making such an assumption.

The attorney represents the child's *legal* interests and is not required to perform the duties of the social worker nor to perform services that are unrelated to the child's legal representation. Welf & I C §317(e); Cal Rules of Ct 1438(c)(4); *In re Robert A.* (1992) 4 CA4th 174, 192, 5 CR2d 438. However, in assessing how to handle the litigation, the child's attorney as well as the social worker (or other guardian ad litem) must be notified of changes in the child's life including changes in placement. See *In re Robert A., supra.*

The attorney is required to investigate any possible rights or interests to be protected or pursued on behalf of the child, and to report to the court for appropriate instructions. Welf & I C §317(e); Cal Rules of Ct 1438(e)(2). Because the child's attorney has an obligation to represent the child's interests, the attorney may have to present a position to the court that runs counter to the positions of both the parents and DSS. See *Allen M.* v *Superior Court* (1992) 6 CA4th 1069, 1075, 8 CR2d 259.

Either the child or child's counsel, with the child's informed consent if he or she is found by the court to be sufficiently mature or old enough to consent, may invoke the psychotherapist-client, physician-patient, and clergyman-penitent privilege; if the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Welf & I C §317(f). Counsel is the holder of the privilege if the court finds that the child is not old or mature enough to consent to the invocation of the privilege. Welf & I C §317(f). The court may order the therapist to disclose limited information, despite the child's invocation of

the privilege, if the information would help the court to evaluate whether further orders are needed. *In re Kristine W.* (2001) 94 CA4th 521, 528, 114 CR2d 369. Once the child has begun therapy, the privilege does not preclude the court from ordering the release of very circumscribed information so that it can make reasoned decisions regarding the child's welfare. *In re Mark L.* (2001) 94 CA4th 573, 584, 114 CR2d 499.

Separate counsel for each dependent child in a family need not be appointed unless there is an actual conflict of interest. *In re Candida S.* (1992) 7 CA4th 1240, 1252, 9 CR2d 521. However, because Welf & I C §317.5 makes children parties to the action, it may be better to appoint separate counsel even if there is a *potential* conflict of interest. See Cal Rules of Prof Cond 3–310(C)(1).

☛ JUDICIAL TIP: Because of increased attention given to sibling relationships throughout the dependency process, particularly the Welf & I C §366.26(c)(1)(E) exception to the termination of parental rights because of substantial interference with a sibling relationship, courts should be alert to conflicts between siblings or groups of siblings that develop during the review process.

c. [§103.21] Conflicts of Interest

Counsel for the child may be a public defender, district attorney, or other member of the bar, provided that he or she does not represent another person or agency whose interests conflict with those of the child. Welf & I C §317(c). The district attorney's office may pursue criminal charges against the parent while representing the child. Welf & I C §317(c) (not an automatic conflict of interest). Finally, the district attorney may also represent children in some instances in which the office had previously prosecuted the parents as long as it does not represent another party or agency whose interest conflicts with the child's. *In re Albert B.* (1989) 215 CA3d 361, 382, 263 CR 694. However, in any of these cases, the court must consider the facts of the case to determine if there is an actual conflict. See also *Castro v Los Angeles County Bd. of Supervisors* (1991) 232 CA3d 1432, 1441–1445, 284 CR 154 (members of publicly funded, nonprofit group of lawyers that contracts with county for representation in dependency cases may properly represent parties with adverse interests in such proceedings unless *actual* conflict is shown).

Assessment of actual or potential conflict of interest concerning appointment of counsel for dependent siblings must be on a case-by-case basis. *In re Candida S.* (1992) 7 CA4th 1240, 1253, 9 CR2d 521 (disagreements among siblings about visitation will not necessarily present conflict of interest). But see *Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891 (court may need to appoint separate counsel for siblings if there is even a potential conflict of interest); Cal

Rules of Prof Cond 3–310(C)(1) (attorney may not accept representation of two clients whose interests potentially conflict without informed written consent). The court has broad discretion in determining the need for separate counsel for children and may appoint separate counsel even in the absence of a conflict. *Los Angeles County Dep't of Children etc. Servs. v Superior Court* (1996) 51 CA4th 1257, 1263–1264, 59 CR2d 613.

☛ JUDICIAL TIP: When counsel represents both parents, the court may wish to advise the parents of possible pitfalls, including conflict of interest, as the case develops.

d. [§103.22] Attorneys' Fees

The juvenile court may set compensation for appointed counsel for the child unless the attorney is a district attorney, public defender, or other public attorney (Welf & I C §317(c)), although the court may assess attorneys' fees against parents represented by a public attorney if they are able to afford the fees.

In the absence of a contractual obligation to pay a particular fee, the court may modify its payment to an appointed attorney during the pendency of a dependency case, despite the attorney's obligation to see the case through until the end. *Amarawansa v Superior Court* (1996) 49 CA4th 1251, 1259–1260, 57 CR2d 249.

4. [§103.23] Conduct of Hearing

As with any juvenile court hearing, a review hearing must be closed to the public, heard at a special or separate session of court, and granted precedence on the calendar. See Welf & I C §§345–346. The hearing must be conducted in an informal, nonadversarial manner, unless there is a contested issue of law or fact. See Welf & I C §350(a)(1); Cal Rules of Ct 1412(b). The court must control the proceedings with a view to expeditious determination of the facts and to obtaining maximum cooperation of the child and the persons interested in the child's welfare. Welf & I C §350(a)(1); Cal Rules of Ct 1412(a).

The proceedings must be transcribed by a court reporter if the hearing is conducted by a judge or by a referee acting as a temporary judge. Welf & I C §347; Cal Rules of Ct 1411(a). If the hearing is before a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 1411(b).

a. [§103.24] Who May Be Present

At any juvenile court hearing, the child and the child's attorney are entitled to be present. Welf & I C §349. In addition, Cal Rules of Ct 1410(b) permits the following persons to be present:

(1) Parents or guardians, or if none can be found or none reside within the state, any adult relatives residing within the county, or if none, any adult relatives residing nearest the court;

(2) De facto parents who may be foster parents or other caregivers;

(3) Indian custodians and guardians or a representative of the Indian child's tribe (see Cal Rules of Ct 1412(i));

(4) Counsel for parent, de facto parent, guardian, or adult relative, Indian custodian, or tribe;

(5) County counsel or district attorney;

(6) Social worker;

(7) Court clerk;

(8) Court reporter;

(9) Bailiff, at the court's discretion;

(10) Court-appointed special advocate (CASA); and

(11) Interpreters as needed.

The court may also permit any of the child's relatives to be present at the review hearing on a sufficient showing. See Cal Rules of Ct 1412(f). In addition to the participants mentioned above, the court may allow a support person for the child. See Welf & I C §326.5. See also Welf & I C §§100–109, 356.5 (setting forth the requirements governing the appointment and duties of a person appointed as a CASA volunteer); Cal Rules of Ct 1424 (program guidelines for CASAs); Standards of Judicial Administration §24.5 (implementing the statutory requirements).

If ICWA applies, the tribe is entitled to intervene as a party at any stage of the dependency proceeding and can be represented by counsel or by any other authorized representative. See Cal Rules of Ct 1412(i). If the tribe does not intervene as a party, the court may still allow a person affiliated with the tribe or a representative of a program operated by an Indian organization to participate in the proceedings. Cal Rules of Ct 1412(i)(2).

All others must be excluded from the courtroom, unless a parent or guardian requests that the public be admitted and this request is consented to by the child. Welf & I C §346. The court may also admit anyone who it determines has a direct and legitimate interest in the case or in the work of the court. Welf & I C §346. In any event, no person on trial, accused of a

crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is the parent, a de facto parent, guardian, or relative of the child. Welf & I C §345; Cal Rules of Ct 1410(a). A stepparent who is accused of a crime must be excluded from the proceedings.

b. [§103.25] Advisement of Rights

At review hearings, the court may wish to advise the parties of their rights under Cal Rules of Ct 1412. This is ordinarily not done at a review hearing unless it is the parents' first appearance or special issues (such as new allegations) have arisen. If the court does make advisements concerning rights, it should advise any unrepresented parent or guardian of the right to retain counsel and of the right to court-appointed counsel if the parent is financially unable to afford counsel. Cal Rules of Ct 1412(g)–(h). As to appointment of counsel for an unrepresented parent or guardian, see discussion in §103.19.

The court may also advise the party of the following rights in addition to the right to counsel (Cal Rules of Ct 1412(j)):

(1) The right to confront and cross-examine the persons who prepared reports or documents submitted to the court by the petitioning agency, and the witnesses called to testify at the hearing;

(2) The right to use the process of the court to bring in witnesses;

(3) The right to present evidence in court; and

(4) Any right to assert the privilege against self-incrimination.

Although Welf & I C §311(b) and Cal Rules of Ct 1412(j)(1) speak of a privilege against self-incrimination, this privilege can rarely be asserted because of the immunity parents receive in dependency proceedings. See Welf & I C §355.1(f). See also *In re Candida S.* (1992) 7 CA4th 1240, 1249–1251, 9 CR2d 521 (court not required to advise represented parent about immunity), citing *In re Lamonica H.* (1990) 220 CA3d 634, 649–650, 270 CR 60, and *In re Jessica B.* (1989) 207 CA3d 504, 517–521; 254 CR 883 (parents were required to admit abuse as part of the reunification plan without impairing the privilege against self-incrimination); Cal Rules of Ct 1420(e) (requiring the parent or guardian to disclose relevant information), 1421(d) (granting immunity for other witnesses).

☛ JUDICIAL TIP: The requirement of an advisement may be met by either of the following:

- Reading these rights to the parties and confirming that they understand their rights.
- Obtaining a personal waiver from this advisement requirement. To do this, the judge should ask the attorneys if they have explained

these rights to their respective clients and ask the parties to confirm that their attorneys have explained these rights to them, that they understand these rights, and that they waive formal reading of their rights.

c. [§103.26] Receipt of Documentary Evidence

At all review hearings, the court is required to read and consider the reports submitted by the social worker and by any court-appointed special advocate for the child. See Welf & I C §§366.1 (required content of reports), 366.21(c) (review hearings generally); Welf & I C §366.21(e); Cal Rules of Ct 1460(c)–(d) (six-month review); Welf & I C §366.21(f); Cal Rules of Ct 1461(b)–(c) (12-month review); Welf & I C §366.22(a); Cal Rules of Ct 1462(b) (18-month review); Welf & I C §366.3(f); Cal Rules of Ct 1466 (postpermanency planning review). The reports must be given to the parents ten days before the hearing. Welf & I C §366.21(c). This 10-day requirement is mandatory. *Judith P. v Superior Court* (2002) 102 CA4th 535, 553, 558, 126 CR2d 14 (review hearing orders overturned when parents only received the report when they attended the hearing).

When a child has been removed from parental custody, the social worker must provide a summary of his or her report to any CASA, foster parents, relative caregivers, certified foster parents who have been approved for adoption, or foster family agency with physical custody of the child at least ten days before the hearing. Welf & I C §366.21(c).

The statutory requirements of Welf & I C §355, regarding the right to cross-examine the social worker, do not apply at review hearings. See *In re Jeanette V.* (1998) 68 CA4th 811, 816, 80 CR2d 534. Indeed, social study reports are admissible at review hearings without the preparer being available for cross-examination. See *In re Matthew P.* (1999) 71 CA4th 841, 849 n3, 84 CR2d 269.

At review hearings, general principles of due process apply, which may include the right of the parent to call the social worker for cross-examination or otherwise challenge the material in the report. See *In re Jeanette V., supra.*

Parties and counsel, including counsel for the child, are to be provided with copies of the DSS report at least ten calendar days before the hearing. Cal Rules of Ct 1460(c)(2).

☛ JUDICIAL TIP: If a party was not timely provided with a copy of the report, and the party requests a continuance and establishes that he or she has been prejudiced by the late receipt of the report, the court should continue the case for a reasonable time to allow the party to respond to the report.

d. [§103.27] Presentation of Other Evidence

At review hearings, the court may receive testimony and other admissible evidence that is relevant to the child's status, the continuing necessity for and appropriateness of the child's placement, the extent of compliance with the case plan, plans for sibling interaction, limitations on parents' rights to make educational decisions, and the extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care. See Welf & I C §366(a)(1). See also *In re Roger S.* (1992) 4 CA4th 25, 30, 5 CR2d 208 (court may hear testimony at review hearing). A parent is entitled to cross-examine adverse witnesses, including the social worker and psychologist. *Ingrid E. v Superior Court* (1999) 75 CA4th 751, 753, 758–759, 89 CR2d 407.

Psychological evaluations can serve as credible evidence to sustain a detriment finding as long as they are reasonably specific and objective. *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1750, 53 CR2d 687. Indeed, without evidence from psychologists, courts might sometimes be reduced to making arbitrary decisions. *In re Jasmon O.* (1994) 8 C4th 398, 430, 33 CR2d 85.

A parent's or guardian's failure to cooperate in the provision of services may be used as evidence in any review hearing. Evid C §1228.1(b).

e. [§103.28] Child's Testimony

If one or more parties request that the child's testimony be taken, the court should consider issues concerning whether the child should be required to testify and, if so, under what circumstances.

(1) [§103.29] When Child Should Not Testify

In appropriate cases, the court may refuse to permit a child to testify if it determines that testifying would cause psychological stress and injury, and the potential benefit derived would not outweigh the injury it would cause. *In re Jennifer J.* (1992) 8 CA4th 1080, 1086, 10 CR2d 813, distinguishing *In re Amy M.* (1991) 232 CA3d 849, 283 CR 778 (child's testimony could have assisted in resolving a disputed issue). Although nothing in statutory or case law specifically authorizes a court to exclude a child's testimony in order to avoid psychological harm, the court nevertheless has such power based on the overriding objective of the dependency hearing—to preserve and promote the best interests of the child. *In re Jennifer J., supra,* 8 CA4th at 1089 (judge must weigh whether testimony would materially affect issues to be resolved against potential psychological injury to child). See also Evid C §240(c) (defining unavailability due to emotional trauma). In other cases, the court may direct that the child's testimony be taken in chambers and outside the

presence of the child's parents or guardians. Welf & I C §350(b); Cal Rules of Ct 1412(c).

(2) [§103.30] Testimony in Chambers

If the court determines that the child should testify, he or she may testify in chambers outside the presence of the parents if the parents' counsel is present and any one of the following conditions exists (Welf & I C §350(b); Cal Rules of Ct 1412(c)):

- The court determines that testimony in chambers is necessary to ensure truth-telling.
- The child is likely to be intimidated in the more formal courtroom setting.
- The child is frightened to testify in front of the parent or parents.

In determining whether to permit in-chambers testimony, the court may rely on the social worker's report or on a stipulated offer of proof. Cal Rules of Ct 1412(c)(3); *In re Katrina L.* (1988) 200 CA3d 1288, 1297, 247 CR 754 (court properly relied on statements in social worker's report that child would probably be intimidated in courtroom setting; social worker was available for cross-examination). The court may permit the child to testify in chambers even when the child does not expressly state a fear of testifying in open court. *In re Katrina L., supra,* 200 CA3d at 1297–1298 (requirements of Welf & I C §350 were otherwise met).

The presence of parents' counsel is essential; it may be prejudicial error for the court to question the child in chambers with only a reporter present. See *In re Laura H.* (1992) 8 CA4th 1689, 1697, 11 CR2d 285. Mere acquiescence by the parent to such a procedure does not constitute a waiver of counsel; a waiver must be knowing and intelligent. *In re Laura H., supra,* 8 CA4th at 1695. But see *In re Jamie B.* (2001) 90 CA4th 766, 771, 109 CR2d 123, disagreeing with *In re Laura H., supra,* and holding that a parent who keeps silent and otherwise acquiesces in the child's being questioned in chambers, outside the counsel's presence, waives the statutory right to have counsel at the in-chambers proceeding. (.26 hearing).

When a child testifies in chambers, the court must first administer an oath to the child or obtain a satisfactory promise from the child to tell the truth. See *In re Heather H.* (1988) 200 CA3d 91, 95–97, 246 CR 38 (failure to administer oath rendered testimony inadmissible). See also Evid C §710 (witnesses under ten years old need only promise to tell the truth). When the child testifies in chambers, the testimony must be recorded and the parent or guardian may request the reporter to read back the testimony. See Cal Rules of Ct 1412(c)(3). For a discussion of handling child

witnesses in court generally, see THE CHILD VICTIM WITNESS BENCH HANDBOOK (CJER 2002).

☛ JUDICIAL TIP: To accommodate the needs of the child witness, some judges remove their robes, which can be frightening symbols of formality to the child, and reduce the formality of the proceedings in other ways. See THE CHILD VICTIM WITNESS BENCH HANDBOOK §§1.19, 3.9 (CJER 2002). In addition, some judges conduct "in-chambers" proceedings in the courtroom without the parents because some chambers become too crowded and therefore too frightening for the child with so many people in attendance.

(3) [§103.31] Other Accommodations

When a child is unwilling to testify even at an in-chambers hearing because of the presence of so many adults (the judge, many attorneys, social worker, and court reporter), a court is entitled to use its inherent powers to carry out its duties and ensure the orderly administration of justice (derived from Cal Const art VI, §1) and may permit the testimony of the child by closed-circuit television even in the absence of any express statutory authority for this procedure. *In re Amber S.* (1993) 15 CA4th 1260, 1266, 19 CR2d 404 (court may use new procedure to protect best interests of child because parents' rights are at least as protected as they would have been under Welf & I C §350(b)).

C. Findings and Orders

1. [§103.32] Six-Month Review Hearings

Under Welf & I C §366.21(e), the court must hold a review hearing six months after the initial disposition hearing for all dependent children remaining at home but not more than six months after the date the child entered foster care if the child has been removed. See Cal Rules of Ct 1460. The six-month review hearing for a child who has been removed from the custody of a parent or guardian must be held within six months from the date of entry into foster care, rather than within six months from the date of the disposition hearing, despite language to the contrary in Welf & I C §§366(a)(1) and 366.21(e). *In re Christina A.* (2001) 91 CA4th 1153, 1163–1165, 111 CR2d 310.

The term "six-month review" applies to a child who remains at home (see Welf & I C §364), as well as to a child who is removed from the parents' custody (see Welf & I C §366.21(e)). If the child remains at home as a dependent, there may be several six-month reviews. See Welf & I C §364(d).

See the checklist in §103.4 for the manner of conducting the six-month review hearings and the findings and orders the court is required to make at the hearing. See §§103.49–103.52 for requirements for setting a .26 hearing.

a. [§103.33] Options—In General

At the six-month review hearing, the court may terminate dependency of a child who has remained at home or, if proper findings support it, the court may continue dependency and services to the child and the family. Welf & I C §§364(c), 366.21(e); Cal Rules of Ct 1460(e). If the court finds that the parent is in total compliance with the case plan, has made a concerted effort to integrate insights gained in therapy into his or her daily life, and has been permitted to return to the home in which the child has been residing with the other parent, it must terminate jurisdiction under Welf & I C §364(c). *In re N.S.* (2002) 97 CA4th 167, 173, 118 CR2d 259.

If the child has been removed, the court may:

- Return the child and terminate dependency (Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2));
- Return the child and continue dependency with services to the child and family (Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2));
- Place the child with the noncustodial parent and do either of the above (Welf & I C §366.21(e); Cal Rules of Ct 1460(h));
- Continue out-of-home placement with reunification services (Welf & I C §366.21(e)); or
- Terminate reunification services if previously ordered and schedule a .26 hearing (Welf & I C §366.21(e); Cal Rules of Ct 1460(f)).

If the child has been in out-of-home placement, the court must order the child returned to the custody of the parents or guardians unless the DSS shows by a preponderance of the evidence that returning the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2). Evidence of a parent or guardian's failure to participate regularly and make substantive progress in court-ordered treatment programs, unless successfully rebutted, is sufficient to merit a finding that continued supervision is necessary and that return would be detrimental, thus justifying continued out-of-home placement. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(3). This is not an unconstitutional presumption of parental unfitness, but rather a valid presumption affecting the burden of producing evidence. *In re Heather B.* (1992) 9 CA4th 535,

560, 11 CR2d 891. The substantial risk of detriment to returning a child need not be the same risk as that which necessitated the assumption of juvenile court jurisdiction; the court must focus on the risk to the safety, protection, or physical or emotional well-being of the child at the time of the review hearing. *In re Joseph B.* (1996) 42 CA4th 890, 899, 49 CR2d 900. In addition, even if the parent had corrected the problem that originally gave rise to court intervention, the court may well conclude that reunification would create a substantial risk of detriment, perhaps because of a long history of abuse. *In re Joseph B., supra*, 42 CA4th at 901.

☛ JUDICIAL TIP: If the evidence warrants, some judges make the finding of substantial risk of detriment by clear and convincing evidence.

A court must retain jurisdiction at a review hearing when a child, who is not a proper subject for adoption, has been placed in another country with a relative who is not a legal guardian, no matter how satisfactory that arrangement. In the absence of an adoption or legal guardianship, continued supervision is necessary because otherwise there is no one with legal custody of the child and no guaranty that the placement is permanent. *In re Rosalinda C.* (1993) 16 CA4th 273, 279, 20 CR2d 58.

b. [§103.34] Continuing Services

If the court decides that there would be a substantial risk of detriment if the child were returned (see §103.54) and does not terminate reunification services, it must order continuing services and set the matter for a permanency hearing not later than 12 months from the date the child entered foster care. See Welf & I C §§366.21(e)–(f), 361.5(a) (defining date child deemed to have entered foster care); see also Cal Rules of Ct 1461(a) (12-month permanency hearing must be held no later than 18 months from the date of the initial removal). The fact that the child had been returned home and then re-removed during the reunification period does not toll the time period. Welf & I C §361.5(a).

The court must also make further findings concerning the continuing necessity and appropriateness of the child's placement, the extent of compliance with the case plan, plans for sibling interaction, limitations on parents' rights to make educational decisions, and the extent of progress made toward alleviating or mitigating the causes necessitating placement in foster care. Welf & I C §§366(a)(1), 366.21(e).

If the child is not to be returned home and there are no grounds to set a .26 hearing, the court must (Welf & I C §366.21(e)):

- Determine whether reasonable reunification services have been provided or offered to the parents or guardians;

- Order that reunification services be initiated, continued, or modified; and
- Inform the parent or guardian that if the child cannot be returned home by the 12-month permanency hearing, a proceeding for termination of parental rights under Welf & I C §366.26 may be instituted.

Services may not be reasonable if they are not provided during a parent's incarceration in a situation in which the parent is deported immediately upon release from prison. See *In re Maria S.* (2000) 82 CA4th 1032, 1040, 98 CR2d 655.

In determining whether reasonable services were offered or provided, the following facts should not, in and of themselves, be considered a failure to offer or provide services (Welf & I C §366.21(*l*); Cal Rules of Ct 1460(e)(2)(B)):

- The child has been placed with a foster family eligible to adopt or has been placed in a preadoptive home.
- The case plan includes services to make and finalize a permanent plan for the child if efforts to reunify fail.
- Services to make and finalize a permanent plan for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

The court should also consider making findings and orders on whether reasonable concurrent planning efforts have been provided to achieve legal permanence for the child if efforts to reunify fail. See Welf & I C §§366.21(c), 16501.1(f)(9); Cal Rules of Ct 1460(e)(2)(B)(iii).

c. [§103.35] Setting a .26 Hearing

If the court finds by clear and convincing evidence that the child was removed initially under Welf & I C §300(g) and that the whereabouts of the parent are still unknown or the parent has failed for six months to contact and visit the child, or the parent is deceased, it may schedule a .26 hearing and order an assessment under Welf & I C §366.21(i) (covering prospects for adoption, search efforts for absent parents, review of parent-child contacts, and evaluation of child). Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1). A court may set a .26 hearing at this stage when the parent has failed to contact and visit the child; there is nothing to be gained in continuing to offer services when a parent makes no effort to reunify with the child for six months and there are no extenuating circumstances. *In re Monique S.* (1993) 21 CA4th 677, 682, 25 CR2d 863.

In addition, if the court finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness, it may also terminate services, schedule a .26 hearing, and order an

assessment under Welf & I C §366.21(e), (h)–(i); Cal Rules of Ct 1460(f)(1)(C). Although the provisions for denying reunification at disposition do not directly apply to review hearings, services may be terminated and a .26 hearing may also be set if the conditions of Welf & I C §361.5(b) arise during the reunification period, providing that all parties have notice of these changed conditions by appropriate means including the filing of a petition for modification under Welf & I C §388.

☛ JUDICIAL TIP: In an ICWA case when the evidence supports the findings required for setting a .26 hearing, the court should consider making these findings (that serious emotional or physical damage likely to occur if the child is continued in the parent's custody, as well as that "active efforts" were made) when setting the .26 hearing. See 25 USC §1912(d)–(f). In this way, those findings will not have to be litigated at the .26 hearing. See *In re Matthew Z.* (2000) 80 CA4th 545, 554–555, 95 CR2d 343 (serious risk to physical health finding); *In re Michael G.* (1998) 63 CA4th 700, 713 n9, 74 CR2d 642 ("active efforts" finding should be made before scheduling the .26 hearing).

If the court sets a .26 hearing at this point, it must advise the parent or guardian of the writ remedy for review of the orders and make sure the parent or guardian receives the appropriate Judicial Council forms (JV-820, Notice of Intent To File Writ Petition and Request for Record, Rule 39.1B, and JV 825, Petition for Extraordinary Writ—Juvenile Dependency). See Cal Rules of Ct 39.1B. See also Welf & I C §366.26(*l*); Cal Rules of Ct 1460(f)(3)–(8).

At the six-month review, the court may not set a .26 hearing to consider the termination of parental rights of only one parent unless that parent is the sole surviving parent, the rights of the other parent have already been terminated, or the other parent has relinquished custody. Cal Rules of Ct 1460(i). See discussion in §103.49.

d. [§103.36] Child Under Three Years Old or Member of Sibling Group in Which One Sibling Under Three Years Old at Removal

If the child was under three years old or is a member of a sibling group in which one child was under three years old at the date of initial removal and it is shown by clear and convincing evidence that the parent failed to make substantive progress or regularly participate in a court-ordered treatment plan, then the court may terminate services and schedule a .26 hearing within 120 days. Welf & I C §366.21(e); see Cal Rules of Ct 1460(f)(1)(E). If the court determines that there is a substantial probability that the child may be returned to the home within six months or 12 months from the date the child entered foster care (whichever is sooner) or that

reasonable services were not provided or offered, the court must continue the case to the 12-month permanency hearing. Welf & I C §366.21(e); Cal Rules of Ct 1401(a)(7), 1460(f)(1)(E). To find a substantial probability of return within six months, the court must find all the following (Cal Rules of Ct 1460(f)(1)(E)):

- The parent or guardian has consistently and regularly visited the child;
- The parent or guardian has made major progress in solving the problems that led to removal; and
- The parent or guardian has shown the ability to complete the objectives of the treatment plan and to provide for the child's safety, health, physical and emotional well-being, and special needs.

In determining whether to schedule a .26 hearing for a child who is a member of a sibling group in which one child was under three years old at the date of initial removal (see Welf & I C §361.5(a)(3)), the court must review and consider DSS's recommendations. Welf & I C §366.21(e). Among the factors the court may consider under Welf & I C §366.21(e) and Cal Rules of Ct 1460(g) are:

- Whether the sibling group was removed from the home as a group,
- Strength of the sibling bond,
- Children's ages,
- Suitability of keeping the siblings,
- Detriment to the child if sibling ties are not maintained,
- Possibility of finding a permanent home for the sibling group,
- Whether the group is currently together in a preadoptive home or has a concurrent plan objective of legal permanency in the same home,
- Wishes of each child who is capable of having a meaningful response to the situation, and
- Best interest of each child.

The court must specify the factual basis of its finding that it is in the best interest of each child to schedule a .26 hearing within 120 days for some or all siblings. Welf & I C §366.21(e).

2. [§103.37] 12-Month Permanency Hearings

The court must hold a permanency hearing within 12 months after the date the child entered foster care. Welf & I C §366.21(f); see Cal Rules of Ct 1461(a). At the permanency hearing, the court must determine the

permanent plan for the child, including an assessment of when and if the child will be returned home. Welf & I C §366.21(f). When the child cannot be returned home, the court must determine the extent of progress made toward alleviating or mitigating causes necessitating placement in foster care. Welf & I C §366(a)(1)(E). See also Cal Rules of Ct 1461(b) (DSS must report on the services offered and progress made, including recommendations for court orders and description of concurrent efforts to achieve legal permanence should reunification efforts fail).

For procedures involved in a 12-month permanency hearing and the findings and orders the court is required to make at the hearing, see Cal Rules of Ct 1461 and the checklist in §103.5.

a. [§103.38] Return of Child

If the child had been in out-of-home placement, the court must order the return of the child to parental custody unless it finds by a preponderance of the evidence that return would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1). Evidence of a parent's or guardian's failure to make substantive progress and participate regularly in court-ordered treatment programs, unless successfully rebutted, is sufficient to merit a finding that return would be detrimental, thus justifying the continued removal of the child from the custody of the parents or guardians. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1).

If the child is not returned, the court must terminate reunification services and set a hearing under Welf & I C §366.26 unless it find that there is a substantial probability of return within 18 months of the initial removal. Welf & I C §366.21(g); Cal Rules of Ct 1461(d)(1), (4). In order to find a substantial probability that the child will be returned home and safely maintained there, the court must find all the following:

- That the parent or legal guardian has consistently and regularly contacted and visited the child,
- That the parent or legal guardian has made significant progress in resolving the problems that led to the child's removal, and
- That the parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs. Welf & I C §366.21(g)(1)(A)–(C); Cal Rules of Ct 1461(c)(3).

A finding of substantial probability that the child will be returned to the custody of the parent or guardian by the next review hearing is a

compelling reason for determining that setting a .26 hearing is not in the child's best interests. Welf & I C §366.21(g).

b. [§103.39] Other Options

If the court does not order the child's return, it may order

- Up to six more months of services and the holding of an 18-month permanency review hearing no later than 18 months from the initial removal of the child,
- Long-term foster care (if it finds by clear and convincing evidence that the child is not a proper subject for adoption and that there is no one willing to accept legal guardianship), or
- A .26 hearing to be held within 120 days (see §103.42) (if there is clear and convincing evidence that reasonable reunification services have been provided or offered to the parent or guardian).

Welf & I C §366.21(g)(1)–(3). See also Cal Rules of Ct 1461(d)(1)–(3).

c. [§103.40] Reasonable Services

The court must also determine whether reasonable reunification services have been provided or offered to the parents or guardians, as well as whether services to aid in the transition between foster care and independent living were offered to children 16 years of age and older. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(4). Evidence of any of the following does not constitute a failure to offer or provide reasonable services (Welf & I C §366.21(*l*); Cal Rules of Ct 1461(c)(5)):

- The child has been placed with a foster family eligible to adopt or in a preadoptive home.
- The case plan includes services to make and finalize a permanent plan for the child if efforts to reunify fail.
- Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

The court should also consider making findings and orders on whether reasonable concurrent planning efforts have been provided to achieve legal permanence for the child if efforts to reunify fail. See Welf & I C §16501.1(f)(9); Cal Rules of Ct 1461(c)(5)(C). A finding that services were reasonable was reversed when the services were not provided during the parent's incarceration and the parent was deported immediately after being released from incarceration. See *In re Maria S.* (2000) 82 CA4th 1032, 1040, 98 CR2d 655.

In an ICWA case when setting a .26 hearing, the court should also determine whether "active efforts" have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and whether those efforts have proved unsuccessful. See 25 USC §1912(d). If this finding is made by clear and convincing evidence at the hearing at which the .26 hearing is set, it will not have to be relitigated at the .26 hearing. See *In re Michael G.* (1998) 63 CA4th 700, 712, 713 n9, 74 CR2d 642.

d. [§103.41] Setting 18-Month Permanency Review Hearing

If the child cannot be returned home, the court may continue the case for up to six months (but not more than 18 months from the date on which the child was originally removed from the home) if it finds that reasonable reunification services were not offered or provided or if it finds that there is a substantial probability that the child will be returned within the statutory period and safely maintained in the home. Welf & I C §366.21(g)(1); see Cal Rules of Ct 1461(d)(1), 1462(a).

If services are continued, the court must inform the parent or guardian, if present, that if the child cannot be returned to the physical custody of the parent or guardian by the 18-month permanency review hearing, reunification services will be terminated and a permanent plan will be developed at that hearing. Welf & I C §366.21(g)(1), (h).

e. [§103.42] Setting a .26 Hearing

If the court does not find a substantial probability that the child will be returned home within 18 months from removal, the court may order that a .26 hearing be held, but only if the court does not continue the case to a permanency review hearing. Welf & I C §366.21(g)(2); Cal Rules of Ct 1461(d)(3). When the court sets a .26 hearing, it must order the termination of reunification services to the parent or guardian and direct DSS to prepare an assessment under Welf & I C §366.21(i). Welf & I C §366.21(h)–(i); Cal Rules of Ct 1461(d)(4)–(5). When ordering a .26 hearing, the court must order visitation to continue unless this course of action would be detrimental to the child. Cal Rules of Ct 1461(d)(4). The court must also advise the parent of the right to challenge this decision by means of extraordinary writ. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1461(d)(9). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties. See Welf & I C §366.26(*l*)(3)(A); *In re Cathina W.* (1998) 68 CA4th 716, 721–724, 80 CR2d 480. See discussion in §103.49.

☛ JUDICIAL TIP: It is important that parents are advised of the writ review requirement, either in court when setting the .26 hearing or

by mail to absent parents, so that parents are fully apprised of their rights and cannot raise the lack of notice on appeal.

A finding of substantial probability that the child will be returned home by the next review hearing is a compelling reason for the determination that setting a .26 hearing is not in the child's best interests. Welf & I C §366.21(g)(1).

3. [§103.43] 18-Month Permanency Review Hearings

An 18-month permanency review hearing (no later than 18 months from the date the child was originally removed from the physical custody of the parent) must be held when the case was continued at the 12-month permanency hearing on grounds that at that time there had been a substantial probability that the child would be returned to the physical custody of the parent or guardian within six months (actually, within 18 months from removal) or that reasonable reunification services had not been provided. Welf & I C §§366.22(a), 366.21(g)(1). The 18-month permanency review hearing represents a critical juncture in that the court must embrace or forsake family preservation at this point. *Mark N. v Superior Court* (1998) 60 CA4th 996, 1015, 70 CR2d 603.

Procedures involved in 18-month permanency review hearings and the findings and orders the court is required to make are set out in Cal Rules of Ct 1462 and the checklist in §103.6.

a. [§103.44] Options—In General

If the child has been in out-of-home placement, the court must order the return of the child to parental custody unless it finds by a preponderance of the evidence that return would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1). If the court does not order return, it must order (Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)):

- Long-term foster care if it finds by clear and convincing evidence that the child is not a proper subject for adoption and that there is no one willing to accept legal guardianship, or
- A .26 hearing to be held within 120 days.

b. [§103.45] Factors To Consider

At the hearing held under Welf & I C §366.22, a judge may consider (*Constance K. v Superior Court* (1998) 61 CA4th 689, 704–705, 71 CR2d 780):

- Whether changing custody will be detrimental because a positive, loving relationship with the foster family would be severed.
- Whether the parent maintains relationships with people who might harm the child.
- Instability in the home.
- The child's difficulties in dealing with others, such as stepparents.
- The parent's awareness of the child's needs.
- The parent's past conduct toward the child.

The judge should also consider the needs of the child with regard to maintaining contact with his or her siblings. See Welf & I C §366(a)(1)(D).

c. [§103.46] Reasonable Services/Extension of Services

The court must also determine whether reasonable reunification services have been provided or offered to the parents or guardians, as well as whether services to aid in the transition between foster care and independent living were offered to children 16 years of age and older. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(5). Evidence of any of the following does not constitute a failure to offer or provide reasonable services (Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(5)):

- The child has been placed either with a foster family eligible to adopt or in a preadoptive home.
- The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.
- Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

The standard is not whether the services provided are the best possible services, but whether they were reasonable under the circumstances. *In re Julie M.* (1999) 69 CA4th 41, 48, 81 CR2d 354 (six-month review).

The court should also consider making findings and orders on whether reasonable concurrent planning efforts have been provided to achieve legal permanence for the child if efforts to reunify fail. See Welf & I C §§366.22(a), 16501.1(f)(9); Cal Rules of Ct 1462(b)(5).

Some courts have held that in a rare case and under exceptional circumstances the court may consider extension of services beyond the 18-month limitation. The extension must be supported by substantial evidence that is reasonable in nature, credible, and of solid value. *In re Brequia Y.*

(1997) 57 CA4th 1060, 1068–1069, 67 CR2d 389. In making its determination, the court should consider:

- The failure to offer or provide reasonable services,
- The likelihood of success of further reunification services,
- Whether the child's need for prompt resolution of the situation outweighs the benefit gained by providing further reunification services, and
- Any other relevant factors.

Mark N. v Superior Court (1998) 60 CA4th 996, 1017, 70 CR2d 603. See also *Rosa S. v Superior Court* (2002) 100 CA4th 1181, 1188, 122 CR2d 866 (a parent may not be precluded from receiving reunification services when he or she had previously received 18 months of services in a prior dependency proceeding that resulted in successful reunification). But see *Los Angeles County Dep't of Children etc. Servs. v Superior Court* (1997) 60 CA4th 1088, 1091–1093, 70 CR2d 658 (extending services beyond 18-month date found to be an abuse of discretion and beyond court's jurisdiction).

For discussion of the need to make "active efforts" in an ICWA case, see §§103.35 and 103.40.

d. [§103.47] Setting a .26 Hearing

If a .26 hearing is scheduled, the court must direct DSS to prepare an assessment under Welf & I C §366.22(b), order the termination of reunification services to the parent, and continue visitation unless to do so would be detrimental to the child. See Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)–(4), (6). When the court terminates reunification services at the 18-month hearing, the child is entitled to a .26 hearing at that time, unless proved by clear and convincing evidence that the child is not a proper subject for adoption and there are no potential guardians. *In re John F.* (1994) 27 CA4th 1365, 1374, 33 CR2d 225. As with the other review hearings, if a .26 hearing is set at this stage, the court must advise the parents of their right to challenge the decision by extraordinary writ. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1462(b)(10). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties. See Welf & I C §366.26(*l*)(3)(A); *In re Cathina W.* (1998) 68 CA4th 716, 721–724, 80 CR2d 480. See discussion in §103.49.

4. [§103.48] Postpermanency Planning Review Hearings

Once a permanent plan (adoption, guardianship, or long-term foster care) has been selected for a child, periodic reviews of the child's case must continue to be held every six months. Welf & I C §366.3(a), (d); Cal Rules of Ct 1466(a)–(b). Although the review may be conducted by either

the juvenile court or by an appropriate local agency, the court *must* conduct the review under any of the following circumstances (Welf & I C §366.3(d)):

- Parental rights have been terminated and the child is awaiting adoption;
- The child, parents, or guardian have requested a court hearing;
- 12 months have elapsed since a .26 hearing has been held;
- 12 months have elapsed since an order was made that the child remain in long-term foster care under Welf & I C §366.21, §366.22, §366.26, or §366.3(g) (see Welf & I C §366.21(g)(3)); or
- 12 months have elapsed since a review was conducted by the court.

Rarely, if ever, are court hearings replaced by administrative reviews and most judges recommend against such a practice. In any event, a *court* must hold a hearing to review the permanent plan at least every 12 months. Welf & I C §366.3(d).

At this hearing, the court must inquire into the progress being made to provide a permanent home and must consider the child's safety and determine (Welf & I C §366.3(e)):

- The continuing necessity for and appropriateness of the child's placement.
- The continuing appropriateness of and extent of compliance with the permanent plan.
- The extent of DSS compliance with the case plan in making reasonable efforts to return the child to a safe home and to complete plans for permanent placement.
- The adequacy of services provided, including the progress in providing documents, information, and services for a child who has reached the age of majority (see Welf & I C §391).

☛ JUDICIAL TIP: If the child has reached the age of majority, DSS may seek termination of jurisdiction. The circumstances under which the court may deny this dismissal are set out in Welf & I C §391(c). At least ten calendar days before the hearing, DSS must file form JV-356 (Termination of Dependency Jurisdiction (Child Attaining Age of Majority)) and provide copies to the child, the parent or guardian, all counsel, and any CASA. Cal Rules of Ct 1466(d).

- The parents' progress toward alleviating the causes that required foster care.

- The probable date by which the child may be returned home or placed for adoption or in some other permanent living situation.
- Whether the child has siblings under jurisdiction and, if so:
  - — The nature of the relationship with the siblings;
  - — The appropriateness of developing and maintaining sibling relationships;
  - — If siblings are not placed together, the reason for that placement, and efforts, if any, to correct it;
  - — Frequency and nature of sibling visitation; and
  - — Impact of sibling relationship on placement and permanent planning.
- The services needed to assist a child who is 16 years of age or older to make the transition from foster care to independent living (see Welf & I C §366.21(f)).

☛ JUDICIAL TIP: In some counties, work toward independent living begins when children are 14 years old.

If parental rights have been terminated and the child has been ordered placed for adoption, the court must make appropriate orders to protect the child's stability and promote permanent placement and adoption after reviewing a report from DSS that covers the child's current physical, emotional, educational, and mental status, as well as the current placement, progress toward adoption, and extent that the final adoption order should include provisions for postadoptive sibling contact under Welf & I C §366.29. Welf & I C §366.3(f).

At the review held for a child in long-term foster care and for whom 12 months have elapsed since the hearing took place in which the child was ordered into long-term foster care, the court must consider all permanency options, including the following (Welf & I C §366.3(g)):

- Returning the child home,
- Placing the child for adoption,
- Establishing a legal guardianship, and
- Continuing the child in long-term foster care.

If the child is in long-term foster care, the court must set a .26 hearing at this review hearing unless it finds by clear and convincing evidence that holding such a hearing is not in the best interest of the child. Welf & I C §366.3(g).

If it is unlikely that the child will be adopted or that one of the conditions in Welf & I C §366.26(c)(1) applies, this constitutes a

compelling reason not to order a new .26 hearing. See Welf & I C §366.3(g). The conditions set out in Welf & I C §366.26(c)(1) are that:

- The parent or guardian has maintained regular visitation and contact;
- The child is 12 years old or older and objects to termination;
- The child is in residential treatment, adoption is unlikely or undesirable, and continuation of parental rights will not affect finding a permanent placement if parents are not able to resume custody;
- The child is living with a relative or foster parent who is not able or willing to adopt the child, but who is providing a stable home; or
- There would be substantial interference with the relationship between the child and his or her siblings.

If the court orders a .26 hearing at this postpermanency planning review hearing, it must order an assessment by local or state DSS or the adoption agency supervising the child and hold the hearing within 120 days of the 12-month hearing. Welf & I C §366.3(h).

The court must grant a contested postpermanency planning status hearing under Welf & I C §366.3(e) to a parent of a child who is in long-term foster care and for whom DSS is recommending a reduction in visitation. *In re Kelly D.* (2000) 82 CA4th 433, 439–440, 98 CR2d 188.

The nature and substance of postpermanency planning review hearings, the manner of conducting them, and the findings and orders the court is required to make at such hearings are set out in Cal Rules of Ct 1466 and in the checklist in §103.7.

5. [§103.49] Setting the Selection and Implementation (.26) Hearing

Except at a postpermanency planning review hearing, when the court orders that a hearing under Welf & I C §§366.26 be held, it must order termination of reunification services to the parents or guardians and direct DSS to prepare an assessment. Welf & I C §§366.21(h), 366.22(a)–(b); Cal Rules of Ct 1460(f)(2), 1461(d)(4)–(5); see also Cal Rules of Ct 1462(b)(3)(B). The court must also continue to permit the parent to visit the child pending the hearing unless it finds that visitation would be detrimental to the child (Welf & I C §366.21(h)–(i)), but terms of the visitation may be modified from previous levels to fit the current situation. Unless there are exceptional circumstances that justify ordering long-term foster care, the child *must* receive a .26 hearing. *In re John F.* (1994) 27 CA4th 1365, 1374, 33 CR2d 225. When the court knows that more permanent options are not foreclosed, it does not have discretion to

maintain the child in the uncertainty of foster care and deny the .26 hearing. 27 CA4th at 1377

In determining whether to grant visitation to the parents when setting a .26 hearing at a review hearing (see Welf & I C §§366(a)(1), 366.21(h), 366.22(a)), the court must use a "preponderance of the evidence" standard of proof. *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282.

The court may not set a .26 hearing to consider the termination of parental rights of only one parent unless that parent is the sole surviving parent, the rights of the other parent have already been terminated, or the other parent has relinquished custody. Cal Rules of Ct 1460(i), 1461(e), 1462(c).

When ordering a .26 hearing, the court must order that no notice of the hearing be given to a parent who has relinquished the child for adoption or a father who has denied paternity by completing and submitting Judicial Council form JV-505, Statement Regarding Paternity. See Welf & I C §294(b); Cal Rules of Ct 1460(f)(8), 1461(d)(10)(B), 1462(b)(11).

a. [§103.50] Advisements

In setting a .26 hearing, the court must advise the parents of the time and place of the proceedings, the right to counsel, the nature of the proceedings, the DSS recommendation, and the fact that the court will select and implement a permanent plan of adoption, legal guardianship, or long-term foster care. Welf & I C §294(e). The court must advise the parents at that time that they may challenge this order with an application for extraordinary writ. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1460(f)(3)–(8). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties. See Welf & I C §366.26(*l*)(3)(A); *In re Cathina W.* (1998) 68 CA4th 716, 721–724, 80 CR2d 480. However, the court must order that no notice of the hearing be provided to a parent who has relinquished the child for adoption when the relinquishment has been accepted and filed with notice under Fam C §8700 (Welf & I C §294(b)(1); Cal Rules of Ct 1460(f)(8)(A)), nor to a parent whose rights have been terminated or to an alleged father who has denied paternity officially on Judicial Council form JV-505, Statement Regarding Paternity (Welf & I C §294(b)(2), (3); Cal Rules of Ct 1460(f)(8)(B)).

Many courts will also advise the parents that if changed circumstances arise, they may file a petition for modification under Welf & I C §388.

b. [§103.51] Petition for Modification

The filing of a §388 petition may suspend or halt the process of moving toward a permanent plan. Once a court grants a Welf & I C §388 petition showing changed circumstances, including the possibility that the parent *would* be able to care for the child, it must not then proceed to a .26 hearing and terminate parental rights. *In re Sean E.* (1992) 3 CA4th 1594, 1599, 5 CR2d 193. It may be a denial of due process to proceed to a .26 hearing without holding a new §388 hearing when there is a showing of changed circumstances. *In re Hashem H.* (1996) 45 CA4th 1791, 1801, 53 CR2d 294.When a parent makes a showing of being able to reunify with the child, it may be a denial of due process for a court to deny a petition for modification without a full hearing, even when the process is so far along as to be past the 12-month permanency hearing at which services were terminated. *In re Jeremy W.* (1992) 3 CA4th 1407, 1416, 5 CR2d 148.

☛ JUDICIAL TIP: If a §388 petition is filed after a .26 hearing is set, the court may consolidate the §388 hearing with the .26 hearing as long as the §388 petition is decided first. See *In re Jeremy W., supra,* 3 CA4th at 1416 n14. However, if the hearings are consolidated, the court should ensure that there is a clear record of separate findings and orders in case there is an appeal.

When an order denying a parent's petition for modification under Welf & I C §388 is integrally related to the order setting the .26 hearing, the parent must seek review of that order by extraordinary writ rather than by appeal. *In re Charmice G.* (1998) 66 CA4th 659, 671, 78 CR2d 212.

c. [§103.52] Delay in Setting .26 Hearing

A court might be required to delay the setting of a .26 hearing if the parents can show that reunification services could not have been completed during the time allotted. See *In re Michael R.* (1992) 5 CA4th 687, 695, 7 CR2d 139 (.26 hearing was set at 12 months and mother filed a motion for continuance under Welf & I C §352 so that she could complete a drug rehabilitation program and then presumably file a petition for modification).

☛ JUDICIAL TIP: The court should not grant a continuance if the parent has deliberately delayed entry into a court-ordered program or is responsible in any significant way for the delay in completion of services.

The court must not just summarily deny the motion for the continuance without exercising its discretion in the process. *In re Michael R., supra.* One court has held that Welf & I C §352 provides an emergency

escape in those rare instances in which the court determines that the best interest of the child would be served by continuing the 18-month hearing. *In re Elizabeth R.* (1995) 35 CA4th 1774, 1798–1799, 42 CR2d 200; but see *Los Angeles County Dep't of Children etc. Servs. v Superior Court* (1997) 60 CA4th 1088, 1091–1093, 70 CR2d 658 (extending services beyond 18-month date found to be an abuse of discretion and beyond court's jurisdiction). See discussion in §103.46.

When DSS delays in preparing assessments of children who are not proper subjects for adoption by the public at large but only by a particular family because assessment of that family is time-consuming, the failure to hold a .26 hearing thwarts the goal of the dependency system, *i.e.*, for prompt resolution of custody status and a stable home environment. *In re John F.* (1994) 27 CA4th 1365, 1377, 33 CR2d 225. Even if the home study is not completed by the .26 hearing, the child need not necessarily be removed from foster caretakers who have not yet been approved for adoption. 27 CA4th at 1378. If the study is not completed within the 120-day period, other options include a continuance under Welf & I C §352, relative placement under Welf & I C §366.26(k), or guardianship. 27 CA4th at 1379.

6. [§103.53] Placement

If the child had been removed from parental custody at disposition, both physical and legal custody reside with the social worker, under the court's supervision, unless the court places the child with the noncustodial parent and orders custody awarded to that parent. See Welf & I C §361.2(b); *In re Robert A.* (1992) 4 CA4th 174, 189, 5 CR2d 438. The court retains jurisdiction to oversee administration by DSS in its choice among placement alternatives enumerated in Welf & I C §361.2; the authority of DSS is limited by the court's interpretation of the child's best interests under Welf & I C §202(b). 4 CA4th at 189. Once the child is freed, the child is placed with DSS for adoptive placement, and unless DSS's placement decision is patently absurd or unquestionably not in the child's best interests, the court may not interfere with the placement. *Los Angeles County Dep't of Children etc. Servs. v Superior Court* (1998) 62 CA4th 1, 9–12, 72 CR2d 369; *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734, 68 CR2d 239.

At a review hearing, the child may be returned home, placed with the noncustodial parent, or changed from one out-of-home placement to another, including placement with a nonrelative extended family member (see Welf & I C §362.7). At any review hearing, DSS may consider placement with a relative who had not been found to be unsuitable and who will fulfill the requirements of the reunification or permanent plan. Welf & I C §361.3(d). In making a decision to place the child with a

relative, the court and the social worker must consider the following factors:

- The best interests of the child. Welf & I C §361.3(a)(1).
- The parent's, relative's, and child's wishes. Welf & I C §361.3(a)(2).
- Provisions of Fam C §§7950–7952 with respect to relative placement. Welf & I C §361.3(a)(3).
- Placement of siblings and half-siblings in the same home. Welf & I C §361.3(a)(4).
- Good moral character of the relative and any other adult living in the home. Welf & I C §361.3(a)(5).
- Nature and duration of the relationship between the child and the relative. Welf & I C §361.3(a)(6).
- Desire of the relative to care for the child. Welf & I C §361.3(a)(6).
- Whether the relative can
  - — Provide a safe, secure, and stable environment;
  - — Exercise care and control;
  - — Provide a home and necessities of life;
  - — Protect the child from the parents;
  - — Facilitate court-ordered reunification efforts;
  - — Facilitate visitation with other relatives;
  - — Facilitate implementation of all elements of the case plan;
  - — Provide legal permanence for the child if reunification fails; and
  - — Arrange for appropriate and safe child care. Welf & I C §361.3(a)(7).
- The safety of the relative's home. Welf & I C §361.3(a)(8).
- Whether the relative has established and maintained a relationship with the child. Welf & I C §361.3(d).

When placement with a relative has been considered and denied, the court must state reasons on the record for this denial. Welf & I C §361.3(e).

☛ JUDICIAL TIP: Although relative placement is given preferential consideration in the early stages of a proceeding, this preference recedes over time. See *In re Daniel D.* (1994) 24 CA4th 1823, 1834, 30 CR2d 245. A court may reasonably conclude that once a

child is stabilized in foster care, it is in the child's best interests to continue in that placement rather than to place the child in a relative placement that could subject the child to future instability. 24 CA4th at 1835.

The relative placement preference of Welf & I C §361.2 applies when a new placement becomes necessary after reunification services are terminated but before parental rights are terminated. *Cesar V. v Superior Court* (2001) 91 CA4th 1023, 1032, 111 CR2d 243.

The court may place the child with a noncustodial parent at a review hearing, or, if the placement had previously been with the noncustodial parent under court supervision, the court may terminate supervision and transfer custody permanently to the previously noncustodial parent as provided in Welf & I C §361.2(a), (b)(1). See Welf & I C §366.21(e); Cal Rules of Ct 1460(h) (six-month hearing). However, Welf & I C §361.2 is not applicable to a biological but not presumed father and, in any case, is applicable only when the child is first removed from the custodial parent's home. *In re Zacharia D.* (1993) 6 C4th 435, 453–454, 24 CR2d 751 (biological father waited until 18-month hearing to assert his status as a father).

Sometimes, however, an alleged father may be a potentially valuable resource for the child if he can establish his paternity. Judicial Council form JV-505 may be used to bring the issue to the court's attention. If the court declares the alleged father to be the biological father, Judicial Council form JV-501 must be completed and signed, with a copy forwarded to the district attorney. When the court places the child with a biological father, the father may subsequently become a presumed father by virtue of that placement. See *In re Zacharia D., supra,* 6 C4th at 449, 454. See also *Adoption of Kelsey S.* (1992) 1 C4th 816, 842, 4 CR2d 615 (court may grant custody to biological father, who may later be able to qualify as presumed father, even over mother's objection). At least one court has declined to declare dependency because it was able to place the child with an alleged father. See *In re Phoenix B.* (1990) 218 CA3d 787, 267 CR 269. The court held that when a man comes forward in a dependency proceeding to offer to care for a child he claims as his and actually takes the child into his home, he becomes a presumed father. 218 CA3d at 790 n3.

Only a presumed father (see Fam C §§7600–7614) is entitled to custody of his child. See Welf & I C §361.2. However, the court may place a child with a biological father after considering the child's best interests and that placement will, in effect, change the status of the father to that of a presumed father. See *In re Zacharia D., supra,* 6 C4th at 449 (once the biological father receives the child into his home and holds the child out as his own, he may become the child's presumed father).

7. [§103.54] The Decision-Making Process: Assessing Progress Toward Reunification

In determining whether to return the child home, the court must review the report of the social worker and the report and recommendations of any CASA, and consider the following factors (Welf & I C §§366.21(e)–(f), 366.22(a)):

- The efforts and progress of the parents towards reunification.
- Whether reasonable services were offered or provided to the parents. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2)(A) (six-month review hearing); Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(4) (12-month permanency hearing); Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(5) (18-month permanency review hearing).

The following factors should not, in and of themselves, be considered a failure to provide or offer reasonable services:

- Evidence that the child has been placed in a preadoptive home or in a foster home that is eligible to adopt,
- Evidence that the case plan includes services to make and finalize a permanent placement with the foster/preadoptive home, or
- The fact that services to make and finalize a permanent plan are being offered concurrently with reunification services.

Welf & I C §§366.21(*l*) (six-month review), 366.21(f) (12-month permanency review), 366.22(a)(1)–(3) (18-month review).

It is important for a judicial officer to evaluate the parents' *progress* in the utilization of reunification services, not just their participation. See Welf & I C §366.21(e)–(f); *In re Dustin R.* (1997) 54 CA4th 1131, 1142–1143, 63 CR2d 269 (simply complying with the plan by attending counseling sessions and participating in visitation is not sufficient if parents gain only a limited awareness of their children's physical and emotional needs). Judicial officers sometimes require the social worker or even a counselor to evaluate actual progress (as long as the counselor does not breach confidentiality) and may require a report from service providers on the effectiveness of the particular program for the parent. Some judicial officers require the parent to demonstrate the learned behavior to the social worker or to respond to a hypothetical situation designed to showcase the learning that should have occurred. In some counties, parents are graded in parenting classes.

Parenting programs vary. When the program is presented in a lecture format, the completion certificate may be little more than an attendance certificate; other parenting programs may require the parent to play an active role and may issue a completion certificate only if it is determined that the parent actually learned something. Judges should encourage their

local DSS to distinguish among types of programs and utilize those that are more meaningful.

Judicial officers should make sure that social workers and attorneys are providing them with needed information concerning the parents' progress and that they are able to evaluate that information. Some judges meet with representatives from their local DSS to encourage them to provide the court with detailed information as to what particular programs actually require and to encourage social workers to talk to parenting class instructors regarding the level and quality of the parent's participation.

Although attendance at Alcoholics or Narcotics Anonymous is a positive step for alcohol and drug abusers, neither attendance nor abstinence means that the person is actually in recovery. Judicial officers should encourage the social worker to question the parents about their progress in substance abuse programs within the limits of confidentiality that may be an integral part of the program. Generally, parents will agree to release information regarding their participation in 12-step programs.

If the parent has a sponsor who has accepted the sponsorship knowing that he or she may be questioned for information relating to a dependency proceeding and is willing to talk, the social worker may be encouraged to talk with the sponsor regarding the parents' progress and sincerity. This investigation into the progress parents are making in their recovery may reveal a great deal about whether they pose a continuing danger to their children.

The question of whether it would be detrimental to return a child to the custody of the parents involves a balancing of the evidence. Social workers carry out this process through what they call "risk assessment." Many either consciously or subconsciously perform this task under one of a number of risk assessment models. See Doueck, English, DePanfilis & Moote, *Decision-Making in Child Protective Services: A Comparison of Selected Risk-Assessment Systems,* Vol. LXXII, No. 5 Child Welfare 441 (1993). While the validity of such models has been questioned (see Wald & Woolverton, *Risk Assessment: The Emperor's New Clothes?* Vol. LXIX, No. 6 Child Welfare 483, 485–486 (1990)), these models can be valuable tools for the social worker when combined with professional skill and judgment (see *Resource Handbook, California Risk Assessment Curriculum for Child Welfare Services,* The Child Welfare Training Project, p 10 (Cal State Univ—Fresno, 1991) (cited here as Resource Handbook).

The judicial officer may benefit from having some knowledge of the risk assessment process used by the county DSS. A primary difference between the social worker's risk assessment and the judicial officer's determination of detriment in returning the child to parental custody is that the social worker can conduct the investigation for additional information and form an expert opinion regarding the level of risk, while the court can

consider, evaluate, and weigh only the evidence presented to it. Whether it is called risk assessment or a judicial determination of detriment, however, the decision-making process in this regard is essentially a balancing process.

As noted in the Resource Handbook at p 24,

> Assessment of risk is an evaluation of a constellation of child, caretaker and family factors that serve to identify the level of risk in a family. . . . It is important that all documented assessments be based on factual behaviors, statements or professional opinions that can be substantiated by case documentation or contact with collateral sources. . . . To arrive at an overall assessment of risk, there must be:
>
> - A review of the most critical areas of risk;
> - An examination of family strengths, and a weighing of their interaction with critical risk factors; and then
> - A consideration of available service resources.

In deciding whether it would be detrimental to return the child, a psychological evaluation may serve as credible evidence to sustain a finding of detriment if it is reasonably specific and objective. *Blanca P. v Superior Court* (1996) 45 CA4th 1738, 1750, 53 CR2d 687. Indeed, the California Supreme Court has noted that, without evidence from psychologists, in many cases the juvenile court might be forced to make arbitrary decisions. *In re Jasmon O.* (1994) 8 C4th 398, 430, 33 CR2d 85.

D. [§103.55] Service of Findings and Orders

Written findings and orders must be personally served by the clerk or served by first class mail within three judicial days of their issuance on the petitioning agency, the child or child's counsel, and the parent or guardian or parent's or guardian's counsel. Welf & I C §248.5. In some counties, attorneys who appear regularly in juvenile court agree to accept service on behalf of the client in a separate mailbox located in the clerk's office.

E. [§103.56] Continuances

A continuance may be granted on request of counsel for the parent, child, or petitioning agency if it would not be contrary to the child's best interests. Welf & I C §352. In determining whether to grant a continuance, the judge must give substantial weight to the need for prompt resolution of the child's custody status, the need to provide the child with a stable environment, and damage that could be caused by prolonged temporary placements. Welf & I C §352(a).

A grant of a continuance must be based on good cause, which is *not* shown by (Welf & I C §352(a)):

- Stipulation between counsel,

- Convenience of parties,
- A pending criminal prosecution, or
- A pending family law case.

The failure of an alleged father to return a certified mail receipt is not necessarily good cause to continue a review hearing. See Welf & I C §316.2(c).

To request a continuance, written notice must be filed at least two court days before the date set for hearing. Welf & I C §352(a). When granting a continuance, the facts that form the basis for the continuance must be entered in the court minutes. Welf & I C §352(a).

In any case, the continuance should last only for the period of time shown necessary by the evidence. Welf & I C §352(a). See also *In re Emily L.* (1989) 212 CA3d 734, 742–743, 260 CR 810 (pauses in the proceedings prolong the uncertainty for the child and make it more difficult for prospective adoptive parents to make a commitment to the child); *In re Edward C.* (1981) 126 CA3d 193, 207, 178 CR 694 (court has discretion to deny a request for a continuance to deal with a new factual allegation in the petition when the parents had been told of the basic allegations a few weeks before hearing).

F. [§103.57] Rehearing of Proceedings Before Referees

At any time before the expiration of ten days after the child, parent, or guardian is served with the written findings and orders of a referee, the child, parent, guardian, or DSS may apply for a rehearing before a juvenile court judge. Welf & I C §252; Cal Rules of Ct 1418(a). The application may be directed toward the entire order or a specified part and must contain the reasons for the request. Welf & I C §252; Cal Rules of Ct 1418(a).

In addition, a juvenile court judge, on his or her own motion, may order a rehearing of any case heard by a referee within 20 judicial days of the hearing before the referee. Welf & I C §253; Cal Rules of Ct 1418(d). See also *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873 (when a judge's approval of a referee's order is required, court may order a rehearing until ten calendar days from service of referee's order or 20 judicial days after hearing, whichever is later). See *In re Winnetka V.* (1980) 28 C3d 587, 591–593, 169 CR 713 (delinquency case in which Supreme Court held that judge's own motion for rehearing may be preceded, and even prompted, by a request from district attorney). All rehearings of proceedings heard by referees must be conducted de novo. Welf & I C §254; Cal Rules of Ct 1418(e).

A rehearing must be granted if the proceedings held before a referee were not recorded by an authorized reporting procedure such as a court reporter. Welf & I C §252; Cal Rules of Ct 1418(b). If the proceedings had

been recorded, the juvenile court judge may grant or deny the request for a rehearing on the basis of the transcript, provided that if the request is not denied within 20 calendar days following its receipt (or within 45 calendar days if the court extends the time for good cause), it will be deemed granted. Welf & I C §252; Cal Rules of Ct 1418(c).

Unless there is a timely challenge, the orders of the referee will become final. See *In re Carina C.* (1990) 218 CA3d 617, 623, 267 CR 205.

G. [§103.58] Scheduling of Further Hearings; Review by Writ

Unless dependency jurisdiction is ordered terminated at a review hearing, the court should schedule further hearings (*e.g.,* future review hearings or .26 hearings) before adjourning the review hearing. Welf & I C §§366(a)(1), 366.3(a) (review hearings must be held every six months). At the review hearing, the court must advise the parties present of the date of any future hearing and of their right to be present and represented by counsel at the hearing. Welf & I C §366.21(a).

There is no direct appeal from an order setting a .26 hearing. See Welf & I C §366.26(*l*). An order setting a .26 hearing may be reviewed on appeal only if a petition for an extraordinary writ is filed under the requirements of Cal Rules of Ct 39.1B and *all* the following conditions are met (Welf & I C §366.26(*l*)(1); Cal Rules of Ct 1436.5):

- The writ petition was filed in a timely manner,
- The writ petition substantively addressed the issues to be challenged on appeal, and
- The appellate court summarily denied the petition or otherwise failed to decide the case on the merits.

If, between the setting of the .26 hearing and the commencement of the hearing itself, a party files a petition under Welf & I C §388, showing a change of circumstances which, if proved, would cause a reconsideration of the findings and orders setting the .26 hearing, the court must set the 388 petition for hearing before the commencement of the .26 hearing. See *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 244; Cal Rules of Ct 1432. See also discussion in §103.51.

IV. SAMPLE FORMS

A. [§103.59] Script: Conduct of Review Hearing

[If parents and the child are represented by counsel and all required conflict of interest statements are on file, go to (4).]

(1) Appointment of attorney for parents or guardians

You have a right to be represented by an attorney during this review hearing and all other hearings in the juvenile court. If you want to employ a private attorney, the court will give you an opportunity to do so.

[*Or*]

The court has reviewed the financial declaration of [*name of parent or guardian*] and finds that [*he/she*] is entitled to appointment of counsel. At this time, the court appoints [*name of attorney*] to represent [*him/her*].

☛ JUDICIAL TIP: When the attorney is on the staff of a governmental agency, it is the *office*, not the individual attorney, who is being appointed.

[*If parents waive counsel*]

This is a serious matter. The court might determine that eventually your parental rights may be terminated. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

[*When applicable, add*]

The court now finds that the parents have knowingly and intelligently waived their right to counsel at this hearing.

[*If child is represented by counsel and there is no motion for separate counsel, go to (3).*]

(2) Attorney for child

The court has read and considered the documentary material submitted by the DSS that is relevant to the limited purpose of assessing whether to appoint counsel for the child. Would anyone like to be heard on the issue of why the court should not appoint counsel for the child?

[*After hearing evidence, if any, on issue of child's need for attorney*]

The court finds, based on the facts of this case, that there is a need to appoint counsel for the child at this time. The court appoints [*name of attorney*] as the child's CAPTA guardian-ad-litem to represent the child.

[*Or*]

The court finds, based on the facts of this case, that [*the child understands the nature of the proceedings; the child is able to communicate and advocate effectively on behalf of him or herself before the court, other counsel, other parties, including social workers, and other professionals involved in the case; and under the circumstances of the*

case, the child would not gain any benefit by being represented by counsel because [state reasons for each finding]/there is a need to appoint counsel for the child at this time].

The court [*does not appoint counsel at this time/appoints* [*name of attorney*]] to represent the child.

(3) Explanation of procedure/notification of consequences

I am going to explain to you what happens at these juvenile court proceedings. These proceedings are divided into several separate hearings. You have already participated in a detention hearing, a jurisdiction hearing, and a disposition hearing [*as well as* [*six-/12-/18-*] *month review hearings*]. At the previous hearing, the court ordered that [*state orders*]. At this hearing the court will determine whether [*the out-of-home placement will continue/jurisdiction should be terminated/ reunification services should be maintained, increased, or terminated, etc.*].

Note: Often, the attorney for the parent or guardian will state that he or she has explained these matters to the parents and will go on to explain the parents' or guardians' position. Many judges encourage attorneys who appear in their courts to take this responsibility.

(4) Waiver of advisement of rights

[*To each participant*]

Did your attorney explain your rights to you?

Do you waive advisement of rights?

[*If the answer to both is yes, go to (10).*]

(5) Advisement of rights

You have certain rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing, (2) the right to cross-examine, which means ask questions of, any witness who may testify at this hearing, (3) the right to present to the court any witnesses or other relevant evidence, (4) the right to subpoena witnesses, and (5) the right to a hearing on the issues raised in the review report. You have the right to assert the privilege against self-incrimination [*but anything you say in this or in any other dependency proceeding may not be admissible as evidence in any other action or proceeding*].

Note: See discussion in §103.25.

(6) Advisement re addresses under Welf & I C §316.1

The address that [*is in the petition/you gave the court* [*at previous hearings/today*]] will be used by the court and the social worker for all

further notices unless you advise the court and the social worker of any changes in address.

Note: The court should ensure that Judicial Council Form JV-140, Notification of Mailing Address, is made available

(7) Evidence

[*Court reads any written reports and states for the record all material read by the court*]

The court has read and considered and now receives into evidence the report dated _____, prepared by [*name*], consisting of _____ pages, and containing the following attachments: [*list attachments*].

Note: The term for the social worker's supplemental report (see Welf & I C §366.1) varies from county to county. Whatever the local usage, the court must indicate which documents it is relying on.

The court has also read and considered the report of [*name*].

Note: The court may read and consider the report of any court-appointed special advocate. See §103.26.

[*To parent, guardian, child, or other interested person*]

Now is the time for you to present any evidence or make any statement you may wish to make before the court decides [*whether to continue the child's present living situation or change it in some way/what services to offer or augment, etc.*]. If the court makes findings solely on the basis of the evidence in the social worker's report, do you understand that you will have given up your right to cross-examine those who prepared the report and to deny the statements found in the report?

[*To parent, guardian, and the attorneys*]

May the court base its findings solely on the social worker's report and other documents that it has received?

Note: If the answer is no, the court should orally examine or permit testimony of the child, if present, and the parents or other persons with relevant knowledge bearing on relevant issues. The court must allow cross-examination of any witness who may testify.

Now is the time for you to present any evidence or make any statement before the court decides on continuing or changing the child's placement and the nature and extent of the reunification services.

[*To persons seeking fifth amendment protection from testifying (see California Judges Benchguide 102: Juvenile Dependency Disposition Hearings §102.19 (Cal CJER))*]

I am going to grant the [*joint*] request of the DSS [*and the district attorney*] for immunity and will order you to testify despite your claim of self-incrimination. However, anything you say here may not be used against you in any criminal court or juvenile court proceeding arising out of the same conduct we are discussing here today.

Note: If there is no joint request, the judge must hear argument on why immunity should not be granted. Cal Rules of Ct 1421(d).

(8) Introduction of court process to child witness

Hello. I am Judge _____. I am in charge of this courtroom. My job is to make sure that everything is fair and that everyone else here does his or her job correctly. This is Bailiff Y. [*He/She*] is here to make sure that no one gets hurt. [*Mr./Ms.*] Z is the court reporter. [*He/She*] will write down everything that people say so that if anyone later forgets what was said, we can look it up.

It is important to speak loudly and clearly so that [*Mr./Ms.*] Z can hear you.

Mr. L and Ms. M are the lawyers. They will be asking you some questions. Their job is to help you tell what you saw and heard so that we can find out the truth.

It is very important to tell the truth, because if I do not understand the whole truth, I may not be able to make the plan that is the best for everyone.

You will be answering questions this [*morning/afternoon*]. We will stop often so that everyone may have a rest. If you have any problems before the next break, let the [*support person/attorney/judge*] know.

Also, you may not understand all the questions. Adults are used to talking to other adults and not to children. When you don't understand a question, raise your hand and let me know that you don't understand. If you don't know the answer to a question, just say, "I don't know," or "I don't remember."

Note: Some judges may not want to tell the child that their job is to be fair for fear that the child will not find the result fair and be more traumatized than reassured. Whatever explanation, if any, is given to the child must be appropriate to the child's age, experience, and stage of development.

(9) Final question

Do you have any questions about the court's orders or what is going to take place in the future?

B. [§103.60] Script: Findings and Orders—In General

(1) Introduction

The court has read and considered [*name the documents, e.g., the social worker's report dated _____, and attached documents or whatever the local nomenclature is*].

[*If applicable*]

The court has also considered the testimony of the witnesses and their demeanor on the stand as well as the arguments of counsel.

(2) Parties

[*As to each man who claims to be (or is alleged by others to be) the father, the court may make a finding as to whether he is a biological or presumed father (or not a father at all) after holding a hearing on the issue.*]

The court finds that the legal status of [*name*] is [*status of father, e.g., presumed father*].

[*If de facto parent status is sought*]

The court finds by a preponderance of the evidence that [*name*] should be accorded the status of de facto parent because of the following: [*state reasons*].

[*Or*]

The court does not find by a preponderance of the evidence that [*name*] should be accorded the status of de facto parent. The facts underlying this finding are: [*state facts*].

[*Optional*]

Therefore, [*name*] may not participate in future hearings.

(3) When child has not been removed

The court finds that the following conditions that justified assumption of jurisdiction under section 300 no longer exist: [*state conditions*]. Moreover, withdrawal of supervision would not cause those conditions to rearise. Therefore, jurisdiction is terminated.

[*Or*]

The court finds by a preponderance of the evidence that the following conditions that justified assumption of jurisdiction under section 300 still exist: [*state conditions*].

[*And/Or*]

The court [*further*] finds that withdrawal of supervision would cause those conditions to rearise. Therefore, jurisdiction is retained and a further review hearing is scheduled for [*date*].

These additional services are ordered to alleviate these conditions:

[*List services and the conditions they are intended to address.*]

C. [§103.61] Script: Findings and Orders—Six-Month Review

(1) Return of child

The court orders that custody of [*name of child*] is returned to [*parent/guardian/other former custodian*].

[*Or*]

The court finds by a preponderance of the evidence that returning the child home would create a substantial risk of harm to the child's [*physical health/emotional well-being*] because [*state reasons*]. Therefore, [*name of child*] may not be returned home at this time.

(2) Finding under Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2); 42 USC §675(5)(B).

The court finds that the placement [*continues to be/is no longer*] necessary because [*state reasons*] and is [*no longer*] appropriate to this child because [*state reasons*]. [[*Name of parent or guardian*] *shall therefore have custody of the child effective* [*date*].]

(3) Reunification services (Welf & I C §366.21(e))

The court further finds that:

[*Add as applicable*]

DSS and [*parents/guardians/other*] have participated regularly and made substantive progress in court-ordered treatment programs.

[*Or*]

DSS has provided services and opportunities but [*parent/guardian/other*] has not participated regularly and made substantive progress in court-ordered treatment programs in that [*describe*].

[*Or*]

The services provided have been inadequate in that [*explain*] [*and in addition [parent/guardian/other] has not participated regularly and made substantive progress in court-ordered treatment programs in that [describe]*].

The court also finds that the following progress has been made toward alleviating or eliminating the need for foster care: [*describe*].

(4) Date of return of child or permanent placement

Finally, it is likely that the child will be returned home by [*date*].

[*Or*]

It is likely that the child will be placed for adoption or legal guardianship by [*date*].

(5) Moving toward termination of parental rights

The court finds the following by clear and convincing evidence:

The child was removed initially under Welfare and Institutions Code section 300(g), and

[*Add as applicable*]

the whereabouts of [*name of parent or guardian*] are still unknown.

[*Or*]

[*name of parent or guardian*] has failed for six months to contact and visit the child.

[*Or*]

[*name of parent or guardian*] has been convicted of a felony indicating parental unfitness.

[*Continue*]

A hearing under Welfare and Institutions Code section 366.26 will be scheduled for [*date within 120 days (Welf & I C §366.21(e); Cal*

Rules of Ct 1460(f)(1))]. This order may be challenged by the filing of an extraordinary writ in the appellate court.

(6) Reunification services discontinued/assessment prepared (Welf & I C §366.21(h)–(i); Cal Rules of Ct 1460(f)(2))

Reunification services shall be discontinued. DSS shall prepare an assessment that will include the current search efforts for the absent parent, a review of the nature and amount of contacts between [*name of child*] and the [*parent/guardian*], prospects for adoption, and an evaluation of [*name of child*].

(7) Visitation (Welf & I C §366.21(h))

Visitation with [*name of parent or guardian*] shall continue.

[*Or*]

The court finds that visitation would be detrimental to the child and therefore must [*be discontinued/not take place*].

(8) Child placed with noncustodial parent

The court finds that supervision is no longer necessary. Custody is transferred permanently to [*name of noncustodial parent*] as provided in Welfare and Institutions Code section 361.2(b)(1). Jurisdiction is terminated.

[*Or*]

Placement with [*name of noncustodial parent*] shall continue with court supervision.

(9) When out-of-home placement continues but .26 hearing has not been ordered (Welf & I C §366.21(e))

Reasonable reunification services have [*not*] been [*provided/offered*] to the [*parent/guardian*]. The court now orders that reunification services be [*initiated/continued/modified*].

If [*name of child*] cannot be returned home by the 12-month permanency hearing, a proceeding for termination of parental rights under Welfare and Institutions Code section 366.26 may be instituted.

(10) Setting 12-month permanency hearing (Welf & I C §§366(a), 366.21(a); Cal Rules of Ct 1461(a), (c))

A 12-month permanency hearing is set for [*insert date within six months*].

[*To parents or guardians*]

You have the right to be present and represented by counsel at that hearing.

D. [§103.62] Script: Findings and Orders—12-Month Permanency Hearing

(1) *Return of child*

The court orders that custody of [*name of child*] shall be returned to [*name of parent/guardian/other former custodian*].

[*Or*]

The court finds by a preponderance of the evidence that returning the child home would create a substantial risk of harm to the child's [*physical health/emotional well-being*] because [*state reasons*]. Therefore, [*name of child*] may not be returned home at this time.

(2) Reasonable reunification services (Cal Rules of Ct 1461(c)(4))

Reasonable reunification services have [*not*] been [*provided/offered*] to the [*parents/guardians*].

(3) Finding re placement (Welf & I C §366.21(f); Cal Rules of Ct 1461(d); 42 USC §675(5)(B))

The court finds that the placement [*continues to be/is no longer*] necessary because [*state reasons*] and [*is appropriate/is no longer appropriate*] to this child because [*state reasons*].

[*Name of custodian*] shall therefore have custody of the child effective [*date*].

The court further finds that:

DSS and [*parents/guardians/other*] have participated regularly and made substantive progress in court-ordered treatment programs.

[*Or*]

DSS has provided services and opportunities but [*name of parent/guardian/other*] has not participated regularly and made substantive progress in court-ordered treatment programs in that [*describe*].

[*Or*]

The services provided have been inadequate in that [*describe*].

(4) Finding re foster care

The court also finds that the following progress has been made toward alleviating or eliminating the need for foster care: [*describe*].

(5) Further Hearings

The court finds that to return [*name of child*] to the custody of [*his/her*] [*parents/guardians*] would be detrimental because [*state reasons*]. The court also finds that [*there is a substantial probability that [name of child] will be returned to the physical custody of [name of parent/guardian]/reasonable services have not been provided to [name of parent/guardian]*]].

Therefore, a permanency review hearing is set for [*date within six months, but not later than 18 months from the date the child was taken from the physical custody of the parent or guardian (see Welf & I C §366.21(g)(1); Cal Rules of Ct 1462(a))*].

[*To parent or guardian*]

You have the right to be present and represented by counsel at that hearing.

If [*name of child*] cannot be returned home by the next review hearing, a proceeding for termination of parental rights under Welfare and Institutions Code section 366.26 may be instituted.

Note: This procedure is authorized by Welf & I C §366.21(g)(1).

[*Or*]

The court finds by clear and convincing evidence that [*name of child*] is not a proper subject for adoption and there is no one willing to accept legal guardianship. Therefore, [*name of child*] shall remain in long-term foster care and a hearing is set for [*date not later than six months*].

The court finds by clear and convincing evidence that reunification services have been offered or provided to [*name of parent or guardian*].

(6) Scheduling .26 hearing

A hearing under Welfare and Institutions Code section 366.26 will be scheduled for [*date within 120 days (see Welf & I C §366.21(e); Cal Rules of Ct 1461(d)(3))*].

This order may be challenged by the filing of an extraordinary writ in the appellate court.

(7) Discontinuing reunification services (Welf & I C §366.21(h)–(i))

Reunification services shall be discontinued. DSS shall prepare an assessment that includes the current search efforts for the absent parent, a review of the nature and amount of contacts between [*name of child*] and the [*parent/guardian*], prospects for adoption, and an evaluation of [*name of child*].

(8) Visitation

Visitation with [*parent/guardian*] shall continue.

[*Discontinuance or prohibition of visitation (see Welf & I C §366.21(h))*]

The court finds that visitation would be detrimental to [*name of child*] and therefore must [*be discontinued/not take place*].

E. [§103.63] Script: Findings and Orders—18-Month Permanency Review

(1) Return of child

The court orders that custody of [*name of child*] shall be returned to [*name of parent/guardian/other former custodian*].

[*Or*]

The court finds by a preponderance of the evidence that returning the child home would create a substantial risk of harm to the child's [*physical health/emotional well-being*] because [*state reasons*]. Therefore, [*name of child*] may not be returned home at this time.

Reasonable reunification services have [*not*] been [*provided/offered*] to the [*parent/guardian*].

[*Continue*]

The court finds by clear and convincing evidence that [*name of child*] is not a proper subject for adoption and there is no one willing to accept legal guardianship. Therefore, [*name of child*] shall remain in long-term foster care and a hearing is set for [*date not later than six months*].

(2) Scheduling .26 Hearing

A hearing under Welfare and Institutions Code section 366.26 will be scheduled for [*date within 120 days (see Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)(B)*].

This order may be challenged by the filing of an extraordinary writ in the appellate court.

(3) Discontinuing reunification services

Reunification services shall be discontinued. DSS shall prepare an assessment that will include the current search efforts for the absent parent, a review of the nature and amount of contacts between [*name of child*] and [*parent/guardian*], prospects for adoption, and an evaluation of [*name of child*].

(4) Visitation

Visitation with [*parent/guardian*] shall continue.

[*When visitation detrimental to child (see Welf & I C §366.21(h))*]

The court finds that visitation would be detrimental to [*name of child*] and therefore must [*be discontinued/not take place*].

F. [§103.64] Script: Findings and Orders—Postpermanency Planning Review Hearing

(1) Terminating or continuing jurisdiction

[*Termination of jurisdiction (see Welf & I C §366.3(a); Cal Rules of Ct 1466(a))*]

Because [*name of child*] has been adopted since the last review hearing, juvenile court jurisdiction is terminated and the case is dismissed.

[*Continuation of dependency jurisdiction*]

The court finds that [*name of guardian*] is the legal guardian of [*name of child*] and orders the continuation of dependency jurisdiction over [*name of child*].

[*Termination of dependency jurisdiction (see Welf & I C §§366.3(a), 366.4; Cal Rules of Ct 1466(a), (c))*]

The court finds that [*name of guardian*] is the legal guardian of [*name of child*] and orders the termination of dependency jurisdiction. The court retains jurisdiction over [*name of child*] as a ward of the guardianship.

(2) Notice

[If child is in a placement other than a preadoptive home or the home of a legal guardian, parental rights have not been terminated, and jurisdiction has not been dismissed:]

[*And*]

[*If one parent is not present, make sure that the absent parent received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear.

[*When both parents present*]

The court finds that the [*mother/father/guardian*], the child, and all counsel were notified of this hearing and served with the review report as required by law.

(3) Review of court documents; findings

The court has read and considered the report submitted by DSS and has taken into account the following factors [*describe with particularity (see Welf & I C §366.3(e)*]:

- The progress being made to provide a permanent home;
- The continuing necessity for and appropriateness of the child's placement;
- The continuing appropriateness of and extent of compliance with the permanent plan;
- The extent of DSS compliance with the case plan in making reasonable efforts to return the child to a safe home and to complete plans for permanent placement;
- The adequacy of services provided, including documents, information, and services for a child who has reached the age of majority (see Welf & I C §391);
- The parents' progress toward alleviating the causes that required foster care;
- The probable date by which the child may be returned home or placed for adoption or in some other permanent living situation; and
- The services needed to assist a child who is 16 years of age or older to make the transition from foster care to independent living.
- Whether the child has siblings under the court's jurisdiction, and if so:
    - — The nature of the relationship with the siblings;
    - — The appropriateness of developing and maintaining sibling relationships;
    - — If siblings are not placed together, the reason for that placement, and efforts, if any, to correct it;

— Frequency and nature of sibling visitation; and

— Impact of sibling relationship on placement and permanent planning.

(4) Child remains in foster care

[*Name of child*] shall remain in foster care.

(5) Other options (see Welf & I C §366.3(g))

The court orders that [*name of child*] [*be returned home/be placed for adoption/have* [*name*] *appointed as* [*his/her*] *legal guardian*].

(6) Further reunification services (see Welf & I C §366.3(e); Cal Rules of Ct 1466(b))

The court finds by a preponderance of the evidence that further efforts at reunification are the best alternative for the child and orders further reunification services until [*date not later than six months*].

(7) Reasonable efforts

Reasonable efforts to finalize a permanent placement [*have/have not*] been made. Welf & I C §366.3(d)–(f).

(8) Setting review hearing

A review hearing is set for [*date within six months*].

[*To parents or guardians (see Welf & I C §366.3(e)–(f); Cal Rules of Ct 1466(a)–(b))*]

You have the right to be present at that hearing.

Recommended Legal Findings

To Ensure Federal Foster Care Reimbursement

Detention Hearings
Make A, B and C Findings as follows:

A. Continuance in the home is contrary to the child's welfare;
B. Temporary placement and care is vested with the child welfare agency/probation department; and
C. Reasonable efforts have been made to prevent removal.

Pre-Permanency Case Reviews
Make D1 - D4 Findings as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts to make it possible for the child to safely return home and to complete whatever steps are necessary to finalize the permanent placement of the child;
D. (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement has been _____; and
D. (4) the likely date by which the child may be returned to and safely maintained in the home or placed for adoption, appointed a legal guardian, placed permanently with a relative, or placed in another planned permanent living arrangement.

Permanency Hearings
Make D1 - D3 findings and E finding as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts to make it possible for the child to safely return home and to complete whatever steps are necessary to finalize the permanent placement of the child;
D. (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement has been _____; and
E. The permanent plan of *_return home* is appropriate
_adoption
_legal guardianship
_permanent placement with a fit and willing relative
_planned permanent living arrangement

Post-Permanency Case Reviews
Make D1 and D2 findings and E finding as follows:

D. (1) the child's placement is necessary and appropriate;
D. (2) the agency has/has not complied with the case plan by making reasonable efforts, including whatever steps are necessary to finalize the permanent placement of the child; and
E. The permanent plan of *_return home* is appropriate
_adoption
_legal guardianship
_permanent placement with a fit and willing relative
_planned permanent living arrangement

APPENDIX: TITLE IV E COURT REQUIREMENTS

FEDERAL (Title IV-E of the Social Security Act, 42 U.S.C. 670 et seq.)	CALIFORNIA **DEPENDENCY** (WIC 300 et seq.)	 **DELINQUENCY** (WIC 602 et seq.)	RESULT IF NO FINDING
At Removal Hearings			
A. Continuance in the home of the parent or legal guardian would be contrary to the child's welfare. (42 USC 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 CFR 1356.21(c))	Substantial danger to child and no reasonable means to protect without removal. (WIC 319, WIC 11401(b)(3), CRC rule 1446(c)(1))	Continuance in the home of the parent or legal guardian would be contrary to the child's welfare. (WIC 636, and 11401(b), CRC rule 1475(c)(1))	**NEVER** eligible for Title IV-E funding (45 CFR 1356.21(c)
B. Placement and care are the responsibility of the State agency (In California, it is not the state agency, but the local child welfare agency or the probation department). (42 USC 672 (a)(2); 45 CFR 1356.71(d)(1)(iii))	Temporary placement and care is vested with the child welfare agency pending disposition or further order of court. (CRC rule 1446(c)(2))	Temporary placement and care is vested with the probation officer pending disposition or further order of court. (WIC 636 and 11401(a), CRC rule 1475(c)(2))	No funding until made
C. Reasonable efforts have been made to prevent or eliminate need for removal. (42 USC 671(a)(15); 42 USC 672(a)(1); 45 CFR 1356.21(b)(1)). This finding must be made within 60 days of the date of removal. (45 CFR 1356.21(b)(1))	Reasonable efforts have been made to prevent or eliminate the need for removal. (WIC 319, CRC rule 1446(d))	Reasonable efforts have been made to prevent or eliminate the need for removal (WIC 636, 727.4(d)(5) and 11401(b), CRC rule 1475(c)(3))	**NEVER** eligible for Title IV-E funding (45 CFR 1356.21(b)(1)(ii))
At Case Reviews			
D. Review child's status and safety no less frequently than once every 6 months from **the date the child entered foster care,** in order to determine: (1) the continuing necessity for and appropriateness of the placement, (2) the extent of the agency's compliance with the case plan in making reasonable efforts to safely return the child to the child's home and to complete whatever steps are necessary to finalize the permanent placement of the child, (3) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and (4) the likely date by which the child may be returned to and safely maintained in the home or placed for adoption, appointed a legal guardian, placed permanently with a relative, or placed in another planned permanent living arrangement. (42 USC 671(a)(15)(B), (C); 42 USC 675(5)(B); 45 CFR 1355.34(c)(2)(ii); 45 CFR 1355.20)	Must hold periodic status reviews no less frequently than every 6 months from **the date of original disposition hearing** until termination of the case. (WIC 366(a), 366.21(e) & (f), 366.3, 11400(i), 11404.1, CRC rule 1460(a)).	Must hold periodic case plan reviews for children in placement no less frequently than every 6 months from **the date the child entered foster care,** until termination of the case. (WIC 727.3(c), 11400(I), 11404.1)	Funding stops unless Finding made
At Permanency Hearings			
E. Must hold a permanency hearing to select a permanent plan no later than 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency plan hearings every 12 months thereafter. (45 CFR 1356.21(b)(2)(i); (42 USC 675(5)(C) and (F); 45 CFR 1355.20)) For dependency cases where no reunification services are offered, the permanency hearing must be held within 30 days of disposition. (45 CFR 1356.21(h)(2))	Must hold permanency-planning hearing within 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency hearings every 12 months thereafter. (WIC 361.5(f), 366.21(f), 366.21(g), 366.22, 366.3, 11400(j), 11404.1)	Must hold permanency hearing within 12 months from **the date the child is considered to have entered foster care,** and must hold subsequent permanency hearings every 12 months thereafter. (WIC 727.3(f), 727.31, 11400(j), 11404.1)	Funding stops unless Findings made
Definition of Date Entered Foster Care			
Date the child is considered to have entered foster care means the earlier of: the date of the first judicial finding that the child has been subjected to child abuse or neglect, or the date that is 60 calendar days after the date on which the child is removed from home. (45 CFR 1355.20)	Date entered foster care is the earlier of the first finding of child abuse or neglect (jurisdictional finding) or 60 days after the child is removed from home. (WIC 361.5(a))	Date of entry into foster care means the date that is 60 days after the date on which the child was removed from his or her home. (WIC 727.4(d)(4))	

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CALIFORNIA JUDGES BENCHGUIDES

Benchguide 104

JUVENILE DEPENDENCY SELECTION AND IMPLEMENTATION HEARING

[REVISED 2003]

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ADMINISTRATIVE OFFICE OF THE COURTS

EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

JUVENILE DEPENDENCY SELECTION AND IMPLEMENTATION HEARING

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I. [§104.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency hearings held generally under Welf & I C §366.26 and Cal Rules of Ct 1463. The benchguide covers the setting and conduct of the hearing and possible findings and orders. It contains a number of procedural checklists, a brief summary of the applicable law, and scripts.

The hearing that is the subject of this benchguide is one that is designed to result in a permanent plan for a child who is a dependent of the juvenile court. Although appellate courts often refer to this hearing as a "selection and implementation" hearing (see discussion in §104.7), judicial officers typically call it a ".26 hearing," because it is held under Welf & I C §366.26. Throughout this benchguide, this hearing will be referred to as a ".26 hearing."

II. PROCEDURAL CHECKLISTS

A. [§104.2] General Conduct of Hearing

(1) *Attorneys or referees serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 244.* See discussion in §104.30.

(2) *Call the case.* In many counties, the social worker serving as court officer or deputy county counsel calls the case and announces the appearances. Otherwise, the judicial officer should call the case and ask counsel to announce their appearances. Some judicial officers will first call the entire calendar to determine which cases are ready and in what order they will be taken.

(3) *Determine the identity of those present and each person's interest in the case before the court.* Welf & I C §§346, 349; Cal Rules of Ct 1410(b); see discussion in §104.31.

- *Exclude all persons from the court except parents (including alleged fathers), guardians, anyone granted status as a de facto parent, counsel, or anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court including a court-appointed special advocate (CASA), and, in some cases, relatives.* Welf & I C §§345, 346, 349.
- *Permit the child to attend if the child or his or her counsel requested the child's attendance or if the child's presence would be helpful to the court.* See Welf & I C §366.26(f)(1).

(4) *If this is a first appearance for parents or guardians, ask them to designate a mailing address for the court and remind them that the designated mailing address will be used by the court and the social services agency for notification purposes until the parent or guardian provides a new address in writing to the court or social services agency.*

Welf & I C §316.1(a); Cal Rules of Ct 1412(*l*). Parents are no longer entitled to notice of subsequent hearings once parental rights have been terminated. Welf & I C §366.3(a); Cal Rules of Ct 1466(a).

(5) *If no parent (including an alleged father) or guardian is present:*

- *Determine whether the parent received actual notice of the hearing.* See Welf & I C §294; Cal Rules of Ct 1463(b).

Note: Parties should have received actual notice if they were present at a previous hearing at which the .26 hearing was set and were ordered to appear at the .26 hearing. See Welf & I C §294(f)(1); Cal Rules of Ct 1463(b)(2)(A). If there was actual notice, the court should make such a finding on the record and also direct that the parents receive further notice by first-class mail to the mailing address the parents have provided. See Welf & I C §294(f)(1); Cal Rules of Ct 1463(b)(2)(A).

- *If the parties have not received actual notice, determine whether service and notification were properly accomplished.* See §§104.21–104.26 for types of notification and permissible means of service.
- *If notice requirements have not been met, continue the case for a reasonable time in order to permit service.*

(6) *Make a finding that notice requirements have or have not been met.* Cal Rules of Ct 1412(k). See discussion in §104.18.

(7) *If a parent is present for the first time, inquire whether the child has American Indian heritage and, if so, take steps to ensure that proper notice is given and provisions of the Indian Child Welfare Act are followed.* See Welf & I C §360.6; 25 USC §§1901–1963; Cal Rules of Ct 1439. Determine whether this inquiry has already been made by the social worker.

Note: Steps (8)–(10) below concerning notice and appointment of counsel will usually have been taken at earlier hearings and will therefore generally not have to be repeated at this hearing.

(8) *Advise any parent or legal guardian who appears without counsel of the right to retain counsel and the right to appointed counsel if the parent or guardian cannot afford to retain one.* See Welf & I C §366.26(f)(2).

☛ JUDICIAL TIP: If counsel has been previously retained or appointed to represent more than one parent or legal guardian, the judge should examine the parties to determine if a present or potential conflict exists. If there has been no prior resolution of this issue and therefore no conflict of interest statement on file, the judge should obtain a written personal waiver of conflict of interest from each of the affected parties and take steps to ensure

that the rights of all parties are protected. The judge should appoint counsel for incarcerated or institutionalized parents.

(9) *If the child has not previously been represented by counsel, appoint counsel for the child unless the child would not benefit from the appointment.* The court must state on the record the reasons for any finding that the child would not benefit from counsel. Welf & I C §317(c); Cal Rules of Ct 1412(g)–(h). See discussion in §104.33.

☛ JUDICIAL TIP: The court should consider appointing independent counsel for each sibling or group of siblings when the siblings or groups might have different interests, such as different adoptive placements or different permanent plans. See *In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778. But see *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88 (possible benefit of placing child near siblings is not sufficient to give mother the right to appeal the placement). The substantial interference with a sibling relationship exception to the termination of parental rights that became effective January 1, 2002, increases the potential for conflicts between siblings or groups of siblings at the .26 hearing. See Welf & I C §366.26(c)(1)(E); Cal Rules of Ct 1463(d)(1)(B)(v). Courts need to be sensitive to and alert for such conflicts. See *Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891, holding that an attorney may not continue to represent multiple children among whom there is an actual conflict of interest, and if one attorney is appointed and a conflict arises later, the court must relieve the attorney from representation of any of the children.

(10) *If appointing new counsel, consider continuing the proceeding for up to 30 days as necessary to allow counsel to become acquainted with the case.* Welf & I C §366.26(g).

(11) *Advise the parties of their hearing rights as specified in Cal Rules of Ct 1412(j), by either:*

- *Obtaining a personal waiver from this advisement requirement.* The judge should ask the attorneys if they have explained these rights to their respective clients and should then ask the parties to confirm that their attorneys have explained these rights to them, that they understand these rights, and that they waive formal advisement of them; or
- *Reading these rights to the parties and confirming that they understand their rights.*

(12) *Receive the report from the Department of Social Services (DSS) containing an assessment of the child and of any prospective adoptive parents:*

- *Before the hearing, read and consider the reports prepared by DSS, including any attachment to the reports and recommendations for court orders made by DSS that are contained in the reports.* See Welf & I C §§361.5(g), 366.21(i), and 366.22(b) (contents of assessments).
- *State on the record that the reports have been read and considered.* Welf & I C §366.26(a); Cal Rules of Ct 1463(d).

(13) *If necessary to ascertain the wishes of the child, arrange for the child's testimony to be taken.* The judge should question the child's attorney about his or her efforts to determine the child's wishes. Ordinarily the child is not present at the .26 hearing. Welf & I C §366.26(f)(1). Evidence of the child's wishes may be presented in the social worker's assessment, through the statements of the child's counsel, or by other means by which the court may gain information about the child's understanding of and feelings about the termination of parental rights. The court may request the testimony of the child if other sources of the information are not provided or are insufficient.

However, because the court must consider the child's wishes and best interests, testimony of the child may be valuable. See Welf & I C §366.26(h). Under certain circumstances, the child's testimony may be taken in chambers. See Welf & I C §366.26(h)(1)–(3); discussion in §104.42.

(14) *Receive other evidence, including testimony from the parents, guardians, social worker, court-appointed special advocate, and others with pertinent knowledge, as appropriate.* See Welf & I C §366.26(b); Cal Rules of Ct 1463(d).

(15) *Make one or more of the following findings, as appropriate:*

☛ JUDICIAL TIP: Judicial Council form JV-320 contains the findings and orders that judicial officers must make at a .26 hearing.

- The child is likely to be adopted (clear and convincing evidence). Welf & I C §366.26(c)(1); Cal Rules of Ct 1463(d)(1).

☛ JUDICIAL TIP: If there is an impediment to termination, but there is clear and convincing evidence that the child is likely to be adopted, it must make the adoptability finding even though it may not terminate parental rights. If the court finds the child is *not* likely to be adopted, it must not base its conclusion on the fact that the child has not yet been placed in a preadoptive home or

with a relative or foster parent who is willing to adopt the child. Cal Rules of Ct 1463(d)(2).

- Adoption is the permanent placement goal because termination of parental rights is desirable and would not be detrimental under Welf & I C §366.26(c)(1) and there is a probability that the child is likely to be adopted, but the child is difficult to place and there is no identified or available prospective adoptive parent because of sibling considerations or other reasons. Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(5). The determination that the child is difficult to place for adoption must be based on one or more of the following (Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(5)):
  - The child is a member of a sibling group that should stay together;
  - The child has a diagnosed medical, mental, or physical handicap; or
  - The child is seven years old or older and no prospective adoptive parent is available.
- Termination of parental rights would be detrimental to the child because of one of the following (preponderance of the evidence):
  - The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from a continuation of that contact. Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 1463(d)(1)(B)(i).
  - A child who is 12 years or older objects to the termination of parental rights. Welf & I C §366.26(c)(1)(B); Cal Rules of Ct 1463(d)(1)(B)(ii).
  - The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child is released from residential care. Welf & I C §366.26(c)(1)(C); Cal Rules of Ct 1463(d)(1)(B)(iii).
  - The child is living with a relative or foster parent who is unwilling to adopt, but is willing to accept legal or financial responsibility for the child and to provide a stable home for the child, and removal from that placement would be emotionally detrimental to the child. Welf & I C §366.26(c)(1)(D); Cal Rules of Ct 1463(d)(1)(B)(iv). This exception does not apply to a child under six years old living with a nonrelative or to a child who is part of a sibling group which should stay together in which at least one child is under

six years old. Welf & I C §366.26(c)(1)(D); Cal Rules of Ct 1463(d)(1)(B)(iv).

— There will be substantial interference with the relationship between the child and his or her siblings. Welf & I C §366.26(c)(1)(E); Cal Rules of Ct 1463(d)(1)(B)(v).

☛ JUDICIAL TIP: If the court finds that termination is detrimental as noted above, it must state its reasons in writing or on the record. Cal Rules of Ct 1463(d)(4).

- The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 1463(d)(3).

[*And, in all cases in which adoption is the permanent plan*]

- In at least one prior hearing at which the court was required to consider ordering reasonable services, the court found that reasonable efforts were made or that reasonable services were offered or provided. See Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1).

[*Use if long-term foster care or legal guardianship is the permanent plan*]

- Visitation with the parents or guardians [*would/would not*] be detrimental to the physical or emotional well-being of the child (preponderance of the evidence). Welf & I C §366.26(c)(4); Cal Rules of Ct 1463(d)(6).

(16) *Make one or more of the following orders as appropriate:*

[*Use if adoption is the permanent plan*]

- The parental rights of _____ [*mother/ father/ alleged fathers*] shall be terminated and [*name of child*] shall be placed for adoption. Welf & I C §366.26(b)(1); Cal Rules of Ct 1463(d)(1).
- Adoption is identified as a permanent goal without permanently terminating parental rights. Efforts shall be made to locate an appropriate adoptive family within 180 days. Welf & I C §366.26(b)(2); Cal Rules of Ct 1463(d)(5).

[*Use if long-term foster care or legal guardianship is the permanent plan*]

- [*Name*] is appointed legal guardian for the child and letters of guardianship shall issue. Welf & I C §366.26(b)(3); Cal Rules of Ct 1463(d)(6).

[*Or*]

- The child shall be placed in long-term foster care subject to juvenile court review. Welf & I C §366.26(b)(4); Cal Rules of Ct 1463(d)(6).

[*And/Or*]

- If no adult is available to be a legal guardian and there is no suitable foster home, the court may order the child's custody transferred to a licensed foster family agency, subject to further orders. Cal Rules of Ct 1463(d)(7).

[*And/Or*]

- Visitation with the parents shall be _____. See Welf & I C §366.26(c)(4); Cal Rules of Ct 1463(d)(6), 1465(d)(2).

[*Use if legal guardianship is the permanent plan*]

- Dependency shall be [*continued/dismissed*]. See Welf & I C §366.3.

(17) *Rule on any additional requests, including requests for restraining orders under Welf & I C §340.5, as may be appropriate.*

(18) *Schedule future hearings as necessary.*

- *Review hearing in six months if* (Welf & I C §366.3(a), (c)–(d); Cal Rules of Ct 1466(a)–(b))
  - — The child is in long-term foster care,
  - — Legal guardianship or adoption have been established but not completed, or
  - — Legal guardianship has been established but dependency has been continued.
- *Schedule adoptive placement hearing if court has ordered that efforts be made to locate prospective adoptive family within 180 days.* Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(5).

B. [§104.3] Setting Hearing at Disposition

(1) *Once the petition has been sustained, declare dependency and review the disposition recommendations.* See Welf & I C §360(d); Cal Rules of Ct 1456.

(2) *Find that either reasonable efforts had been made or not been made.* Welf & I C §361(d); Cal Rules of Ct 1456(e). See Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services, which may have been at the detention hearing). See discussion in §104.10.

(3) *Make findings required for the setting of a .26 hearing:*

- The child should be removed from parental custody (clear and convincing evidence). Welf & I C §361(c); Cal Rules of Ct 1456(d). Reasons should be stated on the record.
- No reunification services should be provided because of clear and convincing evidence of one or more of the circumstances set out in Welf & I C §361.5(b) or Cal Rules of Ct 1456(f)(5). See §104.10.
- The parent or guardian is incarcerated or institutionalized and the court determines by clear and convincing evidence that reunification services will be detrimental to the child. Welf & I C §361.5(e)(1); Cal Rules of Ct 1456(f)(12).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. Cal Rules of Ct 1459, 1460(i), 1463(a), (g).

(4) *If no reunification services have been ordered under Welf & I C §361.5, order a .26 hearing to be held within 120 days, unless there is a finding that services to the other parent or guardian are to be provided.* See Welf & I C §361.5(f); Cal Rules of Ct 1456(f)(13). Although reunification services will not be ordered if the parents' whereabouts are unknown (see Welf & I C §361.5(b)(1); Cal Rules of Ct 1456(f)(5)(A)), a .26 hearing may not be set if this is the only basis for denial of services. See Welf & I C §361.5(d); Cal Rules of Ct 1456(f)(13).

☛ JUDICIAL TIP: Some courts set a hearing between 45 and 90 days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be lacking, there will often be time to remedy this within the 120-day period.

(5) *Order an assessment under Welf & I C §361.5(g) containing:*

- Current search efforts for absent parents.
- Review of amount of and nature of contact between the child and the parents and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or guardian, including a criminal check, a check for prior child abuse or neglect, and an assessment of the person's ability to meet the child's needs and to understand the obligations of adoption or guardianship.

- Relationship of the child to prospective adoptive parents or prospective guardians, their motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Analysis of likelihood of adoption if parental rights are terminated.

(6) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council Notice of Intent to File Writ Petition form JV-820 is presented to any parent or guardian who is present, and order that the form be mailed immediately to those not present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1436, 1436.5(d), 1456(f)(15)–(17). The court must advise all parties that they must file this notice of intent within seven days. See Cal Rules of Ct 39.1B(f). See discussion in §104.17. See also Cal Rules of Ct 39.1B, encouraging the appellate court to resolve these writ petitions on their merits and requiring the juvenile court clerk to transmit the transcript of the juvenile court hearing to the appellate court within 12 days.

(7) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child; state what that detriment would be.* See Welf & I C §361.5(f).

C. [§104.4] Setting Hearing at Six-Month Review

(1) *Terminate reunification services and make the following findings:*

- *Continued removal is necessary because return would create substantial risk of detriment to the child.* Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2). It is advisable to state on the record the factual basis for this conclusion.
- *"The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate."* See 42 USC §675(5)(B).
- *Reasonable efforts or services have or have not been offered or provided.* See Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2)(A). See Welf & I C §366.26(c)(2) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and

finalize an alternative permanent plan have actually been provided concurrent with reunification services. Welf & I C §366.21(*l*); Cal Rules of Ct 1460(e)(2)(B).

- *One or more of the following applies by clear and convincing evidence:*
  - — Parents' whereabouts are still unknown and the basis for removal was Welf & I C §300(g) (child left without provision for care and parents' whereabouts unknown). Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)(A).
  - — Parent has not had contact with child for six months. Cal Rules of Ct 1460(f)(1)(B).
  - — Parent has been convicted of a felony indicating parental unfitness. See Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)(C).
  - — Parent is deceased. Cal Rules of Ct 1460(f)(1)(D).
  - — The child was under three years old when removed or was a member of a sibling group in which one member was under three at the time of removal and the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan. Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)(E). The court must not set a .26 hearing in this situation if it finds that reasonable services were not offered or provided or that there is a substantial probability of return within six months or within 12 months of the date the child entered foster care, whichever is sooner. See Welf & I C §366.21(e), (g)(1); Cal Rules of Ct 1460(f)(1)(E), 1401(a)(7). See Cal Rules of Ct 1460(f)(1)(E)(i)–(iii) for criteria relating to a substantial probability of return and Welf & I C §366.21(e) for factors to consider in setting a .26 hearing as to some or all members of a sibling group.

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. Cal Rules of Ct 1459, 1460(i), 1463(a), (g).

(2) *Order a .26 hearing to be held within 120 days.* See Welf & I C §366.21(e), (h); Cal Rules of Ct 1459, 1460.

☛ JUDICIAL TIPS:

- If the parents have had notice, the judge may set the .26 hearing early in the 120-day period, subject to the time requirements of Welf & I C §294(c)(1) (notice must be completed at least 45 days

before the hearing) and the need for DSS to prepare a full report. If a contested hearing is expected, the scheduling should permit time for it.

- If the parents are present in court at the review hearing, they should be ordered back for the .26 hearing, with written notice to follow, sent by first-class mail to the mailing address that has been provided. See Cal Rules of Ct 1463(b)(2). If a parent is absent and cannot be located, the judge may inquire whether DSS has used due diligence in attempting to locate the parent. Once there is a finding of due diligence, DSS need only submit an order for publication or other substituted service. See Cal Rules of Ct 1463(b)(2)(A)(v).
- Some judges set a hearing 30 or more days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be lacking, there may be time to remedy this within the 120-day period.

(3) *Order an assessment under Welf & I C §366.21(i), containing the following:*

- Current search efforts for absent parents or legal guardians.
- Review of amount and nature of contact between the child and the parents, legal guardians, and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parents or prospective legal guardians to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective legal guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Analysis of likelihood of adoption if parental rights are terminated.

(4) *Advise all parties of their right to seek review by extraordinary writ and advise that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council form JV-820 is presented to any parent or guardian who is present, and order that the form be mailed immediately to those not present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 39.1B, 1436, 1436.5(d), 1460(f)(4)–(6).

(5) *Continue to permit the parent or legal guardian to visit the child pending the hearing unless visitation would be detrimental to the child.* See Welf & I C §366.21(h). Modify terms of visitation from previous levels as necessary to meet current needs.

D. [§104.5] Setting Hearing at 12-Month Permanency Hearing

(1) *Terminate reunification services and make the following findings:*

- Continued removal is necessary because return would create substantial risk of detriment to the child. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(1). It is advisable to state on the record the factual basis for this conclusion.
- "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- Reasonable efforts or services have or have not been offered or provided. Welf & I C §366.21(g)(1); Cal Rules of Ct 1461(c)(4), (5). See Welf & I C §366.26(c)(2) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided concurrent with reunification services. Welf & I C §366.21(*l*); Cal Rules of Ct 1461(c)(5). Under Welf & I C §366.21(g), a finding of a substantial probability that the child will be returned to the physical custody of the parent or guardian is a compelling reason not to set a .26 hearing.
- There is no substantial probability of return within 18 months from initial removal. Welf & I C §366.21(g)(1); Cal Rules of Ct 1461(c)(3); 1461(d)(3).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. See Cal Rules of Ct 1459, 1460(i), 1463(a), (g). Moreover, if at this or any subsequent review hearing the court finds by clear and convincing evidence that the child is not likely to be adopted and that there is no one willing to assume guardianship, it must order that the child be placed in long-term foster

care. See, *e.g.*, Welf & I C §366.21(g)(3); Cal Rules of Ct 1461(d)(2). See also Welf & I C §366.3(d) (periodic hearings).

(2) *Order a .26 hearing to be held within 120 days if there is clear and convincing evidence that reasonable services have been offered or provided.* See Welf & I C §366.21(g)(2); Cal Rules of Ct 1461(d)(3).

(3) *Order an assessment under Welf & I C §366.21(i), containing:*

- Current search efforts for absent parents and legal guardians.
- Review of amount of and nature of contact between the child and the parents and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or prospective legal guardian to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective legal guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Analysis of likelihood of adoption if parental rights are terminated.

(4) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council form JV-820 is presented to any parent or guardian who is present, and order that the form be mailed immediately to those not present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 39.1B, 1436, 1436.5(d), 1461(d)(6)–(9).

(5) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child.* See Welf & I C §366.21(h). Modify terms of visitation from previous levels as necessary to meet current needs.

E. [§104.6] Setting Hearing at 18-Month Permanency Review Hearing

(1) *Make the following findings:*

- Continued removal is necessary because return would create substantial risk of detriment. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1). The court must state on the record the factual basis for this conclusion. Cal Rules of Ct 1462(b)(3). "The child's

placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).

- Reasonable services have been offered or provided. Cal Rules of Ct 1462(b)(5). But see Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided concurrent with reunification services. Welf & I C §366.22(a).

Note: A .26 hearing cannot be set to terminate the parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. Cal Rules of Ct 1459, 1460(i), 1463(a), (g).

(2) *Terminate reunification services and order a .26 hearing to be held within 120 days.* See Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)(B).

Note: If reunification services are terminated and the court finds by clear and convincing evidence that the child is not a proper subject for adoption and that there is no one willing to assume legal guardianship, it may order that the child be placed in long-term foster care. Welf & I C §366.22(a); see Cal Rules of Ct 1462(b)(3)(A).

(3) *Order an assessment under Welf & I C §366.22(b).* The assessment under Welf & I C §366.22(b) is essentially the same as that required when setting the .26 hearing at disposition or the 6- or 12-month review hearings.

(4) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council form JV-820 is presented to any parent or guardian who is present, and order that the form be mailed immediately to those not present. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 39.1B, 1436, 1436.5(d), 1462(b)(2)(G)–(J).

(5) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child.* See Welf & I C §366.22(a). Modify terms of visitation from previous levels as necessary to meet current needs.

III. APPLICABLE LAW

A. [§104.7] General Background

Under a statutory scheme that was passed in 1987 (see SB 243; Stats 1987, ch 1485), Welf & I C §366.26 provides the exclusive procedures for selecting and implementing a permanent plan including the termination of parental rights, adoption, establishment of a legal guardianship, or long-term foster care, for a child who was adjudged dependent after January 1, 1989, removed from the home of the parents, and for whom reunification efforts were deemed futile from the outset (Welf & I C §361.5(b)) or proved to be futile. Welf & I C §366.26(a)–(b); Fam C §7808(a). Effective January 1, 1999, the use of a separate termination action for children still in the system who were declared dependents before January 1, 1989, was eliminated. Welfare & Institutions Code §366.26 is the permanency planning statute for all dependent children.

The current statutory scheme contemplates that before reaching the .26 hearing stage the juvenile court will have conducted several hearings and made a number of findings that returning the child to parental custody would be detrimental. *In re Vanessa W.* (1993) 17 CA4th 800, 806, 21 CR2d 633; *In re Brittany M.* (1993) 19 CA4th 1396, 1404, 24 CR2d 57 (no denial of equal protection to parents whose rights are terminated under Welf & I C §366.26). It is not a denial of due process that some of these findings are made by only a preponderance of the evidence; because the dependency process has so many safeguards built into it, by the time the .26 hearing stage is reached, the evidence in favor of termination is already clear and convincing. To require more at the .26 hearing stage would prejudice the interest of the adoptable child. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 256, 19 CR2d 698; *In re Cristella C.* (1992) 6 CA4th 1363, 1372, 8 CR2d 342 (California statutes provide a variety of safeguards at every stage, including initial removal by clear and convincing evidence, presumption of return to parents at each judicial review, and provision of reunification services). Return of the child at the .26 hearing is not an issue before the court, and no evidence to support a request for return may be received. See *In re Marilyn H.* (1993) 5 C4th 295, 309–310, 19 CR2d 544.

The hearing held under Welf & I C §366.26 is called a "selection and implementation" hearing, rather than a "termination" hearing, because it is the hearing at which the court determines the future disposition of a child who cannot be returned to the parents' home even when parental rights are not terminated. *In re Amanda B.* (1992) 3 CA4th 935, 938, 4 CR2d 922. In other words, at the Welf & I C §366.26 hearing the court "selects" a permanent plan of adoption, legal guardianship, or long-term foster care, and at the same time "implements" that plan by terminating parental rights, appointing legal guardians, or ordering long-term foster care, as

appropriate under the statutory provisions of that section. The main thrust of this hearing is no longer the success or failure of the parent's activities and efforts; it is the child's need for stability. See *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 544.

B. [§104.8] Purpose of .26 Hearing

The purpose of a .26 hearing has been characterized as follows:

(1) To select and implement a permanent plan of adoption, legal guardianship, or long-term foster care. Welf & I C §§294(e)(6), 366.26(b); *In re Marilyn H.* (1993) 5 C4th 295, 304, 19 CR2d 544.

(2) To determine a permanent placement for a child who cannot be returned home. *In re Heather B.* (1992) 9 CA4th 535, 546, 11 CR2d 891.

The court may not necessarily terminate parental rights at this hearing; although adoption is the favored option, there are certain circumstances in which termination may be precluded. Welf & I C §366.26(c)(1)(A)–(D); see, *e.g., In re Brandon C.* (1999) 71 CA4th 1530, 1537, 84 CR2d 505 (mother made great improvement in rehabilitating herself and securing a stable living situation; considerable bond developed with children that would benefit them should the relationship be allowed to continue).

The options that a court may choose at a .26 hearing are:

- Permanent termination of parental rights, and adoption. Welf & I C §366.26(b)(1), (c)(1) (court must find by clear and convincing evidence that child is likely to be adopted).
- Adoption identified as the permanent placement goal, but the child is difficult to place. Welf & I C §366.26(b)(1)–(2), (c)(3) (court must order that efforts be made to identify prospective adoptive parents within 180 days).
- Guardianship. Welf & I C §366.26(b)(3) (court must appoint a guardian at this hearing).
- Long-term foster care. Welf & I C §366.26(b)(4).

The .26 hearing is not a periodic status review hearing. *In re Marilyn H., supra.* At every review hearing, the focus is on the parents' progress at reunification. However, once the court orders a .26 hearing, attention shifts to whether the child is adoptable. *In re Edward R.* (1993) 12 CA4th 116, 126, 15 CR2d 308.

By the time the .26 hearing is held, it has already been determined that the parent will not have custody of the child. The remaining important issue is whether the child can and should be adopted. *In re Andrew S.* (1994) 27 CA4th 541, 548–549, 32 CR2d 670. Therefore, return of the child to the parents is not an option at this hearing. *In re Marilyn H., supra.* Parents who seek to reinstate reunification services and make return

home an option must seek modification under Welf & I C §388 of the order terminating reunification services. *In re Marilyn H., supra,* 5 C4th at 309.

C. Setting the Hearing

1. [§104.9] In General

Once reunification services have been terminated, the focus shifts to the child's needs for stability and a permanent arrangement. *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 544. After services have been terminated at any stage, the child is entitled to the holding of a .26 hearing unless there are exceptional circumstances that justify the court's exercise of discretion to order long-term foster care (*i.e.,* the court finds by clear and convincing evidence that the child is not a proper subject for adoption and no one is willing to assume legal guardianship—see, *e.g.,* Welf & I C §366.22(a)). *In re John F.* (1994) 27 CA4th 1365, 1374, 33 CR2d 225 (child had filed a petition for modification under Welf & I C §388 requesting the setting of a .26 hearing). When the court knows that more permanent options, such as adoption, are not foreclosed, it does not have discretion to maintain the child in the uncertainty of foster care and deny the .26 hearing. 27 CA4th at 1376–1377. See also *In re Johnny M.* (1991) 229 CA3d 181, 279 CR 693 (parents entitled to contested permanency planning hearing before permanent plan determined by court). Moreover, because the hearing at which the .26 hearing is set is so crucial, it may be an abuse of discretion to deny a parent a contested hearing at *that* hearing. See *Ingrid E. v Superior Court* (1999) 75 CA4th 751, 759, 89 CR2d 407 (parent had notified the court of new evidence that she had wanted to present at the 18-month permanency hearing).

While the .26 hearing can be scheduled at the disposition hearing (see §104.10) or any of the review hearings (see §§104.12–104.14), a court may also set a .26 hearing when it grants a petition under Welf & I C §387, removing a child from parental custody, if the parent has received at least 12 months of reasonable services (presumably six months for a child under three). See *Carolyn R. v Superior Court* (1995) 41 CA4th 159, 164, 48 CR2d 669. It may also be scheduled when the court grants a petition under Welf & I C §388, changing a disposition order for services to an order for no services. *Sheila S. v Superior Court* (2000) 84 CA4th 872, 877, 881, 101 CR2d 187. Services are not reasonable if a formerly incarcerated parent is deported before being able to use them. See *In re Maria S.* (2000) 82 CA4th 1032, 1040, 98 CR2d 655.

Once a guardianship has been established, no statute or court rule requires the court to make a judicial finding of changed circumstances at a separate Welf & I C §388 hearing before holding a .26 hearing. *In re Andrea R.* (1999) 75 CA4th 1093, 1105–1106, 89 CR2d 664.

Whenever the court terminates reunification services and sets a .26 hearing, it must advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1436, 1436.5(d). The court must advise all parties that they must file this notice of intent within seven days. See Cal Rules of Ct 39.1B(f). See discussion in §104.17.

a. At Disposition Hearing

(1) [§104.10] Denial of Reunification Services

Subject to the exceptions noted below, the court must set a .26 hearing at the disposition hearing if both parents and any guardian are denied reunification services and the court makes the following findings (see Welf & I C §361.5(f); Cal Rules of Ct 1456(f)(13)):

(1) The child should be removed from parental custody on statutory grounds found by clear and convincing evidence. See Welf & I C §361(c); Cal Rules of Ct 1456(d).

(2) Reasonable efforts were made or not made to prevent or eliminate the need for removing the child from the home. Welf & I C §361(d); Cal Rules of Ct 1456(e).

☛ JUDICIAL TIPS:

- For a county to be eligible for Title IV-E federal foster care funding, the judge must have made specified reasonable efforts findings. See 45 CFR §1356.21(b)(2)(ii). Therefore, it is strongly advised that the court find that "reasonable efforts to prevent removal were made" in a situation in which it might previously have found that the failure to make efforts was reasonable or that reasonable efforts were excused. If the court determines that DSS's concern for the child's safety was a valid basis for not providing services to prevent or eliminate the need for removal, it may find that the level of effort was reasonable, and should thus make a finding that reasonable efforts were made.
- Although this finding need only be made by a preponderance of evidence, many judges recommend using a clear and convincing standard, if warranted, when setting a .26 hearing.

(3) No reunification services are to be ordered under Welf & I C §361.5(b)(2)–(14) or (e)(1) and Cal Rules of Ct 1456(f)(5) because one of the following has been found by clear and convincing evidence:

- The parent has a mental disability described by Fam C §§7826 and 7827 that renders the parent incapable of using reunification services. Welf & I C §361.5(b)(2); Cal Rules of Ct 1456(f)(5)(B).

- The child had previously been removed because of physical or sexual abuse under Welf & I C §361 and had been returned home without termination of jurisdiction, and is again being removed for abuse under Welf & I C §361. Welf & I C §361.5(b)(3); Cal Rules of Ct 1456(f)(5)(C).
- The child's parent or guardian has caused the death of another child through abuse or neglect. Welf & I C §361.5(b)(4); Cal Rules of Ct 1456(f)(5)(D). In this regard, a judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273a), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 280 CR 349 (decided under a former version of Welf & I C §361.5(b)(4)).
- The court has jurisdiction because of Welf & I C §300(e) (severe physical abuse under the age of five) based on parent's or guardian's conduct. Welf & I C §361.5(b)(5); Cal Rules of Ct 1456(f)(5)(E).
- The child has been adjudged a dependent because of severe physical or sexual harm suffered by the child or a sibling or half-sibling, and the court makes a factual finding that it would not benefit the child to pursue reunification with the offending parent. Welf & I C §361.5(b)(6); Cal Rules of Ct 1456(f)(5)(F).
- The parent is not receiving services for a sibling or half sibling because of acts specified by Welf & I C §361.5(b)(3), (5), or (6). Welf & I C §361.5(b)(7); Cal Rules of Ct 1456(f)(5)(G).
- The child was conceived as a result of the parent's committing an act of child sexual abuse as described by Pen C §288 or §288.5 or equivalent acts in another state. Welf & I C §361.5(b)(8); Cal Rules of Ct 1456(f)(5)(H).
- The parent or guardian is incarcerated or institutionalized, and the court determines by clear and convincing evidence that reunification services will be detrimental to the child. Welf & I C §361.5(e)(1); Cal Rules of Ct 1456(f)(12).
- The child has been found to be described by Welf & I C §300(g) (voluntarily surrendered or otherwise left without provision for support), and the abandonment was willful, constituting serious danger for the child. Welf & I C §361.5(b)(9); Cal Rules of Ct 1456(f)(5)(I).
- The court had ordered termination of reunification services for siblings or half-siblings who had been removed under Welf & I C §361 because reunification services had failed and court finds that

the parent or guardian has not made reasonable efforts to treat the problem that caused the removal. Welf & I C §361.5(b)(10); Cal Rules of Ct 1456(f)(5)(J).

- Parental rights had been terminated with respect to siblings or half-siblings and the parent or guardian has subsequently not made reasonable efforts to treat the problem. Welf & I C §361.5(b)(11); Cal Rules of Ct 1456(f)(5)(K).
- The parent or guardian was convicted of a violent felony (see Pen C §667.5(c)). Welf & I C §361.5(b)(12); Cal Rules of Ct 1456(f)(5)(L).
- The parent or guardian has severe drug or alcohol problems and has either resisted treatment during the previous three years, or has failed or refused to comply with a court ordered substance abuse treatment program as part of a dependency reunification plan on at least two prior occasions. Welf & I C §361.5(b)(13); Cal Rules of Ct 1456(f)(5)(M).
- The parent or guardian has advised the court that he or she is not interested in receiving reunification or family maintenance services or having the child returned, has completed the Judicial Council's form for waiver of services, and has been found by the court to have knowingly and intelligently waived the right to services. Welf & I C §361.5(b)(14); Cal Rules of Ct 1456(f)(5)(N).
- The parent or guardian has on one or more occasions willfully abducted the child or a sibling or half-sibling from a placement and refused to disclose the child's whereabouts or return the child. Welf & I C §361.5(b)(15); Cal Rules of Ct 1456(f)(5)(O).
- The parent or guardian is incarcerated or institutionalized and the provision of reunification services would be detrimental to the child. Welf & I C §361.5(e)(1).

Under Welf & I C §361.5(b)(10) and (11), prior termination of parental rights of a man who was an alleged or biological father of a sibling or half-sibling of the child who is the subject of the newest petition may serve as the basis for denying reunification services even if the man is the *presumed* father of that child. *Francisco G. v Superior Court* (2001) 91 CA4th 586, 599, 110 CR2d 679.

See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §§102.74–102.83 (Cal CJER).

(2) [§104.11] Exceptions to Denial of Reunification Services

If findings are made based on Welf & I C §361.5(b)(5), the court may order reunification services (and therefore not schedule a .26 hearing) if it makes one of the following findings by a preponderance of the evidence:

(1) Services are likely to prevent reabuse or continued neglect of the child, or

(2) Failure to attempt reunification will be detrimental to the child. Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(11).

If findings are made based on Welf & I C §361.5(b)(3), (4), and (6)–(15), the court may order reunification services (and therefore not schedule a .26 hearing) if it finds by clear and convincing evidence that reunification would be in the child's best interest. Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(10).

If the parent has a mental illness described by Fam C §§7826 and 7827, the court must still order reunification services unless competent evidence from at least two mental health professionals establishes, by clear and convincing evidence, that the parent would be unable to care for the child within the next 12 months. See Welf & I C §361.5(c); Cal Rules of Ct 1456(f)(9). In assessing the effect of a mental disability on entitlement to reunification services, the court should first determine whether the parent suffers a mental disability as described in Fam C §§7820–7829 (formerly CC §232(a)(6)). If so, and the disability renders the parent incapable of using reunification services, reunification may be denied under Welf & I C §361.5(b)(2). If not, but the parent is unlikely to be capable of using services so as to be able to care for the child within 12 months, reunification may be denied under Welf & I C §361.5(c). *In re Rebecca H.* (1991) 227 CA3d 825, 843, 278 CR 185.

b. [§104.12] At Six-Month Review Hearing

To set a .26 hearing at the six-month review hearing, the court must make the following findings by a preponderance of the evidence:

(1) That continued removal is required because return would create a substantial risk of detriment. Welf & I C §366.21(e); Cal Rules of Ct 1460(e)(2). It is advisable to state on the record the factual basis for this conclusion.

☛ JUDICIAL TIP: Federal audit mandates require the court to find that the "child's placement is necessary and appropriate." See 42 USC §675(5)(B). Acceptable alternative language might be "out of home placement is necessary and the child's placement is appropriate."

(2) That reasonable services were offered or provided. See Welf & I C §366.21(e), (*l*); Cal Rules of Ct 1460(e)(2)(A). But see Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts).

☛ JUDICIAL TIP: Although both these findings need only be made by a preponderance of evidence, many judges recommend using a clear and convincing standard (when the evidence warrants) when setting a .26 hearing. It is advisable to state on the record the factual basis for these conclusions.

(3) That one or more of the following has been shown by clear and convincing evidence (Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)):

- The child was removed initially under Welf & I C §300(g), and the whereabouts of the parent are still unknown.
- The parent has failed for six months to contact and visit the child.
- The parent has been convicted of a felony indicating parental unfitness. In this regard, a judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 280 CR 349.

☛ JUDICIAL TIP: A .26 hearing may be set at the six-month review or at any other time only if it is set to consider termination of parental rights of both parents and any guardian. See Cal Rules of Ct 1459, 1460(i), 1463(a). If either parent or a guardian is still receiving services, the court may not proceed to a .26 hearing.

- The parent is deceased.
- The child was under three years old when removed, or is a member of a sibling group one of whom was under three at removal, and the parent has failed to participate regularly and make substantial progress in the treatment plan, unless the court finds that there is a substantial probability that the child will be returned within six months or within 12 months of the date the child entered foster care, whichever is sooner. Welf & I C §366.21(e); Cal Rules of Ct 1460(f)(1)(E), 1401(a)(7). To find such a probability the court may consider whether (1) the parent or guardian has regularly visited and contacted the child, (2) the parent or guardian has made significant progress in curing the conditions that led to removal, and (3) the parent or guardian has demonstrated ability to complete

the plan and to provide for the child's protection and needs. See Cal Rules of Ct 1460(f)(1)(E).

A court may set a selection and implementation hearing at the six-month review when the parent has failed to contact and visit the child; there is nothing to be gained in continuing to offer services because the parent has made no effort to reunify with the child for six months, and there are no extenuating circumstances. *In re Monique S.* (1993) 21 CA4th 677, 682, 25 CR2d 863. A brief casual or chance meeting with the child will not be sufficient to count as contact in determining whether to continue reunification services. *In re Tameka M.* (1995) 33 CA4th 1747, 1754 , 40 CR2d 64.

The setting of a .26 hearing for a child under three years old after just six months of reunification services when the father failed to engage in age-appropriate activity with the child, continued to stay with the mother who had serious mental problems (necessitating monitored visitation), and failed to reunify with the child's siblings after 18 months of reunification services was upheld on appeal in *Armando D. v Superior Court* (1999) 71 CA4th 1011, 1018, 1022–1023, 84 CR2d 189.

In determining whether to deny visitation to the parents when setting a .26 hearing at any review hearing (see Welf & I C §§366(a)(1), 366.21(h), 366.22(a)), the court must use a "preponderance of the evidence" standard of proof in finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282.

☛ JUDICIAL TIPS:

- In setting a .26 hearing based on the fact that there has been no contact for six months, it is generally believed that it is the last six months that counts; however, initiation of some token contact as the hearing date approaches will not, by itself, defeat the setting of the .26 hearing.
- Many judges would be reluctant to set a .26 hearing at this stage if the parents have attempted to contact the child by leaving messages, speaking with the foster parents, or in some other manner without actually reaching the child. If possible, judicial officers should assess the sincerity and quality of these attempts.

See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.34 (Cal CJER).

c. [§104.13] At 12-Month Permanency Hearing

To set a .26 hearing at the 12-month permanency hearing, the court must make the following findings, that:

(1) Continued removal is required because return would create a substantial risk of detriment by a preponderance of the evidence. Welf & I C §366.21(f), (*l*); Cal Rules of Ct 1461(c)(1). It is advisable to state the factual basis for this conclusion on the record.

☛ JUDICIAL TIP: Federal audit mandates require the court to find that the "child's placement is necessary and appropriate." See 42 USC §675(5)(B). Acceptable alternative language might be "out of home placement is necessary and the child's placement is appropriate."

(2) There is no substantial probability of return to the parents within 18 months from detention/removal. Welf & I C §366.21(g)(1); Cal Rules of Ct 1461(c)(3), (d)(3).

(3) Reasonable services were offered or provided. Welf & I C §366.21(f); Cal Rules of Ct 1461(c)(4), (5). This finding must be made by clear and convincing evidence. Welf & I C §366.21(g)(1). But see Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1) (to terminate parental rights at a .26 hearing, the court need only find that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts).

d. [§104.14] At 18-Month Permanency Review Hearing

If the child is not returned home at the 18-month review, services must be terminated and a .26 hearing set unless the court finds, by clear and convincing evidence, that the child is not a proper subject for adoption and has no one willing to accept legal guardianship, in which case, it may order long-term foster care as the permanent plan. Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(3)(A). Therefore, at the 18-month hearing, there are only three alternatives: (1) the child is returned home, (2) services are terminated and a .26 hearing is set, or (3) services are terminated and the court orders long-term foster care after finding by clear and convincing evidence that the child is not a proper subject for adoption. See Welf & I C §366.22(a); Cal Rules of Ct 1462(b)(1), (3). Even when the court learns at the 18-month hearing that the parents have made substantial efforts toward compliance with the reunification plan, it may set a .26 hearing when the parents have not alleviated the conditions that caused the court to remove the child from the home in the first place. See *In re Dustin R.* (1997) 54 CA4th 1131, 1142, 63 CR2d 269.

The one rare exception to this three-part scheme is when the court finds that adequate services have not been offered or provided. In this situation, the judge must exercise discretion whether to terminate services and select one of the three alternatives specified above or to continue reunification services beyond 18 months. See *In re Dino E.* (1992) 6 CA4th 1768, 1779, 8 CR2d 416 (no reunification plan had been

developed). See also *In re Daniel G.* (1994) 25 CA4th 1205, 1209, 31 CR2d 75 (some reunification services had been provided but court still should have exercised discretion in deciding whether or not to extend services when it found previous services to be inadequate) and *In re Elizabeth R.* (1995) 35 CA4th 1774, 1792–1799 , 42 CR2d 200 (parent was hospitalized for mental illness during most of the reunification period, did not miss any visits, and made many attempts to augment visitation; court should have used Welf & I C §352 to continue the 18-month hearing). Distinguishing factors in these cases are either that services were inadequate or that some "external factor" prevented the parent from participating in the services. See *Andrea L. v Superior Court* (1998) 64 CA4th 1377, 1389, 75 CR2d 851. The extension must be supported by substantial evidence that is reasonable in nature, credible, and of solid value. *In re Brequia Y.* (1997) 57 CA4th 1060, 1068–1069, 67 CR2d 389. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.46 (Cal CJER).

☛ JUDICIAL TIP: As with the other review hearings, federal audit mandates require the court to make the findings described in §104.12.

2. [§104.15] Ordering an Assessment

Whenever the court terminates or denies reunification services and orders a .26 hearing, it must concurrently order the preparation of an assessment. See, *e.g.*, Welf & I C §366.21(i); Cal Rules of Ct 1460(c). When the .26 hearing is set at disposition, the court must direct DSS (and the licensed county adoption agency, if separate from DSS) to prepare an assessment that includes (Welf & I C §361.5(g)):

- Current search efforts for absent parents.
- Review of amount of and nature of contact between the child and the parents since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or prospective guardian to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or

guardianship unless the child's age or condition precludes a meaningful statement.

- Analysis of likelihood of adoption if parental rights are terminated.

Similarly, at a 6-, 12-, or 18-month hearing, when the court terminates or denies reunification services and orders that a .26 hearing be held, it must direct DSS to prepare an assessment. Welf & I C §§366.21(i), 366.22(b); Cal Rules of Ct 1460(f)(2), 1461(d)(5), 1462(b)(6). The assessment must contain the same factors specified above.

3. [§104.16] Other Orders /Advisements

At the time that the court sets the .26 hearing, it must advise the parent or guardian of the right to seek review by extraordinary writ and that failure to seek writ review will waive the right to raise issues in a subsequent appeal. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1436, 1436.5(d). See also Cal Rules of Ct 1456(f)(16) (disposition), 1460(f)(6) (six-month review), 1461(d)(9) (12-month permanency hearing), and 1462(e)(9) (18-month permanency review hearing). See discussion in §104.17. The court must also advise the parents either in statutory language (see Welf & I C §294(e)(6)) or in a functional equivalent that at the *next* hearing it is required to select and implement a permanent plan, which may be a plan of adoption, guardianship, or long-term foster care. *In re Anna M.* (1997) 54 CA4th 463, 468, 62 CR2d 831 (termination of parental rights was reversed because the court had emphasized guardianship as the likely plan).

In addition, the court must continue to permit the parent to visit the child pending the hearing unless it finds that visitation would be detrimental to the child (see, *e.g.,* Welf & I C §366.21(h)), but terms of the visitation may be modified from previous levels to meet current needs. If denying visitation when setting a .26 hearing, the court must use a "preponderance of the evidence" standard of proof when finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282.

4. [§104.17] Right To Appeal Setting of .26 Hearing

The order setting a .26 hearing is not appealable at the time it is made. See Welf & I C §366.26(*l*); Cal Rules of Ct 1436.5; *In re Charmice G.* (1998) 66 CA4th 659, 668, 78 CR2d 212. Nor is any order, regardless of its nature, that has been made at the hearing at which a .26 hearing is set. *In re Anthony B.* (1999) 72 CA4th 1017, 1024, 85 CR2d 594 (order denying reinstatement of supervised visitation.

The order setting the .26 hearing is also not appealable at the conclusion of the .26 hearing unless all the following conditions apply (Welf & I C §366.26(*l*)(1); Cal Rules of Ct 1436.5(c)):

(a) A petition for an extraordinary writ was filed in a timely manner,

(b) The writ petition substantively addressed the issues to be challenged on appeal and supported that challenge with an adequate record, and

(c) The writ petition was summarily denied or otherwise not decided on the merits.

Failure to file a petition for extraordinary writ review under Welf & I C §366.26(*l*) and Cal Rules of Ct 39.1B precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405, 62 CR2d 726.

When the court has ordered a .26 hearing it must orally advise all parties present, and notify absent parties by first-class mail, that any party who desires to preserve the right to appeal must file a petition for extraordinary writ (see Judicial Council forms JV-820 and JV-825). See Welf & I C §366.26(*l*)(3); Cal Rules of Ct 1436, 1436.5(d). The notice of intent to file the writ petition must be filed within seven days. See Cal Rules of Ct 39.1B(f). Copies of the Judicial Council form petitions must be available in the courtroom and must accompany all mailed notices of the advice. Cal Rules of Ct 1435(e). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties within 24 hours. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 1436.5(d); *In re Cathina W.* (1998) 68 CA4th 716, 721–724, 80 CR2d 480.

☛ JUDICIAL TIP: With heavy workloads, court clerks may easily miss this deadline. Judicial officers may therefore need to remind court personnel to mail the required notices within the 24-hour time limit.

The deadline for filing a writ petition is mandatory. *Roxanne H. v Superior Court* (1995) 35 CA4th 1008, 1012, 41 CR2d 760. See also *Karl S. v Superior Court* (1995) 34 CA4th 1397, 1401, 41 CR2d 84 (petition for writ must be denied when the notice of intent to file the writ is not timely filed under Welf & I C §366.26(*l*) and Cal Rules of Ct 39.1B).

A petition for a writ requires a client's consent. *Guillermo G. v Superior Court* (1995) 33 CA4th 1168, 1173, 39 CR2d 748. A parent's stated desire to appeal any future unfavorable decision is not sufficient to infer consent when that parent did not appear at the hearing in which the .26 hearing was set and did not sign the writ petition, despite the attorney's warnings. *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788, 54 CR2d 25. An attorney who represents a parent who has not communicated with the attorney or appeared at the hearings is under no

professional duty to file a Rule 39.1B writ petition without the client's authorization. *Janice J. v Superior Court* (1997) 55 CA4th 690, 692, 64 CR2d 227.

With the client's authorization, however, if a parent is incarcerated or otherwise not present at the hearing at which the .26 hearing is set, counsel may complete the notice of intent to file a writ and file it on behalf of the client. *Jonathan M. v Superior Court* (1995) 39 CA4th 1826, 1830, 46 CR2d 688 (appellate court consent based on good cause is needed under Cal Rules of Ct 39.1B(f) if parent's signature is not obtained).

D. Notice Requirements

1. [§104.18] Who Is Entitled to Notice

Notice must be given to the following people (Welf & I C §294(a)):

- The mother.
- Any presumed and alleged fathers.
- Child (if 10 years of age or older).
- All counsel of record.
- Indian custodian and tribe if the court has reason to know that an Indian child is involved; if the custodian or tribe cannot be identified or located, notice must be given to the Bureau of Indian Affairs (see also 25 USC §1912(a); Cal Rules of Ct 1439(f)).

Notice must not be given to (Welf & I C §294(b)):

- A parent whose rights have been terminated.
- A parent who has relinquished his or her child for adoption to a licensed adoption agency or state DSS, and the relinquishment has been accepted
- An alleged father who has denied paternity and waived notice of further hearings on Judicial Council form JV-505.

☛ JUDICIAL TIP: Notice can be a major issue in the .26 hearing. Before the hearing begins, the court should examine the file, determine who has been notified, and determine whether the notice (including that done by publication) was proper. If all is in order, the court should find, at the hearing, that all parties were properly noticed.

It is essential for all those claiming to be fathers to be notified because a court may not terminate the parental rights of only one parent unless that parent is the sole surviving parent or the other parent had his or her rights terminated or had relinquished custody to DSS. Cal Rules of Ct

1463(a), (g). See also Cal Rules of Ct 1459, 1460(i) (.26 hearing may not be set to consider termination of parental rights of only one parent).

2. [§104.19] Time Limitations

Notice must be completed at least 45 days before the hearing; service is deemed complete either at the time of personal delivery, 10 days after placement in the mail, or at the end of the time prescribed by the order of publication (see Welf & I C §294(f)(7)(A)). Welf & I C §294(c)(1).

☛ JUDICIAL TIP: Some courts set a hearing at least 30 days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be deficient, there will often be time to remedy this within the 120-day period (see, *e.g.*, Welf & I C §366.21(e)) so that the .26 hearing may be held on time.

A court may not sanction DSS for failing to provide timely notice by publication (see Welf & I C §294(f)(7)(A)) by refusing to consider adoption as recommended by DSS. *In re Christiano S.* (1997) 58 CA4th 1424, 1433, 68 CR2d 631.

When an Indian child is involved, notice to the Indian custodian and tribe must be completed at least 10 days before the hearing. Welf & I C §294(c)(2). If notice was given to the Bureau of Indian Affairs, the bureau must have at least 15 days after receipt to notify the parent or custodian and the tribe. Welf & I C §294(c)(3). Under ICWA, even when the child's status as an Indian child is not conclusive, a .26 hearing may not be held until at least 10 days after receipt of notice. *In re Jonathan D.* (2001) 92 CA4th 105, 110–111, 111 CR2d 628. These notice requirements apply even with a previous determination that the siblings were not Indian children; determination of tribal membership is made on an individual basis. 92 CA4th at 111.

Procedures for giving notice are found in Cal Rules of Ct 1439(f)(1)–(4) and Welf & I C §294(a)(6), (c), and (e)(7). See generally Risling, California Judges Benchguide—The Indian Child Welfare Act (California Indian Legal Services, 2000) (available on the Internet at http://www.calindian.org/icwa.htm).

3. [§104.20] Contents of Notice

The notice must inform those receiving it of the time and place of the hearing and must advise them of their right to appear. Welf & I C §294(e)(1), (2); see Cal Rules of Ct 1463(b)(1)(A). The notice must also advise the child and parents of the right to counsel, the nature of the proceedings, the recommendation of DSS, and of the fact that at the hearing the court will be selecting and implementing a permanent plan of adoption, legal guardianship, or long-term foster care for the child. Welf &

I C §294(e)(3)–(6). If an Indian child is involved, the notice must contain a statement that the parent or Indian custodian and the tribe may intervene at any point and that they may have up to an additional 20 days for preparation. Welf & I C §294(e)(7).

When the parents are present at the hearing at which the .26 hearing is scheduled and the court advises them about the date, time, and place of the .26 hearing, the court must also advise them of the right to counsel, the nature of the proceedings, and of the fact that at the hearing the court will be selecting and implementing a permanent plan of adoption, legal guardianship, or long-term foster care for the child. Welf & I C §294(f)(1).

4. [§104.21] Type of Notification

The type of notice will depend on whether the parents were present when the .26 hearing was scheduled. Notice to the child and counsel must always be by first-class mail. See Welf & I C §294(g); Cal Rules of Ct 1463(b)(2)(B)–(C).

Whatever the required method of notification, once the court has found initially that notice was properly given to the parents and others entitled to notice, notice for any continuation of the hearing may be by first-class mail to the last known address, unless the recommendation for the permanent plan has changed. Welf & I C §294(d). If the recommendation has changed, notice must be provided according to §§104.22–104.24 below. In a case decided before this statute went into effect, the court held that a parent who received notice and does not appear at a hearing that is then continued is entitled to notice of the rescheduled hearing. *In re Angela C.* (2002) 99 CA4th 389, 393, 120 CR2d 922.

Notice can be a problem when the parent is homeless. The court should ask the parent to give a *permanent* mailing address at the earliest opportunity to the court, as well as to the attorney and social worker, in order to be in compliance with Welf & I C §316.1 and Cal Rules of Ct 1412(*l*). See *In re Rashad B.* (1999) 76 CA4th 442, 449–450, 90 CR2d 462 (failure to file writ petition was excused because of lack of notice to homeless parent). A permanent mailing address does not have to be the same as a residence address. 76 CA4th at 450.

When an Indian child is involved, notice to the tribe must be by registered mail, return receipt requested. Welf & I C §294(h).

a. [§104.22] Parents or Attorney Present When .26 Hearing Set

If the parents were present at the hearing at which the .26 hearing was scheduled, the court must advise them at that time of the time and place of the hearing, order them to appear, and direct that they receive notice of this hearing by first-class mail. Welf & I C §294(f)(1); Cal Rules of Ct

1463(b)(2)(A). If the *attorney* was present at the time the .26 hearing was scheduled, no further notice is required. If adoption is the permanent plan and the parents' whereabouts are unknown, service must be to the attorney by certified mail, return receipt requested (see Welf & I C §294(f)(7)(A)). Welf & I C §294(i).

b. [§104.23] Parents Not Present When .26 Hearing Set

If the parents were not present at the hearing at which the .26 hearing was scheduled, notice to the parents must be given in one of the following ways (Welf & I C §294(f)(2)–(7)):

- By certified mail, return receipt requested; this notice will be sufficient if DSS receives a signed return receipt.
- By personal service.
- By delivery to a competent person who is 18 years old or older at the parents' usual residence or business address, followed by a first-class mail notice to the same address.
- By personal service or delivery to a person 18 years old or older at the parent's address, or by certified mail, return receipt requested, if the parent resides outside the state.
- By first-class mail to the usual residence or business address if the recommendation is for legal guardianship or long-term foster care.

c. [§104.24] When Parents Cannot Be Found

If the parent's whereabouts are unknown and they therefore cannot with reasonable diligence be served as specified above, DSS must file an affidavit at least 75 days before the hearing is scheduled, stating the parent's name and describing efforts made to locate and serve the parent. Welf & I C §294(f)(7).

If the court determines that DSS used due diligence (see discussion in §104.25) in attempting to locate the parent and adoption is recommended, service must be to the attorney of record by certified mail, return receipt requested. Welf & I C §294(f)(7)(A). If there is no attorney of record, the court must order service by publication in which a citation requiring the parent to appear is published once a week for four consecutive weeks in the newspaper most likely to be seen by the parent. Welf & I C §294(f)(7)(A). Whether service is to the attorney or by publication, the court must also order that notice be given to the grandparents by first-class mail. Welf & I C §294(f)(7)(A).

If the court determines that DSS used due diligence in attempting to locate the parent and legal guardianship or long-term foster care is recommended, no further notice to the parent is required, but the court must order that notice be given to the grandparents by first-class mail.

Welf & I C §294(f)(7)(B). When the parent's residence becomes known, notice must be immediately served as provided in Welf & I C §294(f)(2)–(6). Welf & I C §294(f)(7)(C).

If the names or identities of one or both parents or alleged parents is unknown or uncertain, the court must order the published citation to be directed to either the father, the mother, or both, and to all who claim to be parents, naming and describing the child. Welf & I C §294(f)(8).

d. [§104.25] Locating Parents

In locating a parent for purposes of notification, DSS should make use of the information it has available. When it ignores the most likely means of finding a parent, reasonable diligence in locating the parent cannot be shown, and substituted service will not be sufficient. *David B. v Superior Court* (1994) 21 CA4th 1010, 1016, 26 CR2d 586 (DSS failed to inquire about father's whereabouts in the armed services although his name and the fact that he was in the Marines was on the birth certificate). DSS must not ignore the most likely means of finding the parent. *In re Arlyne A.* (2000) 85 CA4th 591, 599, 102 CR2d 109 (due diligence declaration appeared valid on its face, but DSS had failed to check directory assistance for town of father's family residence when informed that the father lived there).

A father is not entitled to a stay under the Soldiers' and Sailors' Civil Relief Act even though he was in the Navy and away at sea at the time the .26 hearing was set, because he did not demonstrate that he was actually unavailable to participate in the hearing, and because he had never shown an interest in parenting the child. *Christine M. v Superior Court* (1999) 69 CA4th 1233, 1244, 82 CR2d 220.

5. [§104.26] Notification of Incarcerated Parent

The court has a mandatory duty under Pen C §2625 to notify an incarcerated parent of a hearing at which termination of parental rights are sought; however, when some other outcome such as guardianship is recommended, the court has discretion over whether to require notice and may deny the parent's request to attend the hearing. *In re Barry W.* (1993) 21 CA4th 358, 364, 369–371, 26 CR2d 161. Once an incarcerated parent appears and participates, the parent may not complain on appeal that he or she was denied the right to have been transported to an earlier hearing under Pen C §2625. *In re Gilberto M.* (1992) 6 CA4th 1194, 1200 n7, 8 CR2d 285.

E. [§104.27] Scheduling the Hearing

The hearing must be scheduled within 120 days of the date that reunification services are denied or ordered to be terminated, whether at

disposition (see Welf & I C §361.5(b)) or at a review hearing (see Welf & I C §§366.21(e), (g)(2), 366.22(a)).

☛ JUDICIAL TIP: Some judges recommend setting the hearing well before the 120 days, unless the notice requirements will take that long to fulfill or unless the entire time is needed to complete the assessment.

In general, there may be tension between the timely resolution of dependency cases and the thoughtful exercise of judicial discretion. *In re Sean E.* (1992) 3 CA4th 1594, 1599, 5 CR2d 193. Delay or a change in course may become necessary, although this would be a rare occurrence. For example, if a court grants a Welf & I C §388 petition showing changed circumstances, including a possibility that the parent would be able to care for the child, it must not then proceed to a .26 hearing and terminate parental rights. *In re Sean E., supra.* When a parent makes a showing of being able to reunify with the child, it may be a denial of due process for a court to deny a petition for modification, even when the 12-month hearing has been held and services terminated. *In re Jeremy W.* (1992) 3 CA4th 1407, 1416, 5 CR2d 148.

The judge has a dilemma when the parent is able to show a change of circumstances but still no ability to reunify. In that case, there would have to be a delay, during which time the parent has a hearing on the Welf & I C §388 petition, but no change in course from the original plan to proceed to a .26 hearing if the change in circumstances is insufficient to permit reunification.

1. [§104.28] Continuances

The court may continue the proceeding for up to 30 days to appoint counsel and permit counsel to become acquainted with the case. Welf & I C §366.26(g). In addition, a continuance may be granted on request of counsel for the parent, child, or petitioning agency if it would not be contrary to the child's best interests. Welf & I C §352. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.55 (Cal CJER). In any event, a continuance should last only for the period of time shown necessary by the evidence. Welf & I C §352(a). See also *In re Emily L.* (1989) 212 CA3d 734, 742–743, 260 CR 810 (pauses in the proceedings prolong the uncertainty for the child and make it more difficult for prospective adoptive parents to make a commitment to the child).

Parents who fail to appear at a regularly scheduled .26 hearing must be renotified of any continued hearing. *In re Phillip F.* (2000) 78 CA4th 250, 258, 92 CR2d 693. If they have been properly noticed under former Welf & I C §366.23 (now Welf & I C §294), however, the renotification does not need to comply with all the requirements of that section; instead,

notice by counsel, the clerk of the court, or some other means will suffice. *In re Phillip F., supra,* 78 CA4th at 258–259.

2. [§104.29] Determination of Whether To Grant or Deny

One reason to grant a continuance might be if the reunification services could not be completed during the time allotted. See *In re Michael R.* (1992) 5 CA4th 687, 695, 7 CR2d 139 (.26 hearing was set at 12 months and mother filed a motion for continuance under Welf & I C §352). The court may not summarily deny the motion for the continuance without exercising its discretion in the process. *In re Michael R., supra.*

☛ JUDICIAL TIP: Although it is tempting to be skeptical of a parent's claim that there was inadequate time in which to complete reunification plans, it is important to take the time to provide (on the record) the reasons why reunification could have been completed during the allotted time and any further justification for denial of a continuance.

A court may deny a request for a continuance if the request was made in order to permit the parents time to review an assessment that was provided just before the hearing. *In re Gerald J.* (1991) 1 CA4th 1180, 1187, 2 CR2d 569 (service of the notice of hearing was otherwise in order). A court may also deny a request for a continuance for paternity testing when an alleged father had neither attempted contact with the child during the reunification period nor sought earlier testing. *In re Ninfa S.* (1998) 62 CA4th 808, 810–811, 73 CR2d 209. Because the issue of genetic testing of an alleged father is irrelevant at the .26 hearing to the likelihood of adoption or to any of the exceptions set out in Welf & I C §366.26(c)(1)(A)–(D), the continuance would not be helpful and would interfere with prompt resolution of the child's status and right to a permanent placement. *Ninfa S., supra,* 62 CA4th at 811.

☛ JUDICIAL TIP: The court may also make a paternity finding at the .26 hearing and then terminate parental rights if it is clear that the father could have become involved earlier and chose not to.

In any case, chronic court congestion in the juvenile court is not good cause for continuing the hearing; dependency cases demand priority. See, *e.g., Jeff M. v Superior Court* (1997) 56 CA4th 1238, 1242–1243, 66 CR2d 343; see also *In re Axsana S.* (2000) 78 CA4th 262, 272, 92 CR2d 70 (pending criminal case also not good cause for continuance).

F. [§104.30] Conduct of Hearing

As with any juvenile court hearing, a .26 hearing must be conducted in a nonadversarial manner, unless there is a contested issue of law or fact (see Welf & I C §350(a)(1); Cal Rules of Ct 1412(b)), and the court must

control the proceedings with a view to expeditious determination of the facts and of all information related to the present circumstances and welfare of the child (Welf & I C §350(a)(1); Cal Rules of Ct 1412(a)). The .26 hearing must be closed to the public and heard at a special or separate session of court. See Welf & I C §§345–346.

The court must advise the child, parent, and guardian of any right to assert the privilege against self-incrimination, as well as the following rights to (Cal Rules of Ct 1412(j)):

- Confront and cross-examine the preparers of reports and any witnesses called against them;
- Use the court's process to bring witnesses to court, including the witnesses whose hearsay statements are contained in the social worker's reports (see Welf & I C §366.26(b), (d), and (e)); and
- Present evidence to the court.

The hearing must be recorded by a court reporter or by means of any other authorized procedure if the hearing is conducted by a judge or by a referee, commissioner, or attorney acting as a temporary judge. Welf & I C §347; Cal Rules of Ct 1411(a). If the hearing is before a referee or commissioner assigned as a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 1411(b).

Hearings held under Welf & I C §366.26 may be conducted by referees who meet the qualifications of Welf & I C §247 (five years of legal practice in California) or by superior court commissioners assigned as referees. A referee may obtain a stipulation to act as a temporary judge. Cal Rules of Ct 244, 1415(b). The superior court is not required to designate commissioners as juvenile court referees and, in some jurisdictions, commissioners are appointed as temporary judges and not as referees. As such, their decisions and orders are not subject to rehearing. California Rules of Court 244, relating to the required stipulations for temporary judges, specifically states that it does not apply to court commissioners sitting as temporary judges. A stipulation to a commissioner acting as a temporary judge need not be in writing or express; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98, 284 CR 305; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–228, 45 CR2d 560. If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873.

When the parties refuse to enter into a stipulation, the referee may nonetheless conduct juvenile proceedings; a stipulation is necessary to give the court's acts finality (unless there is a rehearing), but the absence

of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551, 18 CR2d 555. Despite Welf & I C §366.26(i) (court has no power to change or set aside a termination order), if the order had been made by a referee without a stipulation, the parties may seek a rehearing within ten days under Welf & I C §252. *In re Roderick U., supra,* 14 CA4th at 1553. If no rehearing is sought, a termination order will become final when issued by a referee in the absence of a stipulation ten days after service of the order. *In re Roderick U., supra.*

For more in-depth discussion of the conduct of dependency proceedings generally, see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §§103.16 (judicial officers), 103.22–103.30 (conduct of proceeding including duty of advisement of rights and receipt of evidence), and 103.56 (rehearings when original hearing was before referee) (Cal CJER).

1. [§104.31] Who May Be Present

Generally, the child should not attend a .26 hearing unless the child or the child's counsel has requested his or her attendance or the court requires the child to attend. Welf & I C §366.26(f)(1). The child's attorney, however, is entitled to be present and should be present. Welf & I C §349. See also Welf & I C §317.5(b) (child is a party to dependency proceeding). In addition, Cal Rules of Ct 1410(b) permits the following persons to be present:

(1) Parents, de facto parents, or guardians, or if none can be found or none reside within the state, any adult relatives residing within the county, or if none, any adult relatives residing nearest the court;

(2) Counsel for parent or guardian, de facto parent, and Indian custodian;

(3) Attorney for the petitioning agency (see Cal Rules of Ct 1410(d));

(4) Social worker;

(5) Court clerk;

(6) Any court-appointed special advocate;

(7) A representative of the child's Indian tribe;

(8) The official court reporter; and

(9) Bailiff, at the court's discretion.

The court may also permit any of the child's relatives to be present at the .26 hearing on a sufficient showing. See Cal Rules of Ct 1412(f). See also Welf & I C §§100–109, 356.5 (setting forth requirements governing the appointment and duties of a person appointed as a CASA volunteer); Cal Rules of Ct 1424 (program guidelines for CASAs).

All others must be excluded from the courtroom, unless a parent or guardian requests that the public be admitted and this request is consented

to or requested by the child. Welf & I C §346. The court may also admit anyone who it determines has a direct and legitimate interest in the case or in the work of the court. Welf & I C §346. In any case, no person on trial, accused of a crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is the parent. Welf & I C §345; Cal Rules of Ct 1410(a). A stepparent or friend of the parent who is accused of a crime must be excluded from the proceedings unless the court makes a finding under Welf & I C §346 permitting attendance.

A parent's waiver of appearance for one hearing does not extend to other hearings unless the parent was present at the hearing at which the later hearings are scheduled (see *In re Malcolm D.* (1996) 42 CA4th 904, 913, 50 CR2d 148). *In re Julian L.* (1998) 67 CA4th 204, 208, 79 CR2d 839.

2. [§104.32] Appointment of Counsel

Very often, parties will have had counsel retained or appointed before the .26 hearing. When appointing counsel for the first time at the .26 hearing, however, the court may continue the proceeding for up to 30 days to appoint counsel and permit counsel to become acquainted with the case. Welf & I C §366.26(g).

a. [§104.33] For the Child

Although Welf & I C §366.26(f)(1) provides that at the beginning of the .26 hearing, the court must appoint counsel after determining whether the child's interests require representation by counsel, the more recently enacted Welf & I C §317(c) requires the court to appoint counsel in every case unless it finds explicitly that the child must not benefit from counsel. The court must state on the record the reasons for any finding that the child would not benefit from counsel. Welf & I C §317(c); Cal Rules of Ct 1438(b).

The court should appoint independent counsel for each sibling or group of siblings when there is an actual conflict of interest (*In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778) or when one might arise (*Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891). In *In re Cliffton B, supra,* the siblings were very close, one sibling was clearly adoptable, and the other expressed a desire not to have the adoptable sibling's parental rights terminated because of the danger that termination would curtail the sibling contact. *In re Cliffton B., supra.* See also *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88 (parent may not appeal on basis that child should not be separated from siblings); *In re Gerald J.* (1991) 1 CA4th 1180, 1188, 2 CR2d 569 (the court need not consider the objection of one child to the termination of parental rights

for that child's sibling). Even when the conflict between siblings or groups of siblings is only a potential conflict of interest, the court should consider whether the appointment of counsel for each sibling or group of siblings is appropriate because the enactment of the exception to the termination of parental rights for substantial interference with a sibling makes conflicts of interest for children's counsel more likely to occur. See Welf & I C §366.26(c)(1)(E); Cal Rules of Ct 1463(d)(1)(B)(v). The courts should be sensitive to and alert for such conflicts

b. [§104.34] For Parents

If the parents are present at the hearing at which the .26 hearing is set, the court must advise them of the right to counsel at that time. Welf & I C §294(f)(1). Welfare and Institutions Code §366.26(f)(2) requires that if a parent appears at the .26 hearing without counsel and is unable to afford one, the court must appoint counsel for that parent unless representation is knowingly and intelligently waived. The same attorney may not be appointed to represent the child and the parent at a .26 hearing. Welf & I C §366.26(f)(2). The court must determine the payment to be received by private counsel and how much of the payment is to be from the parties' funds and how much, if any, from the county's general fund. Welf & I C §366.26(f)(3). Generally, courts have held that the parent's right to counsel is statutory, rather than constitutional, despite the fact that at the hearing the court will decide whether or not the child will be adopted. See *In re Andrew S.* (1994) 27 CA4th 541, 549, 32 CR2d 670. But see *In re Arturo A.* (1992) 8 CA4th 229, 239, 10 CR2d 131 (there may be a due process right to effective assistance of counsel at any hearing which may lead to termination of parental rights).

If the parent elects self-representation, the court *must* take a waiver before precluding a disruptive but mentally competent parent from self-representation, whether on the grounds of protecting a person unskilled in the law or protecting the process from disruption. *In re Angel W.* (2001) 93 CA4th 1074, 1084–1085, 113 CR2d 659 (.26 hearing). However, the court need not engage in a full *Faretta*-type inquiry with the parent. *In re Angel W., supra,* 93 CA4th at 1084.

If the parent elects self-representation, the court *must* take a waiver of the parent's right to counsel under Welf & I C §317, but need not engage in a full *Faretta*-type inquiry. *In re Angel W.* (2001) 93 CA4th 1074, 1084, 113 CR2d 659 (.26 hearing). Before precluding a disruptive but mentally competent parent from self-representation on the grounds of protecting the process from disruption, the court must find the parent is and will remain so disruptive as to significantly delay the proceedings or cause the proceedings to negatively impact the child's right to a fair and prompt hearing. *In re Angel W., supra,* 93 CA4th at 1085.

c. [§104.35] Relieving Counsel

Once counsel has been appointed, that attorney must represent the client in all proceedings (see Welf & I C §317(d)) including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1404–1405, 25 CR2d 259). A juvenile court policy memorandum providing that attorneys appointed to represent indigent parents are to be relieved once a permanent plan is implemented unless good cause is shown is inconsistent with Welf & I C §317(d) (appointed counsel must represent the parent at all proceedings). *In re Tanya H.* (1993) 17 CA4th 825, 833, 21 CR2d 503.

In general, a court should not relieve a parent's attorney without a showing of good cause and substitution of another attorney. *In re Julian L.* (1998) 67 CA4th 204, 207–208, 79 CR2d 839. When counsel seeks to withdraw, the court must require an explanation for the record why he or she cannot proceed; if the attorney has been unable to contact the parent, counsel must inform the court how this lack of contact has an adverse impact on the client's representation. *In re Malcolm D.* (1996) 42 CA4th 904, 915, 50 CR2d 148. Before counsel may be relieved, the court must conduct a hearing with notice to the concerned parents. *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1066, 50 CR2d 57.

The court must investigate circumstances fairly and impartially before it relieves parent's counsel and goes on to terminate parental rights. See *Katheryn S. v Superior Court* (2000) 82 CA4th 958, 972–975, 98 CR2d 741 (court erroneously relieved public defender when mother had removed the child from the jurisdiction). Once there has been such an investigation, however, it may be proper to relieve a child's counsel if the court determines the child can no longer benefit from the appointment of counsel such as at the postpermanency planning stage when adoption is imminent and there are no longer legal issues to be resolved. See *In re Jesse C.* (1999) 71 CA4th 1481, 1490–1491, 84 CR2d 609.

d. [§104.36] Competency

All parties who are entitled to counsel, including the child who is the subject of the proceedings, are entitled to competent counsel. Welf & I C §317.5. To raise the level of competency of counsel appearing in juvenile court, the juvenile court judge has an obligation to encourage local attorneys to practice in juvenile court over a substantial period of time, to raise the status of public attorneys who practice in juvenile court, and to establish minimum standards of practice for court-appointed attorneys who practice in juvenile court. Standards J Admin §24(c). The judge should also institute and encourage training programs for lawyers who serve as court-appointed attorneys in juvenile court, as well as set

minimum training and continuing legal education standards. Standards J Admin §24(d). See Cal Rules of Ct 1438 for rules governing competency.

e. [§104.37] Attorneys' Fees

A court cannot arbitrarily cut the fees submitted by an attorney for representing a child. *Trask v Superior Court* (1994) 22 CA4th 346, 353, 27 CR2d 425 (delinquency case). To encourage high quality of legal representation of children as required by Standards J Admin §24, a court should not reduce the fees submitted by appointed counsel without a statement of reasons for the reduction. *Trask v Superior Court, supra.* However, when the court is responsible for setting fees for panel attorneys, it may change the method of compensation from hourly to flat fee to be applied prospectively to services rendered after the effective date of the new policy. *Amarawansa v Superior Court* (1996) 49 CA4th 1251, 1257–1251, 57 CR2d 249.

3. Receipt of Evidence

a. [§104.38] Generally

At the hearing, the court must review and consider the social worker's report containing an assessment of the child and of prospective adoptive parents, if any. Welf & I C §366.26(b). See also Welf & I C §§361.5(g), 366.21(i), 366.22(b) (specifying contents of report). This report must be provided to the parties and all counsel at least ten days before the hearing and must provide a summary of recommendations to the child's present custodians, any CASA, and an Indian child's tribe. Cal Rules of Ct 1463(c). Social workers' reports containing hearsay are admissible at .26 hearings. See Welf & I C §366.26(b); *In re Keyonie R.* (1996) 42 CA4th 1569, 1572–1573, 50 CR2d 221. The admissibility of the social worker's report at the .26 hearing is not expressly conditioned on the social worker being available for cross-examination. *In re Jeanette V.* (1998) 68 CA4th 811, 816, 80 CR2d 534; see Welf & I C §366.26(b); Cal Rules of Ct 1463(c), (d). If termination of parental rights is the recommendation, it must be clearly stated in the report that there is sufficient evidence that the child is likely to be adopted. A "fragmentary and ambiguous" assessment is not acceptable and will not meet the agency's burden to prove adoptability. *In re Brian P.* (2002) 99 CA4th 616, 625, 121 CR2d 326.

The parents are entitled to present evidence at a .26 hearing as at any dependency proceeding. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1085, 10 CR2d 813. Once the court determines that the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the four (now five)

exceptions listed in Welf & I C §366.26(c)(1). *In re Zachary G.* (1999) 77 CA4th 799, 809, 92 CR2d 20.

b. [§104.39] Relevance

A .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents. *In re Scott M.* (1993) 13 CA4th 839, 844, 16 CR2d 766. Therefore, deficiencies in the assessment report prepared for the hearing, such as failure to check on prospective adoptive parents' criminal history, do not ordinarily deprive the parents of procedural due process. *In re Crystal J.* (1993) 12 CA4th 407, 413, 15 CR2d 513. See discussion in §§104.53–104.56 on determining adoptability.

Also not relevant is whether the DSS decision on adoptive placement is the best one because the state DSS or a licensed adoption agency has the exclusive care and control of the child and the court may not substitute its judgment for the agency's unless the DSS decision was clearly absurd. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734, 68 CR2d 239. The court's review is limited to whether DSS has abused its discretion. *Los Angeles Dep't of Children & Family Servs. v Superior Court* (1998) 62 CA4th 1, 10, 72 CR2d 369.

Evidence of the racial or ethnic match between the child and prospective adoptive parents is not relevant at a .26 hearing. See *In re Tracy X.* (1993) 18 CA4th 1460, 1464–1465, 23 CR2d 43. Because courts are required to engage in concurrent planning (see Welf & I C §§358.1(b), 16501.1(f)(9)), however, it may be a good idea to actively address ethnic considerations in placement at the earliest possible stages. See Fam C §§8708 and 8709 (although discrimination based on race, etc., in adoptive placement is not permissible, consideration can be given to racial and other factors); see also discussion in Seiser & Kumli, California Juvenile Courts: Practice and Procedure §2.12[6] (Matthew Bender 2002) and in §104.54.

The parents' current circumstances are not relevant to the issue of adoptability which is the focus of the hearing. *In re Edward R.* (1993) 12 CA4th 116, 126, 15 CR2d 308. Current parental circumstances, however, may be relevant in resolving whether the parents have maintained regular contact with the child and whether the child would benefit from continuing this relationship under Welf & I C §366.26(c)(1)(A). 12 CA4th at 127.

Finally, before the enactment of Welf & I C §366.26(c)(1)(E), a court did not need to consider the objection of one child to the termination of parental rights for that child's sibling (*In re Gerald J.* (1991) 1 CA4th 1180, 1188, 2 CR2d 569), although, the adoptive parents may wish to facilitate postadoptive sibling contact (Welf & I C §366.29). Under Welf & I C § 366.26(c)(1)(E), however, it appears that siblings' wishes must be

considered in determining whether or not termination of parental rights would be detrimental to the child when it would sever a sibling relationship.

4. Testimony of Child

a. Consideration of Child's Wishes

(1) [§104.40] Generally

Welfare and Institutions Code §366.26(h) imposes a mandatory duty on the court to consider the child's wishes to the extent that those wishes are ascertainable. This duty will usually not be met by consideration of the child's direct testimony because generally the child will not appear at a .26 hearing (see Welf & I C §366.26(f)(1)). The social worker's report should address the child's wishes, and the judge may augment this report by questioning the child's counsel and the CASA, if any. Unsworn statements of counsel, the CASA, or anyone else, however, is not evidence. See *In re Heather H.* (1988) 200 CA3d 91, 95–96, 246 CR 38. See also Cal Rules of Prof Cond 5–200(e) (attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness").

A court need not consider the child's express wishes, however, when the child is not capable of adequately expressing those wishes by virtue of being too young or frail to communicate or to understand the nature of the proceedings. *In re Juan H.* (1992) 11 CA4th 169, 173, 13 CR2d 716 (child was under four years old; court could properly rely on the determination of his wishes from reports of his behavior in mother's presence).

The court may terminate parental rights even when the child has expressed views to the contrary when the court finds that the child would derive no benefit through continued regular contact with the parents. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088, 10 CR2d 813.

(2) [§104.41] How To Determine Child's Wishes

A court may reasonably infer a young child's preference from his or her conduct. *In re Leo M.* (1993)19 CA4th 1583, 1594, 24 CR2d 253. Most courts that have considered the issue have held that a court need not receive direct evidence of the child's wishes, either at the hearing or through out-of-court statements reflecting the fact that the child is aware of the nature of the hearing. See, *e.g., In re Leo M., supra,* 19 CA4th at 1592; *In re Amanda D.* (1997) 55 CA4th 813, 820, 64 CR2d 108 (holding that in considering the child's wishes under Welf & I C §366.26(h), the court need not hear direct testimony but may rely on evidence of the child's wishes found in the DSS report). See also *In re Jesse B.* (1992) 8 CA4th 845, 853, 10 CR2d 516 (holding that substantial compliance with §366.26(h) may be achieved when the child has independent counsel who

has interviewed the child to determine his or her wishes as required by Welf & I C §317(e)).

Consideration of the child's wishes under Welf & I C §366.26(h) may require the court to explore the child's feelings regarding possible custodians so that it can infer his or her wishes concerning the permanent plan. *In re Julian L.* (1998) 67 CA4th 204, 208–209, 79 CR2d 839. A child's statements that the child liked living with foster parents, referred to their house as "my home," and was apathetic about visits with the biological father was held to be sufficient evidence for the court to assess the child's wishes. *In re Amanda D., supra*, 55 CA4th at 820–821.

Despite the holding in *Leo M.* that the court need not determine that the child specifically understand that the proceeding is one for termination of parental rights (19 CA4th at 1593), one case has held that if the court does not receive direct evidence of the child's wishes at the .26 hearing, it must receive an out-of-court statement reflecting the fact that the child is aware that termination of parental rights is at issue. *In re Diana G.* (1992) 10 CA4th 1468, 1480, 13 CR2d 645.

b. [§104.42] Taking Testimony in Chambers

The child's testimony may be taken in chambers outside the presence of the parents if the parents are represented by counsel and any one of the following applies (Welf & I C §366.26(h)):

(1) The court determines that it is necessary to take testimony in chambers to ensure truthful testimony,

(2) The child is likely to be intimidated by a formal courtroom setting, or

(3) The child is frightened to testify in front of the parents.

The court may also permit the child's testimony to be taken in chambers outside the presence of the guardians under the same circumstances as those governing the taking of testimony outside the parents' presence. Welf & I C §366.26(h).

The presence of parents' counsel is essential; it may be prejudicial error for the court to question the child in chambers with only a reporter present. See *In re Laura H.* (1992) 8 CA4th 1689, 1697, 11 CR2d 285. Although *In re Laura H., supra,* held that acquiescence by the parent to such a procedure might not constitute a waiver, the court in *In re Jamie B.* (2001) 90 CA4th 766, 771, 109 CR2d 123, held that a parent who keeps silent and otherwise acquiesces in the child's being questioned in chambers outside the presence of counsel waives the statutory right to have counsel at the in-chambers proceeding (.26 hearing).

The parents may elect to have the court reporter read back the in-chambers testimony or may elect to have it summarized by counsel. Welf & I C §366.26(h).

c. [§104.43] Other Alternatives

In addition to in-chambers testimony, the court may make other arrangements to accommodate the child witness. See, *e.g., In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404, which held that the court had inherent power to use both in-chambers testimony and closed circuit television to ensure truthfulness (jurisdiction hearing).

Moreover, the court may elect not to have the child testify at all in an appropriate case. *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088, 10 CR2d 813 (although testimony would have been relevant and child was competent and available). Although the court must consider the child's wishes, it may exclude the child's testimony to prevent psychological damage even when the case does not fall under Evid C §765(b) (child under 14 who was victim of crimes). *In re Jennifer J., supra,* 8 CA4th at 1089. The court may refuse to issue process requiring the attendance and testimony of the child after weighing all the interests if the child's wishes can be presented without live testimony and psychological damage would have resulted from such testimony. *In re Jennifer J., supra.*

Statements by a child who is not competent to testify (or one for whom testimony might cause psychological damage as in the *Jennifer J.* case) may be admissible under a "child dependency hearsay exception" when there are indicia of reliability. See *In re Cindy L.* (1997) 17 C4th 15, 23–25, 28, 69 CR2d 803. Also in the context of a jurisdiction hearing, the Supreme Court decided *In re Lucero L.* (2000) 22 C4th 1227, 1242–1243, 96 CR2d 56, which held that a child's out-of-court statements may be admissible even if they do not meet the requirements of the child dependency hearsay exception and even if the child is incompetent to testify.

Although these cases arose out of jurisdiction hearings and would be more likely to be applicable to a situation in which abuse is the central issue, there may be instances in which out-of-court statements of a very young child might be relevant at a .26 hearing (*e.g.*, relevant to the issue of the child's benefiting from the parents' continuing visitation and contact; see Welf & I C §366.26(c)(1)(A)).

G. [§104.44] Findings and Orders

At a .26 hearing, the court may choose to: (1) to terminate parental rights and order the child placed for adoption, (2) to identify adoption as the goal without terminating parental rights and begin to locate appropriate adoptive parents, (3) to appoint a guardian for the child, or (4) to place the child in long-term foster care. *In re Barry W.* (1993) 21 CA4th 358, 364, 26 CR2d 161; Welf & I C §366.26(b). Returning the child to the parents is not an option at the .26 hearing, but due process is satisfied because the parent may have brought a petition under Welf & I C §388 for

modification or termination of jurisdiction based on changed circumstances. *In re Marilyn H.* (1993) 5 C4th 295, 310, 19 CR2d 544.

The court need not specify the grounds for its decision at the .26 hearing; the finding or its equivalent will have been made when the court scheduled the .26 hearing. *In re Janee J.* (1999) 74 CA4th 198, 213, 87 CR2d 634. The only decision required at the .26 hearing is that the child is adoptable and that there had been a prior decision to deny or terminate reunification services. *In re Janee J., supra,* 74 CA4th at 214.

Adoption, as the permanent plan when a child cannot be returned to the parent's custody (see *In re Heraclio A.* (1996) 42 CA4th 569, 578, 49 CR2d 713), is preferred over guardianship. *In re Keyonie R.* (1996) 42 CA4th 1569, 1573, 50 CR2d 221. Adoption is preferable because it places children in the most permanent and secure alternative. *In re Lukas B.* (2000) 79 CA4th 1145, 1156, 94 CR2d 693. An order for adoption will be fairly automatic if the child is a proper subject for adoption and none of the circumstances listed in Welf & I C §366.26(c)(1)(A)–(D) is present. *In re Jose V.* (1996) 50 CA4th 1792, 1798, 58 CR2d 684 (both parents' counsel and child's counsel had argued for guardianship).

Because adoption is preferred over guardianship, the strength and quality of a child's relationship with a parent must outweigh the benefits of a permanent home to justify a guardianship order when the child is otherwise a proper subject of adoption. *In re Teneka W.* (1995) 37 CA4th 721, 728–729, 43 CR2d 666 (father had killed the mother but the children would suffer some detriment from the loss of a long-term relationship with father). The fact that a potential adoptive parent is a relative does not constitute an exception under Welf & I C §366.26(c)(1), permitting the court to select guardianship rather than adoption. *In re Jasmine T.* (1999) 73 CA4th 209, 213–214, 86 CR2d 128. See discussion in §§104.46–104.50 of circumstances in which termination of parental rights is precluded.

1. Termination of Parental Rights

a. [§104.45] In General

To terminate parental rights, the court must find by clear and convincing evidence that it is likely that the child will be adopted. Welf & I C §366.26(c)(1). The purpose of termination of parental rights is to free the dependent child for adoption. Cal Rules of Ct 1463(g). Indeed, the likelihood of adoption is the pivotal question. *In re Heather B.* (1992) 9 CA4th 535, 547, 11 CR2d 891. See discussion in §104.53. If the court makes that finding, one of the following findings (made at an earlier hearing) generally will provide a sufficient basis for termination (Welf & I C §366.26(c)(1)):

- Reunification services were not offered under Welf & I C §361.5(b) (parents' whereabouts unknown, parent mentally disabled, child reabused, parent convicted of causing another child's death, or for a number of other reasons) or §361.5(e)(1) (parent institutionalized or incarcerated).
- Parents' whereabouts are unknown, parent has failed to contact the child for six months, or parent has been convicted of felony indicating parental unfitness under Welf & I C §366.21(e).
- Child cannot or should not be returned to parent or guardian under Welf & I C §366.21 or §366.22.

Because the purpose of termination is adoption, the rights of the mother and any alleged, presumed, and known and unknown fathers must be terminated in order for the child to be able to be adopted. Cal Rules of Ct 1463(g). Despite the requirement that the court may not terminate parental rights of one parent only, when one parent appeals and the parental rights of that parent are reinstated for failure to provide proper notice of the .26 hearing, the other parent's rights cannot also be restored without the filing of a timely appeal under Welf & I C §366.26(i). *Los Angeles County Dep't of Children & Family Servs. v Superior Court* (2000) 83 CA4th 947, 949, 100 CR2d 172. If both parents appeal, however, and the termination of parental rights is reversed as to one parent, it may be in the child's best interests to restore the other parent's rights also, even in the absence of error as to the second parent. *In re DeJohn B.* (2000) 84 CA4th 100, 110, 100 CR2d 649 (both parents appealed; judgment as to mother reversed due to lack of notice, so no reason to deprive the child of whatever benefits might be gained through the father's family).

The finding that a child is adoptable, however, will not of itself support an order terminating parental rights; the court must also have made any one of the findings listed in Welf & I C §366.26(c)(1) at a prior hearing. *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113, 12 CR2d 43. For example, all that may be required for termination of parental rights is a finding at the .26 hearing that the child is adoptable, together with the previous finding at the jurisdictional and dispositional hearings that the parents' whereabouts were unknown and therefore reunification services were not required. *In re Baby Boy L.* (1994) 24 CA4th 596, 605–606, 29 CR2d 654. Once these findings have been made, in the absence of evidence that termination would be detrimental to the child under one of the five exceptions (Welf & I C §366.26(c)), the court *must* terminate parental rights. *In re Andrea R.* (1999) 75 CA4th 1093, 1108, 89 CR2d 664.

After parental rights have been terminated, the parents are no longer entitled to notice of any subsequent hearings (Welf & I C §366.3(a)), nor are they entitled to visitation with the child. *In re Diana G.* (1992) 10 CA4th 1468, 1481–1483, 13 CR2d 645. Moreover, once parental rights have been terminated, a former parent may not be ordered to pay child support. *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1122, 106 CR2d 461.

b. When Precluded

(1) [§104.46] General Requirements

Parental rights may not be terminated if, at each hearing at which the court was required to make findings concerning reasonable efforts or services, the court found that reasonable efforts were not made or that reasonable services were not offered or provided. Welf & I C §366.26(c)(2); Cal Rules of Ct 1463(e)(1). When there has been a failure to provide reunification services, termination of parental rights is improper and the court must order an additional six months of services at the review hearing at which a hearing under Welf & I C §366.26 is contemplated. *In re David D.* (1994) 28 CA4th 941, 954–956, 33 CR2d 861. See also *In re Precious J.* (1996) 42 CA4th 1463, 1479–1480, 50 CR2d 385, holding that services are not reasonable for an incarcerated parent when DSS failed to arrange any visits or establish a visitation schedule despite court orders directing it to do so.

In addition, the court may not terminate the parental rights of only one parent unless that parent is the sole parent because the other parent has died, had his or her rights terminated, or had relinquished custody to DSS. Cal Rules of Ct 1463(a), (g). See also Cal Rules of Ct 1459 (.26 hearing may not be set for only one parent). Under Cal Rules of Ct 1463(a), it is error for a court to terminate parental rights at two separate hearings, one for each parent. *In re Vincent S.* (2002) 92 CA4th 1090, 1093, 112 CR2d 476.

Finally, even if the child is a proper subject for adoption and reunification services were not offered or have been terminated, the court may still decide not to terminate parental rights if to do so would be detrimental to the child because of one of the following circumstances:

(1) The parents or guardians have maintained continuing visitation and contact with the child and the child would benefit from a continuation of that contact. Welf & I C §366.26(c)(1)(A).

(2) A child who is 12 years old or older objects to the termination of parental rights. Welf & I C §366.26(c)(1)(B).

(3) The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot

resume custody when the child no longer needs residential care. Welf & I C §366.26(c)(1)(C). A child whose prospective adoptive parents operate a special needs (residential treatment) home in which the child's developmentally delayed brother lives, however, is not thereby precluded from adoption because of Welf & I C §366.26(c)(1)(C). *In re Jeremy S.* (2001) 89 CA4th 514, 527–528, 107 CR2d 280.

(4) The child is living with a relative or foster parent who is unwilling to adopt, but is willing to accept legal responsibility for the child and to provide a stable home, and removal from that placement would be emotionally detrimental to the child. Welf & I C §366.26(c)(1)(D).

(5) There will be substantial interference with the relationship between the child and his or her siblings. Welf & I C §366.26(c)(1)(E); Cal Rules of Ct 1463(d)(1)(B)(v). This exception may not be applied retroactively. *In re Raymond E.* (2002) 97 CA4th 613, 618, 118 CR2d 376. A parent has standing to raise this exception. *In re L. Y. L.* (2002) 101 CA4th 942, 951, 124 CR2d 688. See discussion of procedure in §104.50.

☛ JUDICIAL TIP: In determining whether termination will cause substantial interference with sibling relationships, judges should view the situation from the perspective of the child.

These five criteria are the *only* bases for concluding that adoption or termination of parental rights is not in the child's best interest when the situation would otherwise warrant termination and subsequent adoption. Welf & I C §366.26(c)(1)(A)–(E), (4); Cal Rules of Ct 1463(d)(1). There is no "best interests of the child" exception to adoption in addition to the five enumerated exceptions contained in Welf & I C §366.26(c)(1)(A)–(E). *In re Jessie G.* (1997) 58 CA4th 1, 8, 67 CR2d 811; *In re Josue G.* (2003) 106 CA4th 725, 734, 131 CR2d 92 (case not final) (no best-interest exception to the preference for termination of parental rights and adoption).

The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 1463(d)(2).

Termination of parental rights of a gravely disabled parent, however, is *not* precluded by the ADA. *In re Anthony P.* (2000) 84 CA4th 1112, 1116, 101 CR2d 423. See also *In re Diamond H.* (2000) 82 CA4th 1127, 1139, 98 CR2d 715 (the ADA does not directly apply to juvenile dependency proceedings and cannot be used as a defense).

(2) [§104.47] Benefit From Continuing Contact

In order not to order termination of parental rights under Welf & I C §366.26(c)(1)(A), the benefit from continuing the parent/child relationship must outweigh the security and sense of belonging that a new family would confer. *In re Lukas B.* (2000) 79 CA4th 1145, 1155, 94 CR2d 693.

In deciding whether termination is precluded because of the potential benefit of this continuing contact, the court should balance whether the strength and quality of the parent/child relationship outweighs the well-being that the child would gain from having a permanent adoptive home, together with the security and sense of belonging that a new adoptive family would confer. *In re Autumn H.* (1994) 27 CA4th 567, 574, 32 CR2d 535. The exception applies only when the continuing contact results in positive emotional attachment between parent and child and not just mere incidental benefit. 27 CA4th at 575 (in this case, father had a "friendly visitor" relationship with child). In other words, the exception only applies when

- Parents have had regular visitation and contact,
- The relationship is a parent-child relationship, not a friendship or visitor relationship, and
- The benefit to the child of maintaining that relationship outweighs the benefits of adoption to such a degree that termination of parental rights would "greatly harm" the child.

See *In re Brittany C.* (1999) 76 CA4th 847, 853–854, 90 CR2d 737; Welf & I C §366.26(c)(1)(A).

Courts should consider these general areas in determining whether Welf & I C §366.26(c)(1)(A) applies (*In re Angel B.* (2002) 97 CA4th 454, 467, 118 CR2d 482):

- Child's age,
- Percentage of the child's life spent with the parent,
- Effect of interaction between the parent and child, and
- Child's particular needs.

(a) [§104.48] Termination of Parental Rights Proper—No Parental Role

To preclude termination of parental rights under Welf & I C §366.26(c)(1)(A), the parent must have occupied a parental role in the child's life. *In re Andrea R.* (1999) 75 CA4th 1093, 1108, 89 CR2d 664. Examples in which parents were not found to have performed such a role include:

- *In re Beatrice M.* (1994) 29 CA4th 1411, 1420, 35 CR2d 162 (although the child might have benefited from continuing contact with the natural parents and the adoptive parent maintained and encouraged continuing contact with the natural parents, the natural parents did not have a parental relationship with the children);
- *In re Elizabeth M.* (1997) 52 CA4th 318, 324, 60 CR2d 557 (when visits with a parent were not always consistent and when the parent

did not occupy a parental role during those visits, the parent-child relationship, no matter how positive, was not sufficient to overcome the statutory preference for adoption of Welf & I C §366.26(c)(1)(A));

- *In re Brittany C.* (1999) 76 CA4th 847, 853–854, 90 CR2d 737 (the parent must show that the relationship with the child is a parent-child relationship, rather than a friendship; the relationship must be more than pleasant and emotionally significant—it must have some resemblance to the consistent, daily nurturing that marks a parental relationship);
- *In re Derek W.* (1999) 73 CA4th 823, 827, 86 CR2d 739 (child had lived with prospective adoptive parents, who were the only people who provided the child with food, shelter, protection, and guidance on a daily basis, from the time he was nine days old);
- *In re Zachary G.* (1999) 77 CA4th 799, 811–812, 92 CR2d 20 (strong bond with mother did not rise to the level of the exception listed in Welf & I C §366.26(c)(1)(A) when the child turned to the prospective adoptive parents, rather than the mother, at times when he was hungry, tired, or in need of affection or attention);
- *In re Jasmine D.* (2000) 78 CA4th 1339, 1344, 93 CR2d 644 (parent was loving and never missed a visit (which were always supervised), but failed to obtain housing or participate in drug treatment); and
- *In re Casey D.* (1999) 70 CA4th 38, 52, 82 CR2d 426 (mother's relationship to child was that of friendly visitor, but child turned to foster parent when she was tired or hurt or needed reassurance).
- *In re Angel B.* (2002) 97 CA4th 454, 468, 118 CR2d 482 (although the evidence indicated that mother acted lovingly and appropriately with the child during visits, there was no evidence that the mother-child relationship was so significant that its termination would cause her any detriment).

In an unusual case, however, the court terminated parental rights despite the fact that the father occupied a parental role and the child loved him. *In re Cliffton B.* (2000) 81 CA4th 415, 423–425, 96 CR2d 778. The court balanced the strength and quality of the natural parent-child relationship in a tenuous home situation against the security and sense of belonging the new family would confer. The court considered the facts that the father had once again relapsed from a drug treatment program after a lengthy period of sobriety and that the foster family was willing to adopt the child and provide a stable home. *In re Cliffton B., supra* (case characterized as a close case).

(b) [§104.49] No Termination of Parental Rights—Parental Role Found

The nature of the relationship must be examined in determining whether it would be detrimental to terminate parental rights under the "beneficial contact" exception. In a case in which a nine-year-old child had lived with the mother for six and one-half years and wished to live with her again, the juvenile court's order to terminate parental rights was reversed based on evidence that there was positive interaction between the child and the mother and on the court's own observation that their relationship was "parental." *In re Jerome D.* (2000) 84 CA4th 1200, 1207–1208, 101 CR2d 449. A decision not to terminate parental rights under this beneficial contact exception was also proper when the mother visited regularly, made great progress toward rehabilitation and a stable living situation, and when a significant and close bond developed between her and the children which would benefit the children if the relationship continued. *In re Brandon C.* (1999) 71 CA4th 1530, 1537, 84 CR2d 505.

(3) [§104.50] Procedure

The court may require an offer of proof before setting a contested hearing on an exception sought by a parent to termination of parental rights. *In re Tamika T.* (2002) 97 CA4th 1114, 1121, 118 CR2d 873.

The burden of proving the benefit of continuing the relationship and the maintenance of contact (see Welf & I C §366.26(c)(1)(A)) is on the party claiming that termination would be detrimental to the child. *In re Lorenzo C.* (1997) 54 CA4th 1330, 1345, 63 CR2d 562; Cal Rules of Ct 1463(d)(3). To preclude termination of parental rights under Welf & I C §366.26(c)(1)(A), the parent has the burden of showing that (1) continuation of the relationship will outweigh the benefits to the child of living with an adoptive family, or (2) termination of parental rights would be detrimental to the child. *In re Angel B.* (2002) 97 CA4th 454, 466, 118 CR2d 482. The court must weigh the benefit of continuing the relationship against the benefit to the child that adoption would provide. *In re L. Y. L.* (2002) 101 CA4th 942, 952–953, 124 CR2d 688.

If the court finds that termination is detrimental, it must state its reasons in writing or on the record. Cal Rules of Ct 1463(d)(4). Thus, after DSS reports on the nature of the contact between the child and biological relatives, the burden falls on the parent to produce evidence that the child would benefit from continuing the relationship so much that termination of parental rights would be inappropriate. *In re Urayna L.* (1999) 75 CA4th 883, 887, 89 CR2d 437.

The court may admit a bonding study commissioned by a parent to show that the exception of Welf & I C §366.26(c)(1)(A) applies without

violating the psychotherapist-patient privilege because the parent was not acting as a patient in that instance. *In re Tabatha G.* (1996) 45 CA4th 1159, 1168, 53 CR2d 93. However, the court need not order a bonding study to show the benefit of continuing contact under Welf & I C §366.26(c)(1)(A) as a condition for ordering termination of parental rights because the kind of parent-child bond that may preclude termination of parental rights does not arise in the short period between the termination of services and the .26 hearing. *In re Richard C.* (1998) 68 CA4th 1191, 1196, 80 CR2d 887 (the nature and extent of the relationship should become clear during the 12 months that services are provided).

c. [§104.51] Findings

To terminate parental rights, the court must have made any one of the findings listed in Welf & I C §366.26(c)(1) in addition to the finding by clear and convincing evidence that the child is likely to be adopted. The court cannot substitute an additional ground. *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113–1114, 12 CR2d 43. It is not a condition precedent to the termination of parental rights at a .26 hearing that the court find the following on the record:

(1) It would be detrimental to the child to continue in the parental relationship. *In re Jesse B.* (1992) 8 CA4th 845, 851, 10 CR2d 516.

(2) Termination is in best interest of child. *In re Jennifer J.* (1992) 8 CA4th 1080, 1089, 10 CR2d 813.

(3) Parent was unfit. *In re Cody W.* (1994) 31 CA4th 221, 225, 36 CR2d 848.

(4) Reunification efforts were sufficient. See *In re Michelle M.* (1992) 4 CA4th 1024, 1034, 6 CR2d 172.

(5) Termination is the least detrimental alternative. *In re Cody W., supra*, 31 CA4th at 230–231.

Although the court need not find that termination is in the child's best interest, it must make factual findings in Welf & I C §366.26(c)(1)(A)–(D) and weigh all factors when one of these applies. *In re Jennifer J., supra,* 8 CA4th at 1091.

d. [§104.52] Parents' Conduct and Current Circumstances

The natural parents' current conduct and circumstances do not provide the focus of the .26 hearing. The purpose of .26 hearings is not to punish parents, although parental conduct may be a factor in the outcome. *In re Heather B.* (1992) 9 CA4th 535, 556, 11 CR2d 891.

There is no burden on DSS at this hearing to show that the parents are at fault. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 254, 19 CR2d 698. Nor is termination precluded because the parents have improved their

lives and are ready to provide a stable home for the child. In a case involving a pre-1989 dependency, the Supreme Court has held that a court may find that the child's interest in stability outweighs the parent's interest in the care and custody of the child after 18 months of out-of-home placement. *In re Jasmon O.* (1994) 8 C4th 398, 421, 33 CR2d 85 (DSS failed to disclose to the parents or the court that the mother's social worker's sister was the foster mother, but there appeared to be no connection between that conflict of interest and the failure of attempted reunification).

However, the parents' circumstances are relevant at the time of the .26 hearing, for example, to show that they have maintained regular contact with the child, that the child benefits from maintaining that contact, and that therefore parental rights should not be terminated. Welf & I C §366.26(c)(1)(A); *In re Edward R.* (1993) 12 CA4th 116, 127, 15 CR2d 308. If parents can show that the lack of relationship has resulted from a failure of reunification services (*i.e.*, the court had earlier terminated visitation without making a finding under Welf & I C §366.21(h) that visitation would be detrimental to the children), termination of parental rights may be improper. *In re David D.* (1994) 28 CA4th 941, 954–956, 33 CR2d 861.

e. [§104.53] Likelihood of Adoption

A child who has none of the characteristics listed in Welf & I C §366.26(c)(3) and has been determined by DSS to be adoptable is generally considered likely to be adopted. See *In re Baby Boy L.* (1994) 24 CA4th 596, 610–611, 29 CR2d 654 (only impediment was statement by prospective adoptive parents that it might be risky to become attached to the child because he had not yet been freed for adoption). The issue of adoptability focuses on the child, including the child's age, physical condition, and emotional state, and other factors that would make it difficult for the child to be adopted. *In re Sarah M.* (1994) 22 CA4th 1642, 1649, 28 CR2d 82.

Although the fact that a prospective adoptive parent has not been identified is not a basis to conclude that the child is not a probable subject for adoption, when a child might be difficult to place because of membership in a sibling group or a diagnosis of a medical, physical, or mental disability, or because the child is seven years of age or older, a finding of adoptability may need to include the identification of a prospective adoptive parent. Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(3). The issue of whether a prospective adoptive family exists may be relevant because it provides evidence that the child is adoptable and therefore likely to be adopted within a reasonable time by this family or some other. *In re Sarah M., supra,* 22 CA4th at 1650. If prospective adoptive parents exist, the child may be considered a proper subject for

adoption, even if there are some problems with the proposed adoption. See *In re Roderick U.* (1993) 14 CA4th 1543, 18 CR2d 555.

The determination of adoptability does not focus on any prospective adoptive parents, but rather on the child; it is not necessary that the child already be in a potential adoptive home or that there is an adoptive parent "waiting in the wings." *In re Josue G.* (2003) 106 CA4th 725, 733, 131 CR2d 92 (case not final).

(1) [§104.54] Suitability of Prospective Adoptive Parents

Although a .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents (*In re Scott M.* (1993) 13 CA4th 839, 844, 16 CR2d 766), the court may permit questioning of the social worker concerning impediments to adoption by prospective adoptive parents if the child's age, physical condition, or mental stability otherwise renders adoption questionable (*In re Sarah M.* (1994) 22 CA4th 1642, 1649, 28 CR2d 82). Moreover, if the only person willing to adopt is unsuitable because that person has a history of abuse or for some other reason, the .26 hearing may be the correct forum to hear evidence on the appropriateness of the prospective adoptive parent. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206, 101 CR2d 449 (finding of adoptability by clear and convincing evidence may be precluded in this situation).

A child need not be likely to be adopted by the public at large but only by a particular family, and when assessment of that family is delayed because it is time-consuming, the goal of the dependency system (prompt resolution of custody status and a stable home environment) is thwarted. *In re John F.* (1994) 27 CA4th 1365, 1377, 33 CR2d 225 (case based on failure to set .26 hearing at review hearing).

(2) [§104.55] When Adoption Likely

At least one court has held that there is clear and convincing evidence that a child is likely to be adopted when the child communicated the wish to be adopted by the foster parents and the foster parents were clear that they wanted to adopt the child. *In re Michelle M.* (1992) 4 CA4th 1024, 1035, 6 CR2d 172. Even when a child is at risk for hereditary neurological and developmental problems, the child may nevertheless be likely to be adopted when the problems do not appear to interfere with the child's acquisition of developmental skills and when there were a number of prospective adoptive parents who had expressed interest. *In re Jennilee T.* (1992) 3 CA4th 212, 234–235, 4 CR2d 101.

In *In re L. Y. L.* (2002) 101 CA4th 942, 952, 956, 124 CR2d 688, the court of appeal approved the juvenile court's determination that the child was adoptable based on evidence that the child was in good health, was

developing normally, and had a sociable personality, coupled with the fact that the foster parents were willing to adopt and that there were six other families willing to adopt a child with her characteristics, despite the child's sadness at the separation from a sibling.

(3) [§104.56] When Adoption Not Likely or Evidence Is Insufficient

When DSS has looked for an adoptive family for over ten months, it is reasonable to conclude that the child is not a proper subject for adoption and to order guardianship without termination of parental rights. *In re Tamneisha S.* (1997) 58 CA4th 798, 806–807, 68 CR2d 259. Although a child who has medical or other problems does not need to be in a pre-adoptive home to be considered likely to be adopted, there must be more than an expression of casual interest. See *In re Amelia S.* (1991) 229 CA3d 1060, 280 CR 503. In *Amelia S.*, the fact that a few of the foster parents who had taken in nine siblings said that they might consider adoption does not constitute clear and convincing evidence of adoptability. 229 CA3d at 1065 (children had various emotional, physical, and developmental problems).

Another example of insufficient evidence of adoptability is *In re Brian P.* (2002) 99 CA4th 616, 624–625, 121 CR2d 326, in which there was only a statement that chances of adoption were "very good." There was no adoption assessment report mentioning facts about the child, and there was evidence that the child was somewhat developmentally delayed.

Moreover, when the only prospective adoptive parent has a criminal history involving family violence, this may lead to a finding that the child is not adoptable. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206, 101 CR2d 449.

f. [§104.57] Indian Child

In cases involving claims that the child is an Indian child, courts must seek to promote stability and security of Indian tribes and families, comply with the Indian Child Welfare Act (ICWA), and seek to protect the best interests of the child. Welf & I C §360.6(b). Courts must encourage and protect the child's membership in the tribe and his or her connection to the tribal community. Welf & I C §360.6(a). ICWA must be applied once the tribe determines that the child is either a member or is eligible for membership in the tribe and is a biological child of a tribal member. Welf & I C §360.6(c); Cal Rules of Ct 1439(g).

(1) [§104.58] Findings

Under ICWA, a court may not terminate parental rights unless it finds that active efforts have been made to provide services designed to prevent

the breakup of the Indian family and that these services have been unsuccessful. 25 USC §1912(d). The standard of proof for this finding is "clear and convincing." *In re Michael G.* (1998) 63 CA4th 700, 711, 74 CR2d 642. When the parent of an Indian child did not appear until after the reunification period had ended, despite adequate notification (and the court learned that the child had Indian heritage only after this period had ended), the many attempts to notify the parent constituted "active efforts" under ICWA. *In re William G.* (2001) 89 CA4th 423, 428, 107 CR2d 436.

☛ JUDICIAL TIP: This finding normally should have been made at the time reunification services were denied or terminated and the .26 hearing was scheduled. Presumably, it would need to be made at the .26 hearing only if it had not been made earlier. See *In re Michael G., supra*, 63 CA4th at 712–713.

To terminate parental rights for a child of American Indian heritage, a judge must also find by proof beyond a reasonable doubt at the .26 hearing that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. 25 USC §1912(f); Cal Rules of Ct 1439(m). This stringent burden of proof will be met when the evidence shows that the parent's parenting skills are inadequate because of the child's serious behavioral and psychiatric dysfunction, and the inadequacy was caused largely by the parent's schizophrenia and drug abuse. See *In re Krystle D.* (1994) 30 CA4th 1778, 1798–1799, 37 CR2d 132. The Act is applicable to a petition by an Indian child's non-Indian mother to terminate the parental rights of the child's Indian father. *In re Crystal K.* (1990) 226 CA3d 655, 665, 276 CR 619 (decided under former CC §232). Like the "active efforts" finding, the detriment finding required by ICWA will normally be made at the time reunification services are denied or terminated and, if so, need not be made again at the .26 hearing; if not, it should be made at the .26 hearing. *In re Matthew Z.* (2000) 80 CA4th 545, 553–555, 95 CR2d 343.

(2) [§104.59] Evidence

Evidence regarding detriment for termination must be supported by the testimony of a qualified expert witness. 25 USC §1912(f); Cal Rules of Ct 1439(m)(1). Federal guidelines call for the expert to be a member of the Indian child's tribe; a lay expert witness with substantial experience in delivery of services, customs, standards, and practices; or a person with substantial education and experience in the area of specialty. See *In re Krystle D.* (1994) 30 CA4th 1778, 1801–1802 , 37 CR2d 132; 44 Fed Reg 67584–67595 (1979). The fact that a witness does not have demonstrated cross-cultural experience in Indian matters will not preclude the testimony of that witness. 30 CA4th at 1802.

2. [§104.60] Adoption/Adoptive Placement

If the court orders that parental rights be terminated, it must order at the same time that the child be referred to a licensed county adoption agency for placement. See Welf & I C §366.26(b)(1); Cal Rules of Ct 1463(e)(3). The prospective adoptive parents may have their petition heard in juvenile court or in any other court permitted by law. Welf & I C §366.26(e). The clerk must open a confidential adoption file for each child; this file must be separate and apart from the dependency file, with a number different from the dependency case number. Cal Rules of Ct 1464(a). The use of postadoption contact agreements under Fam C §8714.7 is also applicable and available to dependent children if the agreement was entered into voluntarily by all parties. Welf & I C §366.26(a); Cal Rules of Ct 5.400(b).

☛ JUDICIAL TIP: Some judges set a monthly adoptions calendar to review any cases in which parental rights have been terminated and in which adoption has not yet taken place.

If a petition for adoption is filed in the juvenile court, the court must order a hearing on that petition to take place in juvenile court once the natural parents' appellate rights have been exhausted. Welf & I C §366.26(b)(1), (e); Cal Rules of Ct 1463(e)(3). A report required by Fam C §8715 must be read and considered by the court before the adoption; the preparer of the report may be examined by any party to the adoption proceeding. Welf & I C §366.26(e).

On granting an adoption petition and issuing an adoption order for a dependent child, jurisdiction with respect to dependency must be terminated. Welf & I C §366.29(c). If there is a postadoption contact agreement, however, the adoption court must maintain jurisdiction over the child for enforcement of the agreement. Welf & I C §366.29(c).

a. [§104.61] Identifying Adoption as the Plan Without Termination of Parental Rights

The court may also identify adoption as the permanent placement goal without terminating parental rights and order that the agency responsible for seeking adoptive parents make efforts to locate an appropriate adoptive family within 180 days. Welf & I C §366.26(b)(2); Cal Rules of Ct 1463(d)(5). This interim order is appropriate only when the child is difficult to place for adoption because of the child's membership in a sibling group, because of the diagnosis of a medical, physical, or mental disability, or because the child is seven years of age or older. Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(5). The court must not base a finding that the child is not likely to be adopted on the fact that the child is not currently placed in a pre-adoptive home or that there is

no relative or foster family willing to adopt. Welf & I C §366.26(c)(1); Cal Rules of Ct 1463(d)(2).

Once an order is made identifying adoptive placement as a goal within 180 days, the court must hold another hearing at the expiration of that period. Welf & I C §366.26(c)(3); Cal Rules of Ct 1463(d)(5). At this hearing, the court must proceed with termination of parental rights and the permanent plan of adoption (if the court can find that the child is likely to be adopted) or with legal guardianship or long-term foster care (if such a finding cannot be made). See Welf & I C §366.26(c)(4); Cal Rules of Ct 1463(d)(5).

b. [§104.62] Placement of Child

If the child has substantial ties to the foster parent or relative caretaker and that person wishes to adopt the child, that person will be given preference over other prospective adoptive parents if the agency placing the child determines that the child has such substantial emotional ties to that person that removal from that caretaker's custody would be seriously detrimental to the child's well-being. Welf & I C §366.26(k). "Preference" means that that person's application will be processed and the family study completed before the application of any other prospective adoptive parent is processed. Welf & I C §366.26(k).

The preference for placement with a relative, however, may be outweighed by the child's best interests even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321, 27 CR2d 595 (placement decision made under Welf & I C §361.3 but made after the .26 hearing). Moreover, although relative placement has priority in the early stages of proceedings, an ongoing caretaker may receive preferential consideration later on. *In re Daniel D.* (1994) 24 CA4th 1823, 1834, 30 CR2d 245. Because the preference for placement with relatives under Welf & I C §361.3 applies only before the termination of reunification services, once a permanent plan is being considered, this preference applies only to "relative *caretakers*" under Welf & I C §366.26(k). *In re Sarah S.* (1996) 43 CA4th 274, 285–286, 50 CR2d 503. This preference does not create an evidentiary presumption, but merely places the relative at the head of the line. 43 CA4th at 286.

The Department of Social Services must consider all options and apprise the court of them so that the court is not misled into ordering long-term foster care when adoption or guardianship might be possible. *In re John F.* (1994) 27 CA4th 1365, 1378, 33 CR2d 225. In any event, guardianship should always be considered before long-term foster care. 27 CA4th at 1379; Welf & I C §366.26(c)(4).

The court or parents' counsel are not required to advise parents of the availability of a postadoption agreement before parental rights are terminated. *In re Kimberly S.* (1999) 71 CA4th 405, 415–416, 83 CR2d

740. Nor must the court order DSS to provide the parents with the opportunity to negotiate such an agreement. *In re Zachary D.* (1999) 70 CA4th 1392, 1397, 83 CR2d 407.

c. [§104.63] Placement of Indian Child

The preference order for adoptive placement of an Indian child is for the child to be placed with:

- A member of the child's extended family,
- Other members of the child's tribe,
- Other Indian families, and
- A non-Indian home only if the court finds that a diligent search has failed to discover a suitable Indian home. See 25 USC 1915(a); Cal Rules of Ct 1439(k)(2), (3).

The preference order may be modified only for good cause (25 USC §1915(a); Cal Rules of Ct 1439(k)(4)), except that the tribe may establish a different preference order (25 USC §1915(c); Cal Rules of Ct 1439(k)(6)).

A tribal policy against adoption of dependent children is not entitled to full faith and credit under ICWA in light of the state's compelling interest in providing stable permanent homes for children who are not able to reunify with their parents, particularly when the tribe has neither intervened nor petitioned the court for transfer to tribal jurisdiction. *In re Laura F.* (2000) 83 CA4th 583, 594–595, 99 CR2d 859. In addition, despite Welf & I C §360.6, ICWA does not apply to remove a multi-ethnic child with some Indian heritage from his prospective adoptive parents when the child's minimal relationship to his biological parents (who themselves have virtually no relationship with their Indian tribes) is not sufficient to overcome the child's right to remain in a home where he is loved and well cared for. *In re Santos Y.* (2001) 92 CA4th 1274, 1315–1316, 112 CR2d 692. In such limited circumstances, the child's constitutional right to a stable home outweighs the statutory provisions of the ICWA. See *In re Santos Y., supra.*

d. [§104.64] Process After Parental Rights Have Been Terminated

If parental rights are terminated, the court must order the child referred to the State DSS or a licensed adoption agency for adoptive placement. Welf & I C §366.26(j). State DSS or the licensed adoption agency will be responsible for custody and supervision of the child until the adoption is granted. Welf & I C §366.26(j). With the agency's consent, the court may appoint a guardian to serve temporarily until the child is adopted. Welf & I C §366.26(j).

☛ JUDICIAL TIP: If adoption does not occur but parental rights have been terminated, the court must set a hearing to select a new permanent plan of either long-term foster care or guardianship.

Because the State DSS or a licensed adoption agency has the exclusive care and control of the child under Welf & I C §366.26(j) from the time adoption is selected as the permanent plan until the child is adopted, a court may not order the child placed in a foster home different from that selected by DSS unless the DSS decision was clearly absurd or not in the child's best interests. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734, 68 CR2d 239. Generally, the court may not substitute its independent judgment for that of DSS unless DSS has abused its discretion. *Los Angeles Dep't of Children & Family Servs. v Superior Court* (1998) 62 CA4th 1, 10, 72 CR2d 369.

3. Legal Guardianship

a. [§104.65] In General

If the court finds termination of parental rights or adoption is not in the child's best interests or that termination would be detrimental to the child under Welf & I C §366.26(c)(1), it may appoint a legal guardian for the child at the .26 hearing and issue letters of guardianship. Welf & I C §366.26(b)(3); Cal Rules of Ct 1463(d)(6). Legal guardianship must be considered before long-term foster care if it is in the child's best interests and a suitable guardian is found. Welf & I C §366.26(c)(6). However, guardianship should not be ordered if to do so would mean moving the child from caretakers who do not wish to assume a guardianship role and removal of the child from the caretakers would seriously impair the child's emotional well-being. Welf & I C §366.26(c)(4); Cal Rules of Ct 1463(d)(6). Moreover, the court is not necessarily bound by an agreement between the parents and other relatives for a permanent plan of guardianship. *In re Jason E.* (1997) 53 CA4th 1540, 1548, 62 CR2d 416 (in this case, there were adoptive parents who were willing and able to adopt the child).

A child for whom a legal guardianship has been established remains within the jurisdiction of the juvenile court until dependency is terminated. See Welf & I C §366.4(a). If a relative was appointed legal guardian and the child had been placed with that relative for at least 12 months, the court must terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship except when the relative guardian objects or on a finding of exceptional circumstances. Welf & I C §366.3(a). The objection of a relative guardian to the termination of dependency does not require that dependency be maintained, but can be considered by the court in deciding whether exceptional circumstances exist to justify maintaining dependency. See Welf & I C §366.3(a).

☛ JUDICIAL TIP: Although there are variations in practice among jurisdictions, some judges do not dismiss dependency after establishing a guardianship because, if there is financial need, the court may be able to order services, and because there can be more flexibility with ongoing issues such as visitation and informal joint decisions by the relative guardians and the natural parents concerning the child. Since the establishment of the kinship guardianship assistance payment program (Kin-GAP) program, this practice is less common and less often needed. See Welf & I C §§11360–11375, 366.21(j), 366.22(c).

The court may not dismiss dependency when there is a permanent plan of long-term placement with a relative not amounting to a guardianship. *In re Rosalinda C.* (1993) 16 CA4th 273, 277–279, 20 CR2d 58. In the absence of an adoption or legal guardianship, continued supervision is necessary because otherwise there is no one with legal custody of the child and no guaranty that the placement is permanent. 16 CA4th at 279.

b. [§104.66] Procedure

The appointment of a legal guardian must be made in the juvenile court as part of the .26 hearing. See Welf & I C §366.26(d); Cal Rules of Ct 1463(f). The request for appointment of a guardian may be included in the social study report prepared by DSS, and no separate petition is needed. Cal Rules of Ct 1465(a), (c). Notice of the guardianship hearing must be given according to Welf & I C §294. See Cal Rules of Ct 1465(b).

An assessment that includes an evaluation of the child's medical, developmental, scholastic, mental, and emotional status and an appraisal of prospective guardians (see Welf & I C §§361.5(g), 366.21(i), and 366.22(b)) must be read and considered by the court before the letters of guardianship may be issued. Welf & I C §366.26(d); Cal Rules of Ct 1465(c)(1). Any party to the guardianship proceeding may call and examine the preparer of the assessment. Welf & I C §366.26(d); Cal Rules of Ct 1465(c)(2). The judge must note in the minutes that he or she has considered the report. Welf & I C §366.26(d); Cal Rules of Ct 1465(c)(1).

If the court determines that legal guardianship is the appropriate permanent plan, it must appoint the guardian and order the clerk to issue letters of guardianship which are not subject to the confidentiality protections of Welf & I C §827. Welf & I C §366.26(d); Cal Rules of Ct 1465(d)(1).

The court may also order visitation with the parent or other relative. Cal Rules of Ct 1465(d)(2). Under Welf & I C §366.26(c)(4), visitation with the parents from whose custody the child was removed is only required when the child is living with a relative or foster parent who is *not*

willing to become a legal guardian. *In re Jasmine P.* (2001) 91 CA4th 617, 621, 110 CR2d 562. Although visitation with the parents is not required when the court orders a legal guardianship, it may be advisable. A postpermanency planning order that visitation be directed by the legal guardian, however, is an improper delegation of judicial function even when the court also states that the natural parents have a right to visitation. *In re Randalynne G.* (2002) 97 CA4th 1156, 1165–1167, 118 CR2d 880 (the court knew that the guardians did not want to participate in any visitation).

The court may terminate dependency once a guardian is appointed under Welf & I C §366.26. Cal Rules of Ct 1465(d)(3).

Guardianship may also have been ordered by the juvenile court with the parents' agreement at the disposition hearing. Welf & I C §360(a) (child need not be a dependent child of the court).

c. [§104.67] Indian Child

The court may not order guardianship for an Indian child unless the court finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. Cal Rules of Ct 1439(i). Testimony of a qualified expert witness is required. Cal Rules of Ct 1439(i)(1). The court must also find that efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Cal Rules of Ct 1439(i)(4).

4. Long-Term Foster Care

a. [§104.68] In General

At a .26 hearing, the court may order that the child be placed in long-term foster care subject to the regular review of the juvenile court. Welf & I C §366.26(b)(4); Cal Rules of Ct 1463(d)(4). If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency subject to further orders of the court. Welf & I C §366.26(c)(5); Cal Rules of Ct 1463(d)(5).

Any preference for placement with a relative may be outweighed by the child's best interests even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321, 27 CR2d 595 (placement decision made post .26).

If a child becomes likely to be adopted after a permanent plan of long-term foster care has been implemented, the court may change the permanent plan at a postpermanency planning review hearing in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890, 55 CR2d 396. Indeed, the court must proceed under the assumption that long-term foster

care is not appropriate and must consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

b. [§104.69] Indian Child

The placement of an Indian child in a pre-adoptive or foster home must be made according to the social and cultural standards of the Indian community in which the parent or family member is most connected; it must be in the least restrictive setting close to the Indian child's home and capable of meeting the child's special needs. 25 USC §1915(b), (d); Cal Rules of Ct 1439(i)(4)(A), (k). The child may be placed in a non-Indian home only if the court finds that a diligent search has failed to find a suitable Indian home. Cal Rules of Ct 1439(k)(3). The preference order for foster placement is set out in 25 USC §1915(b) and Cal Rules of Ct 1439(k)(1) and for adoptive placement in 25 USC §1915(a) and Cal Rules of Ct 1439(k)(2).

Order of Preference for Foster/ Pre-Adoptive Placement	Order of Preference for Adoptive Placement
Member of child's extended Indian family	Member of child's extended Indian family
Foster home licensed or approved by the Indian tribe	Other members of the Indian child's tribe
State- or county-licensed or certified Indian foster home	Other Indian families
Children's institution approved by the tribe or operated by an Indian organization and offering programs to meet the Indian child's needs	

The preference order may be modified only for good cause or by tribal resolution. See 25 USC §1915(b)–(c); Cal Rules of Ct 1439(k)(4), (6). The burden of proof for establishing good cause to alter the preference order is on the party seeking a different preference order. Cal Rules of Ct 1439(k)(5).

The court may not order foster care placement for an Indian child unless it finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. 25 USC §1912(e); Cal Rules of Ct 1439(i). Testimony of a qualified expert witness is required. Cal Rules of Ct 1439(j)(1). The court

must also find that efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Cal Rules of Ct 1439(i)(4); see also Cal Rules of Ct 1439(*l*) (to issue any orders under Welf & I C §366.26, the court must find that efforts have been made to provide remedial services and rehabilitative programs).

H. [§104.70] Right to Modification or Appeal

An order terminating parental rights is conclusive and binding on the child, the parents, and all others who have been served under Welf & I C §294. Welf & I C §366.26(i); Cal Rules of Ct 1463(e)(2). Although the order may be appealed, the trial court generally has no power to set it aside or change it. Welf & I C §366.26(i). Once the court makes a termination order, it may not stay execution of that order. *In re Melvin A.* (2000) 82 CA4th 1243, 1248–1249, 98 CR2d 855.

Parents may not appeal an order terminating reunification services and setting a .26 hearing as part of an order terminating parental rights unless all the following apply: a petition for a writ was filed in a timely manner, the petition substantively addressed the issues challenged and was supported by an adequate record, and the writ petition was summarily denied or otherwise not decided on the merits. Welf & I C §366.26(*l*)(1)(A)–(C). Failure of the aggrieved party to file a timely petition for an extraordinary writ, to substantively address the issues challenged, or to support the challenge by an adequate record will preclude subsequent review by appeal of the findings and orders made at the .26 hearing. Welf & I C §366.26(*l*)(2). Such a failure precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405, 62 CR2d 726. But see *In re Janee J.* (1999) 74 CA4th 198, 208–209, 87 CR2d 634 (allowing issues to be raised on appeal from the .26 hearing if there was a fundamental defect that prevented parent from pursuing writ relief).

A judgment terminating parental rights may not be attacked by a writ of habeas corpus when the parents made no claims to error at any earlier points in the proceedings. *In re Meranda P.* (1997) 56 CA4th 1143, 1163, 65 CR2d 913. In addition, termination of parental rights may not be attacked by a parent for failure to comply with ICWA when the issue was not raised at the .26 hearing, in spite of the parent's being aware of the child's potential Indian status. *In re Derek W.* (1999) 73 CA4th 828, 832, 86 CR2d 742.

A parent cannot appeal the setting of a .26 hearing after filing a writ petition which is denied on the merits. *In re Julie S.* (1996) 48 CA4th 988, 990, 56 CR2d 19. See discussion of effect of failure to file a petition for extraordinary writ review in §104.17.

1. [§104.71] Hearing on Petition for Modification Under Welf & I C §388

Once reunification services have been denied or terminated, the court need not reconsider the plan unless the parent had filed a petition under Welf & I C §388 *before* the .26 hearing was held and showed that changed circumstances require a change in the court's orders. See *In re Baby Boy L.* (1994) 24 CA4th 596, 609–610, 29 CR2d 654. The change of circumstances necessary for holding a modification hearing after a .26 hearing has been *set* may relate to the parents as well as the children. The completion by the parent of a reunification plan for siblings who were then able to return home may be a sufficient change of circumstance to warrant holding a §388 hearing even though the children's circumstances have not changed. *In re Daijah T.* (2000) 83 CA4th 666, 674–675, 99 CR2d 904. Further, the allegation that return to the parent would facilitate keeping a bonded sibling group together may be a sufficient showing to find a change of orders may be best for the children, thus necessitating the granting of a hearing on the §388 petition. *In re Daijah T., supra.*

A .26 hearing is not a substitute for a hearing on the modification petition that seeks return of the child, because at the .26 hearing return is not an option, and the evidence received is therefore different. *In re Aljamie D.* (2000) 84 CA4th 424, 433, 100 CR2d 811. At a modification hearing held to modify a .26 hearing, due process requires that the court permit live witness testimony if there is a contested hearing with an issue of credibility. *In re Clifton V.* (2001) 93 CA4th 1400, 1405, 114 CR2d 1.

Once parental rights have been terminated, however, the juvenile court has no jurisdiction to entertain a subsequent motion for modification under Welf & I C §388. *In re Ronald V.* (1993) 13 CA4th 1803, 1806, 17 CR2d 443 (time for appeal had passed). This is true even if there was inadequate service and therefore no personal jurisdiction over the father (*David B. v Superior Court* (1994) 21 CA4th 1010, 1018, 26 CR2d 586) or when there is intentional misrepresentation about the potential adoptive placement (*In re David H.* (1995) 33 CA4th 368, 385, 39 CR2d 313).

2. [§104.72] Who May Initiate Appeal/Standing

An appeal on behalf of a parent will not be valid if the parent does not initiate it. *In re Alma B.* (1994) 21 CA4th 1037, 1043, 26 CR2d 592 (appeal from setting of .26 hearing initiated by parent's counsel based on parent's desire to be reunited with children). Lack of consent may be demonstrated by a parent's actions that show no interest in preserving parental rights. *In re Sean S.* (1996) 46 CA4th 350, 352, 53 CR2d 766 (parent had telephoned attorney and stated she was not going to appear at the .26 hearing). When the mother was present at the time the court set the .26 hearing and raised no objection, she may not object for the first time

on appeal. *In re Kevin S.* (1996) 41 CA4th 882, 886, 48 CR2d 763 (mother had also submitted the matter on the recommendations in the social study). When the parent has not received notice of the hearing, however, the parent need not have personally authorized the appeal. *In re Steven H.* (2001) 86 CA4th 1023, 1031, 103 CR2d 649.

A parent cannot raise an issue on appeal that does not affect his or her own rights. *In re Devin M.* (1997) 58 CA4th 1538, 1541, 68 CR2d 666 (child's bond with foster parents); *In re Jasmine J.* (1996) 46 CA4th 1802, 1806–1808, 54 CR2d 560 (child's relationship with siblings); *In re Nachelle S.* (1996) 41 CA4th 1557, 1562, 49 CR2d 200 (child's visitation with siblings); *In re Gary P.* (1995) 40 CA4th 875, 876, 46 CR2d 929 (child's relationship with grandparent); *In re Joshua M.* (1997) 56 CA4th 801, 807, 65 CR2d 748 (ineffectiveness of other parent's counsel); *In re Caitlin B.* (2000) 78 CA4th 1190, 1194, 93 CR2d 480 (failure to give proper notice to other parent).

Neither a parent whose parental rights have been terminated nor a sibling has standing to seek review on the issue of sibling contact. *In re Cliffton B.* (2000) 81 CA4th 415, 425–427, 96 CR2d 778; *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88. Moreover, an alleged biological father who is not a party of record has no standing to appeal an order terminating parental rights. *In re Joseph G.* (2000) 83 CA4th 712, 715, 99 CR2d 915 (alleged father was notified of proceedings but never appeared). Nor does a mother have the standing on appeal to raise the issue of an unknown biological father's lack of due process. *In re Anthony P.* (2000) 84 CA4th 1112, 1117, 101 CR2d 423.

A parent does have standing, however, to raise the issue of the lack of notice to the grandparents under former Welf & I C §366.23(b)(5)(B) (now Welf & I C §294(f)(7)) when there have been insufficient attempts to notify the parents. *In re Steven H., supra,* 86 CA4th at 1033.

I. Subsequent Hearings

1. [§104.73] Adoption

If parental rights have been terminated, the child remains a dependent until adopted, after which time the court must terminate jurisdiction. Welf & I C §366.3(a); Cal Rules of Ct 1466(a). If there is a postadoption contact agreement, the adoption court must maintain jurisdiction over the child in order to have the ability to enforce the agreement. Welf & I C §366.29(c).

Following the establishment of a plan for termination of parental rights, the court must retain jurisdiction and conduct review hearings every six months to ensure completion of the adoption. Welf & I C §366.3(a); Cal Rules of Ct 1466(a). After parental rights have been terminated, the parents are not parties to, nor are they entitled to notice of,

any subsequent proceeding. Welf & I C §366.3(a); see Cal Rules of Ct 1466(a).

There is a split of opinion as to whether appellate courts should overturn permanent plans of adoption that were free from error when they were made, but that were subsequently revealed as flawed because the children in question were not actually adopted as planned. One case has held that because the law abhors legal orphanage, appellate courts must use the best interests of the child when adoption fails during the postjudgment period, rather than merely looking for prejudicial error during the handling of the case in the lower court. *In re Jayson T.* (2002) 97 CA4th 75, 85–88, 118 CR2d 228. *Jayson T.* suggests that appellate courts should send cases back to juvenile courts for redetermination of the adoptability issue in light of subsequent facts that have cast doubt on the prior adoptability finding. *In re Jayson T., supra,* 97 CA4th at 78, 86–91. But see *In re Heather B.* (2002) 98 CA4th 11, 13–15, 119 CR2d 59, holding that the fact that a prospective adoption has failed does not permit an appellate court to relitigate the adoptability issue nor overturn a termination of parental rights unless there has been error in the lower court.

2. [§104.74] Legal Guardianship

Establishment of a legal guardianship should be ordered at the hearing under Welf & I C §366.26. See Welf & I C §366.26(d). However, if guardianship is not ordered, but a legal guardianship plan is adopted, the court must retain jurisdiction and conduct review hearings every six months to ensure completion of the guardianship. Welf & I C §366.3(a); Cal Rules of Ct 1466(a). Once the legal guardianship has been completed, the court may choose to terminate dependency jurisdiction or to retain jurisdiction over the child as a ward of the guardianship. Welf & I C §§366.3(a), 366.4(a); Cal Rules of Ct 1466(a). In a relative guardian situation, unless there are exceptional circumstances, the court must terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship. Welf & I C §366.3(a). See discussion in §104.65.

A petition to terminate the guardianship, to appoint an additional or successor guardian, or to modify or supplement guardianship orders must be filed and heard in juvenile court. See Welf & I C §366.3(b); Cal Rules of Ct 1466(c). If the legal guardianship is terminated, the court may continue or resume dependency if the child is still in need of court protection, and if the child is not returned to a parent, the court may order reunification services for a six-month period, set a new hearing under Welf & I C §366.26, or order long-term foster care. See Welf & I C §366.3(b); Cal Rules of Ct 1466(b).

3. [§104.75] Long-Term Foster Care

When the child is placed in long-term foster care, review of the child's status is governed by Welf & I C §366.3(d) and Cal Rules of Ct 1466(b). Under these sections:

- Status must be reviewed every six months.
- This review may be by an appropriate local agency rather than by the court, provided that the court conduct a review on request of the child, parent, or guardian or when 12 months has elapsed since holding a .26 hearing, review hearing, or hearing at which long-term foster care was ordered, and at least every 12 months thereafter.
- The parents are entitled to receive notice of, and participate in, those hearings.
- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to six months.
- At these hearings, the court must consider all permanency planning options, including whether the child should be returned to the parent or guardian, placed for adoption, have a guardianship established, or remain in long-term foster care (Welf & I C §366.3(g); Cal Rules of Ct 1466(b)(1)).
- The court must hold a new .26 hearing unless it finds by clear and convincing evidence that the child is not a proper subject for adoption or that there is no one available to assume guardianship care (Welf & I C §366.3(g); Cal Rules of Ct 1466(b)(2)).
- The court may order the child to remain in long-term foster care if it makes the findings of Cal Rules of Ct 1466(b)(2) (Welf & I C §366.3(g); Cal Rules of Ct 1466(b)(3)).
- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to six months (Welf & I C §366.3(e)).

A court may change the permanent plan at a postpermanency planning review hearing held under Welf & I C §366.3 in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890, 55 CR2d 396. Indeed, the court is obligated to proceed under the assumption that long-term foster care is not appropriate and to consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition

brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

The court need not hold a contested postpermanency planning hearing for a child in long-term foster care in order to change or continue the permanent plan. *Maricela C. v Superior Court* (1998) 66 CA4th 1138, 1147, 78 CR2d 488. If there is an issue of credibility, however, the court must hold a contested hearing and permit live witness testimony. *In re Clifton V.* (2001) 93 CA4th 1400, 1405, 114 CR2d 1 (modification hearing). At the hearing (whether contested or uncontested), the court must consider all options, including whether the child should be returned home. *Maricela C. v Superior Court, supra.*

If the court orders a new .26 hearing under Welf & I C §366.26(g), it must direct DSS and the licensed adoption agency, or the State DSS in a county without a county adoption agency, to prepare an assessment under Welf & I C §366.21(i) or §366.22(b). Welf & I C §366.3(h). This hearing must be held no later than 120 days from the 12-month review at which it was ordered. Welf & I C §366.3(h).

4. [§104.76] Indian Child

When the Indian Child Welfare Act applies, a parent, the child, an Indian custodian, or the tribe may petition a court to invalidate a foster placement or termination of parental rights. 25 USC §1914; Cal Rules of Ct 1439(n). If the child is a dependent child of the juvenile court or the subject of a pending petition, the juvenile court is the only court to hear the petition. Cal Rules of Ct 1439(n)(1). If a decree of adoption is set aside and a biological parent or Indian custodian petitions the court for return of the child, the court must grant the petition unless there is a showing that the return would be contrary to the child's best interests. Cal Rules of Ct 1439(n)(2).

IV. SAMPLE FORMS

A. [§104.77] Script: Conduct of Hearing

[If parents and the child are represented by counsel and all required conflict of interest statements are on file, go to (4).]

(1) Appointment of Attorney for Parents or Guardians

You have a right to be represented by an attorney for this selection and implementation hearing. If you want to employ a private attorney, the court will give you an opportunity to do so.

[*Or*]

The court has reviewed the financial declaration of [*name(s) of parent(s) or guardian(s)*] and finds that [*he/she/they*] [*is/are*] entitled to appointment of counsel. At this time, the court appoints [*name of attorney*] to represent [*him/her/them*].

☛ JUDICIAL TIP: When the attorney is on the staff of a governmental agency, it is the office, not the individual attorney, that is being appointed.

[*If parent(s) waive(s) counsel, add*]

This is a serious matter. Your parental rights may be terminated at this hearing. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

[*When applicable, add*]

The court now finds that the parent(s) [*has/have*] knowingly and intelligently waived [*his/her/their*] right(s) to counsel at this hearing.

[*If child is represented by counsel, go to (4).*]

(2) Attorney for Child

The court has read and considered the documentary material submitted by DSS that is relevant to the limited purpose of assessing the benefit, if any, of appointing counsel for the child. Would anyone like to be heard on this issue?

[*After hearing evidence, if any, on issue of child's need for attorney, add*]

The court finds, based on the facts of this case, that there is no identifiable benefit to the child that would require appointment of counsel at this time because [*give reasons*].

[*Or*]

The court finds, based on the facts of this case, that there is a need to appoint counsel for the child at this time. The court appoints [*name of attorney*] to represent the child.

(3) Continuance if New Counsel Needed

The case is continued for __ [*up to 30*] days to permit [*appointment of counsel/new counsel to become familiar with the case*].

(4) Explanation of Procedure/Notification of Consequences

I am going to explain to you what happens at this proceeding. Today, the court will determine a permanent plan for the child, that is whether your parental rights should be terminated and [*name of child*] placed for adoption, or whether adoption should be the eventual goal without terminating parental rights, as the search for appropriate adoptive parents gets underway, or whether to appoint a guardian for [*name of child*] without terminating parental rights, or whether to place [*name of child*] in long-term foster care.

In any event, returning [*name of child*] home to the custody of [*his/her*] parents is no longer an option.

Note: Very often, the attorney for the parent or guardian will state that he or she has explained these matters to the clients and will go on to explain their position. Many judges encourage attorneys who appear in their courts to take this responsibility.

(5) Notice of Hearing

(a) One parent not present

[*If one parent is not present, make sure that the absent parent received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear.

(b) Both parents present

The court finds that the [*mother/father/guardian(s)*], the child, and all counsel were notified of this hearing and provided the review report as required by law.

(c) Notice attempted

The court finds that the following attempts were made to locate the [*mother/father/guardian(s)*]: [*List attempts*].The court has reviewed the declaration of search and finds that the efforts made to locate and serve the [*parents/guardians*] were reasonable.

(d) Insufficient attempts at notice

The court finds that the Department has not used due diligence in attempting to locate the [*parents/guardians*]. The case is therefore continued for [*state time period*].

(6) Waiver of Advisement of Rights

[*To each participant*]

Did your attorney explain your rights to you?

Note: Hearing rights are specified in Cal Rules of Ct 1412(j).

Do you waive advisement of rights?

[*If the answer to both is yes, go to step 8.*]

(7) Advisement of Rights

You have certain rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing; (2) the right to cross-examine, which means ask questions of, any witness who may testify at this hearing; (3) the right to present to the court any witnesses or other evidence you may desire; (4) the right to subpoena witnesses; and (5) the right to a hearing on the issues raised in the review report. You have the right to assert the privilege against self-incrimination [*but, in any event, anything you say in this or in any other dependency proceeding may not be admissible as evidence in any other action or proceeding].*

(8) Advisement re Addresses Under Welf & I C §316.1

The address that [*is in the petition/you gave the court* [*at previous hearings/today*]] will be used by the court and the social worker for all further notice unless you advise the court and the social worker of any changes in address.

See discussion in §104.18.

(9) Evidence

[*Court reads any written reports and states for the record all material read by the court.*]

The court has read and considered and now receives into evidence the assessment report of [*date*], prepared by _____, consisting of____ pages and containing the following attachments: [*List*].

Note: The court must indicate which documents it is relying on.

[*To parent, guardian, child, or other interested person*]

Now is the time for you to present any evidence or make any statement you may wish to make before the court decides to [*terminate parental rights/appoint a guardian/etc.*].

If the court makes findings solely on the basis of the evidence in the report, do you understand that you will have given up your right to cross-examine those who prepared the report and to deny the statements found in the report?

[*To parent, guardian, and the attorneys*]

May the court base its findings solely on the report and other documents that it has received?

[*If the answer is no, the court should orally examine or permit testimony of the child, if necessary, and other persons with relevant knowledge bearing on relevant issues. The court must allow cross-examination of any witness who testifies.*]

Now is the time for you to present any evidence or make any statement you may wish to make before the court selects a permanent plan.

[*If necessary to ascertain the child's wishes, arrange for child's testimony. Make one or more of the following findings as appropriate to permit the child's testimony in chambers:*]

(1) It is necessary to take testimony in chambers to ensure truthful testimony.

(2) The child is likely to be intimidated by a formal courtroom setting.

(3) The child is frightened to testify in front of the parents [*Welf & I C §366.26(h)*].

(10) Final Question

Do you have any questions about the court's orders or what is going to take place in the future?

B. [§104.78] Script: Findings and Orders

Note: Findings and orders are contained in Judicial Council Form JV-320.

(1) Introduction

The court has read and considered [*name of documents, e.g., the assessment report of* [*date*]], which recommend [*adoption/eventual adoptive placement/guardianship/long-term foster care*], and attached documents.

[*If applicable, add*]

The court has also considered the testimony of the witnesses and their demeanor on the stand, as well as the arguments of counsel.

(2) Termination of Parental Rights

The court finds by clear and convincing evidence that [*name of child*] is likely to be adopted.

[*If child is of Indian heritage*]

The court finds by proof beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to [*name of child*] based on the testimony of experts [*names of experts*], who said that [*provide factual basis*].

(3) Placement for Immediate Adoption

The parental rights of [*name of parents*] with respect to [*name of child*] shall be terminated and [*name of child*] shall be referred to [*name agency, e.g., licensed agency or State DSS*] for adoptive placement immediately.

(4) No Termination/180-Day Placement

Without terminating the parental rights of [*name of parents*] with respect to [*name of child*], the court orders that [*licensed agency or State DSS*] make efforts to locate an appropriate adoptive family within 180 days, that is, by [*date*].

A hearing is scheduled for [*date and time within 180 days*] to determine whether adoptive parents have been located and for further orders in this matter.

(5) Termination of Parental Rights Precluded

At each hearing at which the court was required to make findings concerning reasonable efforts or services, it found that reasonable efforts were not made or that reasonable services were not offered or provided.

[*Or*]

There is another parent who has not relinquished custody and whose parental rights should not be terminated. [*State facts.*]

[*Or*]

Termination of parental rights would be detrimental to [*name of child*] because:

[*Choose appropriate statement*]

[*Name of parents or guardians*] have maintained continuing visitation and contact with the [*name of child*] and [*name of child*] would benefit from a continuation of that contact in that [*explain*]. [*Name of parents or guardians*] have assumed a parental role with respect to [*name of child*].

[*Or*]

[*Name of child*] who is _____ years old [*12 years old or older*] objects to the termination of parental rights as [*he/she*] has explained. [*Describe.*]

[*Or*]

[*Name of child*] has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child is released from residential care.

[*Or*]

[*Name of child*] is living with a [*name of relative or foster parent*] who is unwilling to adopt, but is willing to accept legal responsibility for [*name of child*] and to provide a stable home for [*name of child*], and removal of [*name of child*] from that placement would be emotionally detrimental to [*him/her*].

[*Or*]

[*Name of child who is the subject of the .26 hearing*] has a sibling relationship that is very important to [*him/her*], and termination of parental rights would create a substantial interference with that relationship so that termination of parental rights would be detrimental to [*name of child*], when compared with the benefits of legal permanence through adoption.

Note: The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 1463(d)(2). See discussion in §104.46.

(6) Legal Guardianship

Letters of guardianship are issued and [*name of guardian*] is appointed as the legal guardian for [*name of child*].

Dependency of [*name of child*] is [*continued/dismissed*].

Visitation between the parents and [*name of child*] *is* [*to continue/terminated*].

(7) Long-Term Foster Care

[*Name of child*] is to be placed in long-term foster care subject to the regular court review.

Note: If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency subject to further orders of the court. Welf & I C §366.26(b)(5); Cal Rules of Ct 1463(d)(5).

(8) Future Hearings

A hearing is set for [*date*] for the purpose of [*specify, e.g., reviewing status of child/reviewing progress toward finding adoptive parent*].

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Editorial comments and inquiries: Barry Harding, Editor 415-865-7824
fax 415-865-4335

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CUSTODY AND VISITATION

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I. [§200.1] SCOPE OF BENCHGUIDE

This benchguide addresses child custody and visitation proceedings under the Family Code, specifically the disposition of parent and nonparent claims in marital actions. It also discusses modification of custody and move-away disputes. Discussion of custody and visitation disputes within the context of dependency, guardianship, paternity, and adoption proceedings is beyond the scope of this benchguide.

II. PROCEDURAL CHECKLISTS

A. Jurisdiction Checklists

1. [§200.2] Initial Custody Determinations

A California court may exercise jurisdiction to make an initial custody determination if (Fam C §3421(a)):

- California is the child's "home state" when the initial custody proceeding is commenced; or
- It was the child's home state within six months before the proceeding commenced and the child is absent from California, but a parent or person acting as a parent continues to live in California;

OR

- No other state has "home state" jurisdiction, or a court of the home state has declined jurisdiction; *and*
- The child and at least one parent or person acting as parent have a significant connection with California other than mere physical presence; *and*
- Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

OR

- All courts having jurisdiction have declined to exercise jurisdiction on the ground that California is the more appropriate forum.

OR

- No court of any other state would have jurisdiction under the above criteria.

For discussion, see §§200.14–200.17.

2. [§200.3] Emergency Jurisdiction

(1) *A California court may exercise temporary emergency custody jurisdiction if* (Fam C §3424(a)):

- The child is present in this state; *and*
- The child has been "abandoned"; *or*
- The exercise of such jurisdiction is "necessary in an emergency" to protect the child because the child, child's sibling, or child's parent is subjected to or threatened with mistreatment or abuse.

For discussion, see §200.22.

3. [§200.4] Modification of Out-of-State Order

A California court may not modify a child custody determination made by another state unless (Fam C §3423):

(a) The California court has jurisdiction to make an initial custody determination because:

- California is the child's "home state" when the initial custody proceeding is commenced; or
- It was the child's home state within six months before the proceeding commenced and the child is absent from California, but a parent or person acting as a parent continues to live in California;

OR

- No other state has "home state" jurisdiction, or a court of the home state has declined jurisdiction; *and*
- The child and at least one parent or person acting as parent have a significant connection with California other than mere physical presence; *and*
- Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

AND

(b) The court of the other state determines:

- It no longer has exclusive, continuing jurisdiction or that California would be a more convenient forum; *or*
- The child, the child's parents, and any person acting as a parent do not presently reside in the other state. The California court may also make this determination.

For discussion, see §200.24.

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4. [§200.5] Venue Checklist

Venue is governed by CCP §395(a) in the following instances:

- For custody in a dissolution action: the county where either petitioner or respondent has resided for the previous three months.
- In an action for legal separation or nullity: the county in which either petitioner or respondent resides at the commencement of the action.
- For modifications of existing orders (CCP §397.5):
  - — Venue remains in the county or original jurisdiction as long as one of the parties resides there; or
  - — If both parties have moved from the county that issued the original decree, the court in that county has the discretion to change the venue for any modification proceeding to the county where either party resides. CCP §397.5.

For discussion, see §200.27.

B. [§200.6] Hearing on Order To Show Cause: Custody and Visitation

(1) *Commissioners or attorneys serving as temporary judges should obtain a stipulation from the parties.* Cal Rules of Ct 244.

(2) *Determine whether minor children are in the courtroom.* If so, address the issue under your court's policies.

☛ JUDICIAL TIP: Most courts do not allow minor children, even older ones, into the family law courtroom. This is particularly true if their parents' case is set for hearing. It may not be in the child's best interest to hear the evidence the parents are presenting, nor even to hear the evidence and accusations made by other parents in other cases. Furthermore, if the parties brought the children with the intent that the court will hear testimony from them, the court has an obligation to control the questioning of the minor witness and has many ways to obtain information from the minor. For discussion, see §§200.50–200.51.

(3) *Determine whether a domestic violence protective order has been issued in any of the cases or whether either party has alleged domestic violence in writing, under penalty of perjury.* Note that special procedures may be required in such cases. For discussion, see §200.54.

(4) *Warn any party who is the subject of the protective order or against whom domestic violence has been alleged that any statements made in this proceeding may be used as evidence against the party in any criminal proceedings arising from the allegations or incidents involved*

and that the party has a right to remain silent, refuse to testify or respond, and not incriminate him- or herself.

(5) *If hearing an ex parte request for custody or visitation, determine whether*:

- The child is faced with immediate harm that includes:
  - — A recent act of domestic violence directed to child or to other party or in presence of child;
  - — A pattern of domestic violence in the past; or
  - — Lack of supervision for the child.

OR

- There is an immediate risk that the child will be removed from the state.

(6) *If any of the factors in item 5 are present:*

- Issue an ex parte temporary custody order.
- Set a hearing date within 20 days.
- Issue an order to show cause on the respondent.
- Enter an order restraining the party receiving custody from removing the child from the state pending notice and the hearing on the order.

For discussion of ex parte orders, see §200.29.

(7) *If none of the factors in item 5 is present, the court may not issue orders ex parte but must set the matter for hearing and require proper service and notice.* The court, however, may shorten the time for the hearing and service of notice of the hearing

(8) *Call the calendar to determine if the parties and counsel are present and to get time estimates for each hearing.*

(9) *If only one party is present, determine whether the other party has been served, or whether, if served, service was timely.*

(10) *If absent party was not served or service was untimely:*

- Reissue the order to show cause with a new hearing date.
- Set a new date for mediation before new hearing date.
- Instruct petitioner to serve all original documents as well as the notice of the new date or dates.

(11) *If the absent party was served in a timely manner, the hearing will proceed as a default.*

(12) *If it is the practice to do so, administer an oath to all witnesses at this time.* Otherwise, administer the oath to the parties and their witnesses as each case is called forward.

(13) *Determine if the parties have been to mediation.*

(14) *If the parties have not been to mediation:*

- Assign a new date for mediation and a continued hearing date subsequent to the mediation date. Instruct both parties to appear at mediation and at the new hearing date. The court may not make custody or visitation orders without an attempt at mediation.
- If one party has had exclusive control and care of the child and the other party has not had contact with the child, the court should determine whether the parties can agree to some contact or visitation or whether it should order some minimal contact until the parties can go to mediation.

(15) *If the parties have been to mediation*:

- Determine whether the parties have received copies of the mediation report from the mediator. If one or more of the parties have not received the report, ask court staff to make copies of the report for them to review immediately. Pass the case and move it to the bottom of the calendar. Often that provides sufficient time for the parties to be able to review and take action on the report without having to continue the matter. Fam C §3186(a); Cal Rules of Ct 5.210(e)(8)(A).
- Determine whether the parties reached an agreement at mediation.
  - — If an agreement has been reached, call the parties and ask them if they have read and if they understand the mediator's report of their agreement and if the report accurately reflects their agreement. Verify that they assent to the agreement and, absent any concerns the court may have based on review of the declarations, the mediation report, or statements made by the parties, confirm the agreement and incorporate it in the order for custody and visitation rights. See §200.89.
  - — If the parties did not reach an agreement or reached only a partial agreement, subsequent actions will be determined by the type of mediation program used in the court's county.
  - — If nonrecommending (confidential) mediation program: After being informed in writing by mediator that agreement was not reached on specified issues, consider resubmitting the matter to mediation, ordering a custody evaluation, or setting date for hearing. See §§200.77, 200.90.

- If recommending (nonconfidential) mediation program: Review mediator's report and any recommendations from the mediator as to custody and visitation. The parties are entitled to a hearing to examine the mediator about his or her recommendations. Consider and review all other evidence, including testimony from the parties, declarations, parties' comments, and response to the mediator's recommendations. Consider resubmitting the matter to mediation, or ordering a custody evaluation. See §§200.76, 200.90.

☛ JUDICIAL TIP: Mediation procedures vary greatly from county to county. Before beginning any family law assignment, the judge should meet with the local Family Court Services staff and become thoroughly familiar with the local court rules regarding confidentiality of mediation.

(16) *Consider the applicable standards for custody and visitation.* The broad general standard is the best interest of the child. Fam C §3011. In determining this standard, the court must use the health, safety, and welfare of the child as a primary consideration, as well as any history of parental abuse, the nature and amount of contact with both parents, and the habitual or continual use of controlled substances or alcohol. Fam C §3011(a)–(d). See §§200.34–200.46.

(17) *Consider the ramifications of the types of custody in making a custody determination*—legal custody, which may be granted solely or jointly, or physical custody, which may be granted solely or jointly (see §§200.30–200.33).

(18) *If joint custody is awarded:*

- *Legal Custody.* Specify the circumstances under which the consent of both parents is required in order to exercise legal control and the consequences of a failure to obtain mutual consent before acting. Fam C §3083.
- *Physical Custody.* Specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping. Fam C §3084.
- On a party's request, state the reasons for awarding joint custody. Fam C §3082.
- If appropriate, specify one parent as the primary caretaker of the child or children and one home as the primary home of the child or children, for purposes of determining eligibility for public assistance. Fam C §3086.

(19) *If sole physical custody is awarded:*

- Specify visitation schedule of noncustodial parent.

- If appropriate, specify conditions of supervised visitation.
- On a party's request, state the reasons for denying award of joint custody. Fam C §3082.

(20) *Ensure that the custody or visitation order includes the following* (Fam C §3048):

- The basis for the court's exercise of jurisdiction.
- The manner in which notice and opportunity to be heard were given.
- A clear description of the custody and visitation rights of each party.
- A provision stating that a violation of the order may subject the party in violation to civil or criminal penalties, or both.
- Identification of the child's or children's country of habitual residence.

(21) *If appropriate, refer parties to conciliation court for assistance in formulating a plan for implementation of the custody order or resolving disputes arising from implementation of the order* (Fam C §3089), *or require the parties to submit a plan for implementation of the order* (Fam C §3040(a)(1)).

C. Move-Away Checklists

1. [§200.7] Initial Custody Determinations

When the parent with primary custody of the child intends to move with the child, the court must consider the following when making a custody determination:

(1) All relevant circumstances bearing on the best interest of the child, *e.g.*, health, safety, and welfare of child, and history of abuse (best interest standard).

(2) The effects of the move as it bears on the nature of the child's contact with both parents, the child's age, community ties, and health and education needs. Also take into account the child's preferences.

(3) Whether the move is in good faith and not intended to frustrate the other parent's contact with the child. The nonmoving party must establish that the move is in bad faith. Otherwise, the trial court is not required to question the motivation for the move.

(4) The nature and length of the custodial relationship as it existed just before the move. When the moving parent has maintained custody for a significant period, the nonmoving parent will bear the burden of persuading the court that a change in custody is in the child's best interest.

For a comprehensive discussion, see §§200.118–200.125.

2. [§200.8] Modification of Existing Judicially Determined Custody Order

(1) *When existing order grants one parent sole physical custody:*

- The noncustodial parent must show that the move
  - — Is made in bad faith; or
  - — Would cause detriment to the child, requiring a reevaluation of the child's custody. If this showing is made, the court must determine whether a change in custody is in the best interest of the child.

OR

- The parents have a de facto shared physical custody, in which case the court must conduct a de novo determination of custody based on the child's best interest.

(2) *When existing order grants joint or shared physical custody:*

- The court must conduct a de novo determination of custody based on the child's best interest.

OR

- One parent must show that the other parent has not shared in his or her parenting responsibilities, thereby establishing de facto sole physical custody. In that case, the actual custodial parent is entitled to a presumption of the ability to change the residence unless the other parent shows that:
  - — The move is in bad faith; or
  - — The move would cause detriment to the child, requiring a reevaluation of the child's custody. If this showing is made, the court must determine whether a change in custody is in the best interest of the child.

For a comprehensive discussion, see §§200.118–200.122, 200.126–200.130.

III. APPLICABLE LAW

A. Jurisdiction

1. [§200.9] Family Court Proceedings

Family Code §3022 provides that the superior court may, during the pendency of a proceeding, or at any time thereafter, make such orders for the custody of a child during minority as may be necessary or proper. Family Code custody and visitation proceedings are governed by Fam C §§3000 et seq, and these statutes apply to the following (Fam C §3021):

- Proceedings for dissolution of marriage, nullity of marriage, and legal separation of the parties.
- An action for exclusive custody under Fam C §3120.
- A proceeding to determine physical or legal custody or visitation in a proceeding under the Domestic Violence Prevention Act (Fam C §§6200 et seq).
- A proceeding to determine physical or legal custody or visitation in an action under the Uniform Parentage Act (Fam C §§7600 et seq).
- A proceeding to determine physical or legal custody or visitation in an action brought by the local child support agency under Fam C §17404.

2. Preemption of Family Court Custody Jurisdiction

a. [§200.10] Juvenile Court Jurisdiction

When a minor has been adjudged a dependent of the juvenile court under Welf & I C §§300 et seq, that court acquires sole and exclusive jurisdiction over matters relating to the custody of the child and visitation with the child. Welf & I C §§302(c), 304; Cal Rules of Ct 1429.1(a). Any custody or visitation order issued by the juvenile court is a final judgment and remains in effect after the court's jurisdiction is terminated. It may not be modified in a family court proceeding or action unless the court finds that there has been a significant change of circumstances since the issuance of the order, and modification of the order is in the best interest of the child. Welf & I C §302(d).

The juvenile court has preemptive jurisdiction to adjudicate dependency notwithstanding a family court's preexisting custody order in a marital action, regardless of the degree to which the same issues will be heard in a dependency action. *In re Desiree B.* (1992) 8 CA4th 286, 291–293, 10 CR2d 254 (juvenile court not collaterally estopped from reconsidering custody issues already decided in family court); *In re Travis C.* (1991) 233 CA3d 492, 499–503, 284 CR 469 (juvenile court had jurisdiction over petition containing same factual allegations despite fact that hearing on those allegations was pending in family law court; juvenile court's power to protect children even if family law court has prior jurisdiction is single exception to the rule that among courts of concurrent jurisdiction, that which takes jurisdiction first in time has exclusive jurisdiction).

b. [§200.11] Tribal Jurisdiction Under Indian Child Welfare Act

Indian tribes that are recognized by the Department of the Interior have exclusive jurisdiction over certain child custody proceedings (foster

care placement, termination of parental rights, adoption proceedings) involving Indian children residing or domiciled within their reservation under the Indian Child Welfare Act (ICWA) (25 USC §§1901 et seq). 25 USC §1911(a). In custody proceedings involving Indian children who are not domiciled or residing within the reservation, the tribes have limited jurisdiction. In these cases, the tribes have the right to notice and to intervene in state court proceedings. 25 USC §§1911(b)–(c), 1912(a).

The ICWA specifically excludes custody awards to a parent in "divorce proceedings." 25 USC §1903. Therefore, the impact of the ICWA is limited in custody proceedings unless custody is to be awarded to a nonparent.

The California legislature has adopted the federal declaration of policy of the ICWA to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum standards for the removal of Indian children from their families. See Fam C §7810; Welf & I C §360.6. In California, the ICWA must be applied in any proceeding in which there is a determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe. Fam C §7810(c); Welf & I C §360.6(c).

3. [§200.12] Interstate Disputes

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400 et seq) determines the proper subject matter jurisdiction as being between interested states for virtually any custody or visitation dispute. Fam C §3402(c)–(d). UCCJEA requirements must be met whenever a California court is called on to make an initial or modified custody or visitation determination. Unless California is an appropriate court under UCCJEA guidelines, there is no jurisdiction to make any custody orders other than emergency orders. Fam C §§3421–3424.

The Federal Parental Kidnapping Prevention Act (PKPA; 28 USC §1738A) should also be consulted for jurisdictional requirements in appropriate cases. The PKPA was enacted to provide nationwide enforcement of custody orders made in accordance with the UCCJEA. *Marriage of Zierenberg* (1992) 11 CA4th 1436, 1441–1442, 16 CR2d 238. The PKPA contains provisions that are similar to those of the UCCJEA, but they are not identical in every aspect. The provisions of the PKPA are controlling in cases where its provisions conflict with those of the UCCJEA. *Marriage of Zierenberg, supra.*

A custody proceeding pertaining to an Indian child is not subject to the UCCJEA to the extent it is governed by the Indian Child Welfare Act. See §200.11.

4. Initial Custody Determinations

a. [§200.13] Grounds for Jurisdiction

The UCCJEA provides exclusive grounds for a California court's jurisdiction to make an initial child custody determination. Fam C §3421(a), (b). A child custody determination is defined as a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to the child. Child custody determinations include permanent, temporary, initial, and modification orders. Fam C §3402(c).

Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. Fam C §3421(c).

Except as otherwise provided in the UCCJEA provisions for emergency jurisdiction under Fam C §3424, there are four individual grounds for jurisdiction for making initial child custody determinations. See §§200.14–200.17. The corresponding grounds on which a California court may assume jurisdiction under the PKPA are found in 28 USC §1728A(c)(2)(A)–(D).

b. [§200.14] California Is Child's Home State

Jurisdiction is established in California under the UCCJEA if California was the child's home state on the date of the commencement of the proceeding, *or* was the child's home state within six months before the commencement of the proceeding and the child is absent from California but a parent or person acting as a parent continues to live in California. Fam C §3421(a)(1).

Home state. A child's home state is the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the custody proceeding. If the child is less than six months of age, the home state is the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of any of the mentioned persons counts as part of the time period. Fam C §3402(g).

Person acting as a parent. A person acting as a parent means a person, other than a parent, who (1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of the custody proceeding; and (2) has been awarded legal custody by a court or claims a right to legal custody under California law. Fam C §3402(m).

c. [§200.15] No Other Home State; California More Appropriate Forum

Under the UCCJEA, California may exercise jurisdiction if no other state is the child's home state as specified in Fam C §3421(a)(1), *or* a court of the child's home state has declined to exercise jurisdiction on the grounds that California is the more appropriate forum under Fam C §3427 or §3428, and both of the following are true (Fam C §3421(a)(2)):

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with California other than mere physical presence.

(B) Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

d. [§200.16] Other Courts Having Jurisdiction Deferred to California

Jurisdiction is established in California under the UCCJEA if all courts having jurisdiction under Fam C §3421(a)(1) or (a)(2) have declined to exercise jurisdiction on the ground that a California court is the more appropriate forum to determine the child's custody under Fam C §3427 or §3428. Fam C §3421(a)(3).

e. [§200.17] Jurisdiction in No Other Court

Under the UCCJEA, California may exercise jurisdiction if no court of any other state would have jurisdiction under the criteria specified in Fam C §3402(a)(1), (a)(2), or (a)(3). Fam C §3402(a)(4).

If another state has made a child custody determination, a California court may not modify it unless (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under Fam C §3422 or that a California court would be a more convenient forum under Fam C §3427; or (2) a California court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. Fam C §3423.

5. [§200.18] Declining Exercise of Jurisdiction

There are three situations in which a California court that has jurisdiction under Fam C §3421 may choose or be required to decline to exercise its jurisdiction to make an initial child custody determination. See §§200.19–200.21.

a. [§200.19] Simultaneous Proceedings in Another State

Except as otherwise provided in Fam C §3424 (emergency jurisdiction), a California court may not exercise its jurisdiction under

Fam C §§3421–3430 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA, unless the proceeding has been terminated or is stayed by the court of the other state because a California court is a more convenient forum under Fam C §3427. Fam C §3426(a).

Except as otherwise provided in Fam C §3424, a California court, before hearing a child custody proceeding, must examine the court documents and other information supplied by the parties under Fam C §3429. Fam C §3436(b). If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance the UCCJEA, it must stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction does not determine that the California court is a more appropriate forum, the California court must dismiss the proceeding. Fam C §3426(b).

For a discussion of modification jurisdiction when an out-of-state court has commenced a proceeding to enforce a child custody order, see §200.25.

b. [§200.20] Inconvenient Forum

A California court that has jurisdiction under the UCCJEA to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court. Fam C §3427(a).

Before determining whether it is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court must allow the parties to submit information and must consider all relevant factors, including (Fam C §3427(b)):

- Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.
- The length of time the child has resided outside California.
- The distance between the California court and the court in the state that would assume jurisdiction.
- The degree of financial hardship to the parties in litigating in one forum over the other.

- Any agreement of the parties as to which state should assume jurisdiction.
- The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.
- The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
- The familiarity of the court of each state with the facts and issues in the pending litigation.

If the California court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it

- Must stay the proceedings on condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper (Fam C §3427(c)); and
- May require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorneys' fees, incurred by the other parties or their witnesses (Fam C §3427(e)).

A court may decline to exercise its jurisdiction of a child custody determination if it is incidental to an action for dissolution of marriage or other proceeding and still retain jurisdiction over the dissolution or other proceeding. Fam C §3427(d).

c. [§200.21] Unjustifiable Conduct of Petitioner

Except as otherwise provided in Fam C §3424 (emergency jurisdiction) or by any other law of this state, if a California court has jurisdiction under the UCCJEA because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court must decline to exercise its jurisdiction unless one of the following is true (Fam C §3428(a)):

- The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.
- A California court otherwise having jurisdiction under Fam C §§3421–3423, determines that California is a more appropriate forum under Fam C §3427.
- No court of any other state would have jurisdiction under the criteria specified in Fam C §§3421–3423.

Family Code §3128 is directed at a petitioning parent's wrongful taking of a child to another state in an attempt to create jurisdiction in a

chosen forum. California courts, interpreting the former Uniform Child Custody Jurisdiction Act "wrongful conduct" provision (former Fam C §3408), have generally limited application of the provision to situations in which a child has been removed from the state in violation of an existing custody order or injunction. See *Haywood v Superior Court* (2000) 77 CA4th 949, 956–957, 92 CR2d 182.

If a California court declines to exercise its jurisdiction under Fam C §3428(a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a recurrence of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Fam C §§3421–3423. Fam C §3428(b).

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under Fam C §3428(a), it must assess necessary and reasonable expenses against the party seeking to invoke its jurisdiction. These include costs for communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. Fam C §3438(c).

In making a determination under Fam C §3428, a court may not consider as a factor weighing against the petitioner any taking or retention of the child after a visit, or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Fam C §6211. Fam C §3428(d).

6. [§200.22] Emergency Jurisdiction

Even when UCCJEA jurisdiction rests with another state, a California court may exercise temporary custody jurisdiction if the child is present in this state and either (1) the child has been "abandoned," that is, left without provision for reasonable and necessary care or supervision; or (2) the exercise of such jurisdiction is "necessary in an emergency" to protect the child because the child, the child's sibling, or the child's parent is subjected to, or threatened with, "mistreatment or abuse." Fam C §§3424(a), 3402(a).

Unless there is a previous child custody determination that is entitled to enforcement under the UCCJEA, or a child custody proceeding has been commenced in a state with proper UCCJEA jurisdiction, an emergency child custody order remains in effect until an order is obtained from the court having jurisdiction. Such an order will become a final determination if the order so provides and if California becomes the home state of the child. Fam C §3424(b).

If there is a previous child custody determination entitled to UCCJEA enforcement or an action properly commenced, any emergency order must

specify a period of time that the court considers adequate to allow the person seeking an order to obtain it from the proper state. Fam C §3424(c). If a court learns of a valid prior order or commencement of an action in another state, the California court must immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. Fam C §3424(d).

7. Modification Jurisdiction

a. [§200.23] Modification of Prior California Order

Except as otherwise provided in Fam C §3424 (emergency jurisdiction), a California court that has made a child custody determination consistent with Fam C §3421 or §3423 has exclusive, continuing jurisdiction over the determination unless either of the following occurs (Fam C §3422(a)):

- A California court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with California, and that substantial evidence is no longer available in California concerning the child's care, protection, training, and personal relationships.
- A California court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in California.

A California court that has made a child custody determination and does not have exclusive, continuing jurisdiction under Fam C §3422 may modify that determination only if it has jurisdiction to make an initial determination under Fam C §3421.

b. [§200.24] Modification of Order of Another State

Except as otherwise provided in Fam C §3424, a California court may not modify a child custody determination made by a court of another state unless the California court has jurisdiction to make an initial determination under Fam C §3421(a)(1) or (a)(2) ("home state" or "significant connection" jurisdiction), and either of the following determinations is made:

- The court of the other state determines that it no longer has exclusive, continuing jurisdiction under Fam C §3422, or that a California court would be a more convenient forum under Fam C §3427.

- A California court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

☛ JUDICIAL TIP: Before exercising jurisdiction over an order of another state, the court should communicate with the out-of-state court on the question of that state's exclusive, continuing jurisdiction. See Fam C §3426(b) (duty to communicate in case of simultaneous proceedings).

c. [§200.25] Proceeding To Enforce Order in Another State

In a proceeding to modify a child custody determination, a California court must determine whether a proceeding to enforce the determination has been commenced in another state. Fam C §3426(c). If a proceeding to enforce a child custody determination has been commenced in another state, the court may do any of the following (Fam C §3426(c)):

- Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement.
- Enjoin the parties from continuing with the proceeding for enforcement.
- Proceed with the modification under conditions it considers appropriate.

d. [§200.26] Declining Exercise of Jurisdiction To Modify Order

A California court that has jurisdiction under the UCCJEA to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. Fam C §3427 (applicable to both initial custody orders and modification of custody orders). See detailed discussion of Fam C §3427 in §200.20.

8. [§200.27] Venue

The court's jurisdiction to determine custody is governed by the general venue statute. CCP §395(a). Thus, for example, in an action for dissolution, a petitioner may begin a proceeding in the county where either petitioner or respondent has resided for the previous three months. In an action for legal separation or nullity, the county in which either resides at the commencement of the action remains the proper venue throughout the proceeding. CCP §395(a).

Venue for modifications remains in the county or original jurisdiction as long as one of the parties resides there. If both parties have moved from the county that issued the original decree, the court in that county has the discretion to change the venue for any modification proceeding to the county where either party resides. CCP §397.5.

B. Initial Custody Orders

1. [§200.28] Temporary or Pendente Lite Order

Most often the first custody order the court is asked to make is a temporary or pendente lite order made upon an order to show cause. A petition for a temporary custody order may be included with the initial petition or action or at any time after the initial filing. Fam C §3060. If parties agree or reach an understanding about custody or temporary custody, they may attach a copy of the agreement or an affidavit setting forth their understanding to the petition, and the court is bound, except in "exceptional circumstances," to enter an order granting temporary custody in accordance with the agreement, understanding, or stipulation of the parties. Fam C §3061.

Often the parties are satisfied with the pendente lite orders and stipulate or ask that those orders be incorporated into the dissolution judgment. Thus, the orders made at the initial order to show cause hearing may be the only time the court is called upon to make any custody or visitation determinations.

However, the parties may return to court before entry of a judgment setting forth custody and visitation rights to seek changes in the initial temporary orders. The court may modify the pendente lite orders any time before entry of judgment.

☛ JUDICIAL TIP: Parties and their attorneys often believe that the first or initial custody determination is critically important because many judges frequently maintain the status quo through subsequent custody proceedings. Although the initial ruling is important, the court may diffuse the situation by recognizing that an immediate decision must be made but that orders may be modified when warranted by the facts.

2. [§200.29] Ex Parte Order

A party seeking an initial or modified custody order may request an ex parte temporary custody order before the hearing date set for the order to show cause if there is no agreement, understanding, or stipulation. An ex parte custody order may be granted if there is a showing of "immediate harm to the child or immediate risk that the child will be removed from the State of California." Fam C §3064. These are the only circumstances

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under which a court may issue ex parte custody or change of custody orders.

"Immediate harm to the child" includes:

- Having a parent who has committed recent acts of domestic violence or when such acts are a part of a demonstrated and continuing pattern. Fam C §3064.
- Failing to provide supervision for a young child. *Marriage of Slayton* (2001) 86 CA4th 653, 656–657, 103 CR2d 545 (also relying on definitions of neglect and matters subject to mandatory reporting laws in analyzing what constitutes "immediate harm"; see Pen C §§11165.2 and 11166).

If the court issues an ex parte order, it must also issue an order to show cause and set a hearing date within 20 days. That date may be extended pending entry of final judgment if the responding party is served and does not appear or respond within the time set. Fam C §3062(a). Ex parte orders may be extended up to an additional 90 days and a hearing date reset if the responding party is not served, despite good faith efforts, and the party who received ex parte orders shows by affidavit or other proof under penalty of perjury that the responding party has possession of the minor child and seeks to avoid the jurisdiction of the court or is concealing the child. Fam C §3062(b).

In conjunction with an ex parte order, the court must enter an order restraining the person receiving custody from removing the child from the state pending notice and a hearing on the order. Fam C §3063.

☛ JUDICIAL TIP: A determination of whether to issue an ex parte custody order involves some of the most difficult decisions the court will make. In most cases, the court will not have sufficient information to make confident custody decisions. But if the court does not grant appropriate interim relief, there can be tremendous harm to a spouse or children from domestic violence.

C. Types of Custody Orders

1. Overview and Definitions

a. [§200.30] Legal and Physical Custody

In California, custody is of two types: legal and physical. See Fam C §§3002–3007. "Legal" custody refers to the right and responsibility to make decisions related to the health, education, and welfare of the child. Fam C §§3003, 3006. "Physical" custody refers to the time periods during which a child resides with and is under the supervision of a parent or other party. Fam C §§3004, 3007.

Either or both types of custody may be granted solely to one parent or jointly to both parents. Fam C §§3003–3007.

The type of custody (legal or physical) and the means of holding it (jointly or solely) can have an impact on future decisions the court is called upon to make, such as whether a parent is allowed to relocate or change the residence of the minor child, and where the child attends school.

b. [§200.31] Sole Custody

Sole legal custody means that one parent has the right and responsibility to make the decisions relating to the health, education, and welfare of the child. Fam C §3006.

Sole physical custody means that the child resides with and is under the supervision of one parent, subject to visitation with the other parent as ordered by the court. Fam C §3007.

Even if one party has sole legal or physical custody, the noncustodial parent cannot be denied access to records and information regarding the child, including medical, dental, and school records, because the parent is not the custodial parent. Fam C §3025.

c. [§200.32] Joint Custody

Joint legal custody means both parents share the right and responsibility to make decisions related to the health, education, and welfare of the minor child. Fam C §3003.

Joint physical custody means that each parent has significant periods of physical custody, and it must be shared in a way that assures the child of frequent and continuing contact with both parents. Fam C §3004.

2. [§200.33] Presumption and Special Rules Applicable to Joint Custody Orders

Presumption. There is a presumption affecting the burden of proof that joint custody is in the best interest of the minor child when the parents have agreed to joint custody or when they agree in open court at a hearing on custody. Fam C §3080. The court, however, in applying this presumption, must still give consideration to the factors that determine the best interest of the child as described in Fam C §3011.

If the parents do not agree to a joint custody order, the court may make such an order upon the request of either parent. Fam C §3081. Again, the court must consider and apply the factors that determine the best interest of the child as described in Fam C §3011.

Special rules. When the court grants or denies a parent's request for nt custody in the absence of an agreement between both parents, it ust, if requested by one of the parties, state the reasons for granting or

denying the request. A broad statement that the joint custody order is or is not in the best interest of the child is insufficient as a statement of the reasons for the court's action. Fam C §3082.

When it makes a joint legal custody order, the court must specify the circumstances under which the consent of both parents is required in order to exercise legal control of the minor and the consequences of the failure to obtain mutual consent before acting. In all other circumstances, either parent acting alone may exercise legal control. A joint legal custody order also is not to be construed to permit an action that is inconsistent with the physical custody order unless the court expressly authorizes the action. Fam C §3083.

Joint legal custody may be awarded without awarding joint physical custody. Fam C §3085. In such cases, the parents, unless otherwise specified by the court under Fam C §3083, each have rights to make decisions regarding child care, religion, extracurricular activities, school enrollment, and the like.

An award of joint physical custody does not necessarily mean that the parties have an equal or approximately equal share of time. However, it does mean that both parties have significant periods of physical custody. The court must specify the times of physical control for each party and the rights of each party during such times in sufficient detail to enable a parent deprived of such control to implement laws for relief of child snatching and kidnapping. Fam C §3084.

The court may specify one parent as primary caretaker and one home as primary home for the purposes of determining eligibility for public assistance even when making an order for joint legal and joint physical custody. Fam C §3086.

Although Fam C §§3080 and 3081 appear to preclude the court from ordering joint custody on its own motion in the absence of an agreement by the parties or request of one party, the court may modify or terminate a joint custody order on its own motion. Fam C §3087.

In counties that have a conciliation court, the court may refer the parties to the conciliation court for assistance in formulating a plan to implement a joint custody order or resolving disputes arising during the implementation of a joint custody order. Fam C §3089. In addition, the court may require the parties to submit a plan for implementation of the custody order. Fam C §3040(a)(1).

D. Guidelines for Custody Determinations

1. [§200.34] Best Interest of Child

The broad legal standard that governs a court's decisions in matters of custody and visitation is the best interest of the child. Fam C §3011. The standard is "an elusive guideline that belies rigid definition." Its

purpose is to maximize a child's opportunity to develop into a stable, well-adjusted adult. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1263, 284 CR 18. The "best interest" standard is a relative one. The question is not whether a particular set of circumstances is in the best interest of the child, but whether a particular set of circumstances in relation to an alternative set of circumstances is in the best interest of the child. 232 CA3d at 1264.

The court must consider the following factors in determining the child's best interest (Fam C §3011(a)–(d)):

- The child's health, safety, and welfare. See §200.35.
- The nature and amount of the child's contact with both parents. See §200.36.
- History of drug or alcohol abuse. See §§200.37–200.39.
- History of physical abuse. See §§200.40–200.46.
- Any other factors the court deems relevant.

The court must weigh these factors and determine a child's best interest solely from the child's standpoint. The court should not consider the feelings and desires of the contesting parents except as they affect the child's best interest. 232 CA3d at 1264.

☛ JUDICIAL TIP: In contentious custody disputes, some judges remind the parties that the hearing is not a contest between them, but an effort to arrive at a coparenting agreement that is in the child's best interest. The process itself can create conflict and result in parties emphasizing negatives, which the court should discourage.

a. [§200.35] Child's Health, Safety, and Welfare

The court must take into account the child's health, safety, and welfare when making a determination of the best interest of the child. Fam C §3011(a). In addition, the Legislature has declared that it is the state's public policy that the health, safety, and welfare of the child must be the court's primary concern in determining the best interest of the child when making custody or visitation orders. Fam C §3020(a). Consistent with this policy is the legislative finding that child abuse or domestic violence in a household where a child resides is detrimental to the child. Fam C §3020(a).

b. [§200.36] Contact With Parents

In determining the child's best interest, the court must take into account the nature and amount of contact with both parents, except as provided in Fam C §3046 (absence or relocation from residence; see

§200.46). Fam C §3011(c). This is an adjunct to the "frequent and continuing contact" policy under Fam C §3020(b). See §200.47.

c. [§200.37] History of Drug or Alcohol Abuse

In determining the child's best interest, the court must also consider either parent's habitual illegal use of controlled substances or continual abuse of alcohol. Fam C §3011(d). Before considering allegations of a parent's drug or alcohol abuse, the court may require independent corroboration. Fam C §3011(d).

If the court makes an order for sole or joint custody to a parent against whom allegations of drug or alcohol abuse have been made, the court must state its reasons in writing or on the record (Fam C §3011(e)(1)) unless the custody award is made under the parties' written or on-the-record stipulation (Fam C §3011(e)(2)). Any order made in these circumstances must be specific as to time, day, place, and manner of transfer of the child as provided in Fam C §6323(c).

(1) [§200.38] Corroborative Evidence of Drug or Alcohol Abuse

Before considering allegations of drug or alcohol abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by (Fam C §3011(d)):

- Law enforcement agencies.
- Courts.
- Probation departments.
- Social welfare agencies.
- Medical facilities.
- Rehabilitation facilities.
- Other public agencies or nonprofit organizations providing drug and alcohol abuse services.

(2) [§200.39] Drug Testing

If a court determines, based on a preponderance of the evidence, that there is the habitual, frequent, or continual use of controlled substances or the habitual or continual abuse of alcohol by a parent or legal custodian, it may order that parent or legal custodian to undergo testing for illegal use of controlled substances and alcohol use. Fam C §3041.5(a). The evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of controlled substances. Fam C §3041.5(a)

The court must order the least intrusive method of testing for the use of controlled substances or alcohol. If a parent or legal custodian tests positive for controlled substance or alcohol use, he or she may request a hearing to challenge the test result. Fam C §3041.5(a). A positive test result may not, by itself, constitute grounds for an adverse custody decision. Rather, it must be weighed with all relevant factors in determining the best interest of the child. Fam C §3041.5(a).

Test results are confidential and must be maintained as a sealed record. The results may be released only to the court, the parties and their counsel, the Judicial Council (for study purposes), and any person to whom the court grants access by written authorization with prior notice to the parties. Fam C §3041.5(a).

The test results are to be used exclusively to help the court determine the best interest of the child under Fam C §3011 and the content of a custody or visitation order, and may not be used for any other purpose in a criminal, civil, or administrative proceeding. Fam C §3041.5(a).

☛ JUDICIAL TIP: Allegations of drug or alcohol abuse are easily made and difficult to disprove. Drug testing of one party (or of both parties if the charges are mutual) is a quick and convenient way to obtain some independent (and/or mutual) verification of a party's probable abuse of drugs or alcohol. Frequently, the accused party or parties will be willing to take a drug test voluntarily in order to eliminate that issue from consideration by the court and to allay the fears of the charging party.

d. [§200.40] History of Physical Abuse

The court must consider any history of abuse by one parent or any other person seeking custody against

- Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary (Fam C §3011(b)(1));
- The other parent (Fam C §3011(b)(2)); or
- A parent, current spouse or cohabitant, or person with whom he or she has a dating or engagement relationship (Fam C §3011(b)(3)).

If the court makes an order for sole or joint custody to a parent against whom allegations of abuse have been made, the court must state its reasons in writing or on the record (Fam C §3011(e)(1)) unless the custody award is made under the parties' written or on-the-record stipulation (Fam C §3011(e)(2)). Any order made in these circumstances must be specific as to time, day, place, and manner of transfer of the child as provided in am C §6323(c).

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(1) [§200.41] Definition of Abuse

Abuse against a child described in Fam C §3011(b)(1) is defined as nonaccidental infliction of physical injury, sexual abuse, neglect, willful cruelty, or unlawful corporal punishment. See Pen C §11165.6. Abuse against any other person described in Fam C §3011(b)(2) or (b)(3) is defined as intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or engaging in any behavior that has been or could be enjoined under Fam C §6320. See Fam C §6203.

(2) [§200.42] Corroborative Evidence of Physical Abuse

Before considering allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by (Fam C §3011(b)(3)):

- Law enforcement agencies.
- Child protective services or other social welfare agencies.
- Courts.
- Medical facilities.
- Other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence.

(3) [§200.43] Family Code §3044 Presumption Against Awarding Custody to Domestic Violence Perpetrator

If the court finds that a party seeking custody of a child has perpetrated an act of domestic violence against the other party seeking custody, or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that granting sole or joint legal or physical custody to the perpetrator is detrimental to the best interest of the child under Fam C §3011. Fam C §3044(a). Note that this presumption is distinct from the mandatory consideration of physical abuse as a factor in determining a child's best interest under Fam C §3011(b) (see §§200.40–200.42) and applies to a narrower category of cases than Fam C §3011.

Under Fam C §3044(c), a person has "perpetrated domestic violence" when he or she is found by a court to have:

- Intentionally or recklessly caused or attempted to cause bodily injury or sexual assault; or
- Placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another; or

- Engaged in behavior that includes, but is not limited to, the following: threatening, harassing, striking, destroying personal property, or disturbing the peace of another for which a court may issue an ex parte order to protect the other parent seeking custody, the child, or the child's siblings under Fam C §6320.

When a party in a custody or restraining order proceeding alleges that the other party has perpetrated domestic violence under the terms of Fam C §3044, the court must advise the parties of Fam C §3044 and provide them a copy of the code before any custody mediation in the case. Fam C §3044(f).

(4) [§200.44] Finding Under Fam C §3044

The finding required under Fam C §3044(a) (perpetration of domestic violence within previous five years) is satisfied by, but not limited to (Fam C §3044(d)):

- Evidence that a party seeking custody has been convicted within the previous five years of any crime against the other party that comes within the definition of domestic violence contained in Fam C §6211 and of abuse contained in Fam C §6203, including, but not limited to, Pen C §§243(e) (domestic battery), 261 (rape), 262 (spousal rape), 273.5 (inflicting corporal injury), 422 (criminal threats), and 646.9 (stalking).
- A finding under Fam C §3044(a) by any court, whether or not that court hears or has heard the custody proceedings, based on conduct occurring within the previous five years.

The court may not base its finding that a party has perpetrated domestic violence solely on the conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff. It must consider all relevant and admissible evidence submitted by the parties. Fam C §3044(e).

(5) [§200.45] Rebutting Fam C §3044 Presumption

The presumption in Fam C §3044(a) may be rebutted only by a preponderance of the evidence, and the court must consider all the following factors in determining whether the presumption has been overcome (Fam C §3044(b)):

- Whether the perpetrator has demonstrated that giving sole or joint legal or physical custody to him or her is in the child's best interest. In determining the child's best interest, the preference for frequent and continuing contact with both parents, as set forth in Fam C §3020(b), or with the noncustodial parent, as set forth in

Fam C §3040(a)(1), may not be used to rebut the presumption in whole or in part.

- Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria in Pen C §1203.097(c).
- Whether the perpetrator has successfully completed a drug or alcohol abuse counseling program if the court determines that such a program is appropriate.
- Whether the perpetrator has completed a parenting class if the court determines that such a class is appropriate.
- Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
- Whether the perpetrator is restrained by a protective or restraining order, and whether he or she has complied with its terms and conditions.
- Whether the perpetrator has committed any further acts of domestic violence.

(6) [§200.46] Child Sexual Abuse Allegations

If allegations of child sexual abuse are made during a child custody proceeding and the court has concerns regarding the child's safety, the court may take any reasonable, temporary steps as the court, in its discretion, deems appropriate under the circumstances to protect the child's safety until an investigation can be completed. Fam C §3027(a). The court may request the local child welfare services agency to conduct an investigation of the allegations and report its findings to the court. Fam C §3027(b).

No parent shall be placed on supervised visitation, be denied custody of or visitation with his or her child, or have his or her custody or visitation rights limited, solely because the parent (1) lawfully reported suspected sexual abuse of the child; (2) otherwise acted lawfully, based on a reasonable belief, to determine if his or her child was the victim of sexual abuse; or (3) sought treatment for the child from a licensed mental health professional for suspected sexual abuse. Fam C §3027.5(a). But the court may order supervised visitation or limit a parent's custody or visitation if the court finds substantial evidence that the parent, with the intent to interfere with the other parent's lawful contact with the child, knowingly made a false report of child sexual abuse during a child custody proceeding or at any other time. Any limitation of custody or visitation may be imposed only after the court has determined that the limitation is necessary to protect the health, safety, and welfare of the child, and the

court has considered the state's policy of ensuring that children have frequent and continuing contact with both parents as stated in Fam C §3020(b).

Sanctions for false accusation. If the court determines, based on the investigation or other evidence, that a witness, party, or a party's attorney knowingly made a false accusation of child abuse during a child custody proceeding, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorneys' fees incurred in recovering the sanctions, against the person making the accusation. Fam C §3027.1(a).

On motion by any person requesting sanctions, the court must issue its order to show cause why the requested sanctions should not be imposed. The order to show cause must be served on the person against whom the sanctions are sought at least 15 days before the hearing date. Fam C §3027.1(b).

Reconsideration of custody order. The court must grant a motion by a parent for reconsideration of an existing child custody order if the motion is based on the fact that the other parent was convicted of a crime in connection with falsely accusing the moving parent of child abuse. Fam C §3022.5.

2. [§200.47] "Frequent and Continuing Contact" With Both Parents

In addition to the public policy that the health, safety, and welfare of a child must be the primary concern in determining the best interest of the child, the Legislature has also declared that it is a public policy to ensure that children have "frequent and continuing contact" with both parents after their separation or dissolution of marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy unless contact would not be in the best interest of the child. Fam C §3020(b).

If the two policies conflict, the court's order must ensure the health, safety, and welfare of the child, and the safety of all family members. Fam C §3020(c).

When ordering sole custody, the court must consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, consistent with Fam C §§3011 and 3020. Fam C §3040(a)(1).

☛ JUDICIAL TIP: In contentious custody disputes, the court should remind the parties that one consideration in determining custody is which parent is most likely to encourage "frequent and continuing" contact with the other parent. This may encourage

each party to offer more custody time with the other parent and enhance the likelihood of a peaceful settlement.

3. [§200.48] Statutory Preferences

Family Code §3040 sets forth the following order of preference for awarding custody according to the best interest of the child as described in Fam C §§3011 and 3020:

(1) To both parents jointly or to either parent. Fam C §3040(a)(1). The court must consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. The court may not prefer a parent as custodian because of the parent's sex. Fam C §3040(a)(1).

(2) To the person or persons in whose home the child has been living in a "wholesome and stable environment." Fam C §3040(a)(2).

(3) To any person or persons the court deems suitable and able to provide "adequate and proper" care and guidance for the child. Fam C §3040(a)(3).

Family Code §3040 does not establish a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but instead gives the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child. Fam C §3040(b).

In granting custody under Fam C §3040(a)(2) and (3), the court must consider and give appropriate weight to a nomination of the guardian of the person of the child by a parent under Prob C §§1500 et seq. Fam C §3043. For a discussion of requirements and considerations for awarding custody to a nonparent, see §§200.59–200.60.

4. [§200.49] Child's Need for Bonding, Stability, and Continuity

Crucial to a best-interest determination is the importance of stability and continuity in the child's life, and the harm that may result from disruption of established patterns of care and emotional bonds. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1264, 284 CR 18. When making a custody determination, the court must make an assessment of the emotional bonds between a parent and child, and consider how to best provide continuity of attention, nurturing, and care of the child. The assessment requires an inquiry into the heart of the parent-child relationship, that is, the ethical, emotional, and intellectual guidance that the parent gives to the child throughout his or her formative years. *Adoption of Matthew B., supra.* Therefore, the court must consider the length of time that the child has been in the continuous physical custody of

a parent who has custody at the time of the custody hearing. When a child has lived with one parent for a significant period, the need for continuity and stability will often dictate that the maintenance of the current arrangement is in the child's best interest. *Burchard v Garay* (1986) 42 C3d 531, 538, 229 CR 800.

☛ JUDICIAL TIP: A parent with a temporary or ex parte custody order may attempt to delay a full custody hearing for as long as possible in order to obtain a de facto custody determination based on continuity and stability. If a court suspects such conduct, it should consider ordering a comprehensive review as soon as possible.

5. Preference of Child

a. [§200.50] In General

The court must consider and give "due weight" to the wishes of the child in granting or modifying a custody order if the child is of sufficient age and capacity to reason in order to form an "intelligent preference" regarding custody. Fam C §3042(a). Age alone is not the determinative factor. Rather, the court should look to the child's degree of maturity, sincerity, and ability to reason. Thus, the preference of children as young as ten may be considered and given some weight if they appear mature and capable of reason (*Marriage of Rosson* (1986) 178 CA3d 1094, 1103, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38), while older children's preferences may be disregarded if those preferences are not supported by well-thought-out reasons (*Marriage of Mehlmauer* (1976) 60 CA3d 104, 110–111, 131 CR 325). Most cases that have said the court did not abuse its discretion in refusing to hear evidence of the child's preference have involved children under the age of 14. *Coil v Coil* (1962) 211 CA2d 411, 27 CR 378 (12-year-old child); *Marriage of Slayton* (2001) 86 CA4th 653, 103 CR2d 545 (five-year-old child). On the other hand, the court is free to hear evidence of preference for children who are not yet teenagers. See *Marriage of Rosson, supra.* In either event, the court is not bound to follow the preferences of the child, no matter the age of the child. See *Marriage of Mehlmauer, supra,* and *Coil v Coil, supra.* The court may or may not consider the evidence, and once considered, it must only give it "due weight." See Fam C §3042(a).

b. [§200.51] Obtaining Evidence of Child's Preference

Once the court decides to consider evidence of a child's preference, it has very broad discretion to determine how to obtain that evidence.

The court may preclude the calling of the child as a witness when it is in the child's best interest and may use alternative means to obtain

information of the child's preference. Fam C §3042(b). Alternative means can take many forms. The court may ask its child custody mediator to interview the child and report to the court. See, *e.g., Marriage of Slayton* (2001) 86 CA4th 653, 658, 103 CR2d 545 and *Marriage of Rosson* (1986) 178 CA3d 1094, 1103–1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38. If there is no objection, the court can also allow the parents to testify to the child's preference. The court may appoint an attorney for the child or may order a child custody evaluation and obtain information regarding the child's preference from the attorney or evaluator. The court may also interview the child privately, on or off the record.

It is rare that a court would allow a child of any age to testify in a custody dispute between his or her parents. But if the court does decide to allow testimony, it must follow the requirements of Evid C §765(b) and control the child's examination so as to protect the child's best interest. Fam C §3042(b). Under Evid C §765(b), the court, when taking testimony from a witness under the age of 14, must take special care to protect the witness from repetitious questioning and from undue harassment or embarrassment. The court must also ensure that questions are stated in a form appropriate to the age of the witness and may forbid questions not likely to be understood by a person of the witness's age.

6. [§200.52] Party's Absence or Relocation

The court must not consider a party's absence or relocation from the family residence as a factor in determining custody or visitation in either of the following circumstances when (Fam C §3046(a)):

- The absence or relocation is of short duration, and the court makes a finding that during the absence or relocation
  - — the party has demonstrated an interest in maintaining custody or visitation,
  - — the party maintains or makes reasonable efforts to maintain regular contact with the child, and
  - — the party's behavior does not demonstrate an intent to abandon the child.
- The party is absent or relocates because of an act or acts of actual or threatened domestic or family violence by the other party.

In determining whether a party has satisfied either of the above requirements, the court may consider attempts by one party to interfere with the other party's regular contact with the child. Fam C §3046(b).

The court must not consider absence or relocation from the family home as a factor in determining custody in the following situations when (Fam C §3046(c)):

- A protective or restraining order has issued against the party, which excludes the party from the other party's or child's dwelling or otherwise enjoins assault or harassment of the other parent or child, including orders issued under the Domestic Violence Prevention Act (Fam C §§6300 et seq), civil harassment or workplace violence orders issued under CCP §527.6 or §527.8, or criminal protective orders issued under Pen C §136.2.
- A party abandons a child as provided in Fam C §7822.

As to a party's intent to move to another location as a factor in an award of custody or modification of custody, see §§200.118–200.122.

7. [§200.53] Separation of Siblings

The court may enter a custody order that has the effect of separating siblings only when compelling circumstances dictate that the separation is in the children's best interest. *Marriage of Williams* (2001) 88 CA4th 808, 813–815, 105 CR2d 923 (move-away case). No published state opinion has yet to sanction such a custody award.

8. [§200.54] Emergency or Protective Orders in Effect

Any time a court considers issues of custody or visitation, it is encouraged to make a reasonable effort to ascertain whether any emergency protective orders, protective orders, or other restraining orders concerning the parties or child are in effect. Fam C §3031(a). The court is further encouraged not to make a custody or visitation order that is inconsistent with such orders unless it makes both of the following findings (Fam C §3031(a)):

- The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order; and
- The custody or visitation order is in the best interest of the child.

If the court grants custody or visitation in a case in which domestic violence is alleged, and an emergency protective order, protective order, or other restraining order has been issued, the court must consider whether the child's best interest, based on all circumstances of the case, requires that any custody or visitation arrangement be supervised by a third party specified by the court or whether custody or visitation be suspended or denied. Fam C §§3031(c), 3100(b). In reviewing all circumstances of the case, the court must specifically include consideration of the nature of the acts from which the parent was enjoined and the period of time that has elapsed since the injunctive order was issued. Fam C §3100(b).

If domestic violence is alleged and there is an emergency protective order, protective order, or other restraining order, and the court decides

that it is in the child's best interest to allow custody or visitation with the perpetrator, the order must specify the time, day, place, and manner of transfer of the minor child for custody or visitation with the goal of limiting the child's exposure to potential domestic violence or conflict and to ensure the safety of all family members. Fam C §§3031(b), 3100(c).

In addition, if a party is staying at a domestic violence shelter or other confidential location, the court's order must be designed to prevent the disclosure of the location of the shelter or other confidential location. Fam C §§3031(b), 3100(d).

9. Restriction of Custody to Violent Offenders

a. [§200.55] Registered Sex Offenders; Child Abusers

The court may not award custody or unsupervised visitation to any person who is required to be registered as a sex offender under Pen C §290 when the victim was a minor, or has been convicted of Pen C §273a (child abuse), §273d (corporal punishment of child), or §647.6 (child molestation), unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. Fam C §3030(a).

b. [§200.56] Person Convicted of Rape

Without exception, a person convicted of rape under Pen C §261 may not be awarded custody or visitation of a child conceived as a result of the rape. Fam C §3030(b).

c. [§200.57] Person Convicted of Murder

No person convicted of first-degree murder (Pen C §189) of the other parent of the child may be awarded custody or unsupervised visitation, unless the court finds that there is no risk to the child's health, safety, and welfare, and states its reasons in writing or on the record. Fam C §3030(c).

In making its finding of no risk to the child, the court may consider, among other factors, the following (Fam C §3030(c)(1)–(3)):

- The wishes of the child, if the child is of sufficient age and capacity to reason so as to form an intelligent preference.
- Credible evidence that the convicted parent was the victim of abuse (as defined in Fam C §6203), committed by a deceased parent. The evidence may include, but is not limited to, written reports by:
  - — Law enforcement agencies.
  - — Child protective services or other social welfare agencies.
  - — Courts.
  - — Medical facilities.

— Other public agencies or private nonprofit organizations providing services to victims of domestic abuse.

- Testimony of an expert witness, qualified under Evid C §1107, that the convicted parent suffers from the effects of battered women's syndrome.

Unless and until a custody or visitation order is issued to the convicted parent, the child may not be permitted to visit or remain in the custody of the convicted parent without the consent of the child's custodian or legal guardian. Fam C §3030(c).

10. [§200.58] Improper Factors

The court may not consider the following factors in determining the suitability of a parent to have custody absent a showing of harm to the child in the particular circumstances:

- *Sex of parent.* Fam C §3040(a)(1).
- *Race.* Custody determinations may not be made on the basis of race. *Palmore v Sidoti* (1984) 466 US 429, 104 S Ct 1879, 80 L Ed 2d 421 (trial court improperly removed custody from the mother after mother entered into interracial marriage because it feared possible harm to child because of racial prejudice).
- *Physical disability.* It is impermissible for the trial court simply to rely on a physical disability as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child. *Marriage of Carney* (1979) 24 C3d 725, 736, 157 CR 383.
- *Religion.* Religion is not a factor that should enter into a custody decision unless there is a showing of harm to the child. *Marriage of Murga* (1980) 103 CA3d 498, 505, 163 CR 79 (noncustodial parent or a joint custodial parent may not be prohibited from discussing religion with his or her child or involving the child in the parent's religious activities absent showing that such involvement would be harmful to the child); see also *Marriage of Urband* (1977) 68 CA3d 796, 798, 137 CR 433 (court rejecting contention that mother's religious belief as a member of the Jehovah's Witnesses rendered her unfit to have custody because, among other things, of her belief against blood transfusions and her refusal to permit children to participate in sports, absent compelling evidence that her religious beliefs and observances were harmful to the children).
- *Parents' comparative income.* Comparative income or economic advantage is not a permissible basis for awarding custody. There is no basis for assuming a correlation between wealth and good

parenting or wealth and happiness. If the custodial parent's income is insufficient to provide proper care for the child, the court should award child support rather than remove custody from the parent. *Burchard v Garay* (1986) 42 C3d 531, 539–540, 229 CR 800 (trial court's reasoning that care given by a mother who, because of her work and study must entrust the child to daycare centers and babysitters, is per se inferior to care given by a father who also works, but who can leave the child with a stepmother at home, was not suitable basis for custody order). See also *Marriage of Loyd* (2003) 106 CA4th 754, 759–760, 131 CR2d 80 (trial court erred, in response to modification motion, by changing physical custody from father to mother based on fact that the father would have to place children in daycare).

- *Sexual preference.* A parent's sexual preference alone is not determinative in awarding custody or restricting visitation. Rather, insofar as the court finds it relevant, it is but one factor to be considered, in determining custody. *Nadler v Superior Court* (1967) 255 CA2d 523, 63 CR 352; *Marriage of Birdsall* (1988) 197 CA3d 1024, 243 CR 287 (court order prohibiting homosexual father from exercising overnight visitation with son in presence of other persons known to be homosexual vacated for lack of affirmative showing of detriment of child).
- *Parent's sexual relations.* A parent's sexual conduct is not relevant in awarding custody unless there is compelling evidence that such conduct has significant bearing on the welfare of the child. *Marriage of Wellman* (1980) 104 CA3d 992, 994, 999, 164 CR 148 (abuse of discretion to restrain a custodial parent from having overnight visitors of the opposite sex unless the welfare of the minor children is thereby directly placed in jeopardy); *Marriage of Slayton* (2001) 86 CA4th 653, 661–662, 103 CR2d 545 (mother did not show that father's adultery would adversely affect the child's home environment).

E. Awarding Custody to Nonparent Over Parent's Objection

1. [§200.59] Detriment Test

Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court must make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. Fam C §3041(a). Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, must not appear in the pleadings. Fam C §3041(a). The court may, in its

discretion, exclude the public from the hearing on this issue. Fam C §3041(a).

In a case decided under former CC §4600 (predecessor statute of Fam C §3041), the court held that there must be a clear showing that an award to the nonparent is "essential to avert harm to the child." *In re B.G.* (1974) 11 C3d 679, 698–699, 114 CR2d 444.

As used in Fam C §3041, "detriment to the child" includes the harm caused by removing a child from a stable placement with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. Fam C §3041(c). A finding of detriment does not require any finding of unfitness of the parents. Fam C §3041(c).

2. [§200.60] Standard of Proof

Subject to Fam C §3041(d), a finding that parental custody would be detrimental to the child must be supported by clear and convincing evidence. Fam C §3041(b).

Notwithstanding Fam C §3041(b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in Fam C §3041(c) (one who has taken on the role of a parent), this finding will constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary. Fam C §3041(d).

F. Visitation Rights

1. [§200.61] Reasonable Visitation by Parent

The court must grant a parent reasonable visitation rights unless it is shown that such visitation would be detrimental to the best interest of the child. Fam C §3100(a).

In determining what is "reasonable visitation," the court has broad discretion and may craft a variety of orders. All visitation orders must be made to protect the child's best interest and must take into account the broad policy of ensuring the child's health, safety, and welfare, and to the extent consistent therewith, the policy preference for frequent and continuing contact with both parents. See §§200.35, 200.47.

As it does when making a decision on whether to award any form of joint custody, the court must also consider a variety of factors that may create presumptions or be indicators of detriment to the child's best interest. Such factors include domestic violence, alcohol abuse, illegal drug use, and parenting skills. Such considerations of detriment must also

be balanced against the policy of ensuring frequent and continuing contact with both parents.

☛ JUDICIAL TIP: Many judges avoid the terms "visitation" and "noncustodial parent" in favor of "parenting or coparenting schedules," "custody plans," or "custody time-shares," even to the extent of crossing out the word "visitation" on Judicial Council forms. In emotionally charged custody disputes, "visitation" and "noncustodial parent" may appear to diminish the childrearing contributions of the parent with less than an equal time share.

2. [§200.62] Visitation by Incarcerated Parent

An incarcerated parent has a right to reasonable visitation with his or her child. Therefore, visitation between children and their incarcerated parents cannot be denied without a detriment finding. *Hoversten v Superior Court* (1999) 74 CA4th 636, 640–641, 88 CR2d 197. The *Hoversten* case outlines some alternative means by which an incarcerated parent can secure meaningful access to the court to represent his or her visitation rights (74 CA4th at 642–644):

- Deferring the action until the parent's release.
- Appointing counsel for the parent.
- Ordering the transfer of parent to court.
- Using depositions instead of personal appearances.
- Propounding written discovery.
- Conducting hearing by telephone or closed circuit television
- Using services of the family court mediator (Note: Mediation mandatory in contested cases (see §200.74)).

Bar to visitation. An incarcerated parent cannot be granted visitation rights with a child conceived by the parent's act of rape for which the parent was convicted. See §200.56.

3. [§200.63] Visitation by Nonparents

In the discretion of the court, reasonable visitation rights may be granted to nonparents having an interest in the welfare of the child. Fam C §3100(a). Provision is also made for reasonable visitation by stepparents, grandparents, and specified relatives of a deceased parent if the court determines that such visitation is in the best interest of the child. Fam C §§3101–3104. Nonparent visitation may be ordered based on stipulation of the parents. *Marriage of Ross & Kelley* (2003) 114 CA4th 130, 140, 7 CR3d 287.

The United States Supreme Court in *Troxel v Granville* (2000) 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49, has set limits on nonparent visitation orders. Several California cases interpreting the state's nonparent visitation laws since *Troxel* have found the laws to be unconstitutional as applied. These cases and the application of the *Troxel* standards are discussed in more detail below.

a. [§200.64] *Troxel* Limits on Visitation

Troxel centered on a Washington State statute, similar to Fam C §§3101–3104, permitting "any person" to petition for visitation and allowing the court to grant visitation "whenever visitation may serve the best interest of the child." Over objections of the child's mother, the state trial court granted the paternal grandparents extensive visitation of their deceased son's children. The Supreme Court held that, in the context of grandparent visitation, the statute violated the due process rights of a fit parent and her family to make decisions concerning the care, custody and control of their family. *Troxel v Granville* (2000) 530 US 57, 64–65, 73, 120 S Ct 2054, 147 L Ed 2d 49. Several California cases since *Troxel* have found court-ordered visitation for parents of a deceased mother or father under Fam C §3102 unconstitutional as applied, although none have held that the statute is unconstitutional on its face. See *Zasueta v Zasueta* (2002) 102 CA4th 1242, 1254–1255, 126 CR2d 245; *Punsly v Ho* (2001) 87 CA4th 1099, 1110, 105 CR2d 139; and *Kyle O. v Donald R.* (2000) 85 CA4th 848, 851, 102 CR2d 476. The court in *Herbst v Swan* (2002) 102 CA4th 813, 125 CR2d 836, found that the application of Fam C §3102 was unconstitutional as applied to visitation request by adult sibling of deceased parent. According to *Troxel,* the court may not rely solely on the best-interest-of-the-child standard when considering nonparent visitation if there is a fit custodial parent. *Troxel v Granville, supra,* 530 US at 67. Such reliance infringes on the fundamental rights of a parent simply because a judge believes a "better" decision could be made. To the extent Fam C §3102 is applied to requests by nonparent relatives for visitation using only a best-interest-of-the-child standard, it is unconstitutional. See *Troxel v Granville, supra; Zasueta v Zasueta, supra; Punsly v Ho, supra;* and *Kyle O. v Donald R., supra.*

In determining whether to grant visitation to nonparents, the above cases require the court to:

- Determine if the parent is fit. If so, there is a presumption that the fit parent acts in the best interest of the child.
- Give special weight to a fit parent's determination of what is in the child's best interest.
- Not shift the burden to the fit parent to show that the visits are not in the child's best interest.

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- Consider whether the fit parent has voluntarily allowed visits, no matter how limited.

In other words, the court may *not* presume that nonparent visits are in the child's best interest and it *must* presume that a fit custodial parent's decision is in the child's best interest. Thus, any order for nonparent visits must be narrowly tailored to advance the interest of the nonparent relatives and the child in maintaining a natural relationship and cannot unduly infringe on the parent's fundamental right to make decisions for a child.

b. [§200.65] Stepparent Visitation

The court may grant visitation to a stepparent if it is determined to be in the child's best interest, provided such visitation rights do not conflict with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3101. This statute does not authorize the court to grant joint custody to the stepparent. See *Marriage of Lewis & Goetz* (1988) 203 CA3d 514, 517, 250 CR 30. Visitation under Fam C §3101 is not available to a natural parent who has relinquished the child to adoption. *Marckwardt v Superior Court* (1984) 150 CA3d 471, 478–479, 198 CR 41. But see Fam C §3100(a) (visitation may be granted to "any other person" having an interest in the child's welfare).

If a birth parent objects to visitation of a stepparent, the rational of *Troxel* and the California cases interpreting it apply (see §200.64), and the court should in most cases respect the wishes of the birth parent. *Marriage of James W.* (2003) 114 CA4th 68, 72–75, 7 CR3d 461 (court ordered stepparent visitation without applying presumption favoring birth parent's decision that visitation was not in child's best interest; Fam C §3101 found unconstitutional as applied).

A stepparent visitation order may interfere with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3101(c).

If a protective order under Fam C §6218 (part of the Domestic Violence Prevention Act) has been directed to a stepparent, the court must consider whether the best interest of the child requires that any visitation by the stepparent be denied. Fam C §3101(b).

c. [§200.66] Visitation by Relatives of Deceased Parent

If a minor's parent is deceased, the deceased parent's children, siblings, parents, and grandparents may be granted reasonable visitation with the child if the court finds that such visitation would be in the child's best interest. Fam C §3102(a).

Before granting such visitation to persons other than a grandparent, the court must consider the amount of personal contact between the party seeking visitation and the child before the application for the visitation

order. Fam C §3102(b). If the living parent objects to visitation of relatives of the deceased parent, the *Troxel* analysis, discussed in §200.64, is applicable, and the court should in most cases respect the wishes of the legal parent. See *Kyle O. v Donald R.* (2000) 85 CA4th 848, 863, 102 CA4th 476 (fit parent presumed to act in child's best interests, and his or her decision regarding the amount of visitation and preference for less structured and more spontaneous manner of visitation is given deference).

The family of a deceased parent may not seek visitation if a person other than a stepparent or grandparent has adopted the child. Fam C §3102(c).

Family Code §3102 has withstood constitutional review even though it may allow for nonparent visitation over the objection of two fit parents. *Fenn v Sherriff* (2003) 109 CA4th 1466, 1 CR3d 185 (*Troxel* requirement that parental decisions be given special weight does not mean they are insulated from any court intervention).

d. [§200.67] Grandparent Visitation

Family Code §§3103 and 3104 authorize the court to award visitation to grandparents when both parents are still living. Note that under Fam C §3103, grandparents may seek visitation in any custody proceeding between the parents, while under Fam C §3104, grandparents may bring an independent petition to seek visitation.

Under Fam C §3103, grandparent visitation claims are incidental to a custody proceeding between the parents that is properly before the court. Thus, the grandparents must be joined in the action between the parents. In contrast, Fam C §3104 was adopted to fill the gap in cases where neither parent had died (Fam C §3102) and there was no custody proceeding between the parents pending (Fam C §3103). See *White v Jacobs* (1988) 198 CA3d 122, 124–125, 243 CR 597.

Unlike the broad general statute for nonparent visitation when a parent is deceased (Fam C §3102), California's specific grandparent visitation statutes when both parents are still living do not appear to run up against the constitutional limitations established in *Troxel*. See *Lopez v Martinez* (2000) 85 CA4th 279, 287–288, 102 CR2d 71. Both Fam C §§3103 and 3104 contain rebuttable presumptions affecting the burden of proof that visitation with a grandparent is not in the child's best interest if a parent opposes such visits. Fam C §§3103(d), 3104(e), (f). One California court, in a case in which review has been granted, has interpreted the constitutional limitations of *Troxel* as requiring grandparents who seek visitation under Fam C §3104 (and presumably also under Fam C §3103) to show by clear and convincing evidence that the child will suffer harm if visitation is not ordered. *Marriage of Harris* (review granted Jan. 3, 2002, S101836; superseded opinion at 92 CA4th 499, 112 CR2d 127).

(1) [§200.68] Family Code §3103

When there is an action under Fam C §3021, a grandparent who is permitted to join the action and seek visitation is subject to several statutory requirements other than the rebuttable presumption affecting the burden of proof discussed in §200.67:

- The grandparent must give notice, by certified mail, return receipt requested, postage prepaid, to each parent of the child, to any stepparents, and to any person who has physical custody of the child, or to the attorneys of record of the parties to the proceedings. Fam C §3103(c).
- No visitation rights may be ordered if they would conflict with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3103(e).
- If a protective order under Fam C §6218 (part of the Domestic Violence Prevention Act) has been directed to the grandparent seeking visitation, the court must consider whether the best interest of the child requires that visitation by the grandparent be denied. Fam C §3103(b).
- Court-ordered grandparent visitation may not be used as a basis for or against a change of residence of the child, although it is one of the factors the court must consider in ordering a change of residence. Fam C §3103(f).
- The court may exercise its discretion to allocate the percentage of grandparent visitation between the parents for purposes of calculating guideline child support (Fam C §3103(g)(1)) and may order a parent or grandparent to pay to the other an amount for transportation (Fam C §3103(g)(2)(A)) or basic expenses related to the visitation (Fam C §3103(g)(2)(B)). "Basic expenses" includes medical expenses, daycare costs, and other necessities. Fam C §3103(g)(2)(B). Note that only costs essential to facilitate the grandparent's visitation may be assessed against the grandparent. *Marriage of Perry* (1998) 61 CA4th 295, 312–314, 71 CR2d 499 (trial court erred when it assessed costs of counseling for the child when there was insufficient evidence to show that counseling was necessary to facilitate or redress problems arising during grandmother's visitation).

(2) [§200.69] Family Code §3104

When there is no pending custody action between living parents, grandparents may file an independent petition for a visitation order under Fam C §3104. In this case, the petitioner-grandparent must give notice by

personal service under CCP §415.10 to each parent, any stepparent, and any person who has physical custody of the child. Fam C §3104(c).

Before ordering visitation, the court must do both of the following (Fam C §3104(a)):

- Find that there is a preexisting relationship between the grandparent and grandchild that has "engendered a bond such that visitation is in the best interest of the child."
- Balance the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority. (Note: The court must balance the interest of the child against parental rights, not the interest of the grandparents.)

These two requirements, together with the rebuttable presumptions affecting the burden of proof that such visits are not in the child's best interest in the face of parental opposition (Fam C §3104(e), (f)), appear to satisfy the constitutional requirements of *Troxel*. See *Lopez v Martinez* (2000) 85 CA4th 279, 287–288, 102 CR2d 71 (noting that unlike the state statute in *Troxel*, the California statute only allows a petition to be filed when some disruption to the nuclear family has already occurred, and makes clear a court must accord extreme deference to parental authority while considering the best interest of the child); Fam C §§3104(e) (presumption when the natural or adoptive parents agree that there should be no visitation), 3104(f) (presumption when a parent who has been awarded sole legal and physical custody in another proceeding or a parent with whom the child resides if there is no custody order objects to the grandparent visitation).

If a grandparent seeks visitation when the natural or adoptive parents are still married, one or more of the following circumstances must exist in order for the grandparent to file his or her visitation petition (Fam C §3104(b)):

- The parents, at the time of filing, are living separately and apart on a permanent or indefinite basis.
- One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse.
- One of the parents joins in the petition with the grandparents.
- The child is not residing with either parent.

If at any time a change of circumstances occurs so that none of these circumstances exist, the parent or parents may move the court to terminate the grandparent visitation, and the court must grant the termination. Fam C §3104(b).

The statutory requirements under Fam C §3104 parallel those of a grandparent visitation request under Fam C §3103:

- The court must consider whether the best interest of the child requires that the request for grandparent visitation be denied if a protective order as defined in Fam C §6218 (Domestic Violence Prevention Act) has been directed to the grandparent. Fam C §3104(d).
- No visitation rights may be ordered if they would conflict with a right of custody or visitation of a birth parent who is not a party to the proceeding. Fam C §3104(g).
- Court-ordered grandparent visitation may not be used as a basis for or against a change of residence for the child, although it is one factor the court must consider when ordering a change of residence. Fam C §3104(h).
- The court may allocate the percentage of grandparent visitation between the parents for purposes of calculating guideline child support (Fam C §3104(i)(1)) and may order a parent or grandparent to pay to the other an amount for transportation (Fam C §3104(i)(2)(A)) or basic expenses related to the visitation (Fam C §3104(i)(2)(B)).

G. [§200.70] Supervised Visits and Exchanges

When there is concern for the safety or welfare of a child during visits with a noncustodial parent, the court may order that the visits be supervised by a relative, friend, or a professional. See Fam C §§3200 et seq.

1. [§200.71] Court's Determination of Need and Manner of Visitation

The court must make the final decision about the need for and the manner, terms, and conditions of any supervision. Cal Standards J Admin §26.2(c). This decision depends on several factors, including the degree of risk in each case, the financial situation of the parties, and the local resources available for supervision. Cal Standards J Admin §26.2(c). The court may consider recommendations regarding the need for supervision and the level and manner of supervision from the parties, their attorneys, attorney for the child, Family Court Services staff, custody evaluators, therapists, and providers of supervision. Cal Standards J Admin §26.2(c).

☛ JUDICIAL TIP: The process of obtaining appropriate supervised visitation is one of the most difficult problems for a court. In many situations, an order for supervised visitation is tantamount to an order for no visitation. If the parties cannot afford a

professional or therapeutic visitation supervisor or cannot agree on a nonprofessional supervisor, then there will be no visitation. Judges should determine what resources are available in their county for no cost or low cost supervisory services to ensure contact between the child and the noncustodial parent.

2. [§200.72] Types of Supervised Visit Providers and Qualifications

The Judicial Council has established rules and standards for the qualifications, training, and experience of supervised visit providers. See Cal Standards J Admin §26.2. The goal of the Judicial Council standards, and the court's goal in ordering supervised visitation or exchanges should be to ensure the safety and welfare of the child, adults, and providers of supervision services. Fam C §3200; Cal Standards J Admin §26.2(a). Once safety is ensured, the best interest of the child is paramount, especially in deciding the manner of supervision. Fam C §3200; Cal Standards J Admin §26.2(a).

The rules apply to all providers of supervised visitation, whether the supervisor is paid or volunteers, whether he or she is a relative, friend, paid independent contractor, therapist, or works through a supervised visitation agency or center, unless otherwise specified. Cal Standards J Admin §26.2(a). The rules do not apply to supervised visitation exchanges, although they may be helpful in such cases. Cal Standards J Admin §26.2(b).

The rules describe three kinds of supervised visitation providers: nonprofessional, professional, and therapeutic. Cal Standards J Admin §26.2(c).

Nonprofessional provider. A nonprofessional provider is anyone not paid for providing the supervised visitation services. Cal Standards J Admin §26.2(c)(1). Unless otherwise ordered by the court or stipulated by the parties, a nonprofessional provider should (Cal Standards J Admin §26.2(c)(1)):

- Be 21 years of age or older;
- Have no driving under the influence conviction within the last five years;
- Not have been on probation or parole for the last 10 years;
- Have no record of a conviction for child molestation, child abuse, or other crimes against a person;
- Have proof of automobile insurance if transporting the child;
- Have no civil, criminal, or juvenile restraining orders within the last 10 years;

- Have no current or past court orders in which the provider is the person being supervised;
- Not be financially dependent on the person being supervised;
- Have no conflict of interest (see §200.69); and
- Agree to adhere to and enforce the court order regarding supervised visitation.

Professional provider. A professional provider is any person paid for providing supervised visitation services or an independent contractor, employee, volunteer, or intern operating independently or through a supervised visitation center or agency. Cal Standards J Admin §26.2(c)(2). A professional provider should meet the same conditions required of a nonprofessional provider, except for the condition that he or she not be financially dependent on the person being supervised. In addition, a professional provider must speak the language of the child and the party being supervised or provide a neutral interpreter over the age of 18. Cal Standards J Admin §26.2(c)(2).

Therapeutic provider. A therapeutic provider is a licensed mental health professional paid for providing supervised visitation services including, but not limited to, a psychiatrist, psychologist, clinical social worker, marriage and family counselor, or intern working under direct supervision. Cal Standards J Admin §26.2(c)(3).

3. [§200.73] Responsibilities of Supervised Visit Providers

All providers must make every reasonable effort to ensure the safety of all parties during the visitation. Cal Standards J Admin §26.2(d). Professional and therapeutic providers must: (1) receive certain types of training; (2) institute certain safety and security procedures: (3) maintain detailed records of visitation: (4) enforce the terms and conditions of visitation; and, if necessary, (5) suspend or terminate visitation. Cal Standards J Admin §26.2(d)–(n).

All providers, including nonprofessional providers, are bound by conflict-of-interest rules that prohibit: (1) financial dependence on the person being supervised; (2) being an employee of the person being supervised; (3) being in an intimate relationship with the person being supervised; and (4) being an employee of the court that orders the supervision unless specified in the employment contract. Cal Standards J Admin §26.2(f). In addition, all providers must refuse to discuss the merits of the case or take sides with any of the parties (Cal Standards J Admin §26.2(f)) and must advise the parties that there is no confidential privilege during supervision and that they are bound to report any suspected child abuse to appropriate authorities (Cal Standards J Admin §26.2(k)).

H. Mediation of Custody or Visitation Disputes

1. [§200.74] General Provisions

All contested child custody or visitation issues must be referred to mediation (Fam C §3170(a)), and each superior court must provide mediation services and make a mediator available (Fam C §3160).

The mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or any other person designated by the court, but must meet the minimum qualifications required of a counselor of conciliation under Fam C §1815. Fam C §3164.

If the county's board of supervisors has adopted a resolution so authorizing, parties may request mediation of a dispute related to an existing order for custody, visitation, or both, without filing a new order to show cause, and such mediations must be set within 60 days after filing the request. Fam C §3173.

Domestic violence cases that involve disputed custody or visitation issues are also referred to mediation but are handled by Family Court Services under a separate written protocol approved by the Judicial Council, and may include additional services beyond mediation, such as referral to community resources, videotapes, parent education programs, or informational booklets. Fam C §3170(b).

If a stepparent or grandparent has applied for visitation rights as authorized by law, the matter must also be referred to mediation. Fam C §3171(a). In such cases, a natural or adoptive parent who is not a party to the proceeding is not required to participate in mediation, but his or her failure to do so is a waiver of the right to require a hearing on the matter or to object to a settlement reached by the other parties. Fam C §3171(b).

Mediation services are available even if paternity is at issue in the case before the court. Fam C §3172.

2. [§200.75] Purposes of Mediation

The purposes of a family court mediation proceeding are to (Fam C §§3161, 3181(b)):

- Reduce the acrimony that may exist between the parties;
- Develop an agreement ensuring that the child will have close and continuing contact with both parents that is in the best interest of the child, consistent with Fam C §§3011 and 3020; and
- Bring about a settlement of visitation rights that is in the best interest of the child.

3. Types of Mediation

a. [§200.76] Recommending

Currently each county determines by local rule whether it will have recommending or nonrecommending mediation. "Recommending" or "nonconfidential" mediation permits the mediator to submit recommendations to the court as to custody of or visitation with the child. Fam C §3183(a). Such recommendations are authorized only if written local rules permit it. Fam C §3183(a); *Marriage of Rosson* (1986) 178 CA3d 1094, 1104–1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10. A mediator may not make a recommendation to the court without first allowing the parties to examine the mediator at a hearing on the issues covered by the recommendation. *McLaughlin v Superior Court* (1983) 140 CA3d 473, 483, 189 CR 479.

A mediator's recommendations are evidence to be weighed with all other relevant evidence in the case, and it is the court, not the mediator, who is charged with deciding the custody or visitation issues. *Marriage of Rosson, supra*, 178 CA3d at 1104.

b. [§200.77] Nonrecommending

"Nonrecommending" or "confidential" mediation occurs in counties that do not have local rules authorizing a mediator to make recommendations as to custody or visitation. In such counties, the mediator simply reports to the court whether the parties have reached an agreement and, if there is an agreement, the mediator reports the terms of the agreement. Fam C §§3185–3186.

Some counties have adopted local rules that, subject to limited exceptions, follow a policy of strict confidentiality in custody and visitation mediation proceedings, precluding the mediator from testifying or otherwise sharing his or her report or recommendations with the court. See San Francisco Uniform rule 11.22 and Los Angeles rule 14.3 (both counties provide exceptions when the child is perceived as being at risk of harm and when there are threats of death or bodily harm directed to any party).

☛ JUDICIAL TIP: Before beginning any family law assignment, the judge should be thoroughly familiar with the local court rules regarding confidentiality of mediation. If the judge is in a non-recommending county, he or she should understand what customary steps are taken to make appropriate orders pending a full hearing on the merits.

c. [§200.78] Confidential Mediation Pilot Program in Selected Counties

Any county selected by the Judicial Counsel may voluntarily adopt a confidential mediation program that provides for all the following (Fam C §3188(a)):

- The mediator may not make a recommendation as to custody or visitation to anyone other than the disputing parties, except as otherwise provided in Fam C §3188.
- If total or partial agreement is reached in mediation, the mediator may report this fact to the court. When there is a partial agreement, if both parties consent in writing, the mediator may report to the court a description of the issues still in dispute, without specific reference to either party.
- In making a recommendation to the court that counsel be appointed to represent the minor child as described in Fam C §3184 (see §200.84), the mediator may not inform the court of the reasons why it would be in the minor child's best interest to have counsel appointed.
- If the parties have not reached agreement as a result of the initial mediation, Fam C §3188 does not prohibit the court from requiring subsequent mediation that may result in a recommendation as to custody or visitation with the child if the subsequent mediation is conducted by a different mediator with no prior involvement with the case or knowledge of any communication, as defined in Evid C §1040, with respect to the initial mediation. The court, however, must inform the parties that the mediator will make a recommendation to the court regarding custody or visitation in the event that the parties cannot reach agreement on these issues.
- If an initial screening or intake process indicates that the case involves serious safety risks to the child, such as domestic violence, sexual abuse, or serious substance abuse, the court may provide an initial emergency assessment service that includes a recommendation to the court concerning temporary custody or visitation orders in order to expeditiously address those safety issues.

Family Code §3188 shall become operative when funds in the annual Budget Act are appropriated sufficient to implement it. Fam C §3188(b). Once implemented, the provisions of Fam C §3188 will apply only in four or more counties selected by the Judicial Council that currently allow a mediator to make custody recommendations to the court and have more than 1000 family law case filings per year. Fam C §3188(c). The Judicial Council may also make Fam C §3188 applicable to additional counties

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that have fewer than 1000 family case law filings per year. Fam C §3188(c).

4. [§200.79] Mediator's Role

The mediator must assess the needs and interests of the child involved in the dispute and use his or her best efforts to effect a settlement of the custody or visitation dispute that is in the best interest of the child as provided in Fam C §3011 (best interest factors). Fam C §3180. See also Fam C §3161(b) (agreement must be consistent with Fam C §3020 policies).

5. Mediation Procedures

a. [§200.80] Notice of Mediation and Hearing

Mediation is to be held before or concurrent with the setting of the matter for hearing. Fam C §3175. Notice of the mediation is to be given by certified mail, return receipt requested, postage prepaid, to the parties' last known address, to each party and each party's counsel of record, and, when a stepparent or grandparent is seeking visitation, to the stepparent or grandparent, each parent, and each parent's counsel of record. Fam C §3176(a), (b). Notice of mediation under Fam C §3188 (see §200.75) must state that all communications involving the mediator must be kept confidential between the mediator and the disputing parties. Fam C §3176(c).

b. [§200.81] Confidentiality of Proceedings

Mediation proceedings are private and confidential, and all communications from the parties to the mediator made during the proceedings, whether verbal or written, are considered official information within the meaning of Evid C §1040 (official information privilege). Fam C §3177. Because the privilege under Evid C §1040 belongs to court personnel and not the parties, Fam C §3177 does not give either party a right to raise confidentiality of the mediation process to bar a mediator's testimony if a local court rule permits it. Court personnel receiving the confidential information must not make any disclosure to the public. But the official information privilege does not preclude disclosure of information if received in court under a local court rule. *Marriage of Rosson* (1986) 178 CA3d 1094, 1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38.

c. [§200.82] Limits of Agreement

The subject of mediation is limited as follows (Fam C §3178):

- When involving a contested issue of custody or visitation, the agreement must be limited to resolution of issues relating to parenting plans (how parents and other appropriate parties will share and divide their decision-making and caretaking responsibilities to protect the health, safety, welfare, and best interest of the child (Cal Rules of Ct 5.210(c)(2)), custody, visitation, or a combination of these issues.
- When a stepparent or grandparent seeks visitation, the agreement must be limited to resolution of the issues related to that visitation.

d. [§200.83] Interview of Child

The mediator may interview the child when the mediator deems it necessary or appropriate. Fam C §3180(a); Cal Rules of Ct 5.210(e)(3).

e. [§200.84] Issuance of Restraining Orders

Except as provided in Fam C §3188 (see §200.78), and when consistent with local court rules, the mediator may recommend that restraining orders be issued, pending the determination of the controversy, to protect the well-being of the child. Fam C §3183(c).

f. [§200.85] Appointment of Counsel To Represent Child

Except as provided in Fam C §3188 (see §200.78), and when consistent with local court rules, the mediator may make a recommendation to the court that counsel be appointed, under Fam C §§3150–3153, to represent the child. Such recommendation must be accompanied by a statement of the reasons explaining why appointment of counsel would be in the child's best interest. Fam C §3184.

g. Special Procedures When History of Domestic Violence Between Parties

(1) [§200.86] Separate Meetings

When there has been a history of domestic violence between the parties or a Fam C §6218 protective order is in effect, the party alleging domestic violence in a written declaration under penalty of perjury or the party protected by the order may request that the mediator meet with the parties separately and at separate times. Fam C §3181(a).

(2) [§200.87] Presence of Support Person

When a Fam C §6218 protective order is in effect, a support person, as defined in Fam C §6303(a), must be permitted to accompany a party protected by the order during any mediation orientation or session, including separate mediation sessions. Fam C §6303(c). The presence of

the support person does not waive the confidentiality of the mediation. Fam C §6303(c).

h. [§200.88] Exclusion of Counsel or Support Person

The mediator has authority and discretion, when appropriate or necessary, to exclude counsel from the mediation proceedings. Fam C §3182(a); see *Marriage of Slayton* (2001) 86 CA4th 653, 659, 103 CR2d 545 (exclusion of counsel from mediation sessions did not deprive parties of right to counsel when mediator subject to full cross-examination at custody hearing).

The mediator may also exclude a domestic violence support person from the mediation proceeding if the support person participates in the session, acts as an advocate in the session, or disrupts the mediation process. Fam C §§3182(b), 6303(c).

6. [§200.89] Procedure When Agreement Is Reached

When the parties reach an agreement in mediation, the mediator must report that agreement to counsel for the parties on the day of mediation or as soon thereafter as practical, but before the agreement is reported to the court. Fam C §3186(a); see also Cal Rules of Ct 5.210(e)(8)(A).

No agreement reached at mediation may be confirmed or otherwise incorporated in an order unless each party, in person or through counsel, affirms and assents to the agreement in open court or through written stipulation. Fam C §3186(b). The only exception to this is that the court may confirm or otherwise incorporate a mediation agreement in an order if a party fails to appear at a noticed hearing on the issue involved in the agreement. Fam C §3186(c).

The court is not bound by a custody or visitation agreement reached in mediation and is free to modify such an agreement at any time consistent with and subject to the legislative dictates and public policies set forth in Fam C §§3020–3032, 3040–3048, 3080–3089, and 3100–3104. See Fam C §3179.

☛ JUDICIAL TIP: Often one party will state that he or she did not consent to the provisions to the agreement allegedly reached before the mediator. On inquiry, if the court determines the differences are minor, the court can modify the agreement to reflect the true determinations of the parties. However, if the dispute is significant, the court may refer the matter for another mediation with specific instructions to the mediator to resolve the point or points that the contesting party is alleging were not part of his or her agreement.

7. [§200.90] Procedure When Agreement Is Not Reached

When no agreement is reached at mediation or agreement is reached on only some of the issues, the mediator must give the parties a written or oral description of any subsequent court procedures for resolving outstanding issues, including instructions for obtaining temporary orders. Cal Rules of Ct 5.210(e)(8)(B).

In a nonrecommending county, the mediator must inform the court in writing that no agreement was reached on the specified issues, and the court may resubmit the matter to mediation or set the matter for hearing. Fam C §3185(a).

In a recommending county, the mediator may also add his or her recommendations to the court as to custody or visitation. Fam C §§3183, 3185(a). The mediator also may recommend that a custody investigation be conducted, under Fam C §§3110 et seq, or that other services be offered to help resolve the dispute before a hearing on the issue. Fam C §3183(b).

In all counties, if the case involves a request for visitation by a stepparent or grandparent, each natural or adoptive parent must be given an opportunity to appear and be heard on the issue. Fam C §3185(b).

8. [§200.91] Standards of Practice for Mediation

Family Code §3162 sets minimum standards for mediation practice and requires the Judicial Council to develop uniform standards of mediation practice for use throughout California (Fam C §3162(a)). The Judicial Council standards are found in Cal Rules of Ct 5.210 and include:

- Training, education, and experience requirements for mediators (Cal Rules of Ct 5.210(f));
- Specific procedures to be followed by mediators in the course of mediation and in communicating with the parties (Cal Rules of Ct 5.210 (d)–(e)); and
- Ethics for mediators (Cal Rules of Ct 5.210(g)).

Each court must provide mediation services that meet the above standards as well as additional standards set forth in Cal Rules of Ct 5.210(d). Each court must also develop local rules to respond to requests for a change in mediators or to general problems related to mediation. Fam C §3163.

I. [§200.92] Court-Ordered Counseling for Parents and Children

The court may require the parties involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs or services that provide appropriate counseling, including, but not

limited to, mental health or substance abuse services. Fam C §3190(a). The court may order counseling for no more than one year and must ascertain that the program ordered or chosen by the court has counseling available for the designated period of time. Fam C §3190(a).

The court must make the following three findings before it orders counseling (Fam C §3190(a), (d)):

- The dispute between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody of or visitation with the child, or between a party seeking custody or visitation and the child poses a substantial danger to the best interest of the child;
- The counseling is in the best interest of the child; and
- The financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations.

The court must set forth in its findings the reasons why it has found the above criteria are present. Fam C §3190(d).

In determining whether a custody dispute poses a substantial danger to the best interest of the child and thus requires counseling, the court must consider, in addition to any other relevant factors, any history of domestic violence, as defined in Fam C §6211, within the past five years between the parents or the parent and other party seeking visitation or custody with the child or between the parents or such other party and the child. Fam C §3190(b).

The court is barred from ordering the parties to return to court on completion of the counseling. Fam C §3190(e). However, any party may file a new order to show cause or motion after counseling is completed, and the court may again order counseling consistent with the above restrictions. Fam C §3190(e).

1. [§200.93] Goals of Counseling

Counseling must be specifically designed to (Fam C §3191):

- Facilitate communication between the parties regarding their minor child's best interest;
- Reduce conflict regarding custody or visitation; and
- Improve the quality of parenting skills of each parent.

2. [§200.94] Special Procedure When History of Abuse Between Parties

When there has been a history of abuse by either parent against the child or by one parent against the other parent and when a protective order

as defined in Fam C §6218 is in effect, the court may order the parties to participate in counseling separately and at separate times. Fam C §3192.

3. [§200.95] Cost of Counseling

The court may apportion the costs of the counseling as it deems appropriate if it makes a specific finding that the costs assigned to each party will not otherwise jeopardize the party's ability to meet other financial obligations. Fam C §3190(c). When separate counseling has been ordered under Fam C §3192, each party must bear his or her own costs, unless good cause is shown for a different apportionment (Fam C §3192). In such cases, the child's counseling is considered "additional child support" (Fam C §4062), and is to be apportioned accordingly. See Fam C §§4062–4063.

J. Custody Evaluation and Report

1. [§200.96] Appointment of Evaluator

In any contested custody or visitation proceeding, the court may appoint a child custody evaluator to conduct a child custody evaluation and prepare a confidential written report for the court's consideration when the court determines that an evaluation is in the child's best interests. Fam C §3111(a); A child custody evaluator may be a probation officer, a domestic relations investigator, or a court-appointed evaluator. Fam C §3110. Cal Rules of Ct 5.220(c)(1). If the parties can agree, the court will typically appoint an evaluator on whom they have agreed. See Cal Rules of Ct 5220(h)(10) (evaluator may not accept appointment except by court order or parties' stipulation).

Unlike mediation, a custody evaluation is not required in all cases. In some cases, however, it may be an abuse of discretion to deny a parent's request for an independent custody evaluation, at least when it appears the parties' self-serving representations might not present the "complete picture" necessary to ascertain the child's best interest. See *Marriage of McGinnis* (1992) 7 CA4th 473, 481, 9 CR2d 182, disapproved on other grounds in 13 C4th 25, 38 n10.

2. [§200.97] Required Qualifications of Evaluators

All evaluators, whether appointed by stipulation or without, must have completed domestic violence and child abuse training as outlined in Fam C §1816, and have complied with training, experience, and continuing education requirements of Cal Rules of Ct 5.225 and 5.230. Fam C §3110.5(a); Cal Rules of Ct 5.220(g). These requirements govern both court-connected and private child custody evaluators appointed under Fam C §3111; Evid C §730; or CCP §2032. Cal Rules of Ct 5.220(b).

3. [§200.98] Duties of Evaluator

The evaluator must conduct a "child custody evaluation," defined in Cal Rules of Ct 5.220(c) as an expert investigation and analysis of the health, safety, welfare, and best interest of the child, with regard to disputed custody and visitation issues. Fam C §3111(a).

The evaluator must prepare and file a report with the court clerk and serve the report on the parties or their attorneys and any counsel appointed for the child under Fam C §3150 at least 10 days before the custody hearing. Fam C §3111(a). Absent waiver, the court may not act on the evaluation report and recommendations unless the parties are given the opportunity to cross-examine the evaluator. *Fewel v Fewel* (1943) 23 C2d 431, 436, 144 P2d 592. See Fam C §3117(b). Each party's right to cross-examine the evaluator may only be waived after the party or his or her attorney has received the report. Fam C §3115.

Incident to the investigation and report, a custody evaluator may recommend that independent counsel be appointed for the child. See Fam C §3114; see also discussion of appointment of counsel in §200.60.

The report may be received in evidence on stipulation of all interested parties and is competent evidence as to all matters contained in the report. Fam C §3111(c).

4. [§200.99] Special Procedure When History of Domestic Violence Between Parties

A party alleging domestic violence in a written declaration under penalty of perjury or a party who is protected by a Fam C §6218 order may request that the child custody evaluator meet with the parties separately and at separate times. Fam C §3113.

5. [§200.100] Investigation of Sexual Abuse Allegations

Special rules concerning custody evaluations are triggered in cases involving child sexual abuse allegations. Fam C §3118. If, in any contested proceeding involving child custody or visitation rights, the court determines there is a serious allegation of child sexual abuse, the court must order an evaluation, assessment, or investigation under Fam C §3118. But if a child abuse allegation arises in any other circumstances in a custody or visitation proceeding, the court has the discretion to order an evaluation, investigation, or assessment. Fam C §3118(a). A "serious allegation of child sexual abuse" means an allegation based in whole or in part on statements made by the child to law enforcement, a child welfare services agency investigator, any person deemed a mandated reporter, or any other court-appointed personnel, or an allegation that is supported by substantial independent corroboration under Fam C §3011(b). Fam C §3118(a).

The provisions of Fam C §3118 do not apply to any emergency court-ordered partial investigation that is conducted for the purpose of helping the court determine what immediate temporary orders may be necessary to protect and meet the child's immediate needs, nor does it apply when the emergency is resolved and the court is considering permanent child custody or visitation orders. Fam C §3118(a)(1).

The provisions of Fam C §3118 do not prohibit a court from considering evidence relevant to determining the safety and protection needs of the child. Fam C §3118(a)(2).

On ordering a Fam C §3118 evaluation, investigation, or assessment, the court must consider (a) whether the child's best interest requires issuance of a temporary order requiring supervised visitation with the party against whom the allegations have been made, or (b) suspending or denying visitation outright. Fam C §3118(f).

6. [§200.101] Cost of Investigation

The court must inquire into the financial condition of the parent, guardian, or other person charged with the support of the minor. If the court finds that the parent, guardian, or other person charged with the support of the minor is able to pay all or a portion of the expenses of the investigation, report, and recommendation, the court may make an order for that person to repay the court an amount it deems proper. Fam C §3112.

K. Appointment of Counsel for the Child

1. [§200.102] Request for Appointment

A court may appoint counsel to represent children in family law cases when appropriate. Fam C §3150(a). In disputed custody or visitation proceedings, the court should consider the appointment of an attorney to represent the best interests of the child if requested to do so by either party, the attorney for either party, a mediator, a custody evaluator, a court-appointed guardian ad litem or special advocate, the child or any relative of the child, and also on its own motion. Cal Standards J Admin §20.5(a). If there are two or more children involved in the proceedings, the court should consider whether there may be such a conflict that one attorney cannot adequately represent each child. Cal Standards J Admin §20.5(d).

2. [§200.103] Factors for Court To Consider

In determining whether to appoint counsel the court should consider whether (Cal Standards J Admin §20.5(b)):

- The dispute is exceptionally intense or protracted.

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- Because of the dispute, the child is subjected to stress that might be alleviated by the intervention of counsel representing the child.
- An attorney representing the child would be likely to provide the court with significant information not otherwise readily available or likely to be presented.
- The dispute involves allegations that a parent, a stepparent, or other person with the parent's knowledge has physically or sexually abused the child.
- It appears that neither parent is capable of providing a stable and secure environment.
- The child is capable of verbally expressing his or her view.
- Attorneys are available for appointment who are sensitive to the needs of children and the issues raised in representing them.
- The best interest of the child appears to require special representation.

3. [§200.104] Duties of Appointed Counsel

The child's counsel's role is to gather facts that bear on the best interests of the child, and present those facts to the court, including the child's wishes when appropriate. Fam C §3151(a). The counsel's duties include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain facts relevant to the custody or visitation hearing. Fam C §3151(a).

4. [§200.105] Cost of Appointed Counsel

Appointed counsel is to receive reasonable attorneys' fees and costs, paid for by the parties and allocated as the court deems appropriate. Fam C §3153(a). "Parties" who may be liable for these fees include third parties joined on custody and visitation issues, but that responsibility is limited to the fees and costs incurred as a result of the third party's custody/visitation claims. *Marriage of Perry* (1998) 61 CA4th 295, 309, 71 CR2d 499. If the court determines the parties together are financially unable to pay all or a portion of the cost of counsel, the county is to pay that portion the parties are unable to afford. Fam C §3153(b).

L. [§200.106] Appointing Special Master

On the agreement of the parties, a referee or special master may be appointed to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of

decision, or to ascertain a fact necessary to enable the court to determine an action or proceeding. CCP §638(a), (b).

☛ JUDICIAL TIP: The appointment of a special master can be a useful and economical method for the parties to resolve a myriad of minor matters that might otherwise take them into court. It is particularly useful in those cases when the parties are frequently in court on disputes that do not involve custody, for example, the choice to enroll the child in baseball or soccer, the choice to take art or woodshop in school, or the determination that the exchange time should be 4:30 p.m. or 6:00 p.m. on Thursdays.

When the parties do not agree to have a special master hear a dispute, the court may still appoint one on the motion of any party, or on its own motion, but such reference must be limited to those specific fact determinations set forth in CCP §639, which include financial accountings, discovery disputes or questions, and factual questions related to existing controversies. Any such nonconsensual appointment may not include legal issues or matters pending at the time of the reference. *Ruisi v Thieriot* (1997) 53 CA4th 1197, 1209–1211, 62 CR2d 766; *Marriage of Lloyd* (1997) 55 CA4th 216, 221, 64 CR2d 37.

An order appointing a referee or special master under CCP §639 must be in writing and must include (for nondiscovery appointments) a statement of the reason the referee is being appointed, or (for discovery appointments) the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case; the subject matter(s) included in the reference; the name, address, and telephone number of the referee; the maximum hourly rate that the referee may charge, and if requested, the maximum number of hours; and findings concerning the parties' ability to pay for the referee's services. CCP §639(d). See also *Settlemire v Superior Court* (2003) 105 CA4th 666, 671–673, 129 CR2d 560 (reference must state specific facts to be resolved; assignment of commissioner to case "for a hearing and findings on any matter of fact upon which information is required by the court" constituted an improper delegation of judicial duties; the reference was imprecise and included several issues, namely, an injunction, custody and visitation, and disposition of property).

If the necessary findings concerning ability to pay are not made, a court may not appoint a referee at a cost to the parties. CCP §639(d)(6)(A). Finally, an order appointing a discovery referee must be forwarded to the presiding judge. CCP §639(e).

M. Child Abduction Prevention

1. [§200.107] Determining Risk of Abduction

In cases in which the court becomes aware of facts that may indicate that there is a risk of abduction of a child, the court must, either on its own motion or at the request of a party, determine whether measures are needed to prevent the abduction of the child by one parent. Fam C §3048(b)(1). To make that determination, the court must consider the risk of the child's abduction, obstacles to location, recovery, and return if the child is abducted, and potential harm to the child if he or she is abducted. To determine whether there is a risk of abduction, the court must consider whether a party (Fam C §3048(b)(1))

- Has previously taken, enticed away, kept, withheld, or concealed a child in violation of the right of custody or of visitation of a person, regardless of whether the party acted in compliance with Pen C §278.7 or whether a party has threatened to do any of the foregoing.
- Lacks strong ties to California.
- Has strong familial, emotional, or cultural ties to another state or country, including foreign citizenship. This factor must be considered only if evidence exists in support of another factor specified in Fam C §3048.
- Has no financial reason to stay in California, including whether the party is unemployed, is able to work anywhere, or is financially independent.
- Has engaged in planning activities that would facilitate the removal of a child from California, including quitting a job, selling his or her primary residence, terminating a lease, closing a bank account, liquidating other assets, hiding or destroying documents, applying for a passport, applying to obtain a birth certificate or school or medical records, or purchasing airplane or other travel tickets, with consideration given to whether a party is carrying out a safety plan to flee from domestic violence.
- Has a history of a lack of parental cooperation or child abuse, or there is substantial evidence that a party has perpetrated domestic violence.
- Has a criminal record.

Family Code §3048(b)(1) does not affect the applicability of Pen C §278.7 that immunizes persons with a right to custody from the crime of taking, enticing away, keeping, or concealing a child, when that person has a reasonable belief that the child will suffer immediate bodily injury or emotional harm if left with the other parent. Fam C §3048(d).

2. [§200.108] Preventive Measures

If the court makes a finding that there is a need for preventive measures after considering the factors in Fam C §3048(b)(1) (see §200.105), the court must consider taking one or more of the following actions to prevent abduction of the child (Fam C §3048(b)(2)):

- Ordering supervised visitation.
- Requiring a parent to post a bond in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to offset the cost of the child's recovery of the child if there is an abduction.
- Restricting the right of the custodial or noncustodial parent to remove the child from the county, California, or the United States.
- Restricting the right of the custodial parent to relocate with the child, unless the custodial parent provides advance notice to, and obtains the written agreement of, the noncustodial parent, or obtains the approval of the court, before relocating with the child.
- Requiring the surrender of passports and other travel documents.
- Prohibiting a parent from applying for a new or replacement passport for the child.
- Requiring a parent to notify a relevant foreign consulate or embassy of passport restrictions and to provide the court with proof of that notification.
- Requiring a party to register a California order in another state as a prerequisite to allowing a child to travel to that state for visits, or to obtain an order from another country containing terms identical to the custody and visitation order issued in the United States (recognizing that these orders may be modified or enforced under the laws of the other country), as a prerequisite to allowing a child to travel to that country for visits.
- Obtaining assurances that a party will return from foreign visits by requiring the traveling parent to provide the court or the other parent or guardian with any of the following:
  - The travel itinerary of the child.
  - Copies of round trip airline tickets.
  - A list of addresses and telephone numbers where the child can be reached at all times.
  - An open airline ticket for the left-behind parent in case the child is not returned.

- Including provisions in the custody order to facilitate use of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400 et seq) and the Hague Convention on the Civil Aspects of International Child Abduction (implemented under 42 USC §§11601 et seq) such as identifying California as the home state of the child or otherwise defining the basis for the California court's exercise of jurisdiction under the UCCJEA, identifying the United States as the country of habitual residence of the child under the Hague Convention, defining custody rights under the Hague Convention, obtaining the express agreement of the parents that the United States is the country of habitual residence of the child, or that California or the United States is the most appropriate forum for addressing custody and visitation orders.
- Authorizing the assistance of law enforcement.

If the court imposes any or all of the conditions listed in Fam C §3048(b)(2), those conditions must be specifically noted on the minute order of the court proceedings. Fam C §3048(b)(3). If the court determines that there is a risk of abduction that is sufficient to warrant the application of one or more of the preventive measures authorized by Fam C §3048, the court must inform the parties of the telephone number and address of the Child Abduction Unit in the office of the district attorney in the county where the custody or visitation order is being entered. Fam C §3048(b)(4).

N. Missing Party or Child

1. [§200.109] Missing Party in Possession of Child

The district attorney of each county is authorized to find a missing party in possession of a child under California's statutory scheme. Fam C §§3130–3135.

If the whereabouts of a party in possession of a child are not known or if there is reason to believe a party ordered to appear personally with a child will not appear, and a petition to determine custody has been filed in a court of competent jurisdiction or a temporary order has issued, the district attorney must take all necessary actions to find the party and the child and procure compliance with the order to appear. Fam C §3130. The district attorney may even file the petition to determine custody. Fam C §3130.

In performing these functions, the district attorney does not represent any party to the custody proceeding but acts on behalf of the court. Fam C §3132.

with the National Crime Information Center Missing Person System to ascertain whether the child has been reported missing or is the victim of an abduction. Fam C §3140(a). The law enforcement agency must report the results of the check to the court. Fam C §3140(a).

The purpose of this requirement is to assure the court that the party petitioning for custody or modification of custody has not abducted the child in violation of an existing court order.

The missing person check is not required if the custody matter before the court also involves a petition for dissolution of marriage or the adjudication of paternity rights or duties and there is proof of personal service of the petition upon the absent parent. Fam C §3140(b).

In addition, the court may waive the requirement of Fam C §3140 for good cause. Fam C §3140(c).

O. [§200.114] Modification of Custody

Family Code §3022 provides that the court may, during the pendency of a proceeding, or at any time thereafter, make such orders for the custody of a child during minority as may be necessary or proper. See also Fam C §§3087–3088. Parents cannot, by stipulation, divest the court of jurisdiction to modify custody and visitation orders. *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026, 230 CR 203.

For a discussion of the jurisdictional requirements for modification of custody orders, see §§200.23–200.26. For discussion of modification of custody based on the custodial parent's intent to relocate with the child to a new residence, see §§200.126–200.130.

1. [§200.115] Showing of Changed Circumstances

To justify a change in custody other than in a temporary custody arrangement (see §200.117), there must generally be a persuasive showing of changed circumstances affecting the child. The change of circumstances must be substantial; a child will not be removed from the prior custody of one parent and given to the other unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change. *Marriage of Burgess* (1996) 13 C4th 25, 37–38, 51 CR2d 444; *Marriage of Carney* (1979) 24 C3d 725, 730, 157 CR 383. The rule serves the goals of judicial economy and protecting stable custody arrangements. *Burchard v Garay* (1986) 42 C3d 531, 535, 229 CR 800; *Marriage of Carney, supra*, 24 C3d at 730–731. The burden of showing a sufficient change in circumstances is on the party seeking the change in custody. 24 C3d at 731; *Speelman v Superior Court* (1983) 152 CA3d 124, 128, 199 CR 784. See *Marriage of Dunn* (2002) 103 CA4th 345, 347–349, 126 CR2d 636 (party entitled to

formal court hearing on contested facts relating to the alleged change of circumstances).

Although an alteration of legal custody may not necessarily be as disruptive as an alteration of physical custody, the rule requiring a change of circumstances applies even when a party is only seeking to change legal custody. *Marriage of McLoren* (1988) 202 CA3d 108, 111, 247 CR 897. However, changes in the parenting schedule, affecting the timeshare with each parent, do not normally require such a showing. See §200.117.

2. [§200.116] Requirement of a Prior Determination

The changed circumstance rule applies only when there has been a final judicial determination of custody whether established by the parties' agreement, default judgment, or litigation. *Montenegro v Diaz* (2001) 26 C4th 249, 256, 109 CR2d 575; *Burchard v Garay* (1986) 42 C3d 531, 535, 229 CR 800.

A custody order stipulated by the parties is a final judicial determination of custody for purposes of the changed circumstance rule only if there is a clear, affirmative indication that the parties intended that result. *Montenegro v Diaz, supra*, 26 C4th at 256–259 (orders including detailed visitation schedules and not providing for further hearings did not constitute final judicial custody determinations, when they did not clearly state they were final judgments on custody, and the parties' conduct following entry of orders strongly suggested they did not intend orders to be final); *Marriage of Rose & Richardson* (2002) 102 CA4th 941, 950–953, 126 CR2d 45 (judgment reciting that the parties would meet with a therapist or counselor to resolve custody and visitation issues and, if unsuccessful, would make appointment with Conciliation Court before filing a request for hearing, was not intended to be final custody determination).

3. [§200.117] When Changed Circumstance Rule Does Not Apply

The changed circumstance rule does not apply to a temporary custody arrangement that has been implemented under a pendente lite stipulation, order to show cause, or pretrial order. In such cases, the court may award custody to the noncustodial parent if it determines that it is in the child's best interest regardless of whether circumstances have changed. *Marriage of Lewin* (1986) 186 CA3d 1482, 1485–1489, 231 CR 433.

The rule also does not apply to a modification of the time-share schedule under a joint physical custody order. Modification of a coparenting residential arrangement, without modifying the order for joint physical custody, is not considered a change of custody. *Marriage of Birnbaum* (1989) 211 CA3d 1508, 1513, 260 CR 210.

P. Change of Child's Residence ("Move-Aways")

1. [§200.118] Custodial Parent's Presumptive Right To Move

A parent who has physical custody of a child has a presumptive right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child. Fam C §7501(a); *Marriage of Burgess* (1996) 13 C4th 25, 32, 51 CR2d 444 (court may not interfere with that decision unless the move is detrimental to the child). It is reversible error not to consider the custodial parent's presumptive right to change the child's residence. *Marriage of Biallas* (1998) 65 CA4th 755, 762, 76 CR2d 717.

2. [§200.119] Reasons for Move

The reason for a move need only be "sound" and in "good faith," that is, not intended simply to frustrate the other parent's contact with the children. *Marriage of Burgess* (1996) 13 C4th 25, 36, 51 CR2d 444; *Marriage of Bryant* (2001) 91 CA4th 789, 793, 110 CR2d 791. As long as good faith reasons for the move exist, the trial court may not question the custodial parent's judgment in requesting relocation. *Marriage of Edlund & Hales* (1998) 66 CA4th 1454, 1470–1471, 78 CR2d 671.

3. [§200.120] Burden of Proof

Whether a move-away dispute arises in an initial custody determination or after a judicial custody order is in effect, the custodial parent bears no burden of establishing that the move is "necessary." *Marriage of Burgess* (1996) 13 C4th 25, 28–29, 51 CR2d 444. Nor must the custodial parent prove that the move is in the child's best interest. *Marriage of Biallas* (1998) 65 CA4th 755, 762, 76 CR2d 717. Rather, in move-away cases, the burden rests with the noncustodial parent opposing the move to make a showing that (a) the custodial parent has a bad faith reason for the move, *or* (b) the proposed move would cause detriment to the child. *Marriage of LaMusga* (2004) 32 C4th 1072, 1078, 12 CR3d 356; *Marriage of Burgess*, *supra*, 18 C4th at 37–38. See *Marriage of Campos* (2003) 108 CA4th 839, 842–844, 134 CR2d 300 (court erred in denying noncustodial parent evidentiary hearing solely on the basis that the custodial parent lacked any bad faith reason for the move; noncustodial parent has right to present evidence that custodial parent's good faith move would be detrimental to child).

4. [§200.121] Order Conditioning Relocation on Prior Consent

If a stipulated custody order requires the custodial parent to obtain the other parent's consent or a court order before relocating with a child,

the custodial parent must show his or her decision to move was made in good faith, and the opposing noncustodial parent retains the burden to show that relocating the child would cause detriment to the child. *Marriage of Abrams* (2003) 105 CA4th 979, 986–990, 130 CR2d 16 (move-away provision was merely a means of ensuring that the noncustodial parent had notice of, and opportunity to contest, any impending move).

5. [§200.122] "Frequent and Continuing Contact With Both Parents"

The statutory policy encouraging "frequent and continuing contact with both parents" (Fam C §3020(b)) cannot be interpreted as precluding an award of sole custody of a child to a parent who intends to move, or requiring the moving parent to demonstrate that relocation is "necessary." *Marriage of Burgess* (1996) 13 C4th 25, 34, 51 CR2d 444. Although the court may consider the effect of the move on a child's relationship with the nonmoving parent, it is not restricted to any particular formula for contact or visitation. 13 C4th at 36; *Ruisi v Thieriot* (1997) 53 CA4th 1197, 1204, 62 CR2d 766.

6. Effect of Move on Initial Custody Determinations

a. [§200.123] Best Interest Standard

A move-away contest between parents that arises at an initial custody adjudication is governed by the same standards and analysis applicable to any custody dispute. The court has broad discretion, and is to look to all the circumstances bearing on the best interest of the child. This includes the mandatory factors set forth in Fam C §3011, including the health, safety, and welfare of the child; any history of abuse by one parent against the child or against the other parent; and the nature and amount of contact with both parents. *Marriage of Burgess* (1996) 13 C4th 25, 31–32, 51 CR2d 444.

b. [§200.124] Prejudice to Child

As part of the initial custody order, the court must take into account the custodial parent's presumptive right to change the child's residence as long as the removal would not be prejudicial to the child's rights or welfare. *Marriage of Burgess* (1996) 13 C4th 25, 32, 51 CR2d 444. Although the child's interest in the continuity of placement with the primary caretaker will most often prevail, the court may consider the effects of a move-away as it bears on the nature of the child's contact with both parents (including *de facto* custody arrangements) and the child's age, community ties, and health and education needs. When appropriate

under Fam C §3042(a), the court must also take into account the child's preferences. 13 C4th at 39.

c. [§200.125] Continuity and Stability in Custody

The longer a de facto custody arrangement has been in place, the more likely it is that the court will not disrupt it, even if it means the children will be moving away from the other parent. The "paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements." *Marriage of Burgess* (1996) 13 C4th 25, 32–33, 51 CR2d 444. When one parent has maintained custody for a significant period, the other parent seeking custody will bear the burden of persuading the court that a change of the primary caretaker arrangement is in the child's best interests. 13 C4th at 37. Therefore, the court must look to the substance of the custodial relationship for the great majority of the time just before the move away to determine which parent bears the burden of proof. *Marriage of Whealon* (1997) 53 CA4th 132, 143, 61 CR2d 559.

7. Move as Ground for Modification of Existing Custody Order

a. [§200.126] In General

Many aspects of move-away disputes during an initial custody determination are applicable when a parent who has sole physical custody under an existing judicial custody order seeks to relocate with the children. The relocating parent has a presumptive right to move, and bears no burden of demonstrating that the move is necessary. See §§200.118, 200.120. See *Marriage of Burgess* (1996) 13 C4th 25, 37 n8, 51 CR2d 444 (considerations and interests in both types of custody matters closely interrelated).

b. [§200.127] Changed Circumstances Rule

As in any other proceeding to modify an existing order, the court must preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. *Marriage of LaMusga* (2004) 32 C4th 1072, 1088–1089, 12 CR3d 356. If there is an existing custody order and the custodial parent requests to relocate with the child, the noncustodial parent bears the initial burden of showing that the proposed move would cause detriment to the child, requiring the court to reevaluate the existing order. 32 C4th at 1078. The likely impact of the proposed move on the noncustodial parent's relationship with the child is a relevant factor in

determining whether the move would cause detriment to the child. *Marriage of LaMusga, supra*. Bad faith conduct by the custodial parent, such as attempting to relocate simply to frustrate the noncustodial parent's contact with the child, may also be relevant in determining custody arrangement. *Marriage of Burgess* (1996) 13 C4th 25, 36, 51 CR2d 444.

c. [§200.128] Court's Discretion in Light of Child's Best Interest

If the noncustodial parent makes an initial showing of detriment, the court must determine whether a change of custody is in the child's best interest. *Marriage of LaMusga* (2004) 32 C4th 1072, 1078, 12 CR3d 356.

The court should consider the following factors when deciding whether to modify a custody order in response to a custodial parent's request to change the child's residence (32 C4th at 1101):

- The child's interest in stability and continuity in the custodial arrangement;
- The distance of the move;
- The age of the child;
- The child's relationship with both parents;
- The relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interest of the child above their individual interests;
- The child's wishes if the child is mature enough for such an inquiry to be appropriate;
- The reasons for the proposed move; and
- The extent to which the parents currently are sharing custody.

d. [§200.129] Joint Physical Custody

A different analysis applies when parents share joint physical custody under an existing custody order and one parent wishes to relocate with the children. An order for joint custody may be modified or terminated on the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order. Fam C §3087. In these circumstances, the trial court must determine de novo what arrangement for primary custody is in the child's best interest. *Marriage of Burgess* (1996) 13 C4th 25, 40 n12, 51 CR2d 444. This different analysis arises out of the disruption of the status quo inherent in a move-away case when there is a genuine joint physical custody, because it is unavoidable that the existing custody arrangement

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including, in the case of meetings with the parties, the power to determine who attends such meetings.

9. The Special Master may use consultants and/or assistants as necessary to help the Special Master in the performance of the duties contained herein.

DECISIONS:

10. Decisions of the Special Master relating to the items listed in paragraph 3, above, by their very nature are often made in circumstances involving severe time constraints, and, possibly, emergencies; therefore, these decisions may be made orally, but in a fashion communicated to both parties. They are binding when made. In such an event, these decisions should also be communicated to the parties by confirming letter.

WARNING: In signing this agreement, both mother and father should assume that the Special Master's decision on the issues listed in paragraph 3 will be final. Because of time constraints and because of the language of this stipulation, the possibility of obtaining a court order changing a Special Master's decision on these issues is unlikely. Any party challenging the Special Master's decision on any of these issues will have a burden of proving, with clear and convincing evidence, that the Special Master's decision was legally incorrect and/or not in the best interest of the child(ren).

11. If the Special Master makes decisions on issues addressed in paragraph 4, above, these orders should be in writing and filed with the Court. If either party disagrees with any recommendation thus made, [*he/she*] may make a timely motion requesting a judicial review of the order. In that event, the party challenging the Special Master's recommendation has the burden of proof according to the law.

COMMUNICATION WITH SPECIAL MASTER:

12. The parties and their attorneys shall have the right to initiate or receive ex parte communication with the Special Master. Any party may initiate contact in writing with the Special Master, provided that copies are given to opposing counsel simultaneously.

13. The Special Master may communicate ex parte with the judge, at the discretion of the Special Master and the judge. Such communications shall be made only after giving notice to both parties, provided, however, that notice may be excused if notice would frustrate the very purpose of the communication. If the Special Master communicates with the judge without having given notice, [*he/she*] shall notify the judge of that fact and of [*his/her*] reasons for not giving notice.

14. The parties shall provide all reasonable records, documentation, and information requested by the Special Master.

15. No physician-patient or therapist-patient relationship and/or privilege is created by this stipulation.

FEES:

16. The Special Master's fees are: [*amount*] per hour. Time spent in interviewing, report preparation, review of records and correspondence, telephone conversation, travel, court preparation, and any other time invested in connection with serving as Special Master will also be billed at the [*amount*] hourly rate. The Special Master's fee for court appearances and settlement conference is [*amount*] per session while in court and at the settlement conference and [*amount*] per hour travel time to and from [*his/her*] office. The Special Master shall have the right to allocate payment of [*his/her*] fees at a percentage different from the above if [*he/she*] believes the need for [*his/her*] services is attributable to the conduct and/or intransigence of one party. The Special Master may require an advance deposit in an amount to be agreed on by [*him/her*] and the parties.

17. The Special Master shall be reimbursed for any expenses [*he/she*] incurs in association with [*his/her*] role as Special Master. These costs may include, but are not limited to, the following: photocopies, messenger service, long-distance telephone charges, express and/or certified mail costs and excess postage to foreign countries, parking, tolls, mileage, travel expenses, and word processing.

18. Any objection to the Special Master's bills must be brought to [*his/her*] attention in written form within [*number*] business days of the billing date; otherwise the billing shall be deemed agreed to.

19. In the event that arbitration proceedings or a legal action become necessary to enforce any provision of this order, the nonprevailing party shall pay attorneys' fees and costs as may be incurred.

20. The Court reserves jurisdiction in the family law action to enforce the provisions of this stipulation.

21. Except as otherwise provided herein, the fees of the Special Master shall be shared by the parties in the following manner: [*Name*] shall pay _____ percent of the Special Master's fees, expense and advance deposit, and [*name*] shall pay _____ percent of the Special Master's fees, expenses, and advance deposit.

22. Telephone calls to the Special Master by either party are part of the process and appropriately paid for by the parties according to their percentage share as ordered.

23. If either party fails to provide 24 hours' telephone notice of cancellation of any appointment with the Special Master, such party shall pay all the Special Master's charges of such missed appointment at the full hourly rate, at the discretion of the Special Master.

GRIEVANCES:

24. The Special Master may be disqualified on any of the grounds applicable to the removal of a judge, referee, or arbitrator.

25. Neither party may initiate court proceedings for the removal of the Special Master or to bring to the Court's attention any grievances regarding the performance or actions of the Special Master without meeting and conferring with the Special Master in an effort to resolve the grievance.

26. Neither party shall complain about the Special Master to the Special Master's licensing board without first meeting and conferring with the Special Master in an effort to resolve the grievance.

27. The Court shall reserve jurisdiction to determine if either or both parties and/or the Special Master shall ultimately be responsible for any portion or all of the Special Master's time and costs spent in responding to any grievance and the Special Master's attorneys' fees, if any.

28. If either party or the Special Master believes that there exists a grievance between them with respect to this stipulation that cannot be resolved, either party or the Special Master can move the Court for relief from this stipulation, after complying with paragraph 25 above.

RESIGNATION OF SPECIAL MASTER:

29. The Special Master may resign any time [*he/she*] determines the resignation to be in the best interest of the child(ren), or the Special Master is unable to serve out [*his/her*] term, upon thirty (30) days' written notice to the parties.

_____ _____

Mother Father

Approved as to Form: _____

_____ _____

Attorney for Mother Attorney for Father

_____ Special Master

ORDER

Upon reading the foregoing stipulation, and good cause appearing therefore, IT IS SO ORDERED.

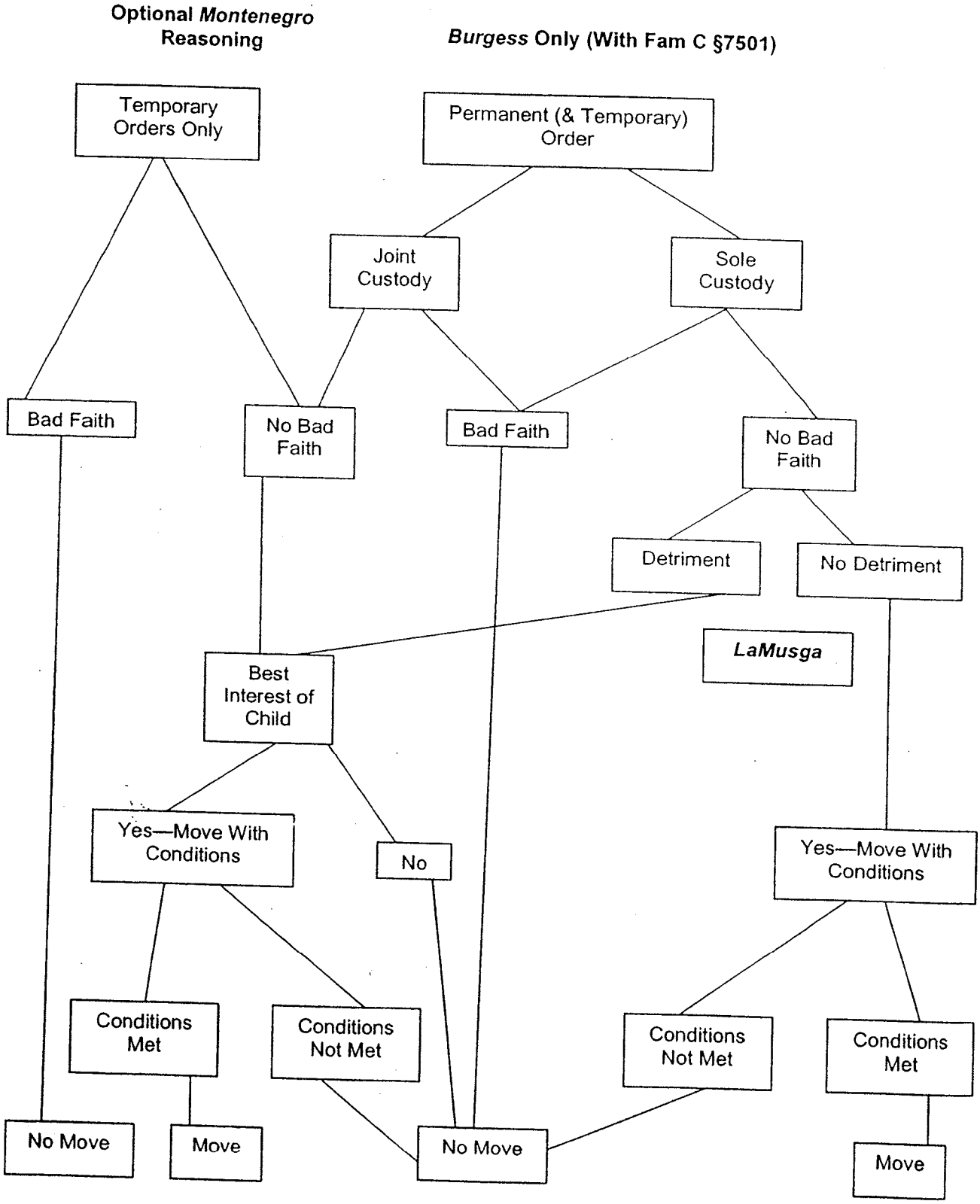
DATED: _____

_____
JUDGE/COMMISSIONER/REFEREE

SACRAMENTO COUNTY LAW LIBRARY

Appendix: Move-Away Flow Chart

Prepared by Hon. James M. Mize, County of Sacramento



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chosen forum. California courts, interpreting the former Uniform Child Custody Jurisdiction Act "wrongful conduct" provision (former Fam C §3408), have generally limited application of the provision to situations in which a child has been removed from the state in violation of an existing custody order or injunction. See *Haywood v Superior Court* (2000) 77 CA4th 949, 956–957, 92 CR2d 182.

If a California court declines to exercise its jurisdiction under Fam C §3428(a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a recurrence of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Fam C §§3421–3423. Fam C §3428(b).

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under Fam C §3428(a), it must assess necessary and reasonable expenses against the party seeking to invoke its jurisdiction. These include costs for communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. Fam C §3438(c).

In making a determination under Fam C §3428, a court may not consider as a factor weighing against the petitioner any taking or retention of the child after a visit, or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Fam C §6211. Fam C §3428(d).

6. [§200.22] Emergency Jurisdiction

Even when UCCJEA jurisdiction rests with another state, a California court may exercise temporary custody jurisdiction if the child is present in this state and either (1) the child has been "abandoned," that is, left without provision for reasonable and necessary care or supervision; or (2) the exercise of such jurisdiction is "necessary in an emergency" to protect the child because the child, the child's sibling, or the child's parent is subjected to, or threatened with, "mistreatment or abuse." Fam C §§3424(a), 3402(a).

Unless there is a previous child custody determination that is entitled to enforcement under the UCCJEA, or a child custody proceeding has been commenced in a state with proper UCCJEA jurisdiction, an emergency child custody order remains in effect until an order is obtained from the court having jurisdiction. Such an order will become a final determination if the order so provides and if California becomes the home state of the child. Fam C §3424(b).

If there is a previous child custody determination entitled to UCCJEA enforcement or an action properly commenced, any emergency order must

specify a period of time that the court considers adequate to allow the person seeking an order to obtain it from the proper state. Fam C §3424(c). If a court learns of a valid prior order or commencement of an action in another state, the California court must immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. Fam C §3424(d).

7. Modification Jurisdiction

a. [§200.23] Modification of Prior California Order

Except as otherwise provided in Fam C §3424 (emergency jurisdiction), a California court that has made a child custody determination consistent with Fam C §3421 or §3423 has exclusive, continuing jurisdiction over the determination unless either of the following occurs (Fam C §3422(a)):

- A California court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with California, and that substantial evidence is no longer available in California concerning the child's care, protection, training, and personal relationships.
- A California court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in California.

A California court that has made a child custody determination and does not have exclusive, continuing jurisdiction under Fam C §3422 may modify that determination only if it has jurisdiction to make an initial determination under Fam C §3421.

b. [§200.24] Modification of Order of Another State

Except as otherwise provided in Fam C §3424, a California court may not modify a child custody determination made by a court of another state unless the California court has jurisdiction to make an initial determination under Fam C §3421(a)(1) or (a)(2) ("home state" or "significant connection" jurisdiction), and either of the following determinations is made:

- The court of the other state determines that it no longer has exclusive, continuing jurisdiction under Fam C §3422, or that a California court would be a more convenient forum under Fam C §3427.

decisions are effective as orders when made and will continue in effect unless modified or set aside by a court of competent jurisdiction:

_____ Dates and times of pick up and delivery

_____ Sharing of vacations and holidays

_____ Method of pick up and delivery

_____ Transportation to and from visitation

_____ Participation in child care/daycare and baby sitting

_____ Bedtime

_____ Diet

_____ Clothing

_____ Recreation

_____ After-school and enrichment activities

_____ Discipline

_____ Health-care management

_____ Alterations in schedule that do not substantially alter the basic time-share agreement

_____ Participation in visitation (*e.g.*, significant others, relatives)

_____ In the case of infants and toddlers, increasing time-share when developmentally appropriate

_____Other _____.

4. The Special Master shall have authority to make recommendations on the following issues, which shall be submitted to the Court, which may approve them and enter them as court orders:

_____ Private school education

_____ Religion and religious training

_____ Church attendance

_____ Large changes in vacation and holiday time-shares

_____ Supervision of visitation

_____ Time-share changes that do not alter the child(ren)'s primary residence.

_____ Appointment of counsel for child(ren)

These recommendations shall be effective when adopted by the Court, and can be reviewed only on a hearing de novo at which the moving party has the burden of proof.

5. The Special Master shall not make any orders that substantially alter the parties' time-sharing arrangements, alter an award of physical custody, alter an award of legal custody, or substantially interfere with a party's contact with [*his/her*] child(ren). These decisions and others relating to the best interest of the child(ren) are reserved to the [*name*] Superior Court for adjudication, and may be presented to the Court by either party on the recommendation of the Special Master in the form of an order to show cause or notice of motion. In an emergency, the Special Master may ask the Court to initiate an order to show cause on its own motion.

6. The Special Master may recommend that child(ren) or the parents participate in adjunct services including physical and psychological examinations, assessments and psychotherapy, and alcohol and drug monitoring and/or testing.

QUASI-JUDICIAL IMMUNITY:

7. The Special Master, as an appointed officer of the Court, has quasi-judicial immunity. The Special Master cannot be sued because of [*his/her*] actions in this matter. The Special Master cannot be compelled to testify and is subject to the restrictions of Evidence Code section 703.5. However, the Special Master may choose to testify if the Court so requests, or on application of the Special Master to the Court notifying it of the Special Master's desire to testify. Such testimony shall not constitute a waiver of the Special Master's quasi-judicial immunity.

PROCEDURE:

8. Both parties shall participate in the dispute resolution process as defined by the Special Master and shall be present when so requested by the Special Master. The Special Master may conduct hearings that are informal in nature, by telephone or in person, and need not comply with the rules of evidence. No record need be made, except for the Special Master's written recommendations. The Special Master shall have the authority to determine the protocol of all interviews and sessions