

1. INITIAL PETITION HEARING

PURPOSE OF HEARING:

The initial petition hearing is the first court hearing held after the Social Services Agency (Agency) files a juvenile dependency petition seeking to declare a child a dependent of the court. The court must determine whether the child should be detained or can remain with or be released to the care and custody of a parent or guardian. In some cases, a petition is filed with the court and the child is not taken into protective custody, nor is there a recommendation to do so. In most cases, however, the Agency will have filed a petition to detain the child and that child will have been taken into protective custody. If the child has been taken into custody, the court shall hold a hearing, which shall be referred to as the “detention hearing” to determine whether the child should be further detained. (WIC 315)

In order to detain the child, the court must find *that there is a substantial danger to the child’s physical health or the child is suffering from severe emotional damage AND there are no reasonable means to protect the child without removal*. The court will also appoint counsel at the initial petition hearing and make certain inquiries and orders as discussed in this section. The court will also review and assess the evidence proffered by the Agency and any additional relevant evidence presented by the parties and their counsel. (WIC 315, 319; California Rules of Court 5.676)

PRELIMINARY CONSIDERATIONS:

1. Timelines

If the child has not been removed from parental custody, the initial petition hearing must take place within 15 judicial court days of the date the petition was filed. When a child has been detained, a petition must be filed within 2 judicial court days of the protective custody hold and a hearing to determine if the child is to remain detained must be held no later than the end of the next court day after the petition is filed. (WIC 313, 315; California Rules of Court 5.670)

- ✚ *TIP: At an initial petition hearing, any party has the statutory right to a one day continuance for any reason to further the interest of the child and collect and provide relevant information at the hearing. (WIC 322)*
- ✚ *TIP: For continuances of longer than one day - and at all subsequent hearings - counsel for any party may request a continuance, for good cause, beyond the statutorily set time line. Under these circumstances, no continuance will be granted if it is contrary to the interest of the minor. (WIC 352(a))*

2. Notice

Notice of the date, time and location of the hearing with a copy of the petition shall be served as soon as possible after the petition is filed and no less than 24 hours in advance of the hearing if the child is detained. (WIC 290.2) If the whereabouts of the parent are unknown, the Agency must conduct due diligence to locate and notice the parent. Failure to notice or providing insufficient notice could mean the jurisdictional and subsequent findings are subject to reversal. (In re Claudia S. (2005) 131 Cal.App.4th 236; In re Arlyne A. (2000) 85 Cal.App.4th 591)

✚ *Tip: Even though the agency has very little time to conduct an initial search, counsel should always review the agency's declaration of search to insure they exercised due diligence, and further inquire of their clients regarding the location of missing parents and relatives.*

Notice shall be given to the following persons whose address is known or becomes known prior to the initial petition hearing:

- The mother.
- The fathers, presumed and alleged.
- The legal guardians.
- The child if the child is 10 years of age or older.
- Any sibling, if that sibling is the subject of dependency proceedings, and that sibling's attorney and caregiver.
- If there is no known parent residing in the state, the adult relative residing nearest the court.
- Counsel for the parties, if known.
- The Agency.

3. Appointment of Counsel


a. Child's Counsel


The court must appoint counsel for the child absent a finding that the child would not benefit from counsel. (WIC 317) Generally, child's counsel has the responsibility to represent the "child's interests," specifically to investigate the facts; interview, examine and cross-examine witnesses; and make recommendations to the court regarding the child's welfare.

In California, there is a "hybrid model" of representation wherein child's counsel must determine and report to the court the child's wishes, but must assess and advocate for the child's well-being. Regardless of the child's stated wishes, counsel cannot advocate for return to a parent if, to the best of their knowledge, return would pose a threat to the child's safety and protection, though in such cases, counsel must advise the court of the child's desires. (WIC 317 (e); California Rules of Court 5.660)

If possible, prior to the initial hearing, child's counsel should interview his or her client if over the age of four, to discuss, in developmentally appropriate terms:

- The nature of the confidential attorney/client relationship;
- The purpose of the hearing and what the court must decide;
- The nature of the allegations if appropriate;
- The client's preferences for placement and visitation if removed from parent;
- Potential permanent connections for the child for concurrent planning purposes;
- Right to remain in school of origin and related educational needs pursuant to Education Code § 48850-§48859;
- Medical and healthcare issues;
- Any pending delinquency issues and;
- Any immigration issues.

 ***TIP: Counsel for children should remember that your child client has a right to be present at the initial hearing and all future hearings. Children also have the right to speak to and ask questions of the judge regarding their case. Counsel must consider these rights and determine whether the child should be transported to this or future hearings or whether a request to continue the hearing is warranted if the child is not present.***

 ***TIP: Counsel for children should bear in mind the client's experiences and developmental ability to communicate his or her wishes and understand advisements and the nature of the proceedings. Remember that abuse and neglect can impact a child's development and counsel should adjust his or her interaction with their client accordingly.***

b. Parent's Counsel

The court must appoint counsel for indigent parents at their first appearance unless the parent client waives his or her right to counsel. (WIC 317(a)) Prior to the initial hearing, parent's counsel should meet with her client and explain and address the following:

- The nature and potential consequences of the proceedings;
- The purpose of the hearing and what the court must decide;
- The nature of the allegations contained in the petition;
- The status of the parent's ability to maintain the child/children in his or her home;
- Potential connections and alternate caretakers for the child;
- Any services or conditions which have been utilized or may be available to alleviate the need for detention;
- The parentage of the child(ren);
- Whether the parent or child has Indian heritage; and
- Current contact information to provide to the Agency and the court.

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✚ *TIP: When meeting your clients for the first time, keep in mind the alleged conditions which brought the family to the Agency's attention. Your clients very likely face challenges involving poverty, mental illness, addiction and domestic violence. It is important that, as dependency counsel, you gain a basic understanding of these issues, as well as an understanding of common biases and misconceptions regarding them. Your own personal beliefs may impact your ability to zealously advocate for your clients, particularly if you are unaware of them.*

As counsel for the child, be mindful that even though these children may have suffered abuse and/or neglect, they often wish to return home to their parents. Counsel should bear this in mind when meeting with and interviewing the child and be empathetic to their situation.

4. Social Worker's Report

The social worker must submit a report for the initial hearing detailing:

- The reasons for removal;
- The need for continued detention;
- The services already provided to the family;
- Any services available to prevent the need for further detention;
- Whether there is a previously noncustodial parent or relative willing and able to care for the child; and
- What efforts have been made and continue to be made to place the child with siblings or half-siblings who have also been detained. (WIC 319)

5. Burdens of Proof and Evidentiary Issues

The social worker's report is admissible evidence and may often serve as the sole evidence before the court at the initial hearing.

After reviewing the report and any other evidence proffered, the court must make a determination whether the Agency can support its recommendation by *prima facie evidence*. Prima facie evidence is that "which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." (In re Raymond G. (1991) 230 Cal.App.3d 964)

AT THE INITIAL HEARING:

The court's initial inquiries will focus on the issues of parentage and Indian heritage.

1. Parentage

The court must make inquiries as to the identity and whereabouts of any and all parents, presumed, biological or alleged. Additionally, if given sufficient information, the court may make a determination as to paternity status. (WIC 316.2) The parentage inquiry must occur and include questions such as the mother's marital status, the existence of any declarations of paternity, and whether the man presenting himself or named as a father qualifies as a presumed father under Family Code 7611. **Parentage inquiries include but are not limited to (California Rule of Court § 5.635(b)):**

- Whether the parent lived with the child;
- Whether the man believes himself to be the biological father;
- Whether the man was present at the child's birth;
- Whether the man was placed on the child's birth certificate;
- Whether the parent has held the child out to the community as his or her child;
- Whether the man is married to or made efforts to marry the mother; and
- Whether there are any preexisting paternity orders.

In addition to the court's inquiry above, the parent(s) may voluntarily complete and submit the Judicial Council Form JV-505, "Statement Regarding Parentage." The court may also utilize the JV-500, "Parentage Inquiry," to seek out parentage information from the local child support agency.

The court may order paternity testing upon the request of a party or upon its own motion if it determines the test necessary to make appropriate findings regarding the child's parentage.

The legal designation a person receives affects the rights afforded to that person and can impact the procedural path of the case. **There are four different categories of parentage:**

- **Alleged Father:** A man is an alleged father if he appears at a hearing and claims to be the child's father, or is named by the child's mother as the father.
- **Biological Father:** A man is the biological father if his paternity is proved by blood test but he has not achieved presumed father status. (In re Zacharia D. (1993) 6 Cal.4th 435) This category includes persons adjudicated to be fathers in a prior family law or child support case, either on the basis of blood test or default judgment only.
- **"Kelsey S." Father:** A man is a "Kelsey" father if he is the biological father and he promptly attempts to fulfill parental responsibilities, but is unable to establish

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presumed father status through no fault of his own. (Adoption of Kelsey S. (11992) 1 Cal.4th 816)

- **Presumed Father:** A man qualifies as the presumed father under any of the following circumstances:
 1. He was married to the child's mother at the time of the child's birth (or the child was born within 300 days of separation). (Fam. Code § 7540)
 2. He and the mother are over 18 years old, are not married to anyone else and complete and file a Voluntary Declaration of Paternity. (Fam. Code § 7573)
 3. He married the child's mother after the child's birth and is either named on the child's birth certificate or has a voluntary or court-ordered child support obligation. (Fam. Code § 7611(c))
 4. He has lived with the child and held himself out as the child's father, (Fam. Code § 7611(d)) or
 5. He and the mother have signed a voluntary declaration of parentage under Family Code § 7570.

2. ICWA Considerations

The court must make inquiries regarding Indian heritage. The court has an affirmative duty to ascertain whether the child is an Indian as defined in the Indian Child Welfare Act (ICWA). (25 U.S.C. 1901 et seq.) Any information suggesting that the child may be an Indian child under the ICWA triggers statutory notification requirements for all subsequent hearings unless and until the court properly determines that ICWA does not apply. The parents must complete the JV-130 form, "Parental Notification of Indian Status," to report any Indian heritage. (California Rule of Court § 5.664)

Whenever there is reason to believe that a child involved in a dependency proceeding may be an Indian child, the Agency must send notice of any upcoming proceedings to the parent, Indian custodian, all tribes of which the child might be a member or be eligible for membership, and to the Bureau of Indian Affairs if no tribe can be identified. The obligation to send notice continues until it is determined that the child is not an Indian child. The juvenile court may determine that ICWA does not apply if, 60 days after notice has been sent, no determinative response has been received from any of the parties notified. Notice must be sent by registered mail with a return receipt requested and the return receipts must be lodged in the court file.


In addition to the mandated notice requirements, inquiry about Indian heritage is critical to connect the family with tribal services or contacts and identify appropriate Indian placements and Indian experts for purposes of future findings.

3. Determination of Detention Status

After the initial inquiries regarding parentage and ICWA status, the court must determine whether the child should remain with or be released to the parent's care and custody.

The court must order the child released to the parent unless the Agency has made a prima facie showing that:

- the child falls within WIC 300;
- continuance in the parent's custody is contrary to the child's welfare; and
- **ANY of the following:**
 - There is a substantial danger to the child's physical health or the child is suffering from severe emotional damage and there are no reasonable means to protect the child without removal;
 - There is substantial evidence the parent is likely to flee with the child; or
 - The child left a previous court-ordered placement; or
 - The child is unwilling to return home and has been physically or sexually abused by someone living there (WIC 319)

 **TIP:** *Removal from parental custody should be the exception not the rule. However, the focus of the court's inquiry must be on the safety and well-being of the child; the child cannot remain with or be released to a parent if that action would place the child at further risk of abuse or neglect.*

4. Initial Hearing Strategies

Remember that the issue at this hearing is not the truth of the allegations in the petition but whether there is a showing of 1) substantial risk to the child; and 2) the unavailability of services that could eliminate the need for detention. As such, consider the following hearing strategies:

a. Submit on the Social Worker's Report

If the child is detained/non-detained and parties do not wish to object, argue or introduce additional evidence, all parties can submit on the Agency's report so that the judge will make findings and orders solely based upon that document. Even when submitting, counsel must request that appropriate orders are made regarding visitation and placement. If the child is detained, counsel must ensure that visitation is ordered for parents, siblings and relatives as appropriate.

b. Submit With Objection or Argument

If either parent's or child's counsel disagrees with one or all of the Agency's recommendations, but presents no further evidence, counsel can argue that the recommendations are not supported by the proffered evidence and request different findings and orders from the court. For example, the parents may not

dispute the facts underlying the initial removal, but may wish to challenge the need for detention in that there are services available that could prevent or eliminate the need for removal.

- ✚ ***TIP: It is critical that all counsel consider whether there were services available which could have prevented or eliminated the need for the child to be detained. It is not enough for the Agency to merely allege that the child is at risk of harm without addressing the issue of whether services may have enabled the child to safely remain with the parent. It is important for counsel to spend the time necessary both in client interview and at the initial hearing to determine if there were services available and to present that information to the court.***

c. Present Evidence or Set a Contested Hearing

Remember, in making its prima facie determination, the court will consider un rebutted evidence to be true. However, given the low standard of proof for the Agency at this hearing and the minimal time available to obtain rebuttal evidence, counsel should carefully consider whether to request a contested hearing and present additional evidence. Contested initial hearings can cause undue delay and can potentially lead to damaging evidence against your client being brought before the court. Contested initial hearings should only occur when a client has evidence that would not only refute the factual information in the report, but would obviate the need for detention as well.

- ✚ ***TIP: If a parent or child's counsel wishes a contested hearing to either challenge or bolster the prima facie case for detention, a rehearing may be held within 3 judicial days. In lieu of this rehearing, the court can set the matter for trial on the initial petition within 10 days. (WIC 321; California Rule of Court § 5.680(d))***
- ✚ ***TIP: When considering a contested initial petition hearing, given the burden of proof, it is often a better strategy to argue against an unfavorable recommendation and ask that the jurisdictional hearing be set as soon as possible. In this circumstance, counsel should always refuse to waive the time within which the jurisdictional hearing is set unless more time is necessary to investigate the circumstances, obtain additional evidence or allow a client to begin service participation.***

POSSIBLE INITIAL HEARING OUTCOMES:

1. Return Home

If the court does not find that there is a substantial risk to the child in either remaining in or returning home, or that there are services which could prevent or eliminate the need for removal, the court must allow the child to remain with or be released to the parent. (WIC 319; California Rule of Court § 5.678)

2. Detention


If the court finds that there is a substantial risk to the child and there are no further services which could prevent or eliminate the need for removal and detains the child from the custodial parent(s) under WIC 319, the court must order the temporary care and custody of the child be vested in the agency. **The court must then place the child:**

- With a non-custodial/non-offending parent (WIC 309);
- With an assessed relative or Non Related Extended Family Member (NREFM) (WIC 319(e)(f));
- In a licensed foster home; or
- In an emergency shelter.

If the child is detained, the court must consider the issue of visitation between the child and other persons, including siblings, determine if contact pending the jurisdiction hearing would be beneficial or detrimental to the child, and make appropriate orders. (California Rule of Court § 5.670(g))

Unless the matter is dismissed for a lack of prima facie evidence and stipulation of all counsel, the court will set the jurisdictional hearing at the conclusion of the initial hearing. The parties then will be given the option to waive the amount of time within which the jurisdiction hearing must be held. It is not advisable to waive this time requirement unless doing so is necessary to talk to potential witnesses, prepare for trial, or ensure your client is participating in services.

The Welfare and Institutions code contemplates two separate hearings for jurisdiction and disposition. (See Jurisdiction and Disposition chapters) In some court systems, these hearings are held together and a “combined” report is submitted. This practice can be prejudicial to the parent because a combined report is likely to contain information that is relevant to disposition but not jurisdiction.

 **TIP:** Counsel should consider objecting to combined jurisdiction and disposition hearings and similarly combined reports, where proceeding this way could be prejudicial to your client. If your client plans to contest either jurisdiction or disposition, it is wise to object to the combination of these hearings.

POST INITIAL HEARING CONSIDERATIONS:

1. Client Contact and Advocacy

Following the hearing, the attorney should:

- Explain the hearing outcome and court's rulings to the client;
- Establish what the client should be doing until the next hearing to ensure compliance with services;
- Gather and provide all attorney and Agency contact information to the client;
- Provide client with next court date and time;
- As child's counsel, send a letter to the caretaker or the child if age appropriate, with contact information and a summary of court orders;
- Conduct a home visit of the child and/or potential relative or non related extended family member placements; and
- Investigate the petitions and conduct any appropriate interviews of witnesses and collection of additional evidence.

2. Appellate Considerations

Are initial hearing orders reviewable on appeal?

- Issues arising from the initial hearing are not reviewable on appeal. (*In re Richard D.* (1972) 23 Cal.App.3d 592, 595)
- Review must be sought by writ petition (see *In re William M.* (1970) 3 Cal.3d 16, 24-25) or if appropriate, a petition for rehearing. (WIC 252)
- However, the merits of otherwise moot or waived claims can be reached if they contain "matters of broad public interest that are likely to recur" (*In re Mark C.* (1992) 7 Cal.App.4th 433, 440; *In re Jody R.* (1990) 218 Cal.App.3d 1615, 1621-1622) or "issues capable of repetition yet evading review." (*In re Raymond G.* (1991) 230 Cal.App.3d 964, 967)

2. JURISDICTION HEARING

PURPOSE OF HEARING:

At the jurisdiction hearing, the court must make a factual determination as to whether the child comes within one or more of the provisions set forth in Welfare and Institutions Code section 300.

PRELIMINARY CONSIDERATIONS:

1. Timelines

If the child is detained from the previously custodial parent, the hearing must be set within 15 court days of the date that the order for detention was made, unless all parties agree to waive this time requirement. If the child is not detained, the hearing must be held within 30 days of the date the petition was filed. (WIC 334; California Rules of Court 5.670)

2. Notice

All parties must be noticed at this determinative phase of the proceedings. Reasonable efforts must be made to locate and notify the parents in order for jurisdictional findings to be made. Notice must contain time, date, place and nature of the proceeding and any potential consequences of failure to attend.

Notice must be provided to the parents, child (if 10 or older), attorneys of record, and dependent siblings and their caregivers and attorneys. If there is reason to believe an Indian child may be involved, notice of the action and the tribe's right to intervene must be served on any known Indian custodian and tribe or, if unknown, on the Bureau of Indian Affairs. (WIC 291; California Rules of Court 5.664) The notice must contain time, date, place, nature of hearing and any recommendations to deny reunification services and those potential consequences. (WIC 358)

3. The Petition

An original WIC 300 petition is filed as to whether a child comes within the provisions of the Welfare and Institutions Code. The circumstances necessitating the filing of a petition may be due to the conduct of one or both parents. Proof by a *preponderance of evidence* must be adduced to support a finding that the minor is a person described by WIC 300. (WIC 355(a); California Rules of Court 5.534) The specific provisions of section 300 can be summarized as follows:

300 (a)

Non-accidental, serious physical harm, inflicted by a parent or guardian.

✦ *TIP: A finding under WIC 300(a) may automatically trigger a recommendation for no reunification services under WIC 361.5(b)(6). If the court finds by clear and convincing evidence that WIC 361.5(b)(6) applies, the burden of proof will shift to the party requesting services, to prove that it is in the child's best interest for reunification services to be provided. (WIC 361.5(c)) Do not allow the court to rule on a 300 (a) petition without being sure that your parent or child client understands the consequences of an order for no reunification services...*

300(b)

Neglect causing serious physical harm or illness or substantial risk thereof. This provision does not include allegations of intentional physical injury, abuse inflicted by a parent or infliction of emotional harm.

The serious physical harm or risk of harm is caused by:

- Parent's failure or inability to adequately supervise or protect; or
- Parent's failure to adequately supervise or protect from custodian with whom child is left; or
- Parent's failure to provide adequate food, clothing, shelter or medical treatment; or
- Parent's inability to provide regular care because of substance abuse, mental illness or developmental disability.

300(c)

Child is suffering or is at risk of suffering serious emotional damage as evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, either as a result of parent's conduct or because the parent or guardian is not capable of providing appropriate mental health treatment for the child.

300(d)

The child has suffered sexual abuse or there is a risk of sexual abuse by the parent or member of the household; or

The parent has failed to protect the child from sexual abuse when the parent knew or should have known that the child was at risk of sexual abuse.

✦ *TIP: A finding under WIC 300(d) may automatically trigger a recommendation for no reunification services under WIC 361.5(b)(6). If the court finds by clear and convincing evidence that WIC 361.5(b)(6) applies, the burden of proof will shift to*

the party requesting services to prove that it is in the child's best interest for reunification services to be provided. Do not allow the court to rule on a WIC 300 (d) petition without being sure that your parent or child client understands the consequences of an order for no reunification services.

300(e)

The child is under the age of five and has suffered “severe physical abuse” by the parent or person known to the parent.

Severe physical abuse is defined as:

- Single act of abuse causing physical trauma which, if left untreated, would cause disfigurement, disability or death; or
- Single act of sexual abuse causing significant bleeding, deep bruising, or significant swelling; or
- More than one act of abuse each of which causes significant bleeding, deep bruising, significant swelling, bone fractures or unconsciousness; or
- Failure to provide adequate food

TIP: A finding under WIC 300(e) may automatically trigger a recommendation for no reunification services under WIC 361.5(b)(5). If the court finds by clear and convincing evidence that this subdivision applies, it cannot order reunification unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification would be detrimental to the child because the child is closely and positively attached to that parent. Be sure your parent or client child understands the consequences of an order for no reunification services.

300(f)

The parent has caused the death of another child. To sustain under this provision:

- A criminal conviction is not required; or
- The death can be caused by a failure to protect by the parent

TIP: A finding under WIC 300(f) may automatically trigger a recommendation for no reunification services under WIC 361.5(b)(4). If the court finds by clear and convincing evidence that WIC 361.5(b)(4) applies, the burden of proof will shift to the party requesting reunification services to prove that it is in the child's best interest for reunification services to be provided. (WIC 361.5(c)) Do not allow the court to rule on a 300 (f) petition without being sure that your parent or child client understands the consequences of an order for no reunification services.

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300(g)

The child has been left without any provision for support; or

The parent has been institutionalized or incarcerated and cannot arrange for adequate care of the child; or

A relative or caretaker with whom the child has been left is unable or unwilling to provide care, the whereabouts of parent are unknown, and reasonable efforts to locate parents have been unsuccessful.

300(h)


The child has been freed for adoption for 12 months, or

An adoption petition for the child has been denied.

300(i)

The child has been subjected to an act or acts of cruelty by the parent or a member of the household, or

The parent failed to protect the child from an act of cruelty when the parent knew or should have known that the child was in danger of being subjected to an act of cruelty.

 ***TIP: A finding under WIC 300 (i) may trigger a recommendation for no reunification services under WIC 361.5(b)(6). If the court finds by clear and convincing evidence that WIC 361.5(b)(6) applies, the burden of proof will shift to the party requesting services to prove that it is in the child's best interest to provide reunification services. (WIC 361.5(c)) Do not allow a court to rule on a 300 (i) petition without being sure that your parent or child client understands the consequences of an order for no reunification services.***

300(j)

A child's sibling has been abused or neglected as defined in subdivisions (a), (b), (d), (e) or (i) and there is substantial risk that the child will be abused or neglected in the same way.


The court must assess circumstances surrounding the original abuse or neglect, the age and gender of each child, the nature of the abuse of the sibling and the mental condition of the parent.

3. Social Worker's Report

Evidence contained in the Agency's report is governed generally by WIC 355 and 355.1.


The social worker's report is admissible hearsay for purposes of jurisdiction, as long as the preparer of the report is available for cross-examination. (In re Malinda S (51 Cal.3d 368))


- However, if any party to the hearing raises a timely objection to the admission of specific hearsay evidence contained in the social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless one or more of the exceptions set out in WIC 355 applies. (WIC 355(c)(1); California Rules of Court 5.684)

 ***TIP: Counsel should be aware that the above referenced hearsay will remain in the social study. Even if the court cannot consider the hearsay to sustain an allegation for which there is no other evidence, the court may consider the hearsay if there is a either a different fact supporting the petition or a different WIC section 300 petition plead, for which there is other supporting evidence.***

The social worker's report must be provided to all parties and their counsel within a reasonable time before the hearing. (WIC 355(b)(3))

- The court may grant a continuance not to exceed 10 days, if the report is not provided within a reasonable time before the jurisdiction hearing.

 ***TIP: If the Agency does not file a timely report, any party can refuse to waive the time in which the jurisdiction hearing is held, and the Agency must go forward based on the presentation of testimony to the court in lieu of a social study.***

 ***TIP: The above hearsay considerations are relevant only at the jurisdictional hearing. At all subsequent hearings, the court can consider hearsay evidence contained in reports presented to the court without consideration of the provisions of WIC 355. As new counsel, you should spend time reviewing the requirements of 355 and 355.1.***

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The report must contain enough evidence to support each of the allegations. As counsel you should read the report and:

- Discuss the report with your client and determine whether the client disputes any of the allegations or has additional relevant information to offer;
- Identify potential witnesses; and
- Determine whether an expert witness can dispute the agency's analyses and recommendations.

4. Burden of Proof and Evidentiary Issues

a. Burden of Proof

The Agency bears the burden to prove by a preponderance of the evidence that the allegations in the petition are true and that the child is therefore described by section 300. (WIC 355 (a); California Rules of Court 5.534)

b. Rebuttable Presumptions

If a rebuttable presumption under WIC 355.1 (a) or (d) is applicable, a presumption affecting the burden to produce evidence is created. (WIC 355.1) In this event, the opposing party must produce evidence to rebut the presumption established under WIC 355.1 (a) or (d).

***FOR EXAMPLE:** The Agency files a petition alleging that the child is described by WIC 300(a) due to a serious injury. The court finds, based on competent, professional evidence, the injury is of a nature that would not ordinarily occur except as the result of the unreasonable or neglectful acts of the parents. This finding is prima facie evidence that the child falls under WIC 300(a). If opposed to the finding, the parent would have an affirmative duty to produce evidence to dispel the finding and rebut the presumption. If the presumption is rebutted, the Agency must proceed to prove the 300(a) petition based on the evidence at hand.*

AT THE JURISDICTION HEARING:

1. Jurisdiction Hearing Strategies

a. Submit on the Social Worker's Report


If the evidence in the report is sufficient, and your client either agrees with the allegations contained in the report or just wants to resolve the issue of jurisdiction, submitting on the report will allow the court to determine whether to sustain the petitions and find the child to be a person described by WIC 300.


Benefits of Submission


1. Tactical advantage – You and your client can avoid the possibility of the evidence presented at trial being worse than what is contained in the report.
2. Submitting can provide some certainty for your client as to what will happen at the hearing

Prior to Submitting

1. Make sure your client understands their trial rights
2. Remember, as parent's counsel, your client's completion of form JV-190 "Waiver of Rights," is required to affect a waiver. The client and attorney must sign the form, as well as an interpreter when appropriate, and the court must make findings on the record that the client voluntarily waived his right to a contested hearing.
3. The child also has trial rights but a formal written waiver form is not required for submission.

 ***TIP: Children's attorneys must consider whether waiving the child's trial rights is in the child's best interest. Child's counsel may discover additional evidence through the course of their independent investigation. Counsel must assess whether the presentation of this evidence at trial or by agreement of counsel, is necessary to sustain or refute allegations or to protect the child's interest.***

 ***TIP: As counsel for the child, you must also consider his or her right to testify and be heard by the court. For some children, testifying can be a very important and necessary part of case progression. Child's counsel should fully explain the court and trial process to their client. The child client should also be advised that if they testify, all other counsel and the court can ask him/her questions and in some instances their parents will be present during their testimony. If the child does decide to testify, counsel may wish to show the child client the courtroom before testimony to increase the child's comfort level. If the child is afraid or intimidated to testify in the presence of their parent, counsel may also file a motion pursuant to §350(b).***

 ***TIP: Counsel must always be mindful that "submissions" are only agreements to proceed based upon the evidence contained in the social worker's report and not agreement to accept the social worker's recommendation. The latter waives the party's right to appeal jurisdictional issues. A submission is only the client's***

agreement to waive their right to produce additional evidence or to cross examine the evidence before the court.

Counsel can clarify for the record that a client is only submitting on the body of evidence contained in the social study, but note an objection to any recommendation to sustain a petition.

If the Agency has provided a combined jurisdiction/disposition report and included recommended findings and orders for both jurisdiction and disposition, pay particular attention to each recommended finding and order. In either case, submitting on the recommendation severely limits your ability to request dismissal of the petition(s) (WIC 350(c)) and may waive your appellate rights.

b. Negotiation of the Petition or Settlement

If the evidence in the report is enough to sustain some of the allegations, consider negotiating with other counsel to amend the petition so that your client will be willing to submit.

✚ *TIP: If child's attorney does not agree with amendments proposed jointly by the agency and the parents, the child may insist on going to trial on the original petition but will carry the burden of proof as to the original allegations (Allen M(get cite)).*

The court may not dismiss allegations unless it finds it is in the interests of justice to do so.

c. Proceed Via Objection or Argument

When the evidence contained in social worker's report is insufficient to support some or all of the allegations, it may be advantageous to proceed with the hearing by making an objection to specific allegations, or making arguments to the court regarding the lack of evidence presented and allow the court to make decisions **without introducing further evidence for the following reasons:**

- Lack of sufficient evidence in the report may be grounds for dismissal of the petition or reversal on appeal, and
- This strategy avoids giving the department additional time to gather evidence or prepare for trial.

d. Present Evidence or set a Contested Hearing

When the client disputes the evidence contained in the report or additional evidence is needed for the court to make a determination as to the sufficiency of the petitions, your client may choose to set the case for a contested hearing. The case may also be set for contested hearing if issues related to WIC 355 or the "child hearsay exception" arise. (See *In re Cindy L* (1997) 17 Cal.4th 15; *In re Lucero L.* (2000) 22 Cal.4th 1227)

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- If a party makes an objection to hearsay contained in the jurisdictional report and provides the Agency with a reasonable period of time to meet the objection. The Agency must make the hearsay declarant available for cross-examination or the hearsay evidence is not sufficient to solely support a jurisdictional finding. If one of the exceptions does apply, the attorney who wants to cross-examine the declarant is responsible to procure the witness' presence in court.

POSSIBLE JURISDICTION HEARING OUTCOMES:

1. Dismissal

After hearing the evidence, the court is required pursuant to WIC 356 to make findings as to whether the child is a person described by WIC 300. If the child is found not to be a person described by WIC 300, the petition must be dismissed.

2. Sustained Petitions

If the child is found to be a person described by WIC 300, findings must be noted in the order. After making a finding that the child is described under WIC 300, the court will then set and conduct a disposition hearing. (WIC 358(a))

If the Agency's recommendation for disposition is that no reunification services be provided to a parent, the parent or child has a right to a mandatory continuance for a period not to exceed 30 days to respond to and prepare for the dispositional recommendation. (WIC 358(a)(3))

POST JURISDICTION HEARING CONSIDERATIONS:

1. Client Contact and Advocacy

- Explain the court's ruling and the outcome of the hearing to your client.
- If a combined jurisdiction and disposition report has been presented to the court, determine whether contested disposition is necessary based on the Agency's recommendations
 - Consider recommendations regarding placement and provision of reunification services. Both issues may require the presentation of further evidence to the court. If so, you would need to begin to gather that evidence and prepare your client for trial as soon as the disposition hearing is set, if not sooner.
- Set an action plan for client regarding services and visitation.
 - Whether the disposition hearing is set for trial or will occur without contest, immediate engagement in services can only benefit both parent and child clients. Unless deemed to be detrimental, regular visitation with parents and siblings is critical at this point in the case.

2. Appellate Considerations

- Jurisdictional findings are not appealable until after the disposition order is entered (See Disposition chapter).

3. DISPOSITION HEARING

PURPOSE OF HEARING:

A disposition hearing is held following a jurisdictional finding that the child is described by WIC 300. (WIC 358) At the hearing, the court shall hear evidence on the issue of the proper disposition for the child and must determine whether the child should be adjudicated a dependent of the court. The court may determine that the child does not need to be adjudicated a dependent, but prior to dismissal, may issue orders designed to protect the child's interests. (WIC 360)

The court may adjudicate the child a dependent and make decisions as to parental custody, placement and visitation, who shall receive reunification services and what services are appropriate. *The court cannot order the child removed from the parent unless the court finds by clear and convincing evidence that there is or would be a substantial danger to the child's physical or emotional well-being if not removed and that there are no reasonable means to protect the child without removal.* (WIC 361(c))

PRELIMINARY CONSIDERATIONS:

1. Timelines

If the child has not been detained, the dispositional hearing must be set within 30 days of the jurisdictional hearing.

If the child has been detained, the court may continue the disposition hearing for no more than 10 judicial days after jurisdictional findings are made, unless the Agency recommendation is for non reunification for a parent. In that case, the hearing shall be continued for a period not to exceed 30 days.

If the recommendation of the Agency is non-reunification, you must advise your client of the ramifications of such a recommendation and determine immediately whether your client will contest the Agency's position.


2. Notice

Notice must be provided to the parents, child (if 10 or older), attorneys of record, and dependent siblings and their caregivers and attorneys. If there is reason to believe an Indian child may be involved, notice of the action and the tribe's right to intervene must be served on any known Indian custodian and tribe or, if unknown, on the Bureau of Indian Affairs. (WIC 291; California Rules of Court 5.664) The notice must contain time, date, place, nature of hearing and any recommendations to deny reunification services and those potential consequences. (WIC 358)

3. Social Worker's Report- Social Study

If the social study is not distributed to all parties at least 48 hours before the disposition hearing, the court must grant any party's request for a continuance. The report must address all issues contained in WIC 358.1, including the following:

- Whether the Agency has considered providing child welfare family preservation services by developing a case plan as a possible solution to the family's problems without removing the children;
- The basis for any recommendation to deny reunification services;
- A reunification case plan that is designed to identify and resolve problems so that the child can safely return to the family home (WIC 358 and 358.1);
- The identified concurrent plan for the child should reunification fail, and the willingness of the caregiver to provide legal permanency if needed (WIC 358(b), 358.1(b)(i));
- Whether the parents have been informed of their right to relinquish the child for adoption (WIC 358.1(g));
- Recommendations regarding visitation with the parents, siblings, and grandparents (WIC 358.1);
- A description of the relationship between dependent siblings detailing the strength of existing bonds, the children's expressed desires to live with or visit each other, the Agency's efforts to place siblings who have been separated together, and the nature and frequency of visitation between any siblings placed apart (WIC 358.1);
- An assessment of the appropriateness of any relative or NRFEM placement (WIC 358.1(h), 361.3); and
- Identification of a responsible adult available to make educational decisions for the child, if recommending limitation of the parent's educational rights. (WIC 358.1)

 **TIP:** *The social study should not merely make conclusory statements regarding family preservation, but must detail specific measures that have been attempted or explain why such measures are not available or appropriate. This information goes directly to the determination the court must make under WIC 361(d) as to whether reasonable efforts have been made to prevent or eliminate the need for removal from the parental home.*

4. Burden of Proof and Evidentiary Issues

The social worker's report or "social study," and any hearsay contained within it, is admissible as competent evidence at disposition. (WIC 281, 355(b)(1), 358(b)) Testimony of the social worker is not a prerequisite to the social study's admission, although a party may always request that the preparer be present for cross-examination. (WIC 281, 358(b)) Additionally, parties have the right to subpoena and cross-examine witnesses, and to present relevant evidence. (WIC 341)

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The Agency must present ***clear and convincing*** evidence to support removal of a child from the custody of a parent with whom the child resided prior to the court's intervention. (WIC 361(c))

Clear and convincing evidence is required even if the child is to be removed from the custodial parent to be placed with the previously non-custodial parent.

✚ ***TIP: It is the Agency's burden to prove that removal from the parent's home is necessary. Before agreeing to out of home placement, counsel must consider this heightened burden and the possibility of litigating removal of the child at the dispositional hearing. After the disposition hearing, the Agency carries a lower burden of proof to keep a child out of the home. At review hearings for example, the Agency need only show by a preponderance of the evidence that return would create substantial risk.***

If the child is not removed from the previously custodial parent at the dispositional hearing, the issue of whether a parent should be provided reunification services is rendered moot.

If the court orders out of home placement and no reunification services to all parents or guardians, the court may order a selection and implementation hearing which could result in the termination of parental rights and a plan of adoption. At a selection and implementation hearing, the court cannot revisit the issue of reunification to a parent.

At disposition, the Agency bears the burden of proving by clear and convincing evidence that denial of reunification services is warranted. It is crucial that counsel for parents and children consider the consequences of an order denying reunification services and whether additional evidence should be presented as to whether the family should be given those services.

ICWA Considerations:

If the child has been determined to be an Indian child within the meaning of the ICWA, the court must receive expert opinion and evidence on the issue of appropriate disposition for that child, including whether the child should be removed from the parent. Persons most likely considered an expert include members of the tribe, or lay or professional persons with substantial education and experience in Indian social and cultural standards.

ICWA requires the court to apply a different legal standard to remove an Indian child from a parent's custody, namely that, "Clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage, including the testimony of a qualified expert witness, is required to place a child in foster care and to order a guardianship." (25 U.S.C. §1911 D.3(a))

AT THE DISPOSITION HEARING:

After finding that a child is described under WIC 300, the court shall hear evidence on the question of the proper disposition of the child. (WIC 358(a)) After receiving and considering evidence on the proper disposition of the case, the court must determine whether to adjudicate the child a dependent of the court. (WIC 360) There may be circumstances where the court determines that although the child is a person described by WIC 300, it is not necessary to adjudicate that child a dependent of the court because there is an alternate plan which alleviates the need for the child to become a dependent of the court.

If the court finds that adjudication is necessary, the court must then determine whether the child can legally be removed from the parent's care and custody. If the child is removed, the court must determine the appropriate placement of the child and order services to appropriate parties. In determining an appropriate placement, the court must order a concurrent plan to consider reunification *and* permanence for the child as a part of the child's case plan. (§ 16501.1(f))

Dispositional Hearing Strategies

1. Submit

As parent's counsel, you should only submit if your client agrees with all recommended findings and proposed orders. This would include orders regarding removal and provision of services. As child's counsel, you must consider whether the proposed findings and orders protect your client's interests. Your independent investigation will help determine whether your client should be removed and if so, to also determine the placement, visitation and services necessary to serve your client's interests.

2. Submit With Objection or Argument

It may be advantageous to submit on the body of evidence but argue for different findings or orders if you feel the Agency has not met its burden of proof. For example, if the Agency is recommending that the child be removed from the parent and there is not clear and convincing evidence to support that recommendation, you may choose to argue against that recommendation based on the lack of evidence. Prior to any such argument, however, be sure to explain to your client that the bench officer may weigh the sufficiency of the evidence differently, and as such, be certain your client consents to this strategy prior to the hearing.

3. Presenting Evidence or Setting the Matter for a Contested Hearing

Even though the burden of proof is on the Agency and the Agency must produce clear and convincing evidence to legally remove the child or deny reunification services to a

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parent, you must consider whether you need to present additional evidence to rebut or augment information contained in the report.

✚ TIP: *Whenever there is a possibility the child could be legally removed from the home or, if removed, that the parents may not be given reunification services, counsel should give strong consideration as to whether to present additional evidence to the court on the issues of: 1) substantial danger to the child remaining at home; and 2) the applicability of any bypass provisions. (Bypass provisions discussed at page 12)*

TIP: *Remember, if the court finds that any of the bypass provisions of WIC 361.5 apply, the burden will be shifted to the party seeking services to present evidence as to why it would be in the child's best interest to provide reunification services to the parents. (WIC 361.5(c)) This evidence might include information regarding the bond between parent and child, the parents' progress since the initial hearing, or the parent's likelihood of success if provided reunification services.*

POSSIBLE DISPOSITION HEARING OUTCOMES:

1. Court Declines Adjudication

The court has the discretion to set aside the jurisdictional findings and dismiss the petition when the interests of justice and the child so require. (WIC 390) After finding the child is described by WIC 300, the court also has the discretion, without adjudicating the child a dependent, to place the child with the parent and order the Agency to provide informal supervision for a period of 6 to 12 months. (WIC 360(b)) If, during the period of supervision, the family is unable or unwilling to cooperate with services, the Agency may file a petition alleging that informal supervision was ineffective in ameliorating the need for services. At a hearing on that petition, the court may either dismiss the petition or set a new disposition hearing. (WIC 360(c))

✚ *TIP: Orders made under sections 390 and 360(b) do not require the Agency's consent. An example of a situation in which a section 390 dismissal might be appropriate would be if, by the time of the disposition hearing, the offender no longer has access to the child victim (possibly as a result of incarceration) and the custodial parent has no need for services. Similarly, informal supervision might be appropriate in the same scenario if the nonoffending parent and/or child need services for only a short period of time and there is no need for judicial oversight of provision of services.*

2. Entry of Legal Guardianship (With or Without Adjudication)

The court may enter an order establishing a legal guardianship either in addition to or in lieu of adjudicating the child a dependent so long as the parent and child (if old enough to meaningfully comment) consent and the court finds that guardianship is in the child's best interest. The parent must indicate that he or she does not want reunification services and understands that none will be provided. (WIC 360(a)) A guardian may not be appointed until the court has read and considered the assessment required under section WIC 361.5(g), which includes an analysis of the eligibility and appropriateness of the prospective guardian. (WIC 360(a), 361.5(g), 16010(b)) Appointment of a guardian pursuant to section WIC 360 is not subject to the criminal history restrictions and exemption requirements of WIC 361.4.

✚ *TIP: Although orders for guardianship may be made at the initial disposition hearing, a continuance is often needed because the WIC 360(a) assessment is not yet available. The additional time may prove beneficial to all parties by allowing adequate time to investigate and formulate a position on the question of whether or not continued jurisdiction will be appropriate. For example, counsel may want to advocate that dependency be declared, guardianship be granted, and the case remain open because additional funding under the Kin-GAP provisions will not be available until the child has been placed with the guardian for 12 consecutive months following the establishment of the guardianship. Conversely, parties may feel that adjudication is not necessary because funding and supervision or services are not needed.*

3. Child is Adjudicated a Dependent

Upon adjudicating the child to be a dependent, the court must determine who will have custody of the child and what limitations, if any, on the parent's control are necessary to protect the child. (WIC 360(a)) The court may permit the child to remain in the parent's custody with services provided by the Agency. If clear and convincing evidence dictates removal from the parent, the court may order that the child be released to the noncustodial parent, or place the child under the care and custody of the Agency. (WIC 361, 361.2, 362)

a. Maintenance in Home of Parent (Supervision With Family Preservation Services)

The court may allow a dependent child to remain in the custody of one or both parents while subject to the supervision of the Agency. The parents can be required to participate in child welfare services, (which may include counseling and educational programs) and may be required to ensure their child's regular attendance at school. (WIC 362(b), (c), and (d))

b. Removal From a Parent

i) Grounds for Removal

Clear and convincing evidence that, at the time of the dispositional hearing, any of the following conditions exist:

- a) There is or would be a substantial danger to the child's physical or emotional well-being if returned to the custodial home; *and*
- b) There are no reasonable means to protect the child without removal. (WIC 361(c)(1))

The court must consider, as a possible reasonable means to protect, the options of removal of the abusive person from the home, or continued custody by a nonoffending parent who has a viable plan to protect the child from future harm. (WIC 361(c)(1)) The court cannot remove a child from a custodial parent absent clear and convincing evidence that:

- A substantial risk of future physical harm to the child exists; or
- The parent is unwilling to have physical custody of the child (WIC 361(c)(2)); or
- The child is suffering severe emotional damage, evidenced by extreme anxiety, depression, withdrawal,

or untoward aggressive behavior directed at himself or others *and* there are no reasonable means to protect the child's emotional health without removal (WIC 361(c)(3)); or

- The child or a sibling has been or is at substantial risk of sexual abuse by the parent, a member of the household, or a person known to the parent, *and* there are no reasonable means to protect the child without removal, *or* the child does not wish to return home (WIC 361(c)(4)); or
- The child has been left without support, an incarcerated or institutionalized parent cannot arrange for the care of the child, or a relative with whom the child was left is no longer willing or able to provide care and support and the whereabouts of the parent are unknown after reasonable location efforts have failed. (WIC 361(c)(5))

ii) Placement

When it is determined that a child's safety requires removal from the custodial parent, placement options include the home of a previously noncustodial parent, the home of an approved relative or nonrelative extended family member, a foster home, or a licensed community care facility. (WIC 361.2)

Any time a child is removed from the home, there is a strong preference to place the child with their siblings whenever possible, so long as placement is not shown to be detrimental to any of the children. The Legislature has mandated that the Agency make diligent efforts to ensure placement of siblings together and to provide for frequent sibling contact when siblings are not together, or that it explain to the court why such arrangements are not appropriate. (WIC 306.5, 361.2(i), 16002)

a) With a previously non-custodial, non-offending parent

If a parent who was not residing with the child at the time the events resulting in dependency occurred comes forward and requests custody, the court must release to that parent absent a finding that placement would be detrimental to the child's safety or physical or emotional wellbeing. A finding of detriment to the child sufficient to deny placement with a previously non-custodial parent must be based on ***clear and convincing evidence***. (WIC 361.2(a))

Upon placing the child with a previously noncustodial parent, the court can terminate jurisdiction with a custody order for that parent (WIC 361.2(b)(1)), or continue jurisdiction with an order for Agency supervision. (WIC 361.2(b)(2))

If services or supervision are not necessary, compliance with the Interstate Compact on the Placement of Children (ICPC) is not required for placement with a parent residing in another state. However, Counsel or the Court may wish to obtain additional information about the noncustodial parent prior to placement of the child. Counsel should be mindful that if ongoing supervision of that parent or services for the family are necessary, compliance with the ICPC is required.

b) With a relative or nonrelative extended family member

Whenever a child is removed from parental custody, the care, custody, and control of the child are placed under the supervision of the Agency. (WIC 361.2(e)) Preferential consideration must be given to a relative's request for placement, meaning that such placements will be considered and investigated first.

Although they do not receive preference for placement, nonrelative extended family members are generally treated the same as relative caregivers under the statutes controlling placement. (WIC 362.7) The Agency is responsible for investigating and advising the court on the appropriateness of potential caregivers. The assessment must include among other factors, an in-home inspection to determine the physical safety of the home and a criminal history check of all of the adults in the home. (WIC 361.3)


c) In foster care

If the child is removed from parental custody and there are no relatives or non-related extended family members with whom to place, the Agency must place the child in foster or group home care. The Agency should select the least restrictive and most family-like setting which will meet the needs of the child and provide as much consistency as possible regarding visitation, environment, and schooling.

In order to facilitate reunification, placement should be in the parent's home county unless a child is placed with a relative. (WIC 361.2(f)) The court may place a child out-of-county if it finds that the particular needs of the child so require, though the parent must be given notice and an opportunity to be heard. (WIC 361.2(g))

iii) Visitation

When a child is removed from the parent's custody and reunification services are granted, visitation must occur between the child and parents, siblings and grandparents as frequently as possible, "consistent with the well-being of the child." (WIC 361.2; 362.1)

 ***TIP: Disposition is a critical time to ensure that a child's network of supportive, stable adults is in place and that orders are made to enable the child to remain in contact not only with the relatives mentioned above but also with other important people in the child's life. Make sure that visitation orders are specific and appropriately address these objectives. Visitation should occur immediately and as frequently as possible to maintain important connections. It is much easier to maintain relationships with siblings, extended family members, teachers, clergy or mentors from the outset than to try to locate these persons at a distant point in time and then attempt to restore connections.***

iv) Provision of Reunification Services

a) Eligibility

If a child is removed from the custodial parent, the court must order the agency to provide reunification services to the mother and legally presumed father unless the child has been voluntarily relinquished for adoption, a section 360 guardianship has been entered, or one of the enumerated exceptions under section 361.5(b) has been established by clear and convincing evidence. The court has discretion to order services for a declared biological father upon a finding of benefit to the child. (WIC 361.5(a))


Incarcerated or institutionalized parents must be provided with reunification services unless the court finds by clear and convincing evidence that those services would be detrimental to the child. In determining detriment the court must look at the child's age, bonding between parent and child, nature of the parent's crime or illness, length of the parent's sentence or nature of treatment, opinion of the child (if older than ten years), and degree of detriment if services are not provided. (WIC 361.5(e)) The Agency must make a good faith effort to provide

services unique to each family's need and specially tailored to fit their circumstances. Neither difficulty in providing services nor low prospects of successful reunification excuse the duty to provide reasonable services available to the incarcerated or institutionalized parent. (Mark N. v. Superior Court (1998) 60 Cal.App.4th 996)

Guardians appointed by the probate court must be provided with reunification services pursuant to the same statutes. However, the courts of appeal have determined that guardians appointed by the juvenile court in conjunction with dependency proceedings have no such right. (WIC 361.5(a); *In re Carlos E.* (2005) 129 Cal.App.4th 1408, 1418–1419; *In re Alicia O.* (1995) 33 Cal.App.4th 176, 181.)

b) Time limits on provision of services

Reunification services are limited to 12 months for parents of children who were older than age three at the date they entered foster care, which is defined as the earlier of the dates of the jurisdictional hearing or 60 days from initial removal. For children younger than three years, services are generally limited to 6 months from the date the child entered foster care. A parent may receive an additional six months if a court finds regular participation and substantive progress or a substantial probability of return. (See Chapter on Review Hearings) For any child, services may be extended to a maximum of 18 or even 24 months from the date that the child was initially detained, but only if the court finds that there is a substantial probability of return within the extended period or that as of the 12 month review hearing, the parent was not provided with reasonable services. (WIC 361.5(a); 366.21(g))

 ***TIP: Given these short timelines, it is critical that attorneys for parents receiving reunification services counsel their clients to begin active participation in the case plan as soon as possible and ensure a specific and frequent visitation schedule whenever possible.***

c) Case plan with tailored services


A case plan must be developed and must describe the reunification services to be provided to address the issues that lead to the child's dependency and those needed to maintain and strengthen the relationships of any siblings placed apart. (WIC 16002, 16501.1)

Counsel should ensure services protect their client's interests, including the ability to access entitlements. **Services may include but are not limited to:**

- Sibling and family visitation;
- Domestic violence prevention, treatment and safe shelter;
- Medical and mental health care;
- Drug and alcohol treatment;
- Parenting education;
- Transitional and independent living services and plan;
- Education; and
- Housing

Additional consideration should be given to appropriate services when representing clients with special needs. These services may include but are not limited to:

- Special education and related services;
- Supplemental security income to help support needed services;
- Therapeutic foster and group home care;
- Residential/in-patient and outpatient psychiatric treatment; and
- Regional center services.

 ***TIP: Counsel can, and should, have a great deal of input into what services are included in the case plan. For example, counsel might consider the need for services such as specialized mental health services (e.g., WIC 370 funds for treatment); independent living programs (ILP) and other independence achievement referrals; day or after-school care; tutoring and other educational support; and minor parent services.***

Clients should not be ordered to participate in additional services which may be intrusive or overburdensome, like generic parenting classes or drug testing unless relevant to the particular problems manifested by the client.

v) Grounds for Denial or Bypass

As noted above, it is presumed that the Agency will provide reunification services to a parent. However, both federal and state laws delineate certain circumstances in which reunification services need not be provided. The following subsections of WIC 361.5(b) lay out the statutory bases for denial or “bypass” of reunification. If the court finds

by clear and convincing evidence that one of the following subsections apply, it may not order reunification services for a parent or guardian unless the court finds by clear and convincing evidence that reunification services are in the best interest of the child. (WIC 361.5(c))

✚ TIP: *The use of bypass provisions pursuant to WIC 361.5 varies from county to county statewide. Some Agencies are more likely to recommend bypass than others. While the provisions are determined on a factual basis, local culture often dictates an Agency's pursuit of bypass findings. As a parent's or child's counsel, you must be aware of the culture in your county, and whether you should be prepared to present evidence to either prove or disprove the existence of one the provisions, or to prove the applicability of the exception pursuant to WIC 361.5(c).*

WIC 361.5(b)(1)

The parent's whereabouts remain unknown after a reasonably diligent search has been made. If the parent's whereabouts become known within six months following the denial of reunification services pursuant to this subsection, however, the Agency must seek modification of the disposition orders and the court must order services to be provided as calculated from the date of initial removal. (WIC 361.5(d)). As such, where the court finds this provision applicable, the court must still set and conduct a six month review hearing before proceeding to a selection and implementation hearing.

WIC 361.5(b)(2)

The parent is suffering from a mental disability that renders him or her incapable of utilizing reunification services. Reunification services can be denied to a parent suffering from a mental disability only if competent evidence from two mental health professionals establishes that the parent is unlikely, even with services provided, to be able to adequately care for the child. (WIC 361.5(c)) Findings must be based on evidence from at least two experts pursuant to WIC 361.5(b)(2).

✚ TIP: *Although the Agency bears the burden of proving that the parent is incapable of utilizing services and is unlikely to be capable of adequately caring for the child even if services are provided, counsel for the parent may want to retain an independent expert to render an opinion as to the parent's ability to benefit from services.*

WIC 361.5(b)(3)

The child or a sibling was previously found to be a dependent due to physical or sexual abuse, was returned to the parent after a period of removal under WIC 361, and has once again been removed due to additional physical or sexual abuse.

WIC 361.5(b)(4)

The parent caused the death of another child through abuse or neglect. The courts of appeal held that it was appropriate to find that a parent “caused” the death of another child, where the juvenile court found that mother’s neglect in failing to protect her son from lethal abuse by her boyfriend rose to the level of criminal culpability. (*Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933, 942–943)

WIC 361.5(b)(5)

The current petition was sustained under subsection 300(e), in that the conduct of the parent resulted in severe physical abuse of the dependent child before the child’s fifth birthday. (Note: “severe physical abuse” is defined in subsection 300(e))

Unlike the other bypass provisions, the court cannot order reunification unless it finds, based on competent testimony, that the services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child due to a close and positive attachment between the parent and child. (WIC 361.5(c))

WIC 361.5(b)(6)

The child was declared a dependent due to severe physical harm or sexual abuse to the child, a sibling, or half-sibling by a parent and it would not benefit the child to pursue reunification with the offending parent. (Note: “severe physical harm” and “severe sexual abuse” are defined in subsection 361.5(b)(6))

In making the determination whether services would benefit the child, the court must consider all relevant information including the factors listed in subsection WIC 361.5(h).

WIC 361.5(b)(7)

The parent has been denied reunification services for a sibling due to reabuse of the sibling (*see* 361.5(b)(3)), severe physical abuse of the

sibling when less than five years old (*see* 361.5(B)(5)), or severe physical or sexual abuse of the sibling (*see* 361.5(b)(6)).

In making the determination whether services would benefit the child, the court must consider all relevant information including the factors listed in subsection WIC 361.5(h).

WIC 361.5(b)(8)

The child was conceived as a result of incest or continuous sexual abuse of a child. (Note: this subsection disqualifies only the perpetrator parent from receiving services).

WIC 361.5(b)(9)

The court sustained a section 300(g) finding that the parent willfully abandoned the child, creating a serious danger to the child, or the child was voluntarily surrendered under the Safe Haven/Safe Surrender statute.

WIC 361.5(b)(10)

The court ordered termination of reunification services as to a sibling *and* the parent has not subsequently made reasonable efforts to treat the problems leading to that sibling's removal.

WIC 361.5(b)(11)

Parental rights were terminated as to a sibling *and* the parent has not subsequently made reasonable efforts to treat the problems leading to that sibling's removal.

This provision applies even if parental rights were terminated based on the voluntary relinquishment of a sibling. (*In re Angelique C.* (2003) 113 Cal.App.4th 509)

WIC 361.5(b)(12)

The parent was convicted of a violent felony pursuant to Penal Code section 667.5

WIC 361.5(b)(13)

The parent has an extensive history of chronic use of drugs or alcohol *and*

- Resisted prior court-ordered treatment in the three preceding years,
or

- Failed to comply with a treatment case plan at least two prior times.

✚ *TIP: Drug treatment ordered by a criminal court fulfills the statute; the program need not have been ordered as part of the dependency court case plan.*

WIC 361.5(b)(14)

The parent waived reunification services.

✚ *TIP: A parent who may be unsuccessful at reunification or who may have an alternate permanent plan in mind for the child, may wish to waive reunification services to avoid an adverse future finding pursuant to WIC 361.5(b)(10).*

WIC 361.5(b)(15)

The parent abducted the child or a sibling and refused to disclose the child's whereabouts or return the child.

✚ *TIP: If the court denies reunification services and sets a selection and implementation hearing, the parties can ask the court to order a bonding/attachment assessment pending the WIC 366.26 selection and implementation hearing. This evidence may become critical in the court's determination at the WIC 366.26 hearing as to whether any of the exceptions to terminating parental rights apply.*

vi) Orders Regarding Educational Rights

After the court adjudicates the child a dependent, it may make any orders it finds to be within the child's best interest. These may include orders intended to ensure the child's regular attendance at school. (WIC 362 (b), (c), and (d))


The court may limit the parent's right to make decisions regarding the child's education. If it does so, the court must simultaneously appoint a responsible adult to make those decisions. The adult appointed cannot have a conflict of interest and by statutory definition cannot be the child's attorney or social worker, but can be the child's foster parent. (WIC 361(a)) [This segment to be reviewed by Chantal after your edits]

✚ *TIP: The issue of educational rights should always be addressed at disposition, even if only to make clear that the parent retains the right to make educational decisions.*

POST DISPOSITION HEARING CONSIDERATIONS:


1. Client Contact and Advocacy

- Meet with client and explain all orders;
- Continue to check in on client's "action plan" including service participation and visitation;
- Make sure child client's placement, education and health care needs are met; and
- Keep in contact with your client to ensure that issues which may arise prior to the next hearing are addressed. If your client needs a change in court orders, you may need to file a WIC 388 petition and have a hearing before the court.

 **TIP:** Any interested party can file a WIC 388 petition showing change of circumstances and request a modification of a prior court order based on a belief that the modification is in the child's best interest. If it appears that the best interests of the child may be promoted by the proposed modification, the court will grant a hearing on the issue. (See Judicial Council Form 388)

2. Appellate Considerations

- After the court has adjudicated the minor a dependent of the court, your client can appeal any jurisdictional issues, including the truth or falsity of the allegations as well as whether the child should have been declared a dependent.
- This is also the appropriate time to appeal any dispositional orders, including the removal of the child from the parent's care and custody.

 **TIP:** If reunification services were denied to the parent and a WIC 366.26 hearing set, you must file a California Rules of Court §8.452 writ petition rather than an appeal. A writ petition requires immediate attention from the appellate court and an appeal would not be resolved by the time a WIC 366.26 hearing must be heard.

4. STATUS REVIEW HEARINGS

PURPOSE OF HEARING:

After a child is declared a dependent of the juvenile court, if the court orders family maintenance or reunification services to either parent or the legal guardians, the court must set a subsequent hearing to review the status of the child and the progress of the parents or guardians.

In cases where the child has remained placed with the parent under supervision of the Agency, the court's function at this hearing is to determine whether continued Agency supervision is necessary. *The court shall terminate its jurisdiction at the status review hearing, unless the Agency establishes that conditions still exist which would justify initial assumption of jurisdiction under WIC 300, or that those conditions are likely to exist if supervision is withdrawn. [WIC 364]* Failure of a parent to participate regularly in court ordered treatment programs constitutes prima facie evidence that the conditions that justified initial assumption of jurisdiction still exist and that continued supervision is necessary.

In cases where the child has been removed from the parent's care and custody and reunification services have been ordered for at least one parent, the court shall review the child's status at a review hearing. At this review hearing, *the court shall order return of the child to the parent unless the court finds that return of the child to the parent would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. [WIC 366.21]* The failure of a parent to participate regularly and make substantive progress in court-ordered treatment programs constitutes prima facie evidence that return would be detrimental.

PRELIMINARY CONSIDERATIONS:

1. Timelines

Generally, review hearings must be held at intervals of no more than six months. In order to accurately calculate when a hearing must be held, attorneys must be familiar with the date of the initial removal from the home and the date the jurisdictional hearing occurred. See sections a–d below for an explanation on how to calculate the exact date for each individual hearing.

a. Initial Six Month Review

The court must review the child's status within six months of the child's disposition hearing, but cannot be later than 12 months from the date the child entered foster care by which time a twelve month review must be held. The date the child entered foster care has been defined as the date the jurisdictional hearing occurred, or 60 days from the initial removal of the child, whichever is sooner.

b. Twelve Month Review

The court must review the child's status 12 months from the date the child entered foster care, which is the date of the jurisdictional hearing, or 60 days from initial removal, whichever is sooner.

c. Eighteen Month Review

The child's status must be reviewed 18 months from the date of *initial removal*. Initial removal is the date the child was taken into protective custody.

d. Twenty Four Month Review

The child's status must be reviewed 24 months from the date of initial removal.

2. Notice

Notice to include the type of status review hearing, any recommended changes in status or custody of the child, and notice of parties' rights to attend the hearing and present evidence, must be served between 15 and 30 days before the hearing. Notice must go to the mother, presumed fathers, legal guardians, the child and dependent siblings, if over the age of 10, the caregiver and all attorneys of record.

3. Social Worker's Report

At least 10 calendar days prior to the status review hearing, the Agency shall file a report pursuant to WIC 366.21(c) with the court regarding:

- The services offered to and progress of the family;
- The placement of the child ; and
- The recommendation of the Agency as to continued supervision or return of the child to the parent's custody. Specifically the report should contain:
 - The services provided or offered to the family to eliminate the conditions requiring court supervision or to enable the parent to assume custody;
 - Efforts to achieve other legal permanence should efforts to reunify fail;
 - Efforts to maintain relationships between the child and individuals who are important to the child;
 - The prognosis and a recommendation as to whether the child can be returned to the physical custody of the parent; and
 - If the recommendation is that the child cannot be returned, the report shall state why return of the child to the parent's custody would be detrimental.

3. Burden of Proof and Evidentiary Issues

At each review hearing where the child is placed out of home, the court must determine, by a *preponderance of evidence*, whether continued supervision is necessary or whether there is a substantial risk of detriment to the child if returned to the parent's custody (if not already returned). The burden to establish either the need for continued supervision or a substantial risk of detriment to return is on the Agency.

AT THE STATUS REVIEW HEARING:

At review hearings, the court must assess the necessity and appropriateness of the child's placement and the extent of compliance, by all parties, with the case plan.

The court must then make the following findings and orders:

- The factual basis for a determination that the child should or should not be returned to the parent's care and custody.
 - In finding whether there is detriment to the child, the court shall determine whether the parent has participated regularly and made substantive progress in court-ordered treatment programs.
- If the child is not returned, identify additional services reasonably believed to facilitate the return of the child to the custody of the parent and determine whether the Agency provided reasonable services to the parent to aid in the safe return of the child to the parent's custody.

✚ *TIP: At every status review hearing, the court must assess whether orders for visitation are appropriate and are being implemented. Visitation is the most critical aspect of the case plan for the child. The court and all parties must be diligent in ensuring the child's permanent connections are maintained.*

✚ *TIP: The finding that reasonable services have been provided is an affirmative finding the court must make at any review hearing when the child hasn't returned to a parent's custody. The court should not make this finding if the Agency does not present evidence in its report that such services were in fact provided.*

Status Review Hearing Strategies


1. Submit on the Social Worker's Report

Parties should only submit if they agree to the recommended findings and orders for the family. This includes recommendations regarding return, continued reunification services and concurrent planning and placement issues.

✚ *TIP: Counsel should carefully compare the visitation orders with what is actually occurring to determine if visitation is an issue that needs to be addressed at the status review hearing. It is critical to ensure that appropriate visitation orders have been made and are actually being followed at the review hearing stage. If orders are not being followed, the issue of enforcement should be addressed with the court.*


2. Submit with Objection or Argument

Parties may wish to submit on the report, but argue that the evidence is not sufficient to support the recommended findings and proposed orders.

 **TIP:** *This can be an especially effective strategy regarding the issue of whether reasonable services have been provided to the family, in that the burden to present evidence to justify this finding is on the Agency. In arguing failure to provide reasonable reunification services, it is often useful to compare the date of the dispositional order with the date the service referrals were actually made. If there is an unreasonable delay in the date of these service referrals, an argument should be made that services were not timely provided.*

3. Present Evidence or Set a Contested Hearing

Parties should set the matter for a contested hearing if evidence beyond that contained in the report is needed to secure an order that your client requests, or is in your client's best interest.

 **TIP:** *Contested hearings may be necessary when the extent of a parent's progress in reunification services is in dispute. For example, it may be necessary to present direct evidence from the parent's service providers as to his or her progress. It may also be necessary for child's counsel to present evidence as to how the child is doing in placement or to present or cross-examine witnesses regarding a parent's progress.*

POSSIBLE OUTCOMES OF THE STATUS REVIEW HEARING:

The court shall hold periodic status review hearings six months after disposition, twelve months after the child entered foster care and 18 or 24 months after the child was originally removed from the parent, to determine whether the child shall be returned to the parent or whether reunification should continue.

If the child is not returned to the custody of a parent or legal guardian at a permanency hearing, the court shall continue the case for up to six months for a further permanency review hearing, provided that the hearing shall occur within 18 months of the child's initial removal and there is a substantial probability that the child will be returned, or within 24 months of the child's initial removal only if specific circumstances apply. (WIC 366.21(g); 366.22)

If the court does not return the child to a parent or continue reunification services for either parent at a status review hearing, it must terminate reunification services and set a selection and implementation hearing under WIC 366.26 *or* order that the child remain in foster care, but only if the court finds by clear and convincing evidence, based upon evidence already presented to it, that there is a compelling reason for determining that a hearing under WIC 366.26 is not in the best interests of the child because the child is not a proper subject for an adoption and has no one willing to accept legal guardianship as of the hearing date. (WIC 366.21(g)(5))

✦ TIP: *Parents and children should be aware of the potential consequences if reunification services are terminated and a WIC 366.26 hearing is set. It is critical for all parties to be aware that once services are terminated, return home is no longer the legally allowed plan.*

If the court sets a selection and implementation hearing, the parties can ask the court to order a bonding/attachment assessment pending the WIC 366.26 selection and implementation hearing. This evidence may become critical in the court's determination at the WIC 366.26 hearing as to whether any of the exceptions to terminating parental rights apply.

Further, after services have been terminated and prior to the selection and implementation hearing, any party can file a WIC 388 petition to modify the prior court orders terminating services and setting the selection and implementation hearing, if circumstances change and a modification may be warranted.

Most importantly, all parties must remember that anytime a WIC 366.26 hearing is set, if parties wish to challenge any of the orders which resulted from the hearing at which the 366.26 hearing was set, a petition for extraordinary writ must be filed to preserve the right to challenge any of the orders. (See CRC 8.452).

Finally, if the child is placed in the home of the parent following any review hearing, the court can continue to hold periodic review hearings until it finds that conditions no longer exist to justify initial jurisdiction or that conditions would not likely exist if supervision was withdrawn. (WIC 364).

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At each status review hearing, the court must consider the following outcomes and make the appropriate findings.

1. Six Month Review Outcomes

- Terminate jurisdiction, if the child is in the home and there are no longer grounds to continue jurisdiction. Return home to the parent, unless there is a substantial risk of detriment.
- If the child was under the age of three on the date of initial removal, and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in the court-ordered treatment plan, the court may terminate reunification services and schedule a selection and implementation hearing.
- Review and approve the case plan if there is a substantial probability that the child may be returned to his or her parent or that reasonable services were not provided, and make a determination of continued services to one or both parents, and concurrent permanency planning; and/or
- If the child is not returned at this hearing, the court must move expeditiously toward return of the child to a parent or to an alternative permanent plan. (WIC 366.21(e))

2. Twelve-Month Permanency Review Outcomes

- Terminate jurisdiction, if the child is in the home and there are no longer grounds to continue jurisdiction,
- Return home to the parent, unless there is a substantial risk of detriment.
- Review and approve the case plan if appropriate, progress in reunification services and make a determination of continued services to one or both parents if they have consistently and regularly visited the child, have made significant progress in the case plan and have demonstrated an ability to benefit from treatment and provide safely for the child and extend reunification services if substantial probability of return. In order to find a substantial probability of return, the court must find the parent has done the following:
 - a. Consistently contacted and/or visited the child;
 - b. Made significant progress in resolving the problems that led to removal; and
 - c. Demonstrated the capacity and ability to complete the case plan and to provide for the child's safety and medical, physical, and special needs. (WIC 366.21(g)(1)); or
- Terminate reunification services and, if the child is not returned to the parent, order an alternate permanent plan unless reasonable services have not been offered or provided

3. Eighteen-Month Permanency Review Hearing Outcomes

- Return home to the parent, unless there is a substantial risk of detriment, and
- Terminate jurisdiction if there are no longer grounds to continue; and/or
 - Terminate reunification services and, if the child is not returned, order a permanent plan other than reunification. A permanent plan must be ordered by the mandated 18-month limit. (WIC 366.22)

Reunification services may be extended to a Twenty Four Month Review Hearing, but only if the court finds that circumstances so warrant. (WIC 366.22)

4. Twenty Four- Month Permanency Review Hearing Outcomes

- Return home to the parent, unless there is a substantial risk of detriment, and
- Terminate jurisdiction if there are no longer grounds to continue; and/or
 - Terminate reunification services and, if the child is not returned, set a hearing pursuant to WIC 366.26 and order a permanent plan other than reunification. (WIC 366.22)

POST STATUS REVIEW HEARING CONSIDERATIONS:

1. Client Contact and Advocacy

- Meet with your client and his or her caretaker to go over the court's orders to ensure they understand continued obligations in the case.
- Continue investigation to ensure that placements, services and visitation are appropriate and ongoing.
- Keep in contact with your client between status reviews to determine if any interim hearing issues need be addressed. If there are issues that can be resolved informally, assist your client in addressing those with the Agency or other parties. If the issues need to come before the court between status review hearings, for a change in orders, prepare and file a WIC 388 petition on behalf of your client.

2. Appellate Considerations

After any periodic review hearing, determine if there are issues to raise on appeal and if so, whether your client wishes to pursue this remedy. Remember, if a selection and implementation hearing under WIC 366.26 hearing is set as a result of a status review hearing, you must file a writ petition under California Rules of Court 8.452 as opposed to an appeal. A writ may challenge issues of continued out of home placement and termination of reunification services. Trial attorneys are responsible for filing both the notice of intent to file a writ petition and the writ petition itself.

5. SELECTION AND IMPLEMENTATION HEARINGS

PURPOSE OF THE SELECTION AND IMPLEMENTATION HEARING:

A selection and implementation hearing (366.26) must be held to determine the permanent plan for a child, once the court has determined that no reunification services will be offered or that reunification services should be terminated. The court can also set a selection and implementation hearing even if a plan of long-term foster care was ordered, but adoption or guardianship later becomes a viable option for the child. The court must then hold a selection and implementation hearing to determine a permanent plan of adoption, guardianship, long-term foster care or Another Planned Permanent Living Arrangement.

By law, if reunification fails, the preferred plan for all children is adoption. The court must order parental rights terminated and adoption as the permanent plan unless it finds the child is not likely to be adopted or that one of the enumerated exceptions to termination of parental rights and adoption applies. (WIC 366.26(c)(1))

PRELIMINARY CONSIDERATIONS:

1. Timelines


The Selection and Implementation Hearing must be set within 120 days of the court's order either denying or terminating reunification services. (WIC 361.5(f), 366.21(e), 366.21(g)(2), 366.22(a))

2. Notice

Notice must be served on the mother, all presumed and alleged fathers, the child if 10 or older, the caregivers and attorneys for any dependent siblings, dependent siblings, grandparents whose addresses are known if the parent's whereabouts are unknown, all counsel of record, the child's present caregiver, any CASA volunteer and any de facto parent. The notice shall contain time, date place and nature of hearing and notice that the court will select and implement a permanent plan for the child.

3. Social Worker's Report

The child welfare agency, together with the state or county adoption agency, is required to file an adoption assessment report which the court must read and consider. (§366.26 (b))

 **TIP:** Make sure the report addresses all of the areas set forth in 361.5(g), 366.21(i) or 366.22(b) depending on which statute resulted in the setting of the 366.26 hearing. If the

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report does not cover all of the required areas, object to the adequacy of the report. Failure to do so waives your client's right to raise the issue of deficiency of the report on appeal.

4. Burdens of Proof and Evidentiary Issues

In order for the court to terminate parental rights and order a plan of adoption, the agency must prove by ***clear and convincing evidence*** that the child is likely to be adopted within a reasonable time. (WIC 366.26(c)(1))

a. ICWA Considerations

- i. If the child is an Indian child, the agency must prove ***beyond a reasonable doubt*** based on evidence that includes the testimony of qualified expert witnesses, that the parent's continued custody of the child is likely to result in serious emotional or physical damage to the child, before those parental rights can be terminated. (25 U.S.C. §1912(f))

AT THE SELECTION AND IMPLEMENTATION HEARING:

After consideration of the social study and any additional evidence proffered, the court shall determine the most appropriate permanent plan for the child based on the child's adoptability and whether there are any exceptions to adoption. The court shall then make findings and orders as to the permanent plan, in the following order of preference: (WIC 366.26(b))

1. Terminate parental rights and order the child placed for adoption;
2. Continue the hearing for a period not to exceed 180 days, upon finding that:
 - a) the child is likely to be adopted and thus adoption is the permanent plan;
and
 - b) the child is difficult to place and an appropriate family needs to be located
3. Appoint a legal guardian for the child and order letters of guardianship, or
4. Order that the child be placed in long-term foster care subject to periodic court review.

Selection and Implementation Hearing Strategies

1. Submit

You should only submit as parent's or child's counsel if your client is in total agreement with the proposed permanent plan keeping in mind that the legally preferred permanent plan is termination of parental rights and adoption. If either the parent or child objects to that plan or, as child's counsel, you are uncertain whether the proposed plan is in the best interests of the child, you should not submit.

2. Submit With Objection or Argument

Parties should submit with objection or argument if they feel the evidence is insufficient for the court to make the proposed findings or recommended orders. Parties also need to note an objection for the record if they wish to appeal the ultimate order terminating parental rights.

3. Presenting Evidence or Setting a Contested Hearing

Parties should request a contested hearing if they need or wish to present additional evidence on the issues of either the child's adoptability or the exceptions to adoption under WIC 366.26(c)(1). At a WIC 366.26 hearing, return home to a parent is no longer a relevant inquiry. Any party wishing to revisit the issues of return home or reunification services would need to file a WIC 388 petition. Additionally, parent's counsel may ask for a contested hearing to allow the parent an opportunity to be heard on the issue of termination of parental rights. Most parents will understand the recommendation to the court and the likely outcome, but will nonetheless want

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a forum to tell the court their preference and objection to the permanent plan of adoption and the termination of their parental rights.

- ✚ ***TIP: If a parent needs a forum to object, parents' attorneys may go to trial even when the result appears to be a foregone conclusion. In this situation, remind other counsel to be empathic to the parents and children. Consider asking the court and counsel to give the client some latitude by not objecting to narrative answers, or allowing the client to speak from counsel table or read a letter. This may persuade the other participants to be more sensitive in their delivery and make them more conscious of the tone and likely outcome of the hearing.***

POSSIBLE OUTCOMES AT SELECTION AND IMPLEMENTATION HEARING:

1. Adoptability (WIC 366.26(c)(1))

- The court must determine whether the child(ren) is likely to be adopted. (WIC 366.26(c)(1)) Factors the court will consider:
 - The agency must establish that the child’s characteristics are such that it is likely that an adoptive family will be found within a reasonable time.
 - The inquiry focuses on the child not on the potential adoptive parents.
 - The fact that the child is not yet placed in a preadoptive home or with a relative or foster family, who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted.
- If the child is not generally adoptable because of physical or emotional problems but adoption is considered likely because there is a foster parent or other caretaker who is willing to adopt, the child is specifically adoptable and the ability of the potential adoptive family to meet the child’s special needs is relevant to the determination of whether it is likely the child will be adopted.

✚ **TIP: If the child is not generally adoptable because of the child’s age, membership in a sibling group who remain together, or the child’s physical or emotional problems, the child’s and parent’s counsel should consider if the child is specifically adoptable, keeping in mind the following:**

- a. Whether there is an identified prospective adoptive family?
- b. Does the family meet the definition of prospective adoptive parent under WIC 366.26(n)? If the family does not adopt, what is the risk that the child will become a legal orphan?
- c. What is the status of prospective adoptive family’s commitment to adoption?
 - Has the family filed an adoption application?
 - Is there an approved home study? A “home study” is the process of certifying a family that meets the statutory and regulatory requirements for adopting a child. An “approved home study” means that an adoption agency has determined that the family meets these requirements.
- d. Can the identified prospective adoptive family meet the child’s special needs?
- e. How long has the child been placed with the prospective adoptive family and have there been any problems with the placement?
 - a. If so, is there a risk that the placement will fail before the child is adopted?
- f. Is the prospective adoptive placement with a relative?

- i. Has the relative agreed to adopt only because s/he has been threatened with removal if s/he does not adopt the child or otherwise pressured to agree to adoption?
 - If so, the relative's unwillingness to adopt but willingness to provide a permanent plan should be explained to the court.
 - A potential alternative permanent plan with this relative is relevant to the question of the relative's commitment to adopting the child.

2. Exceptions to Adoption (WIC 366.26 (c)(1)(A), (B)(1)(i)-(vi))

✚ **TIP:** *The proponent of any of the enumerated exceptions carries the burden of proof and should therefore present any evidence to establish the existence of an exception to termination of parental rights. Argument, unless to suggest a lack of evidence of adoptability, is not enough to establish an exception.*

WIC 366.26(c)(1)(A):

The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child would be detrimental to the emotional well-being of the child.

WIC 366.26(c)(1)(B):

The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

WIC 366.26(c)(1)(B)(i): The Parental "Benefit" Exception

The parent has maintained regular contact with the child and the child would benefit from maintaining the relationship. The court must find that terminating the parent-child relationship would cause the child great harm such that maintaining the relationship would outweigh the benefits of adoption. (*In re Autumn H.* (1994) 27 CA4th 567)

✚ **TIP:** *Beware of The "Bonding Study"*

- *There is no requirement that the juvenile court order a bonding study before it orders termination of parental rights. (In re Lorenzo C. (1997) 54 CA4 1330)*
- *Don't wait until the 366.26 hearing to request a bonding study. The better practice is to request the study at the conclusion of the hearing which results in the setting of the 366.26 hearing. (In re Richard C. (1998) 68 CA4 1191)*
- *Bonding studies can prove that the child's attachment to the parent is not a positive attachment.*

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- *A bonding study may not be sufficient on its own to show attachment for purposes of the WIC 366.26(c)(1)(A) exception.*

WIC 366.26(c)(1)(B)(ii):

The child is 12 or older and objects to adoption.

WIC 366.26(c)(1)(B)(iii):

The child is in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding a permanent home when residential treatment is no longer necessary.

WIC 366.26(c)(1)(B)(iv):

The child is living with a relative or foster parent or Indian custodian who is unable or unwilling to adopt for reasons other than unwillingness to accept legal or financial responsibility for the child but who is willing to provide stability and permanence and removal would be detrimental to the child. This exception does not apply if child is living with non-relative and is under age 6 or is part of a sibling group that includes a child under age 6 and siblings should be placed together.

WIC 366.26(c)(1)(B)(v):

There would be a substantial interference with a sibling relationship. The court must consider various factors about the relationship and must weigh the claimed detriment in terminating the relationship against the benefits of adoption. Detriment considerations apply only to child who is before the court, not to the child's siblings. (*In re Celine R.* (2003) 31 C4 45)

WIC 366.26(c)(1)(B)(vi):

The child is an Indian child and there is a compelling reason for determining that the termination of parental rights would not be in the child's best interest, including but not limited to:

- i. Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or membership rights.
- ii. The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child.

- iii. The child is a nonminor dependent and the nonminor and their tribe have identified tribal customary adoption as the plan.

WIC 366.26(C): For purposes of subsection (B) regarding tribal customary adoptions, WIC 366.24 shall apply.

WIC 366.26(D): If the court finds that termination of parental rights would be detrimental pursuant to any of the above, it shall state the reasons in writing or on the record.

WIC 366.26(c)(2): The court **shall** not terminate parental rights if at each hearing at which the court was required to consider reasonable efforts it made a finding that reasonable efforts were not made or that reasonable services were not offered or provided.

3. Adoption and Termination of Parental Rights or Tribal Customary Adoption Ordered as the Permanent Plan:

- The court must refer the child to the state or county adoption agency for adoptive placement.
- The agency is required to give preference to a foster parent's or relative caretaker's application for adoption if would be detrimental to remove child from that home.
- WIC 366.26(n) permits the court at the WIC 366.26 hearing or later to designate the current caretaker as a Prospective Adoptive Parent if the requirements of the subdivision are met.

a. ICWA Considerations

- If tribal customary adoption is the plan, the court shall order it without termination of parental rights, through tribal custom, traditions, or law of the Indian child's tribe, and upon the court affording the tribal customary adoption order full faith and credit.
- If child is an Indian child and termination of parental rights is the plan, the agency **must give adoptive placement preference to:**
 - Members of the child's extended family
 - Other members of the child's tribe
 - Other Indian families
- The court **shall** not terminate parental rights if at the hearing terminating parental rights, the court has found that active effort were not made. (WIC 361.7)

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- The court *shall* not terminate parental rights if the court does not make the determination that beyond a reasonable doubt and supported by testimony of one or more qualified experts, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.
- Post adoption contact agreements for parent, sibling contact or birth-relative contact are attached to the adoption petition and become part of the adoption order. (§366.29, Fam. Code §8714 *et seq.*)
- The adoption may not be finalized until the parents' appellate rights have been exhausted.

4. Adoption is the Permanent Plan but the Hearing is Continued

- If the court finds that the child is likely to be adopted but that an adoptive home has not yet been identified because the child is difficult to place, the court should identify adoption as the permanent plan but may delay termination of parental rights for 180 days to give the Agency a chance to find an adoptive family. (WIC 366.26(c)(3))
- At the end of the 180 days, the court may terminate parental rights and order adoption as the permanent plan if an adoptive home has been found.

5. Guardianship is Ordered as the Permanent Plan

- When the court orders a guardianship, it may dismiss the dependency case or retain the child as a dependent unless the guardian is a relative with whom the child has been living for at least 12 months. In that case, the court must dismiss the dependency unless the relative objects or the court finds exceptional circumstances. (WIC366.3(a))
- If the dependency is dismissed, the relative guardian is eligible for Kin-GAP funding until the child turns 18. Kin-GAP was designed to provide ongoing funding to relative caregivers, similar to the funding which foster caregivers continued to receive after dependency terminated. (WIC 366.22(c))

6. Order that the Child Remain in Foster Care

If the court finds that adoption or tribal customary adoption of the child or termination of parental rights is not in the best interest of the child because one or more exceptions apply, and the court finds that guardianship is not suitable, the court may order that the child continue in foster care with an identified permanent plan but shall make factual findings identifying any barriers to achieving adoption, tribal customary adoption, legal guardianship, or placement with a fit and willing relative as of the date of the hearing. (WIC 366.26(c)(4)(a))

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If the child is in a placement other than the home of a legal guardian and jurisdiction has not been dismissed, the status of the child shall be reviewed by the court every six months. (366.3(d))

POST SELECTION AND IMPLEMENTATION HEARING CONSIDERATIONS:

1. Client Contact and Advocacy

- Meet with the client and make sure they understand the orders of the court. Explaining these orders is especially critical at this stage because the court may have terminated parental rights which will sever your client's rights to an ongoing relationship with the child.
 - In addition you may be relieved as counsel of record, so the parent needs to understand that they may no longer have appointed counsel at the trial court level.
- If the court ordered a final visit for the parent and child(ren), make sure to assist your client in determining the logistics of the final visit.
- Maintain contact with child clients to ensure implementation of their permanent plans.
 - Also, check with the Agency to determine if they are following through with requirements of either adoption or guardianship, to expedite the permanent plan.
- If the plan is long-term foster care, stay in touch with your client to gather information about important connections and potential placements for the child. The court can always reconsider the permanent plan if a new placement or plan becomes available.

2. Appellate Considerations

- The notice of appeal must be filed within 60 days of the order.
- The attorney must have the client's authorization to file the appeal.
- The client should have been advised to file a writ petition pursuant to California Rules of Court 8.452, in order to preserve their rights on appeal at this point in the proceeding. If a writ petition was not filed at the time the 366.36 hearing was set, the client can waive any right to appeal the orders which are made at the 366.26 hearing.
- If a parent files a notice of appeal, child's counsel must determine whether independent counsel on appeal is necessary for the child. (California Rule of Court 5.661)

3. Setting Aside a Termination of Parental Rights Order

- Pursuant to WIC 366.26(i)(1), an order terminating parental rights is final in the juvenile court and **may not be modified, changed or set aside except as provided in subdivision WIC 366.26(i)(2)**:
 - If the child has not been adopted within 3 years and the court determines that the permanent plan is no longer adoption, the child may file a WIC 388 petition to reinstate parental rights.

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- The child may file before 3 years have passed if the adoption agency and the child stipulate that the child is no longer adoptable. The child may file before 3 years have passed if the adoption agency and the child stipulate that the child is no longer adoptable.
- A child over 12 must sign the WIC 388 petition in absence of a showing of good cause.
- The court must set a hearing if it appears that the best interests of child will be promoted by reinstating parental rights.
- The court must set a hearing if it appears that the best interests of child will be promoted by reinstating parental rights.
- The court must set a hearing if it appears that the best interests of child will be promoted by reinstating parental rights.
- The court must give notice to the agency, the child’s attorney or the child, and to the child’s tribe.
- The court can order the agency or child’s counsel to give notice to the child’s former parents.
- The court can order the agency or child’s counsel to give notice to the child’s former parents.
- The court may grant the petition if there is *clear and convincing evidence* that the child is no longer adoptable and that reinstatement of parental rights in the child’s best interests.
- If parental rights are reinstated, but the plan is not reunification with the parents, the court is required to specify the factual basis for its finding that reinstatement is in the child’s best interests.

6. POST-PERMANENCY REVIEW HEARINGS

PURPOSE OF HEARING:

A post-permanency review hearing is held at least every six months subsequent to a selection and implementation hearing or any other hearing out of which the child remains in foster care to review the status of the child and determine whether the Agency is making reasonable efforts to:

- 1) Implement the child's permanent plan; or**
- 2) Develop and implement a more permanent plan for any child who remains in foster care.**

If the court has ordered a plan of adoption or guardianship pursuant to WIC 360 or 366.26, the court shall continue to review the child's status until the child is adopted or the court closes the case following the establishment of a legal guardianship. (WIC 366.3(a)) If the child's current permanent plan is not adoption or legal guardianship, the court shall review the status of the child in an effort to implement a more permanent plan. (WIC 366.3(d))

PRELIMINARY CONSIDERATIONS:

1. Timelines

A case review must be held at least once every six months. (WIC 366.3(a)) The review may be conducted by a court or a local review board/administrative panel. The review must be conducted by the court if any of the following apply:

- The child has been freed and placed for adoption;
- The child, parent or guardian requests court review;
- Twelve months have passed since an order was made for the child to remain in foster care or since the last WIC 366.26 hearing; or
- It has been 12 months since the last court review.

2. Notice

Notice must contain the date, time, place and nature of the hearing, and any recommended changes to the child's custody, status or permanent plan. Notice must be served on the mother, presumed fathers, legal guardians, the child and dependent sibling, if over the age of 10, the child's caregiver and all attorneys of record.

3. Social Worker's Report

Per WIC 366.3(e), the social worker's report must address and the court must assess each of the following:

- The continuing necessity for and appropriateness of the placement;
- Whether the child has dependent siblings, and if so, the nature of those relationships and whether developing or maintaining them is appropriate as well as the nature of sibling visitation;
- For children over the age of 10 who have been out of home for six months or longer, identification of important individuals other than siblings, and actions to maintain relationships with identified important individuals;
- The continuing appropriateness of the child's permanent plan;
- The extent of the Agency's compliance with the plan and reasonableness of its efforts to return the child to a safe home and finalize the permanent plan;
- Whether the parent's educational rights, if still intact, should be limited;
- The adequacy of services to the child including those required under WIC 391 for teens nearing emancipation;
- For children age 14 and older, the services to assist them in transition to successful adulthood;
- The extent of the parent's progress in alleviating or mitigating the problems necessitating foster care; and
- The likely date by which the permanent plan will be achieved.

4. Burdens of Proof and Evidentiary Issues

For a child in postpermanency, continued care is presumed to be in the child's best interests unless a parent seeking further reunification proves by a *preponderance of evidence* that reunification is the child's best alternative. (WIC 366.3(f)) While the court must consider all permanency options including return to the home of a parent, the burden shifts to the parent at this stage of the proceedings to prove changed circumstances and that return would be in the child's best interests.

AT THE POST PERMANENCY HEARING:

At each review hearing the court must make a determination as to whether the Agency made reasonable efforts to make and finalize a permanent plan. (WIC 366.3(d)(4),(e)(4),(g)(12))

The parent and child have a right to participate and contest any of the proposed findings and orders that the Agency presents to the court.

Strategies at the Post Permanency Hearing

1. Submit

Counsel for parents and children should only submit if the clients are in agreement with the proposed permanent plan and they feel the Agency is meeting all of the requirements to both service the current plan and implement a permanent plan. Because the requirements of WIC 366.3(e) set out above require a detailed assessment by the Agency, counsel should review the evidence carefully to determine if the report sufficiently addresses each element of the statute.

2. Submit with Objection or Argument


Parties may wish to submit but object or argue against certain recommendations or argue that the Agency has failed to make reasonable efforts at plan implementation.

 **TIP:** *As counsel for the child, review the report carefully to ensure that efforts made by the Agency include those necessary to:*

- 1) *Assist the child to transition or achieve independence with identification of a caring adult to serve as a lifelong connection;*
- 2) *Address the child's educational needs; and*
- 3) *Identify and maintain permanent connections*

3. Presenting Evidence or Setting a Contested Hearing


Parties do have the right to contest recommended findings, the proposed permanent plan, or the efforts at finalizing an appropriate permanent plan. Often as long-term cases become static, it becomes incumbent on the attorneys for parents and children to bring additional evidence and information to the court's attention in order for the court to implement an appropriate plan.

 **TIP:** *As post permanency hearings are reviewed in six month increments, circumstances can change between hearings. Attorneys for parents and children must track the situation of parents, relatives, caretakers and the children in order to facilitate permanency and inform the court of changed circumstance regarding services or placement. This evidence may need to come before the court as evidence in a contested hearing. For example, a relative who could previously not take placement of the child, may have had a change in circumstance which would allow for the possibility of placement. Counsel must present this evidence to the court, so that the court can make an appropriate placement determination.*

POSSIBLE POST PERMANENCY HEARING OUTCOMES:

1. Return Home

At every post-permanency planning review hearing for a child who has a permanent plan other than adoption or legal guardianship, the option to return the child home still exists. WIC 366.3(g) states specifically that the court should consider all permanency options including whether the child should be returned to the home of the parent. The presumption is for continued out-of-home care and unless evidence supporting return is contained in the report, the burden is on the parent to present evidence to the court as to why return would be the best permanent plan for the child.

 *TIP: At any time between WIC §366.3 hearings, if the parent or any other party seeks return of the child to parental care a WIC 388 petition is required.*

2. Reinstate Reunification Services

The code does allow for a parent to make a showing that provision of services for a six month period would facilitate reunification. (WIC 366.3(f)) In some cases, immediate return home may not be appropriate, but a parent may be able to show enough progress that, with the provision of services, return home within six months would be likely.

3. Set a WIC 366.26 hearing

At any WIC 366.3 hearing at which the child remains in foster care, the court shall consider all permanency planning options for the child including placement for adoption or tribal customary adoption, appointment of a legal guardian or placement with a fit and willing relative. The court *shall* order that a WIC 366.26 hearing be held, unless it determines by clear and convincing evidence that there is a compelling reason for determining a WIC 366.26 hearing is not in the best interest of the child because the child is not a proper subject for adoption or no one is willing to accept legal guardianship. (WIC 366.3(h)(1))

4. Order that the child remain in foster care

Only upon the court's determination that there is a compelling reason that setting a WIC 366.26 hearing is not in the child's best interest, may the court order that the child remain in foster care, without holding a hearing pursuant to WIC 366.26. The court shall make factual finding identifying any barriers to achieving the permanent plan as of the hearing date. (WIC 366.3(h)(1))

If the court determines for compelling reasons that none of the permanent plan options are in the best interest of the child **AND** the child is 16 or older, the court can consider whether the child should be placed in another planned permanent living arrangement. (WIC 366.3(h)(1)) If the child 16 or older is placed in another planned permanent living

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arrangement, at each review hearing, the court must determine whether the county agency has complied with the case plan by making reasonable efforts, including ongoing and intensive efforts to finalize the permanent plan. (WIC 366.3(h)(2))


5. Termination of Jurisdiction

The court can terminate jurisdiction over the case if the child is returned home and the child no longer needs supervision, adoption is finalized, or guardianship is established and dependency jurisdiction is no longer necessary. It would be rare for the court to order a new permanent plan of return home and simultaneously terminate jurisdiction. If a new plan of return home is ordered, a court typically continues to supervise the case for a period in time to ensure that the conditions originally requiring dependency no longer exist or are not likely to re-occur. When a legal guardianship is ordered, however, it is common for dependency jurisdiction to be terminated.

POST HEARING CONSIDERATIONS:

1. Client Contact and Advocacy

- Make sure you have all of your client's current information and keep track of his/her whereabouts and activities as much as possible between post permanency reviews. Circumstances may change, warranting the filing of a WIC §388 petition to modify the permanent plan.

 *TIP: This is particularly important for minor's counsel because there may be changes in the education, placement, transition and emancipation needs of your client.*

- Make sure the Agency is aware of any services a client may be accessing or may need.
- At all stages of the case, visitation is still important and should be ordered and administrated for parents, siblings and any other significant people in the child's life, unless it would be detrimental to do so.

2. Appellate Considerations

Parents and all parties have the right to contest proposed findings and orders and present evidence to the court. As such, the parties have the right to appeal any final orders made as a result of a post permanency review hearing.

7. NONMINOR DEPENDENT HEARINGS

PURPOSE OF THE HEARING

The enactment of the Fostering Connections Act of 2008 makes it possible to access federal funding for foster care services for dependents and wards beyond their 18th birthday, which will provide them with the time and support needed to gradually become fully independent adults. The guiding principle of this extension is to provide each eligible nonminor with the opportunity to make decisions regarding his or her housing, education, employment, and leisure activities, while ensuring the availability of ongoing support and assistance when difficulties are encountered.

The Fostering Connections Act created two new hearing types—one for a nonminor’s request to return to foster care and the other for a nonminor dependent status review—and made extensive amendments to three existing hearing types—the last status review hearing before a court dependent or court ward in a foster care placement attains 18 years of age, the hearing to terminate juvenile court jurisdiction over a ward who is or was subject to an order for a foster care placement, and the hearing to terminate jurisdiction over a nonminor. These hearing are intended to review the nonminor’s status and make sure that the nonminor has the information need to make a thoughtful decision about remaining in foster care, the options available, including the potential benefits of remaining in foster care, the right to exit foster care, and the right to return to foster care.

PRELIMINARY CONSIDERATIONS

1. Timeliness

a. Last Status Review for Child Approaching the Age of Majority:

- **Dependency:** This hearing should be conducted at the last review hearing before the child turns 18 years of age, under WIC 366.21, 366.22, 366.25, 366.3 or 366.31, within six months of the previous review hearing.
- **Delinquency:** This hearing should be conducted at the last review hearing before the child turns 18 years of age, under WIC 727.2 or 727.3, but should be set at least 90 days before the child’s 18th birthday and within six months of the previous review hearing.

b. Nonminor Dependent Status Review Hearing:

This hearing should be conducted as the first hearing following the nonminor’s 18th birthday, within six months of the previous review hearing, and no less frequently than every six months thereafter.

c. Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Nonminor (Rule 5.555)

This hearing should be conducted prior to terminating juvenile court jurisdiction and may be held during a review hearing required under WIC 366(f), 366.21, 366.22, 366.25, 366.3, 727.2 or 727.3 or California Rule of Court 5.903.

d. Hearing of Request by Nonminor for the Juvenile Court to Resume Jurisdiction

If a hearing is granted by the court, this hearing should be held within 15 days from the date the JV-466—*Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care*, was filed with the court that retained general jurisdiction.

2. Notice

The Social Worker or Probation Officer must serve written notice of the hearing in the manner provided in WIC 295 to all persons required under WIC 295, except parents or legal guardians of the nonminor dependent, unless the parent is still participating in reunification services:

- The nonminor
- Any known siblings
- The current caretaker of the nonminor
- The attorney of record, if any
- The nonminor's Indian Tribe, if any

3. Reports

a. Dependency: Last Status Review for Child Approaching the Age of Majority

At the last review hearing before a child's 18th birthday, in addition to complying with all other statutory and rule1 requirements, the social worker must submit a report that includes all of the following:

- i. The child's plans to remain under juvenile court jurisdiction as a nonminor dependent (NMD), including the criteria in Welfare and Institutions Code section 11403(b)2 that he or she plans to meet;
- ii. The efforts made by the social worker to help the child meet the criteria in section 11403(b);
- iii. For an Indian child to whom the Indian Child Welfare Act (ICWA) applies, whether he or she plans as a NMD to continue to be considered an Indian child for the purposes of the ongoing application of ICWA;
- iv. Whether the child has applied for title XVI Supplemental Security Income (SSI) benefits and, if so, the status of any pending application and whether

it is in the child's best interest to continue juvenile court jurisdiction until the SSI decision is issued to ensure that the child receives continued assistance with the application process;

- v. Whether the child has a pending application for Special Immigrant Juvenile Status or other application for legal residency and, if so, whether an active dependency case is required for that application;
- vi. The efforts made by the social worker toward completing and providing the child with the written information described in section 391(e)(1) and, to the extent that the child has not been provided with the information, the barriers to providing that information and the steps that will be taken to overcome those barriers by the child's 18th birthday;
- vii. The efforts made by the social worker toward completing and providing the child with the documents and services described in section 391(e)(2) and, to the extent that the child has not received them, the barriers to providing them and the steps that will be taken to overcome those barriers by the child's 18th birthday;
- viii. When and how the child was informed of the right to have juvenile court jurisdiction terminated when he or she turns 18 years old;
- ix. When and how the child was provided with information about the potential benefits of remaining under juvenile court jurisdiction as a NMD, and the social worker's assessment of the child's understanding of those benefits; and
- x. When and how the child was informed that if juvenile court jurisdiction is terminated, he or she has the right to file a request to return to foster care and have the juvenile court resume jurisdiction over him or her as a NMD; and
- xi. The child's Transitional Independent Living Plan, which must include:
 - a. The individualized plan for the child to satisfy one or more of the criteria in section 11403(b) and the child's anticipated placement as specified in section 11402; and
 - b. The child's alternate plan for his or her transition to independence, including housing, education, employment, and a support system in the event the child does not remain under juvenile court jurisdiction after attaining 18 years of age.

b. Nonminor Dependent Status Review Hearing

- i. The social worker or probation officer must submit a report that includes the following information:
- ii. The continuing necessity for the nonminor's placement and the facts supporting that conclusion;
- iii. The appropriateness of the current foster care placement;
- iv. The NMD's plans to remain under juvenile court jurisdiction, including criteria in section 11403(b) that have been met;
- v. The efforts made by the social worker or probation officer to help the nonminor meet the criteria in section 11403(b);

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- vi. Verification that the NMD was provided with the information, documents, and services required under section 391(e);
 - vii. Information about the development of the TILCP, including how and when it was created, how the NMD participated, and, for a NMD who elected to have the Indian
 - viii. Child Welfare Act (ICWA) continue to apply, the extent of consultation with the tribal representatives;
 - ix. The efforts made by the social worker or probation officer to comply with the TILCP and efforts to finalize the permanent plan and prepare for independent living;
 - x. Progress made towards meeting the TILP goals, and modifications to assist the nonminor in attaining the goals;
 - xi. The efforts made by the social worker or probation officer to help maintain relationships between the nonminor and caring and committed adults; and
 - xii. The efforts made by the social worker or probation officer as required under section 366(a)(1)(D) to help establish or maintain the nonminor's relationship with his or her siblings who are under the juvenile court's jurisdiction.
 - a. The social worker or probation officer who prepares the report must submit the TILCP and TILP with the report.
 - b. The report, the TILCP, and the TILP must be filed with the court at least 10 calendar days before the hearing, and copies of all documents must be provided to the NMD, all attorneys of record, and, if applicable, tribal representatives where ICWA continues to apply.
- c. Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Nonminor**
- i. The social worker or probation officer's report must include the following information:
 - a. Whether remaining under juvenile court jurisdiction is in the nonminor's best interests and the facts supporting the conclusion reached;
 - b. The specific criteria in section 11403(b) met by the nonminor that makes him or her eligible to remain under juvenile court jurisdiction as a nonminor dependent;
 - c. For an Indian nonminor to whom the Indian Child Welfare Act (ICWA) applies, when and how the nonminor was provided with information about the right to continue to be considered an Indian child for the purposes of the ongoing application of ICWA;
 - d. Whether the nonminor has applied for title XVI Supplemental Security Income (SSI) benefits and, if so, the status of any pending application and whether remaining under juvenile court jurisdiction until a final SSI decision has been issued is in the nonminor's best interests;

- e. Whether the nonminor has applied for Special Immigrant Juvenile Status or other application for legal residency and, if so, the status of any pending application and whether an active juvenile court case is required for that application;
- f. When and how the nonminor was provided with information about the potential benefits of remaining under juvenile court jurisdiction as a nonminor dependent, and the social worker's assessment of the nonminor's understanding of those benefits;
- g. When and how the nonminor was informed that if juvenile court jurisdiction is terminated with the court retaining general jurisdiction, the nonminor has the right to file a request to return to foster care and the juvenile court jurisdiction as a nonminor dependent;
- h. When and how the nonminor was informed that if juvenile court jurisdiction is continued, he or she has the right to have juvenile court jurisdiction terminated;
- ii. For a nonminor who is not present for the hearing:
 - a. Documentation of the nonminor's statement that the nonminor did not wish to appear in court for the scheduled hearing; *or*
 - b. Documentation of the reasonable efforts made to locate the nonminor whose current location is unknown; and
- iii. Verification that the nonminor was provided with the information, documents, and services as required under section 391(e)(1)–(8); *and*
- iv. Verification for a nonminor who is under delinquency jurisdiction that the notices and information required under section 607.5 were provided.
 - a. A completed *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365), the nonminor's TILCP if the recommendation is for continuation of juvenile court jurisdiction, the nonminor's most recent TILP, and the nonminor's completed 90-day Transition Plan must be filed with the social worker's or probation officer's report.
 - b. The social worker or probation officer's report and all documents must be filed with the court at least 10 calendar days before the hearing, and the social worker or probation officer must provide copies of the report and other documents to the nonminor, the nonminor's parents, and all attorneys of record. If the nonminor is under juvenile court jurisdiction as a nonminor dependent, the social worker or probation officer is not required to provide copies of the report and documents to the nonminor dependent's parents.

d. Hearing of Request by Nonminor for the Juvenile Court to Resume Jurisdiction

The social worker, probation officer, or Indian tribal agency case worker must submit a report to the court that includes:

- i. Confirmation that the nonminor was previously under juvenile court jurisdiction subject to a foster care placement order at the time he or she turned 18 years old; Or that the nonminor was in a juvenile court

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established adoption or guardianship at the time he or she turned 18 years old and the caretaker is no longer receiving funding under sections 10103.5; 11400(v)(1); that the juvenile court retained general jurisdiction over the nonminor; and that on and after January 1, 2012, the nonminor will not have turned 19 years of age; or commencing January 1, 2013, he or she will not have turned 20 years of age; or commencing on January 1, 2014, he or she will not have turned 21 years old;

- ii. The condition or conditions under section 11403(b) that the nonminor intends to satisfy;
- iii. The opinion of the person submitting the report as to whether continuing in a foster care placement is in the nonminor's best interests and a recommendation about the resumption of juvenile court jurisdiction over the nonminor as a nonminor dependent;
- iv. Whether the nonminor & the placing agency have entered into a reentry agreement for placement in a supervised setting under the placement & care responsibility of the placing agency;
- v. The type of placement recommended should the request be granted to return to juvenile court jurisdiction and foster care; and
- vi. If the placement recommended is in a setting where minor dependents also reside, the results of the background check of the nonminor under section 16504.5.
 - a. The background check under section 16504.5 is required only if a minor dependent resides in the placement under consideration for the nonminor.
 - b. A criminal conviction is not a bar to a return to foster care and the resumption of juvenile court jurisdiction as a nonminor dependent.
 - i. The report and any supporting documentation must be filed with the court and a copy provided to the nonminor and the nonminor's attorney at least two court days before the hearing; and
 - ii. If the court determines that the report and other documentation submitted by the placing agency do not provide all the information listed above in this section and the court is unable to make all the findings and orders required below in sections IX and X, the hearing must be continued for no more than five court days for the placing agency or the nonminor to submit additional information as ordered by the court.

4. Criteria:

Nonminor Dependent Status:

“Nonminor dependent” is the term used in the Fostering Connections Act to describe a dependent or ward who:

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1. Was under an order for a foster care placement on his or her 18th birthday and is not more than 21 years of age;
2. Is currently in supervised foster care under the placement and care of the county welfare department, county probation department, or Indian tribe;
3. Has chosen to remain under or return to juvenile court jurisdiction; and
4. Has a Transitional Independent Living Case Plan that includes meeting at least one of the education, training, or work requirements in Welfare and Institutions Code section 11403(b) or being unable to do so because of a medical condition.

Nonminor Dependent Participation Conditions:

1. The nonminor is completing secondary education or a program leading to an equivalent credential.
2. The nonminor is enrolled in an institution which provides postsecondary or vocational education.
3. The nonminor is participating in a program or activity designed to promote, or remove barriers to employment.
4. The nonminor is employed for at least 80 hours per month.
5. The nonminor is incapable of doing any of the activities described above due to a medical condition, and that incapability is supported by regularly updated information in the case plan of the nonminor.

Transition Jurisdiction Status:

The juvenile court is required to consider whether the court's jurisdiction should be modified from delinquency jurisdiction to transition or dependency jurisdiction. This also applies to any other hearing during which the court will consider terminating its jurisdiction over a ward in foster care or a ward who was a juvenile court dependent in foster care when he or she was adjudged to be a ward.

- i. Transition jurisdiction is described in WIC 450 and applies to a ward who meets the following criteria:
 - a. Age and foster care status
 - Older than 17 years and 5 months of age and younger than 18 years of age and in foster care placement; or
 - Subject to an order for foster care placement on his or her 18th birthday and on or after January 1, 2012, has not attained 19 years of age; commencing January 1, 2013, has not attained 20 years of age; or commencing January 1, 2014, has not attained 21 years of age.

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- b. Removal status
 - Removed from the physical custody of a parent or legal guardian, adjudged to be a ward, and ordered into foster care placement as a ward; or
 - Removed from the custody of his or her parents or legal guardian as a dependent of the court with an order for foster care placement as a dependent in effect at the time the court adjudged him or her to be a ward.
- c. Rehabilitative goals of the minor or nonminor have been met and juvenile court jurisdiction over him or her as a ward is no longer required.
- d. If the ward is a minor:
 - Reunification services have been terminated;
 - Hearing for termination of parental rights or establishment of guardianship has not been set;
 - A return of the minor to the physical custody of the parents or legal guardian would create a substantial risk of detriment to the minor's safety, protection, or physical or emotional well-being; and
 - The minor has indicated an intent to sign a mutual agreement for placement in a supervised setting as a nonminor dependent.
- e. If the ward is a nonminor, he or she has signed a mutual agreement or a voluntary reentry agreement for placement in a supervised setting as a nonminor dependent.

Continued Jurisdiction Status:

Although a nonminor may remain under juvenile court jurisdiction as a ward or dependent without meeting the requirements for status as a nonminor dependent, he or she will not be eligible to receive the Aid for Dependent Children–Foster Care (AFDC-FC) funding and some of the other services available to a nonminor dependent.

AT THE HEARINGS:

Last Status Review for Child Approaching the Age of Majority

Dependency

This hearing is to confirm that a dependent in a foster care placement has the information needed to make a thoughtful decision about remaining in foster care, the court must ensure that at the last status review hearing held before a dependent turns 18 years old, the child understands the options available, including the potential benefits of remaining in foster care and how that can be accomplished; the right to exit foster care and have juvenile court jurisdiction terminated; and the right to request to have that jurisdiction resumed and to return to foster care. Rule 5.707 of the California Rules of Court states the information that must be included in the social worker's report and the required findings and orders, which are found on an optional form: *Attachment: Additional Findings and Orders for Child Approaching Majority—Dependency* (form JV-460).

Nonminor Dependent Status Review Hearing

This hearing is focused on the goals and services in the nonminor dependent's Transitional Independent Living Case Plan, including efforts to maintain or obtain permanent connections with caring and committed adults. The hearing is intended to be a collaborative effort involving the nonminor dependent, the social worker or probation officer, the judicial officer, and other participants whom the nonminor dependent may have invited. The use of the *Findings and Orders After Nonminor Dependent Review Hearing* (form JV-462) will ensure compliance with the requirements related to the findings and orders at the review hearing for a nonminor dependent.

Strategies at the NMD Status Review Hearing

1. Submit

Counsel for the nonminor should only submit if the nonminor is in agreement with the case plan and proposed continued service plan and they feel the Agency is meeting all of the requirements to both service the current plan and transition them from foster care to independent living.

2. Submit with Objection or Argument


Parties may wish to submit but object or argue against certain recommendations or argue that the Agency has failed to make reasonable efforts at plan implementation.

- ✚ ***TIP: As counsel for the nonminor, review the report carefully to ensure that efforts made by the Agency include those necessary to:***
 - a. Ensure meaningful participation in the eligibility requirements;***
 - b. Maintain the appropriate supervised placement setting; and***

- c. *Assist the nonminor to transition or achieve independence with identification of a caring adult to serve as a lifelong connection; and*

3. Presenting Evidence or Setting a Contested Hearing

Parties do have the right to contest recommended findings, the proposed permanent plan, or the efforts at finalizing the permanent plan. Nonminor cases can sometimes become stalled and it becomes incumbent on the attorney for the nonminor to bring additional evidence and information to the court's attention in order for the court to implement the nonminor's plan.

 **TIP:** *As NMD Status Review Hearings are reviewed in six month increments, circumstances can change between hearings. Attorneys for the nonminor should track the situation of the youth, and inform the agency and the court of changed circumstance if necessary.*

Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Nonminor

This hearing must be held to consider the termination of juvenile court jurisdiction over a nonminor who is a ward, dependent, or nonminor dependent subject to an order for a foster care placement. When terminating jurisdiction over a nonminor, irrespective of his or her status as a ward, dependent, or nonminor dependent, entering an order retaining general jurisdiction for the purposes of resuming jurisdiction over the nonminor is critical because a nonminor who has not yet reached 21 years of age will then be able to return to foster care if he or she meets the eligibility requirements for status as a nonminor dependent. This flexibility is important as circumstances and needs may change several times between the ages of 18 and 21 years.

The *Findings and Orders After Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Nonminor* (form JV-367) is a mandatory form for use in a hearing under section 391 or section 607.3 held on behalf of a nonminor who is appearing before a judicial officer exercising juvenile court jurisdiction under section 300, 450, 601, or 602.

Hearing of Request by Nonminor for the Juvenile Court to Resume Jurisdiction

A nonminor who attained 18 years of age while subject to an order for foster care placement for whom the court has dismissed dependency jurisdiction pursuant to WIC 391, but has retained general jurisdiction, may petition the court in the same action in which the child was found to be a dependent child of the juvenile court, for a hearing to resume the dependency jurisdiction per WIC 388(e)(1).

A nonminor who has not attained 21 years of age may petition the juvenile court for a hearing to assume dependency jurisdiction if he or she is a nonminor former dependent who was receiving aid under adoption assistance or Kin-GAP, and his or her adoptive

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parents or guardians have either died or are no longer willing to provide ongoing support to, and no longer receive benefits on behalf of, the nonminor, per WIC 388.1.

This hearing is to determine whether the nonminor wishes to and legally can resume juvenile court jurisdiction, has entered into a voluntary agreement, and intends to satisfy a condition or conditions under WIC 11403(b) and whether resuming an agreed upon foster care placement is in the nonminor's best interest.

POST AND INTERIM HEARING CONSIDERATIONS

Client Contact and Advocacy

Make sure you have all of your client's current information and keep track of his/her whereabouts and activities as much as possible between status reviews. Circumstances may change, warranting changes to the case plan or the supervised placement setting. You may also need to support and assist the nonminor to continue to successfully participate in the eligibility conditions.