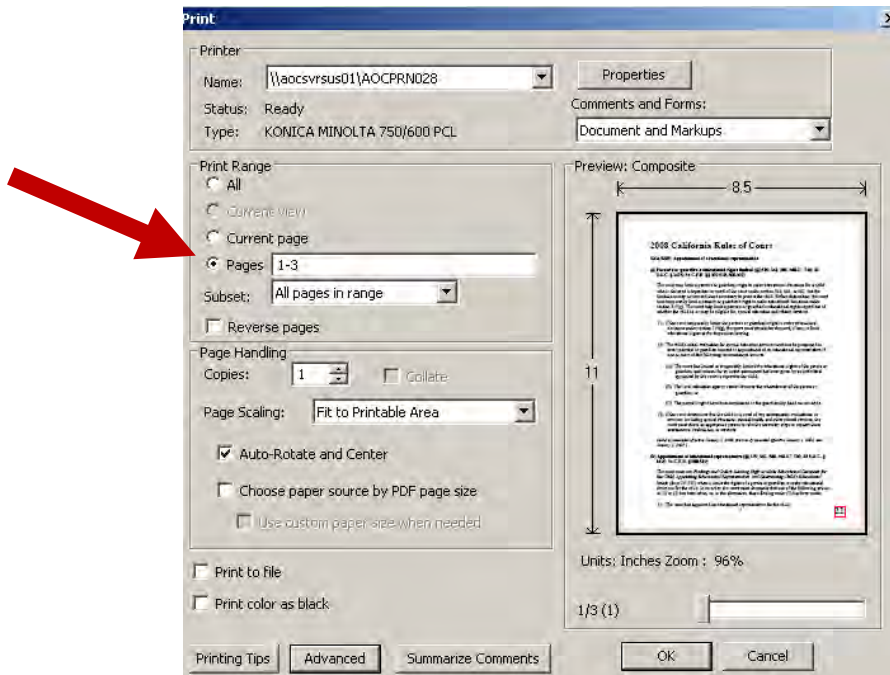


Dear Colleague:

Enclosed are Beyond the Bench 2010 handouts, PowerPoint slides, articles, and other resources made available by faculty.

In keeping with the efforts of going “green”, we encourage you to read from the electronic document rather than print hundreds of pages.

If you choose to print these materials, please make sure to **specify the range of pages**.



Thank you.

*Beyond the Bench conference staff*

FRIDAY – JUNE 4, 2010

8:00 am – 5:00 pm

### An Overview of Juvenile Dependency Law and Practice

education credit:  
BBS  
MCLE

target audience:  
attorneys  
CASAs  
social workers

8:00 am – 12:00 Part 1  
& 1:00 pm – 5:00 Part 2

This course provides an overview of the dependency legal system. Designed for attorneys, CASA, social workers and other professionals working in child welfare, the course focuses upon stakeholder roles and legally mandated timelines. This course meets the 8-hour requirement for attorneys seeking to accept court-appointed cases.

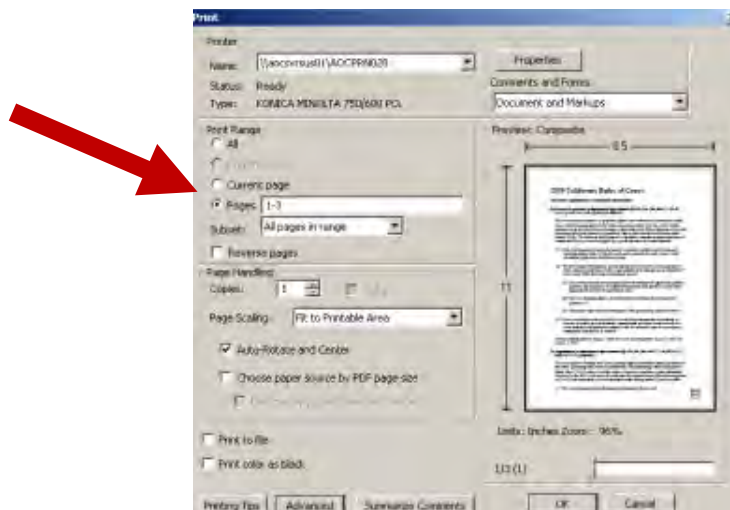
#### Learning Objectives:

- Understand judicial and attorney roles in the dependency legal system.
- Articulate a knowledge of the timelines and legal mandates in a dependency case.
- Learn about available resources to assist them in their daily child welfare practice.

#### Faculty:

- **Hon. Patricia Bresee (Ret.)**  
*Commissioner, Superior Court of San Mateo County*
- **John Passalacqua**  
*Attorney, Private law practice*
- **Nancy Aspaturian**  
*Attorney, Children's Law Center of Los Angeles*
- **Shannon Sullivan**  
*Assistant County Counsel, Santa Cruz County*
- **Rita Cameron-Wedding, Ph.D.**  
*Chair of the Department of Women's Studies, Sacramento State University*

Before you choose to print these materials, please make sure to **specify the range of pages**.



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Administrative Office of the Courts, Center for Families, Children & the Courts

# DEPENDENCY

101

## Purposes of the Child Welfare System

- Maximum protection for children who are physically, sexually or emotionally abused, neglected or exploited, or at *serious risk* of abuse or neglect
- Includes provision of services to the child and family and *presumes* that the best interest of the child is to remain in or be returned to the child's home or family

## Family Preservation or Restoration and Permanency

1. Kids do better at home
2. Need for family
3. Cost to the child
4. State as parent
5. \$\$\$\$\$\$



## Court Structure

- **Judges**
  - Presiding/Supervising
  - Others
- **Commissioners**
- **Referees**
  - Removal orders must be approved by judge
  - Orders subject to rehearing

## VENUE

### Welf & IC §327

County in which:

- Child resides, or
- Child is found, or
- Acts take place, or
- Circumstances exist that are alleged in the petition

### SCOPE OF JURISDICTION

1. Once petition filed:  
EXCLUSIVE jurisdiction over custody, visitation, etc. [W&IC §304]
2. EXCLUSIVE jurisdiction to determine Paternity [W&IC §§ 316.2, 726.5; CRC 1413]
3. Restraining Orders [W&IC §213.5; CRC 1412]
4. Custody and visitation until petition dismissed or dependency terminated [W&IC §304]
5. Exit Orders [W&IC 362.4; CRC 1429.1]

### W&I CODE 305

#### (Peace Officer may remove child)

- \*Reasonable cause to believe child comes within §300 and is at immediate risk
- \*Child is a dependent of the court and not in court ordered placement
- \*Child is in the hospital and release to a parent poses immediate danger
- \*Child is found sick or injured and needs medical care

### W&I CODE 306

#### SOCIAL WORKER POWERS:

- Receive a child from Peace Officer
- Take into custody a neglected or abandoned child in immediate need or danger.

### W&I CODE 309

- Investigate and RELEASE unless
  - No parent or responsible relative
  - Immediate and urgent need for protecting the child
  - Substantial evidence parent will flee with the child
  - Child has left a juvenile court placement

### THE SOCIAL WORKER MUST CONSIDER:

Can the child remain safely at home with services?

Can the child remain safely at home with a non-offending caretaker if the offender leaves?

### THE PETITION

If the child is retained in custody, a petition under W&IC § 300 must be filed within:

**48 HOURS**

OF PROTECTIVE CUSTODY

### Important Data

- **Over  $\frac{3}{4}$  of the children in care are removed due to NEGLECT**
- **Over  $\frac{1}{3}$  of the referrals each year are re-referrals**

### More Info

- African American children are more likely to be in foster care than white or Hispanic children
- More likely to be removed as infants & remain in care
- Less likely to receive reunification and other services and reunify with family
- Children from families with incomes below \$15,000 are 22 times more likely to be maltreated than those from families with incomes above \$30,000.

### KIDS GROW UP IN THE "SYSTEM"

- Some enter young and are never reunited
- Absent adherence to time lines and concurrent planning it is often too late for a truly permanent plan
- Some enter as pre-teens or teens and **WILL** grow up in group homes

### More Statistics

- **Nation wide studies of 19 year olds who exited the juvenile court system at 18 revealed that 63% of them were dead or in jail within that first year**

### "Emancipated" Youth

- **75% work below grade level**
- **50% do not complete high school**
- **45% are unemployed**
- **33% are arrested**
- **30% are on welfare**
- **25% are homeless**

### HEARING CHRONOLOGY

1. Initial Hearing (Detention?)
2. Jurisdiction (Fact determination)
3. Disposition
4. Reviews
  - FM: 6 months
  - FR: 6, 12, 18 months (24?)
5. W&IC §366.26 Hearing (Permanent decision)
6. Reviews W&IC § 366.3 (Post .26)
7. Others
  - "Progress"
  - 388 Hearings
  - Drug Courts
  - Etc

**TIME LINES**

1. Child taken into custody by P.D. or S.W. (*Initial removal*)
  - Petition filed w/in 48 hours, excluding non-court days
2. Detention Hearing
  - - Next court day
3. Jurisdiction Hearing
  - - W/in 15 court days of detention hearing

**TIME LINES**

4. Disposition
  - - W/in 10 court days of JH
5. 6 Month Review
  - - 6 months from Dispo whether in or out of home
  - If child at home, every six months as long as child is a dependent

**Time Lines**

7. 12 Month Review  
[ONLY if child still out of home and any parent or guardian receiving reunification services]
  - - w/in 12 months from the date the child entered foster care

**THE DATE THE CHILD ENTERS FOSTER CARE**

*The date the petition is sustained (jurisdiction hearing)*

OR

*60 days after initial removal—*  
*whichever is earlier.*

**Time Lines**

- 18 Month Review—must be held w/in 18 months from initial removal.
- - [Only if at 12 month review, finding of no reasonable efforts or *substantial probability* of return w/in 18 months of *initial removal*.]
- §366.26—w/in 120 days of setting
- 6 Month Reviews as long as child remains a dependent.

**CRITICAL HEARINGS**

*Disposition	*6 Mo. Rev.
*388 Hearing	*Detention
*Jurisdiction	*§ 366.26
*Paternity	*12 Mo. Rev.
*18 Month Review	



**Initial hearing---Detention  
W&I CODE 315**

The Court must hold a detention hearing

The next judicial day after a petition is filed  
AND

Make a determination if the child should remain in custody

**W&I CODE 322  
RULE 5.672**

The court *SHALL* continue the Detention Hearing

For ONE JUDICIAL DAY on the motion of the  
PARENT or CHILD.

The child remains in custody

**PRELIMINARIES**

- Who can be present?
- Child
- Parent or guardian or adult relative
- Social Worker
- Court clerk
- Court Reporter
- Bailiff
- Counsels
- Defacto Parent
- Indian Custodian and Tribal Representative
- CASA

**Counsel for Parents**

- Welf & IC section 317 permits parents to be represented by counsel at all stages of the proceedings
- And **REQUIRES** the court to appoint counsel for indigent parents if the child has been removed or the recommendation is for removal.

**COUNSEL FOR CHILDREN**

W&I CODE §317(c)

**REQUIRES** the court to appoint counsel for the child **UNLESS** it finds that the child would not benefit from the appointment of counsel.

Must state on the record the reasons for the finding.

### **CRC 5.660**

- To find child would not benefit, court must find:
  - Child understands the nature of the proceedings AND
  - Child able to communicate and advocate effectively w/court, other counsel, etc
  - AND
  - Under circumstances, child would not gain ANY benefit.

### **W&IC 326.5; CRC 5.662**

- Court must designate a CAPTA Guardian ad litem for the child
- If child has an appointed counsel, that person will serve as the CAPTA GAL and court will so state
- If no counsel, MUST appoint a CASA to serve as the CAPTA GAL.

### **COUNSEL FOR CHILD**

- Represents the child's INTERESTS
- SHALL
  - investigate to ascertain facts,
  - interview witnesses,
  - examine and cross examine witnesses,
  - introduce evidence and make recommendations to the court.

### **COUNSEL FOR CHILD**

- If the child is FOUR YEARS of age or older, counsel SHALL interview the child to ascertain the child's wishes and well being, and SHALL advise the court of the child's wishes.
- Counsel SHALL NOT advocate for the return of the child to the parents if that conflicts with the best interests of the child.

### **CRC 5.661**

- Child's counsel MUST file recommendation for appointment of appellate counsel for the child IF:
  - Appeal filed by another party
  - Trial counsel concludes child's best interests cannot be protected w/o appointment
- Must follow procedures in rule
- Must file no later than 20 days after appellant's last opening brief
- JV-810

### **INITIAL HEARINGS-- DETENTION**



### To detain child court must find:

- There is a PRIMA FACIE showing the child is described by
  - W&IC §300 (a – j)
- AND
- One of more of the following:

- There is *SUBSTANTIAL DANGER* to the physical health of the child, or the child is suffering *SEVERE EMOTIONAL DAMAGE* and *THERE ARE NO REASONABLE MEANS* to protect the child's physical or emotional health without removal.
- The child is already a dependent child and has run away or been removed from a court ordered placement.
- The custodian of the child is likely to flee;
- The petition alleges physical or sexual abuse and the child refuses to return home.

### AND TITLE IV-E FINDINGS

- Continuance in the home of the parents is contrary to the child's welfare. (Title IV-E.) AND
- Reasonable efforts have been made to prevent the removal from the parent of guardian. AND
- Temporary care and placement are vested w/county welfare agency.

*Failure to make these findings within 60 days of removal means child will never be eligible for Title IV-E funding*

### OPTIONS FOR DETENTION

- The approved home of a relative
- Emergency Shelter Care
- Licensed home or home exempt from license
- Approved home of a non relative extended family member
- Non relative Extended Family Member (NRFM)
  - any adult caretaker who has established a familial or mentoring relationship with the child

### A RELATIVE IS:

- Adult related by blood, adoption or affinity within 5<sup>th</sup> degree of kinship
- Stepparent
- Stepsibling
- Anyone whose status is preceded by "great" "great-great" or "grand" including a spouse – even after marriage terminated by death or dissolution

### APPROVED RELATIVE?

- The standards used to grant or deny approval of home of a relative of NRFM are the same as in the licensing of foster homes.
- Judicial officers do NOT have the authority to place child in a home that has not been approved. Authority to grant exemptions in the approval process rests with the social services agency.

***In re Esperanza G.* (2008)**  
 165 CA 4<sup>th</sup> 1042

- Juv. Ct. may review agency's denial of exemption for abuse of discretion.
- If abuse found, authority limited to directing agency to consider request for exemption under proper legal standard.
- Child has standing to appeal.
- Agency must examine crime of relative to see if it is (a) exemptible; (b) if so, whether to grant exception based on factors in Cal. Code Regs. and looking at character and rehabilitation.

**VISITATION**

- W&I CODE §362.1
  - Maintain ties between child, parent and SIBLINGS
  - Provide information about reunification
  - Visits as frequent as possible consistent with the well being of the child
  - No visits that jeopardize the child's safety.

**JURISDICTION**

**CONTINUANCES**  
 REQUIREMENTS-W&IC 352; CRC 5.550

- #1: Cannot be contrary to child's best interests
- #2: May be granted only for GOOD CAUSE
- #3: Burden to show good cause is on the moving party
- #4: Must be stated on the record

**Requirements for Continuances**

- #5: **Written motion filed 2 days prior to hearing w/affidavits and declarations**
- #6: **Granted ONLY for time shown to be necessary**
- #7: **May be requested by petitioner, child or parent**

**Court MAY grant oral motion and may allow 7 days to appoint counsel or give newly appointed or retained counsel time to prepare.**

**Continuances**

- Good cause is NOT:
  - Court congestion (*Jeff M. v. Superior Court* (1977) 56 CA 4<sup>th</sup> 1238)
  - Stipulation of parties
  - Pending criminal law matters
  - Pending family law matters
- NO continuance that would cause dispo to be more than 60 days after detention hearing absent *exceptional circumstances*.
- Hearings should be on consecutive court days (*Renee S. v. Superior Ct.* (1999) 76 CA 4<sup>th</sup> 187)

## THE HEARING

- What can happen?
- Parent/Guardian can:
  - Admit
  - Plead No Contest
  - Submit on Report
  - Contest and request evidentiary hearing

## JV-190

- **Admission**
  - **Submission**
  - **No Contest**
- *Arlena M. Sup. Ct. (2004) 121 CA 4<sup>th</sup> 566*
- Mom's writ petition argued error in failure of court to expressly advise her of 6 mo. limit for child under 3 when she submitted
- WRIT DENIED: Form signed and initialed in the right box; court confirmed that she had read it and understood it!

## W&IC 350(c)

- At any hearing in which agency has burden, "after the presentation of evidence on behalf of the [agency] AND THE [CHILD] has been closed,"
- Court (on motion of child, parent or on its own) "shall order whatever action the law requires of it" if it finds that the burden has not been met. (Includes dismissal at juris.)
- If motion denied, parent may offer evidence.

## EVIDENCE

- *In re Malinda S. (1991) 51 C 3<sup>rd</sup> 368*
- Social Study: Prepared by social worker.
  - Must be provided to parties within reasonable time prior to hearing
  - Admissible under W&IC §355(b)
  - Preparer must be available for cross examination (telephonic stand-by OK)
  - FULL of HEARSAY!!!!

## W&IC 355 and CRC 5.684

- Hearsay in the report:
- If a party objects with "reasonable specificity" and w/in a reasonable period—
- Hearsay objected to MUST NOT be sole basis of a true finding on the petition---

## UNLESS

- Admissible under other exception; or
- Declarant is under 12 and the subject of the petition unless—objector proves was by fraud, deceit or undue influence and is therefore UNRELIABLE; or
- Declarant is a peace officer, health practitioner, s.w., or teacher AND statement would be admissible if the declarant were present in court; or
- Declarant available for cross exam.

### Testimony of Child

- W&IC §350 and CRC 5-534
- May take testimony in chambers w/o presence of parents if court finds:
  - Necessary to ensure truthful testimony or
  - Child likely to be intimidated by courtroom setting
  - Child afraid to testify in front of parent

### Child testimony in Chambers

- Court reporter and all counsel must be present
- Parent may elect to have testimony read back or summarized by counsel—prior to cross exam
- How establish need to use this procedure:
- CRC 5-534: To determine basis, court may consider social worker's report or other offers of proof or other evidence
- Competency to testify may be determined after testimony.

### What about child's out-of-court statements—in report?

- Is competency a prerequisite to admissibility?
- *In re Carmen O.* (1994) 28 CA 4<sup>th</sup> 908
- May be admitted under recognized hearsay exceptions.
- Case created a “child dependency hearsay exception.

### *In re Cindy L.* (1997) 17 C 4<sup>th</sup> 15

- For the child's statement to be admissible to prove the petition, there must be a demonstration of reliability --
  - 1) Time, content & circumstances of statement (spontaneity & consistent repetition, mental state, terminology, lack of motive to fabricate)
  - 2) Child available for x-exam OR there is corroborating evidence of child sexual abuse
  - 3) Adequate notice of intent to introduce stmt

### *In re Lucero L.* (2000) 22 C 4<sup>th</sup> 1227

- Further refined and discussed issue of child's statement
  - Competency as witness NOT a requirement under §355
- May be admissible under §355 even if not under the exception; BUT cannot exclusively support petition unless indicia of reliability found

### PRIVILEGES

- EC § 972—spousal privilege—available in dependency?
  - NO!
- EC § 986---marital privilege?
  - NO!
- Use immunity?
  - Sort of---W&IC § 355.1(f)—testimony by parent or guardian or other who has custody of subject child shall NOT be admissible as evidence in any other action or proceeding.

### PRIVILEGES (CONTINUED)

- Psychiatrist/Physician/Clergy-Patient/Confidential Privileges?
- Yes—child holds them unless too young or immature
- Child may waive the privilege
- Court may order limited disclosure to make further orders or gather necessary information [*In re Kristine W.* (2001) 94 CA 4<sup>th</sup> 521; *In re Mark L.* (2001) 94 CA 4<sup>th</sup> 573]

### *In re Cole C.* (2009)

174 CA 4<sup>th</sup> 900

- Juv. Ct. granted child's attorney's claim of privilege when father called therapist.
- Father appealed, arguing attorney could not claim the privilege since the therapy had occurred prior to the appointment of the attorney.
- HELD: AFFIRMED.
- W&IC §317(f) –atty. hold the privilege w/the child
- Atty. had authority throughout the proceedings regardless of when the communications occurred.

### DISPOSITION HEARING



### TIME OF THE DISPOSITION HEARING

- If child detained →
  - W/in 10 court days
- If child not detained →
  - No later than 30 days from juris findings
- If recommendation is for no services under § 361.5(b) →
  - MUST be continued no more than 30 days

### ABSOLUTE LIMIT?

- W&IC § 352: “In no event shall the court grant continuances that would cause the [disposition] hearing ... to be completed more than six months after the [initial] hearing....”

### COURT'S OPTIONS-No removal

- Dismiss the petition
- Order informal services [W&IC §360(b), (c)]
- Appoint a legal guardian [W&IC § 360(a)]
- Declare dependency and appoint a legal guardian [W&IC § 360(a)]
- Declare dependency with child still with custodial parent; order services

## Options--Removal

- Declare dependency, remove from custodial parent and
  - 1. Award custody to non-custodial parent and dismiss dependency w/exit orders OR
  - 2. Place child w/non-custodial parent w/services to either or both parents OR
  - 3. Make general placement order and consider reunification services and VISITATION

## ~~TO REMOVE~~—CLEAR AND CONVINCING EVIDENCE OF:

1. Substantial danger to the physical/emotional well-being and NO reasonable means to protect w/o removal; OR
2. Parent/guardian unwilling to have physical custody; OR
3. Child suffering severe emotional damage; OR
4. Child or sib suffered sexual abuse and NO reasonable means to protect OR child does not wish to return; OR
5. Child w/o provision or support, or incarcerated parent cannot arrange for care.

## Reunification Services W&IC 361.5(a)

- Court **SHALL** order reunification services to:
  - *Child*
  - *Mother*
  - *Statutorily Presumed Father*
  - *Guardians*
  - **MAY** order to declared bio father if will benefit CHILD

## ~~NO Services: W&IC 361.5(b); CRC 5.695~~

- To deny—court must make findings by CLEAR & CONVINCING
- Fifteen grounds
- For most, burden shifts to parent (or child) to produce evidence of benefit to child.
- [See chart]

## SERVICES

- If child remains at home (or is no longer detained or is not removed) — may still order parent and child to participate in services
  - [W&IC §362(b)]
- Court may direct any and all reasonable orders to parents and guardians as the Court deems to be necessary
  - [W&IC §362(c)]

## VISITATION!!!!

- **Specifically addressed in W&IC 362.1**
- **WHY? To maintain family ties and provide info relevant to the return of the child**
- **WHEN? As frequently as possible; subject to child's well-being**

## VISITS

- **HOW? Supervised (monitored); unsupervised but directed and arranged by HSA; with cooperation of caregivers and arrangements with them...**
- **Court MAY make orders so as to protect the child; e.g. location, duration, frequency, siblings, others**
- **BUT although the court may delegate some details, it MUST set some minimum visitation order**

## CONCURRENT PLANNING

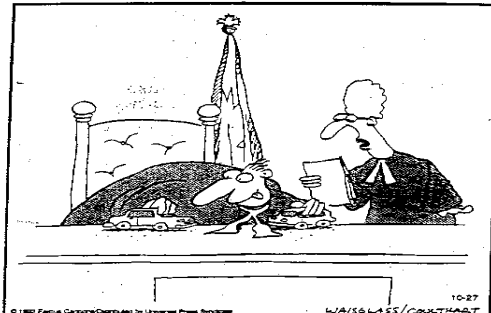
- **Child removed: CWS has DUAL responsibilities**
- **Reunification plan w/services AND plan for "achieving legal permanence" if reunification does not occur**
- **Requires prognosis assessment from beginning, considering strengths and weaknesses of family, needs of child and the likelihood of family meeting those needs if child goes home**
- **Requires frequent re-analysis of prognosis**

## REVIEWS



## Farcus

by David Walsglass  
Gordon Coulthart



"Maybe it's time you took a break from  
Juvenile Court."

## FM REVIEWS W&IC § 364

- **Every 6 months as long as dependency lasts (up to 18 as of 1/1/05)**
  - Report required 10 days ahead
- **ISSUE: Is continued dependency necessary?**
  - Preponderance is B of P
  - **Standard: Do conditions still exist that would justify initial assumption of jurisdiction; or**
  - Likely to exist if supervision removed

## QUIZ

- **The date the child enters foster care is:**

**ANSWER**

- The date of jurisdiction
- OR
- 60 days after the *initial removal of the child*.....
- Whichever is earlier.

***Six Month FR Reviews***  
***W&IC § 366.21    CRC 5.710***

- When? 6 mo. from dispo
- BUT—no later than 12 months after the date the child entered foster care.

**Options at 6 Mo. FR Review**

- MUST return the child UNLESS—
  - Find by a preponderance that return would create a substantial risk of detriment to the safety, protections or physical or emotional well being of the child.
- If no return, MUST continue services and set a 12 mo. review
- OR...

**6 Month FR Review -- Court Options****May set a § 366.26 hearing IF:**

- (a) 300 (g) and whereabouts still unknown; or parent has failed to contact and visit the child OR
  - (b) Parent convicted of a felony indicating parental unfitness OR
  - (c) Parent deceased OR
  - (d) CHILD (or sibling) UNDER 3 when removed AND parent failed to participate regularly in court ordered services and make substantive progress UNLESS---
- substantial probability of return w/in 6 mo*

**Substantial probability =**

1. Consistent and regular contact and visitation AND
2. Significant progress in resolving the problems AND
3. Demonstrates the capacity and ability to care for the child; including special needs

**May set for .26 hearing IF:**

1. Reasonable services have been offered or provided AND
2. One of the factors described has been found by clear and convincing AND
3. No services going to *either parent*



**12 Month Review****W&IC §366.21; CRC 5.715**

- When?
  - 12 Months from the date the child entered foster care
- Shall return UNLESS---
- In no return *SHALL* (must) terminate services UNLESS
  1. Substantial probability of return w/in 18 months of “yank” OR
  2. No reasonable services

**18 month review****W&IC § 366.22 CRC 5.720**

- If services terminated and no order for long term foster care:
  1. Set .26 hearing w/in 120 days
  2. Order visits unless finding of detriment to the child
  3. Advise parent re Notice of Intent to File Writ Petition (JV-820)

**W&IC §366.22; CRC 5.720**

- At 18 mo. may set a review at 24 mo. IF:
  - Substantial probability of return in that time OR
  - No reasonable services
- AND by C and C
- More services in child’s best interests
- AND

**Going to 24 Months**

Parent making significant and consistent progress in substance abuse treatment  
OR

Parent recently released from incarceration or institutionalization and making significant and consistent progress in establishing a safe home.

**W&C §366.26****HEARING****W&IC § 366.26 Hearing****CRC 5.725**

- When hearing set, court must:
  1. Advise re writ procedures— provide JV-820
  2. Order an assessment (§366.21(i))
  3. Order parent back for hearing
  4. Order visitation unless detrimental to child

**WRITS****W&IC 366.26; CRC 8.450 et seq**

- In order for Ct. of App. to review orders terminating (or not ordering) reunification services, and ENTIRE case
  - Must raise the issues IMMEDIATELY after .26 is set—through writ process
  - May not be raised on a subsequent appeal of the .26 orders UNLESS:  
Writ petition filed AND  
Summarily denied or otherwise decided  
NOT on the merits
- SO—failure to seek writ limits appealable issues after .26 to the findings and orders at THAT hearing only

**.26 Hearing Orders  
CRC 5.725 JV-320**

- **SHALL terminate parental rights IF**
- **By clear and convincing evidence court finds child likely to be adopted**

**UNLESS**

- §366.26(c)(1)(A)
    - Child living w/relative unable or unwilling to adopt  
Not because unwilling to accept legal or financial responsibility for the child and  
Willing and capable of providing stable and permanent home through legal guardianship AND  
Removal would be detrimental to the emotional well-being of the child.
- NOTE: "Indian relative defined by ICWA.

**OR**

- **Detrimental to child because:**
  - (i) **Parent(s) have visited and CHILD would benefit from continued relationship or**
  - (ii) **Child 12 or older objects or**
  - (iii) **Child in residential treatment or**

**.26 Orders—Indian Child**

- **(iv) Child w/F.P. or Indian custodian who cannot adopt but wants child to remain permanently AND detrimental to child to remove.**
- Note: does not apply in child under 6, or has a sibling in the system with whom the child should be placed permanently

**W & IC §366.26(c)(1)(A)**

- (vi) Detriment for an Indian child as contrary to the child's best interest, considering (but not limited to):
  - TPR would substantially interfere w/child's connection to tribal community or membership rights;
  - Or Tribe has identified plan other than adoption

**W&IC §366.26(c)(1)(F)**

- Must be *substantial* interference.
- Tribal ID of another plan may not be enough since court must still find detriment in order NOT to terminate
- Must still determine whether the finding of substantial interference outweighs the benefits of adoption

**.26 Orders**

- If court finds detriment (adoptable but no TPR)—must state reasons on the record
- If court finds child not likely to be adopted, or a detriment, look next at guardianship; if guardian appointed, may terminate or continue dependency or
- If no guardian willing or available—long term foster care and continue dependency
- If dependency continued—set 6 mo rev

**.26 Orders-Siblings**

- (v) **Would be a substantial interference with the child's sibling relationship**  
**Considering nature & extent of relationship and whether:**
- **Children raised in same home**
  - **Children shared common experiences or have close bonds**
  - **On going contact in child's best interest when compared to benefit of permanence of legal adoption**

**ANOTHER .26 OPTION****§366.26(c)(3)**

- If child has “probability of adoption” and no detriment but no one identified yet and child is difficult to place because:
  - Child is in a sibling group; OR
  - Diagnosed medical, physical or mental handicap; OR
  - Child is 7 or older.
- Court may identify adoption as the goal AND order efforts to find home within 180 days
- At end of the period, court may only
  - Terminate parental rights OR
  - Appoint a non relative as guardian

**AND §366.26(c)(4)(B)**

- If child w/F.P. or relative who can provide a stable and permanent home, but not willing to become guardian:
  - Child not to be removed IF finding that
  - Removal seriously detrimental to the emotional well-being due to “substantial psychological ties” to the caretaker.

**W&I CODE §366.3 RULE 5.740**

- Purpose of Permanency Review is to determine whether reasonable efforts have been made to finalize a permanent plan for the child.
- Responsibility to reach permanency for each child continues until final adoption, guardianship established or child is returned home.
- Unless parental rights have been terminated, parents receive notice and may participate.

**PARENTAL RIGHTS TERMINATED**

- Review at least every 6 months.
- Determine if appropriate efforts being made to finalize an adoption.
- Are there arrangements for sibling contact now and after adoption if possible?
- Are there other orders court needs to make to facilitate adoption?
- What is the status of any appeal?

**PERMANENT PLANTS GUARDIANSHIP**

- After guardianship is established, court may:
  - Dismiss dependency—court retains jurisdiction over the g-ship (§388 used to modify orders)
- Continue dependency with g-ship in place if further services are needed; review every 6 mos.

**LONG TERM FOSTER CARE  
PLANNED PERMANENT LIVING  
ARRANGEMENT (PPLA)**

For the child who does not have a plan of adoption or guardianship or return home-yet.

- Review at least every 6 months.
- Consider all permanency options:
  - Return Home
  - Adoption
  - Legal Guardianship
  - Long term foster care

**PLANNED PERMANENT LIVING  
ARRANGEMENT (PPLA)**

- At hearing, parent may prove by a preponderance that further reunification efforts are in best interest of the child, court may order 6 months of services and set a 6 month review.

**PLANNED PERMANENT LIVING  
ARRANGEMENT (PPLA)**

- Court shall order another .26 hearing unless
- CLEAR AND CONVINCING EVIDENCE
  - Of a compelling reason
  - A new .26 hearing is not in the child's best interests
  - BECAUSE Child is
    - Returning home OR
    - Not a proper subject for adoption OR
    - No one willing or qualified to become guardian

**Reaching Majority  
W&I CODE 391**

- In order for dependency of a dependent living out of home and now 18 years old or older to be terminated, there must be
- A HEARING
  - The young person must be present, unless he or she does not wish to be, or there is evidence that the person's whereabouts is not known.

**18 year old**

- Social worker must submit a report verifying young person has been provided with:
  - Written info re case history, siblings, how to access court records, date of termination of dependency.
- AND

**18 year old**

- Social Security Card, Birth Certificate, Death Certificate of parent, Proof of Residency or Citizenship.
- Assistance in applying for medical and other insurance, referrals for assistance for housing, employment or other financial support.
- Assistance in applying for college or training, etc. and financial aid.

**18 year old**

- Continue jurisdiction if requirements not met or if there are other appropriate reasons to continue
- File must contain a completed JV-365 form before the case can be dismissed.

***In re T.S.***  
**(2003) 113 CA 4<sup>th</sup> 1323**

- At .26 court found kids “generally adoptable” and “specifically adoptable” by GPs (58 & 61 yrs)
- Appeal by mom---argument that the children were not adoptable because the grandparents were too old and the court should have ordered physical exams

**T.S.**

- HELD:
- REVERSED
- 1. “We must confess to being a bit chagrined... After all, one of us is 62, the other 57 and the ‘new kid on the block’ is not that far behind. Until now we have been indulging in the apparent illusion that we are still in the prime of life.”
- 2. References to several famous “older” parents.
- 3. Suitability to adopt is an issue reserved for the adoption hearing---NOT the .26

**W&IC 366.26(i)(2)**

- Permits dependent child freed for adoption who has not been adopted in three years to petition (§ 388) the court for reinstatement of parental rights, including inheritance.
- Court must determine that adoption is no longer the permanent plan

***CRITICAL HEARINGS***

- \*Disposition \*6 Mo. Rev.**
- \*388 Hearing \*Detention**
- \*Jurisdiction \*§ 366.26**
- \*Paternity \*12 Mo. Rev.**
- \*18 Month Review**

## Beyond the Bench/ Overview of Dependency Law and Practice Workshop 2010

8:00-8:05: Introductions

8:05-8:45: Introduction to Dependency to Initial Hearing- Hon. Pat Bresee

8:45-10:15: Bias and Disproportionality- Dr. Rita Cameron-Wedding/ NCJFCJ

10:15-10:30: Break

10:30-11:30: Initial Hearing thru JN/Dispo: Hon. Pat Bresee

11:30-12:15: Initial Hearing Exercise: Panel: Hon. Pat Bresee, Nancy Aspaturian, John Passalacqua, Shannon Sullivan

12:15-1:15: Plenary Lunch

- 12:15-12:45: CalDOG demonstration: Mara Bernstein

1:15-2:00: JN/Dispo Exercise: Panel

2:00-2:45: Review Hearings: Hon. Pat Bresee

2:45-3:15: Review Hearings Exercise: Panel

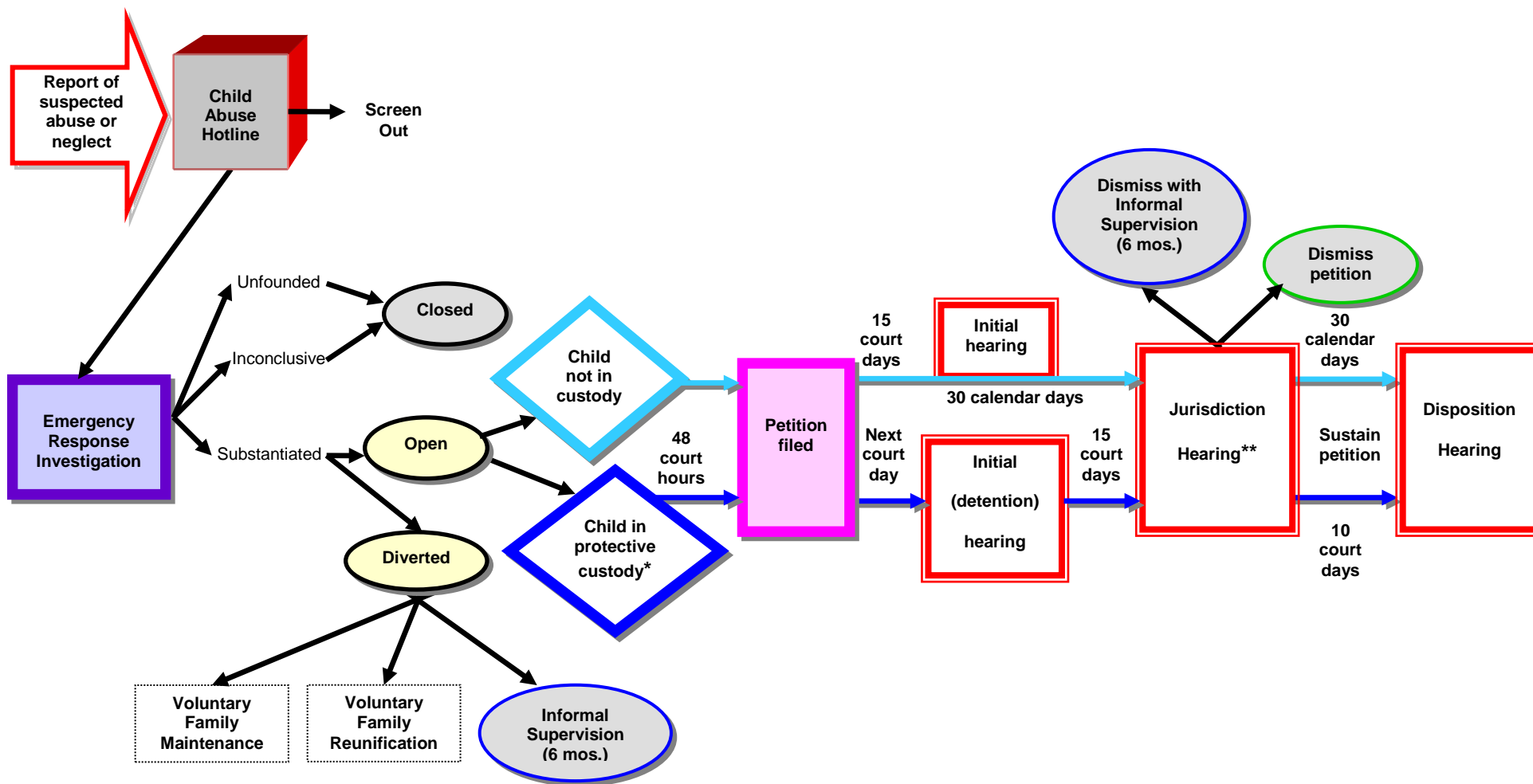
3:15-3:30: Break

3:30-4:15: 366.26 and Post Permanency Hearings Hon. Pat Bresee

4:15-4:45: 366.26 Exercise: Panel

4:45-5:00: Q & A

# The Juvenile Dependency Court Process



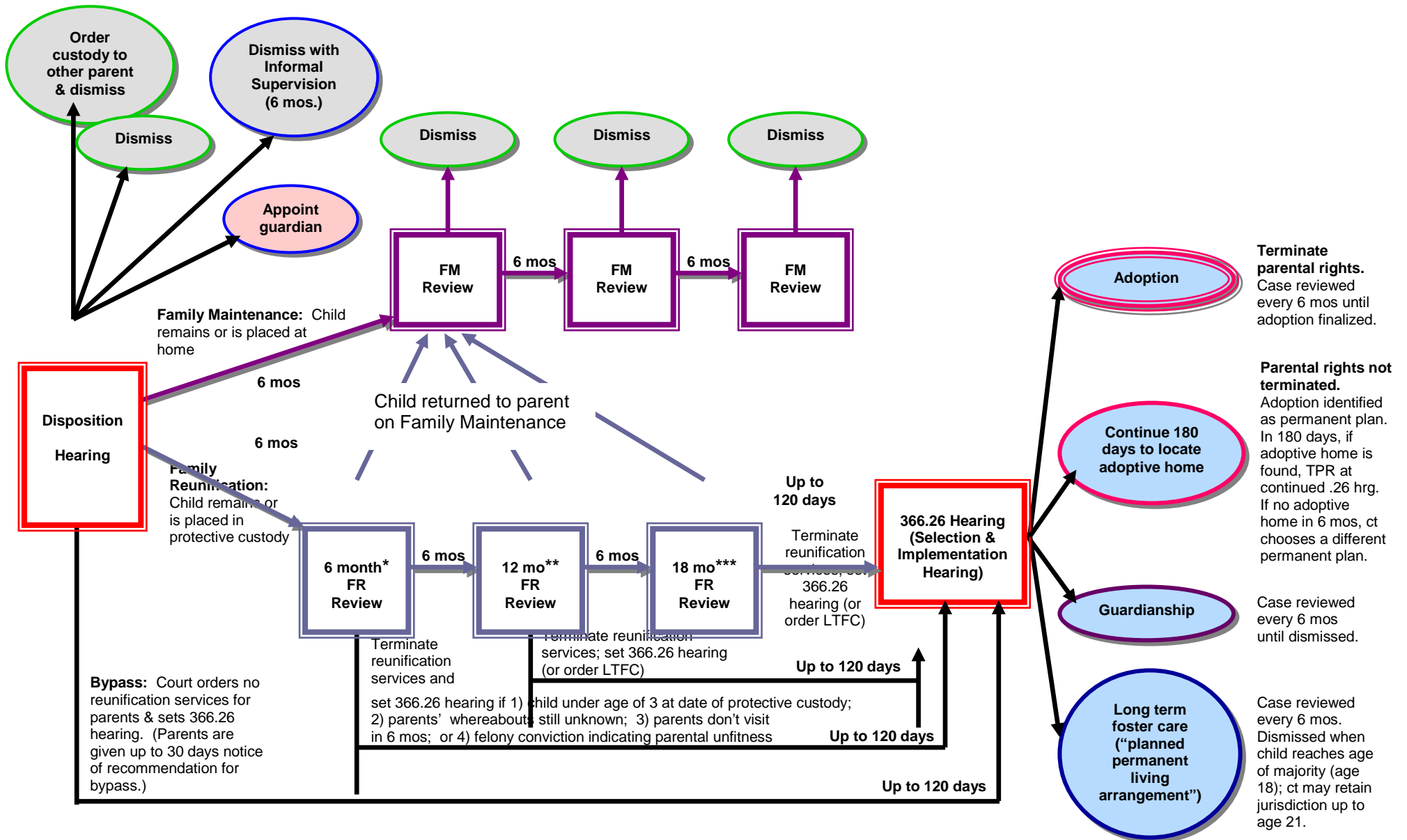
Honorable Shawna Schwarz, [sschwarz@scscourt.org](mailto:sschwarz@scscourt.org)  
 Juvenile Dependency Division  
 Santa Clara County Superior Court  
 October 2005; v.1.5

\* "Date of protective custody" is the date child is physically removed from parent(s)

\*\* "Date entered foster care" is a court finding, defined as the date of jurisdiction or 60 days after the date of protective custody, whichever is first



# Dependency Court Process



\* 6 months from "date child entered foster care"  
 \*\* 12 months from "date child entered foster care"  
 \*\*\* 18 months from "date of protective custody"

## **INITIAL HEARING SCENARIO**

A new case comes into court. Two children, a 10 year old boy (Brian), and a 6 month old girl (Julia), have been detained from their young mother (Martha) due to allegations of drug use and domestic violence between the mother and her boyfriend (Julia's father Frank). Brian has a different father (Fred) who has not been around for several years.

Additional information contained in the detention materials includes a short police report detailing a home call made by the police a month earlier in which screaming had been heard coming from the home, but no arrests were made and all parties denied any problems. At that time, the Mother did admit that Brian's father Fred, whom she hasn't seen in a couple of years, used to beat her. She denies current domestic violence between herself and Julia's father. There was no follow up until the current detention, which resulted from Julia's father being arrested for selling methamphetamine in the alleyway adjacent to the family apartment building. A search of the family's apartment incident to the arrest yielded more drugs, and as the children were present with their mother, they were detained in the ensuing chaos. There is no police report attached relating the events that led to the actual detention of the children.

At an interview conducted by the social worker after removal from the home, Brian, whose speech is difficult to understand, made statements indicating he had seen Julia's father hit his mother, and also that his mother sleeps a lot during the day. Additionally, while Brian meets the age requirements for school, he has not been enrolled for the new school year. The social worker's report indicates that Mother has a sister who may be available to take the children into her home, but the children are currently placed in a foster home together.

## **ADDITIONAL FACTS AT INITIAL HEARING**

Brian and his mother are present at the hearing. Brian was brought in through court transportation. Julia's father was released from custody and is now whereabouts unknown. The maternal aunt also comes with the mother to court.

### **What would you advocate and what issues would you identify if:**

1. The drug involved was marijuana and not methamphetamine?
2. Mother had promised to keep Julia's father out of the house at the time the agency was detaining the children?
3. Mother and the children were not around at the time of Julia's Father's arrest, and the agency found the children at the aunt's home and detained them anyway and placed them in foster care?
4. Brian told you privately that his aunt has hit him in the past?

## **ADDITIONAL FACTS AT THE JURISDICTIONAL HEARING**

CSW's report states that Mother continues to deny sale or use of drugs, current domestic violence or other problems in the home. She very much wants her children returned to her and has pledged to keep Julia's father away from the children. She has been visiting consistently, but cries when the visit is over, which is difficult for the children, and they start crying too.

Neither father is available for interview.

Brian is interviewed for the jurisdictional report and he is now saying that nobody has ever hit anybody, but still says that mother sleeps a lot during the day. He has no knowledge of drug use or sales in the home. After an assessment, both children were placed with the maternal aunt.

Further CSW investigation reveals that Mother had a child in between Brian and Julia who is living with a maternal relative in another county. That maternal relative was contacted and tells the CSW that proceedings were started against Mother and she gave this child up for legal guardianship a couple years ago. She doesn't know if Brian was ever involved in these proceedings. Maternal relative tells the CSW that she took this child in because the Mother was overwhelmed by caring for two children, and that the father was abusive. The father of this child is also Julia's father.

Julia's hospital/birth records are attached and they reveal that no testing for drugs was done, but that she was a low birth weight baby and had difficulty breast feeding. Mother had no prenatal care with regard to Julia as far as the CSW can tell.

The jurisdictional report requests that the petition be sustained as pled and that all parents be denied family reunification services.

### **What would your position be on the petition, placement and reunification if:**

1. You had also contacted the relative in the other county and she tells you that the legal guardianship was granted in probate court, and that there were issues of drug abuse at that time as well?
2. Mother was enrolled in a drug program and parenting classes? What if she hadn't enrolled in any programs but was visiting regularly?
3. Mother was currently homeless and wanted to move in with the aunt and the children?
4. Both children were thriving in the home of the maternal aunt?
5. Brian's father appeared at the jurisdictional hearing?

6. What would your recommendation be for services/resource referrals for both Brian and Julia?

### **ADDITIONAL FACTS AT THE REUNIFICATION STATUS HEARINGS**

Mother has been complying with the case plan somewhat sporadically, but visiting often and appropriately. She enrolled late in a DV class, and attends occasionally, completed parenting, and has missed drug tests. She is currently employed. She continues to maintain that she has had no contact with Julia's father. She is living in a small studio apartment in a rough area of town that she insists is appropriate for both children.

Brian and Julia are thriving in the home of their maternal aunt. Brian is in school, but a grade behind and continues to have some difficulties completing assignments. He has also been hitting other students. Julia, now close to a year old, is just beginning to sit up and is not verbalizing at all.

Maternal Aunt states that if Mother can "get her act together," she should get her children back, but in her opinion, Mother is doing the bare minimum to reunify just so she can get the welfare check. Maternal aunt reports no problems with visits and also states that she has not seen either Father nor heard that they are around. Maternal aunt would be interested in either legal guardianship or adoption if reunification efforts fail.

Brian wishes to return to Mother but is happy at the aunt's house. Even though Maternal Aunt provides day care for other children and Julia, Julia is now relating to her aunt as her mother, and treats mother as a "friendly visitor," when mom visits.

### **What would your position on return or further reunification services be if:**

1. Mother has a new boyfriend?
2. Mother's delay in enrolling in DV counseling was due to the social worker giving her referrals to programs that had no openings?
3. Mother's excuse for missing tests was her work schedule? What if she didn't have a valid excuse?
4. Brian told you in secret that he didn't want to go back to Mom's house?
5. Julia's father shows up at the hearing and wants to move back in with mother and wants reunification services?
6. Do you have any additional recommendations for services for either of the children at this point?

## **ADDITIONAL FACTS AT THE SELECTION AND IMPLEMENTATION HEARING**

Mother's services were terminated at the last review hearing, and a WIC 366.26 Hearing was set for consideration of adoption or guardianship in the home of the Maternal Aunt.

Mother has continued to visit often and appropriately, with Maternal Aunt supervising. Mother has now completed 75% of her domestic violence classes, has continued to test clean when testing, but has missed a few drug tests. Mother also maintains the same job and apartment.

Brian and Julia are still doing very well in the aunt's home, and both children state they would like to stay with maternal aunt.

### **What would your position be as to the appropriate permanent plan if:**

- 1.** Mother contends that her parental rights should not be terminated because the children are extremely bonded to her, and terminating her parental rights would be more detrimental than the benefits of adoption with the maternal aunt?
- 2.** Julia's father shows up stating that he left a message for the social worker after his release from custody, but never received a return call or any information about Julia's case, the dates of the hearings, or what he needed to do to regain custody of her?
- 3.** There was a finding at the last review hearing that due to her late domestic violence counseling referral, mother did not receive reasonable reunification services?
- 4.** Mother filed a WIC 388 petition requesting return of the children, 1 month before the WIC 266.26 hearing. Both were contested and both matters were set for a trial that is pending?

## COMMISSIONER/REFEREE STATUTES AND CASES

### I. Statutes relating to COMMISSIONERS:

- A. Government Code section 70141: Authority to appoint, qualifications. Other sections of the Government Code set the salaries and compensation etc.
- B. Code of Civil Procedure section 259: Powers and duties. 259(e): “Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party.”
- C. Interpretation: Commissioner appointed by Superior Court judges. Qualified if admitted to practice for 5 years. May not practice law.

May act as pro-tem judge if so appointed, and if qualified to be a superior court judge; i.e. 10 years of practice, etc.

May act as judge if so appointed, **or** by stipulation.

Therefore, according to case law, if so appointed, may need no express stipulation.

### II. Statutes relating to REFEREES:

- A. Welfare and Institutions Code sections 247.5 - 251: Appointment, term, compensation, disqualification, cases heard, approval of certain orders by judge, effect and finality of referee’s orders.
- B. Welfare and Institutions Code sections 252-254: Rehearings of matters heard by referees.
- C. Interpretation: Referee appointed by Juvenile Court Judge, or Juvenile Court Presiding or Senior Judge. May be full or part time; may continue to practice law. Compensation set by Board of Supervisors. Must be a lawyer w/5 years experience if appointed after 1/1/77. (N.B. If appointed prior to 1/1/77--need not be a lawyer.)

Hears cases assigned by juvenile court, w/limitations:

1. Must be stipulation to sit as judge pro-tem if jeopardy attaches (i.e. 602)
2. Must serve findings and orders on child over 14 and parents and attorneys of record and notice of right to rehearing.

3. Removal order must be approved by judge.
4. Juvenile court judge may require approval of all orders of referee.
5. Rehearing rights only for orders of referee NOT sitting as pro-tem judge.

### III. COMPARISON AND INTERPRETATION OF STATUTES

- A. Although a Commissioner could be assigned to sit as a referee, the Commissioner must be specifically appointed as a referee under the W&IC.
- B. A Commissioner who is qualified to act as a judge and whose appointment specifies the appointment as a pro-tem judge, sits as a judge. No stipulation is required under the statute.

### IV. RULES OF COURT

- A. **Rule 244: Temporary Judge – Stipulation, Order, Oath, Assignment** “This rule does not apply to the selection of a court commissioner to act as a temporary judge.”
- B. **Rules 1415, 1416, 1417, 1418.** Apply to Juvenile Court Referees. Refers to Rule 244 and permits referee to sit as a judge pro-tem by stipulation of the parties.

### V. CASES

- A. **In re Mark L.** 34 Cal.3d 171 (July 1983)

Commissioner was assigned to sit in Juvenile Court. Unclear as to whether he was specifically assigned as a judge pro-tem or a referee, but he was substituting for the referee and he signed the orders as a referee. Juvenile Court Presiding Judge ordered a re-hearing. Writ to Supreme Court which held that the conduct of the parties sufficient stipulation to Commissioner acting as judge pro-tem.

1. All parties treated the commissioner as a judge and there was no indication on the record or by the conduct of the parties that any other status was considered. Their conduct constituted a sufficient stipulation.

2. Several cases recognize that voluntary participation before a subordinate officer may amount to an agreement that the officer acted as a temporary judge,
3. Rule of Court 244 re stipulation to pro-tem judges specifically excludes commissioners from the requirements.
4. Respondents conceded this exclusion if officer acting in status as a commissioner, but claim he was acting as a referee.
5. “When commissioners sit in juvenile court under appointment as referees, their ‘powers’ in that regard derive exclusively from the laws defining referees, and ‘are not affected by the fact that they hold the additional and separate office of court commissioner.’ (In re Edgar M. 14 Cal.3d 727.) But their authority to sit as juvenile judges may properly arise under the laws governing commissioners. Here the presiding judge of the superior court had expressly empowered Browning, as commissioner, to sit in a judicial capacity, upon proper stipulation of the parties, in any cause assigned to him in any department, including juvenile....The designation of court officers to act as juvenile court judges, of course, is within the express authority of the presiding judge of the superior court.”

B. **In re Damian V.** 197 Cal.App.3d 933 (Jan. 1988) Fifth District.

County Counsel and father stipulated to temporary judge to hear 232 petition and superior court judge approved and so ordered, Mother was not present and so neither she nor counsel stipulated. No oath of office in the record.

HELD: Reversed. Mother and children never stipulated and coupled w/absence of evidence of compliance w/requirement for oath, the pro-tem lacked legal authority to proceed and the error was jurisdictional.

Fact that mother did not stipulate “causes us substantial concern regarding the validity of the trial court’s subsequent order.... However, there is another, more immediate problem which we must address.” Court goes on to discuss failure to comply w/mandatory requirement of oath of office.

C. **In re Robert S.** 197 Cal.App.3d 1260 (Jan. 1988) First District.

C.C. § 232 hearing before a retired referee [to terminate parental rights.] Oral stip by counsel. Appeal based on lack of written stipulation.



HELD: Affirmed.

1. Rule 244 applicable, but the method set forth in that rule should not be elevated to the level of a constitutional prerequisite.
2. Art. VI, section 21 of Calif. Constitution requires only that there be a “stipulation by the parties litigant.” This requirement satisfied here.
3. 1966 amendment to this constitutional provision omitted language making selection of a judge pro-tem subject to Judicial Council regulations and orders; hence compliance w/the rule is not a constitutional prerequisite.
4. Stipulation need not be before any evidence presented.

DISCUSSION OF IN RE MARK L.:

1. Specifically rejected requirement that stipulation be in writing, or other than by conduct of the parties where commissioner sitting as judge pro-tem.
2. Mark L. limited its holding to cases involving commissioners and Rule 244 expressly does not apply.

D. **In re Heather P.** 203 Cal.App.3d 1214 (August 1988) Fifth District.

Attorney sitting as judge pro-tem obtained oral stipulation, but no other compliance with Rule 244.

HELD: Rule 244 requirements are mandatory and the orders of the temporary judge were null and void under the authority of In re Damian V.

E. **In re Lamonica H.** 220 Cal.App.3d 634 (May, 1990) Fourth District.

Oral stipulation by attorneys for DSS and mother to referee sitting as pro-tem judge. No record of compliance w/Rule 244 or of any comment by father’s attorney, who did proceed in hearing. Father appeals, based on failure to conform to 244.

HELD: Disapproves Damian and Heather, adopts reasoning of Robert S. and Mark L. and states:

1. Compliance w/Rule 244 is not a constitutional prerequisite to empowering a temporary judge to act.
2. Failure to comply does not render orders null and void.

3. Conduct of the parties implied an agreement to have the referee sit as a judge pro-tem.

NOTE: Case deals only w/referees.

F. **In re Richard David S.** 90 DOS 4339 (June 13, 1990) Sixth District. **REVIEW GRANTED**

Part-time referee Kris McCarthy. Written stip to her sitting as pro-tem signed on May 20, 1988 after two other hearings at which no stip entered. Child's attorney did not sign stip. Mother appealed based on failure to conform to Rule 244.

HELD: A valid stipulation may be implied by the conduct of the parties. Here, all parties represented by counsel and pro-tem had taken an oath of office. By failing to object and by participating in the hearings, the mother waived the issue on appeal. Consistent w/Robert S. Distinguishes Damian.

G. **In re Samkirtana S.** 222 Cal.App.3d 1475 (August 1990) Fourth District.

Written stip to Referee hearing case as judge pro-tem. Signed by attorneys, not parties. Mother appeals and argues that compliance w/Rule 1416(a)(2) required; i.e. she should have been informed of right to seek review of referee's orders by a juvenile court judge. Also claimed she did not stipulate and attorney's stipulation insufficient.

HELD: "A silent record should not lead to an assumption that the client was not adequately informed on the subject and would have refused to consent had he or she been informed."

No need for court to make further inquiry or advice.

Relied on Lamonica.

H. **In re Larissa W.** 227 Cal.App.3d 124 (January 1991) Second District.

300 hearing before a Commissioner. No stip. Court dismissed the petition. County sought rehearing from judge. Denied. County appealed, claiming prejudicial error in denial of application for rehearing w/o reading the transcript. Mother responds that County had no authority to seek rehearing under 252.

HELD: Absent a stipulation by the parties the commissioner had no judicial powers. Rehearing is a matter of right if no transcript. County, acting for child, had right to seek rehearing.

NOTE: All arguments of court relate to and cite W&IC sections dealing w/referees. No distinction made, no discussion of powers and duties of commissioners. Assume commissioner appointed to act as a referee.

I. **In re Horton** 54 Cal. 3d (August 12, 1991)

L.A. County Superior Court Commissioner heard death penalty case. No written stipulations, although statements on record show that one was requested and promised. Defendant was not informed of his right to stipulate (or refuse to stipulate) and he made some statements on the record questioning the authority of the commissioner. The defendant did not expressly stipulate, either in writing or orally.

Conviction, and death sentence. Writ petition filed on basis that absent a written stipulation, the commissioner was without jurisdiction to proceed and the verdict was void. HELD: 1) The right to a trial be a judge is not a “fundamental” one requiring a personal, knowing and voluntary waiver. 2) The conduct of the parties, and specifically the conduct of the attorneys, may be tantamount to a stipulation. 3) The client’s express stipulation is unnecessary, and counsel’s conduct may provide the basis for the tantamount stipulation. Cites authority of In re Mark L.

J. **In re Courtney H.** 38 CA 4<sup>th</sup> 1221 (Sept. 29, 1995)

Court of Appeal affirmed commitment to the Youth Authority by a commissioner who had not received a written or specific oral stipulation to act as a temporary judge. App. Ct. Examined the order of the commissioners appointment, which provided that she serve as a judge protem, and it was clear that she had never been assigned to perform the duties of a referee. Therefore, she had the authority to commit to CYA only if parties stipulated. Ct. held that here, neither the child nor his counsel objected to the commissioner acting as protem, so deemed to have impliedly given consent under the “tantamount stipulation “ doctrine. **W&IC 247-252 do not apply to commissioners.** By merely intending to have the commissioner hear the case, the parties impliedly confer protem status. If under *Horton* the court permitted a capital murder trial to be held before a commissioner under the tantamount stipulation doctrine, this would apply to juvenile court.

K. *In re Jesse W.* [1<sup>st</sup> Dist.- Lambden] Contra Costa 10/29/01 Although a judge signed the original detention order from the referee, there was no countersign by the judge of the subsequent dispo order removing the children after a sustained 387. This issue was raised for the first time on the appeal of the denial of the father's 388 petition heard just prior to the .26 hearing and in the appeal of the .26 orders establishing guardianship. (The writ petition following the setting of the .26 had been denied on the merits in an unpublished opinion.) Father argued that since W&IC § 249 states "No order of a referee removing...shall become effective until expressly approved by a judge....," it is a jurisdictional requirement rendering the referee's order null and void absent the countersignature. The department argued that the father had waived his right to challenge the order by failing to appeal the dispo order, and that the father lacked standing to raise the issue because the children were not removed from him, but from the mother who was the custodial parent. HELD: APPEAL DISMISSED AND PETITION FOR HABEAS CORPUS DENIED on the basis of *waiver*. (1) Waiver rule flows for § 395 recognizing dispo and post dispo orders as appealable judgments, and may not be attacked on an appeal from a later appealable order. (2) "A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed." *Steve J. v. Superior Ct.* (1995) 35 CA 4<sup>th</sup> 798. (3) Serves policy of promoting finality and expedition in a "carefully balanced scheme." (4) Father attempts to sabotage the process. (5) There were 3 prior appealable orders; this issue was not raised. (5) § 249 states that the order is not "effective," not that the order is "void" or "invalid" w/o approval. (6) No prior opinion holding the requirement is jurisdictional, and this court rejects father's contention that lack of compliance deprives the referee of fundamental jurisdiction and invalidates further orders. (7) Opinion cites cases recognizing "tantamount stipulations." (8) Father can show no prejudice.

L. *In re Brittany K.* 127 CA 4<sup>th</sup> 1497 [1<sup>st</sup> Dist. – McGinnis] Sonoma 2/28/02 Grandmother, who had been recognized as a de facto parent, appealed the termination of parental rights. In the published portion of the opinion, the court addressed her argument that the court's decision was "void and ineffective" because the commissioner hearing the case was sitting as a referee w/o stipulation and w/o subsequent approval by a judge. At start of .26, commissioner stated that because she had already made prior orders in the matter w/o objection by the parties, any contention that she should not preside were waived. Grandmother's attorney stated there would be no stip. Contested hearing proceeded w/o further reference to the issue. HELD: AFFIRMED. (1) Under Sonoma County local rules, commissioner to act as a temporary judge, w/o further order of the court. (2) No assignment as a referee. (3)

In re Mark L. (1983) 34 C 3<sup>rd</sup> 171. (4) Absent express specification that the commissioner was acting as anything other than a temporary judge, she was acting as such. (5) In re Horton (1991) 54 C 3<sup>rd</sup> 82: a valid stipulation may be implied from the conduct of the parties, including their participation in a proceeding tried by a temporary judge. (6) Failure of grandmother to make a timely objection at time the hearing was originally set in front of the commissioner was tantamount to an implied waiver of the required stipulation, notwithstanding statement at the hearing by counsel.

## SUMMARY OF STATUTORY EXCEPTIONS TO REUNIFICATION ORDERS

### W&IC section 361.5(b) Rule of Court 5.695

#### Exception (proved by petitioner by clear and convincing evidence)

#### Order

- |  |   |
|--|---|
| 1. Whereabouts Unknown   | No services; Set for 6 month review   |
| 2. Parent mentally disabled<br>(2 experts state parent incapable of caring for child)  | <u>Services UNLESS</u><br>“competent evidence by mental health professionals” establishes that services are unlikely to enable the parent to care for the child w/in 12 months                                  |
| 3. Child or sibling previously removed due to physical or sexual abuse; returned and now being removed again for physical or sexual abuse. | <u>No services UNLESS</u><br>by <i>clear and convincing</i> that reunification is in the best interest of the child<br>(Burden on parent if court finds basis not to offer services.)                           |
| 4. Parent caused the death of another child through abuse or neglect   | SAME  |
| 5. 300(e) sustained  | <u>No services UNLESS</u><br>Parent proves by preponderance and based on “competent testimony that services are likely to prevent re-abuse, or that it would be detrimental to the child to not order services. |

- |  |  |
|--|--|
| 6. Severe sexual or physical abuse to the child, a sibling, or half-sibling, by the same parent, and court finds that reunification services would not benefit the child. (Abuse as defined in 361.5(b)(6))  | <u>No services UNLESS</u><br>Parent proves by clear and convincing evidence that reunification is in the best interest of the child. 361.5(h) sets out factors the court is to consider. |
| 7. The parent is not receiving services for a sibling or half-sibling because of sections 3, 5 or 6 above.   | SAME:<br>361.5(h) sets out factors court is to consider.   |
| 8. The child was conceived as a result of a violation of Penal Code section 288 or 288.5. (Statutory rape.)  | <u>No services UNLESS</u><br>Parent proves by clear and convincing evidence that reunification is in the best interest of the child.   |
| 9. The child was abandoned and thereby placed in serious danger, or child has been surrendered under H&S §1225.7.  | SAME   |
| 10. The court ordered termination of reunification services for a sibling or half-sibling, AND the court finds that the [same] parent has not made a reasonable effort to treat the problems that led to removal of the sib or half-sib.   | SAME   |
| 11. Parental rights of the same parent have been terminated AND the court finds that the [same] parent has not made a reasonable effort to treat the problems that led to removal of the sib or half-sib.  | SAME   |
| 12. The parent has been convicted of a violent felony as described in Penal Code section 667.5(c).   | SAME   |
| 13. The parent has a history of “extensive, abusive and chronic use” of alcohol and other drugs and (a) has resisted prior court ordered treatment for this problem during a 3 years period immediately prior to the filing of the petition that brought the child to the court’s attention, OR (b) has failed or refused to | SAME   |

comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least 2 prior occasions, even though the programs identified were available and accessible.

14. Parent has advised the court not interested in family maintenance or reunification services or having child returned or placed in the parent's custody and does not wish services. Must have an attorney, be advised by the court of rights and consequences, including possible termination of rights. Court must state its finding that the parent has knowingly and intelligently waived right to services. SAME

15. On at least one occasion, parent has abducted the child or sibling or half-sibling from placement and refused to reveal whereabouts, to return custody to placement or to social worker. SAME

**Setting a 366.26 hearing: If 361.5(b)(2)-(15) basis of no reunification services or 361.5(e) court SHALL set .26 hearing  
UNLESS: Other parent receiving services**

**(Can also go to long term foster care if proper findings made..)**

Parent or Guardian Incarcerated or Institutionalized:

**§361.5(e):** Shall order services UNLESS court determines by clear and convincing evidence that services would be detrimental to the child.

Court shall consider the following:

- a. Age of child
- b. degree of relationship
- c. length of sentence
- d. nature of the treatment
- e. nature of the crime or illness
- f. degree of detriment to child if no services
- g. if child 10 or over; child's attitude
- h. any other appropriate factors



Services may include:

- a. collect phone calls
- b. transportation (where appropriate)
- c. visitation (where appropriate)
- d. services to extended family members or foster parents  
IF services not detrimental to child
- e. order to parent to attend counseling, parenting classes, vocational training –IF AVAILABLE

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**W & IC section 366.21 Rule of Court 5.710  
SIX MONTH REVIEW**

Court may terminate reunification services and go to a .26 hearing IF:

NO SERVICES GOING TO THE OTHER PARENT AND the court finds by clear and convincing evidence that:

1. A 300(g) petition has been sustained and the whereabouts of the parent remains unknown; or
2. The parent has not had contact with the child for 6 months; or
3. The child was under 3 when initially removed or a member of a sibling group as described by §361.5(a)(1)(C), AND the court finds by **clear and convincing evidence** that the parent has **failed to participate regularly in the court ordered treatment plan, [ordered at Disposition] and make substantive progress UNLESS, the court finds a substantial probability of return within 6 months or that reasonable services have not been offered or provided; or**
4. The parent has been convicted of a felony indicating parental unfitness; or
5. The parent is deceased.

**NOTE:** May be applied to a sibling of the child who was under 3 at time of initial removal. Court must consider several factors, including, but not limited to:

- a. Was sibling group removed together?
- b. Closeness of the group;
- c. Ages of all the children;
- d. Detriment if group not maintained;
- e. Likelihood of finding permanent home for the group;
- f. Are they placed together now in a preadoptive home or is there a concurrent plan for them to remain in same home?

- g. Wishes of the children;
- h. Best interest of each child.

**At dispo, court must inform parent that although one or more of the children were over 3 when removed, the time allowed may be limited to 6 months for all the siblings.**