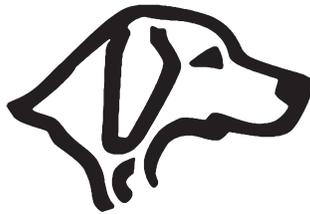




DEPENDENCY QUICK GUIDE



**A DOGBOOK
FOR ATTORNEYS REPRESENTING
CHILDREN AND PARENTS**



**ADMINISTRATIVE OFFICE
OF THE COURTS**

CENTER FOR FAMILIES, CHILDREN
& THE COURTS

**Judicial Council of California/Administrative Office of the Courts
Center for Families, Children & the Courts**

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The points of view, concepts, and practices discussed in this handbook do not necessarily represent the official position of the Judicial Council, its members, or the funders.

Printed in the United States of America

Printed on recycled and recyclable paper

This publication is also available on the California Courts Web site:

www.courtinfo.ca.gov/programs/cfcc

To obtain additional copies of this book, or annual updates, please contact:

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CONTENTS

Acknowledgments	ix
How to Use the <i>Dependency Quick Guide</i>	xi

HEARINGS

Initial / Detention

Detention Hearing Checklist: Child’s Attorney	H-5
Detention Hearing Checklist: Parent’s Attorney	H-7
Black Letter Discussion and Tips	H-9

Jurisdiction

Jurisdiction Hearing Checklist: Child’s Attorney	H-35
Jurisdiction Hearing Checklist: Parent’s Attorney	H-37
Black Letter Discussion and Tips	H-39

Disposition

Disposition Hearing Checklist: Child’s Attorney	H-73
Disposition Hearing Checklist: Parent’s Attorney	H-75
Black Letter Discussion and Tips	H-77

Judicial Review of Placement With Parent

Judicial Review of Placement With Parent Checklist (§ 364): Child’s Attorney	H-109
Judicial Review of Placement With Parent Checklist (§ 364): Parent’s Attorney	H-111
Black Letter Discussion and Tips	H-113

Status Reviews

Status Reviews Checklist: Child’s Attorney	H-123
Status Reviews Checklist: Parent’s Attorney	H-127
Black Letter Discussion and Tips	H-129

Selection and Implementation

Selection and Implementation Checklist (§ 366.26): Child’s Attorney . .	H-149
Selection and Implementation Checklist (§ 366.26): Parent’s Attorney . .	H-151
Black Letter Discussion and Tips	H-153

Review of Permanent Plan

Review of Permanent Plan Checklist (§ 366.3): Child’s Attorney H-181
Review of Permanent Plan Checklist (§ 366.3): Parent’s Attorney H-185
Black Letter Discussion and Tips H-187

Subsequent and Supplemental Petitions

Black Letter Discussion and Tips H-201

Motions for Modification

Black Letter Discussion and Tips H-211

FACT SHEETS

Caregivers F-3
Children’s Rights F-9
Education Laws, Rights, and Issues F-13
Funding and Rate Issues F-19
Hearsay in Dependency Hearings F-27
Immigration F-31
Indian Child Welfare Act (ICWA) F-37
Interstate Compact on the Placement of Children (ICPC) F-45
Jurisdictional Issues F-49
Parentage F-55
Parents’ Rights Regarding GAL Appointments
and Incarcerated Parents F-59
Relative Placements F-65
Safe Haven / Safe Surrender F-77
Termination of Jurisdiction: Common Issues F-81
Visitation F-87

SUMMARIES OF SEMINAL CASES S-3

INDEXES

Topical Index I-3
Tables of Cases, Codes, and Rules of Court I-72

Acknowledgments

We wish to thank the California Office of Emergency Services and the federal Court Improvement Project for providing the funds to make this publication possible.

The primary authors and editors of this publication were Molly Neilson, attorney, Children’s Law Center of Los Angeles, and David Meyers, senior attorney at the Administrative Office of the Courts’ Center for Families, Children & the Courts (CFCC).

The following individuals served as contributing authors and editors:

From the Children’s Law Center of Los Angeles: Leslie Heimov, interim co-executive director; David Estep, law firm director; and attorneys Nancy Aspaturian, Martha Matthews, Cameryn Schmidt, and Sarah Vesecky.

Attorneys Natasha Frost, Alliance for Children’s Rights, Los Angeles; John Passalacqua, Mendocino; Julia Turner-Lloveras, Sacramento; Janet Sherwood, Marin; and Commissioner Patricia Bresee (Ret.), Superior Court of San Mateo County.

CFCC staff: Leah Wilson, supervising analyst; Aleta Beaupied, senior attorney; and attorneys Miriam Krinsky, Christine Williams, Beth Bobby, and Melissa Ardaiz.

We are indebted to the children’s and parents’ attorneys in Los Angeles, San Joaquin, and Marin Counties who participated in the pilot studies and focus groups. Thanks to each of you for helping to shape both the form and substance of the final product.

We are similarly grateful for the insightful comments, leadership, and other assistance provided by Diane Nunn, director, and Lee Morhar and Charlene Depner, assistant division directors, CFCC; Gary Seiser, San Diego County Counsel; Fran Haselsteiner, Senior Editor, AOC Office of Communications; Ruth Flaxman, editor; Christopher Bernard, proofreader; George Mattingly, graphic designer; and Katherine Pitcoff, indexer.

We would like to extend our sincere respect, admiration, and gratitude to the attorneys in California who, on a daily basis, accept the responsibility of representing the parents and children who come before the juvenile dependency court.

How to Use the *Dependency Quick Guide*

The *Dependency Quick Guide* is intended to be used as a reference manual for attorneys representing parents and children in juvenile dependency proceedings. Its goal is to provide guidance and short answers to common problems that attorneys face. The book is designed for use in the trial courts; it is not meant to serve as a treatise or definitive work on juvenile dependency law.

The book is divided into three major parts: “Hearings,” “Fact Sheets,” and “Summaries of Seminal Cases.” The hearings section is organized by statutory hearing in procedural order. Each statutory hearing section contains checklists and black letter discussion and tips. The checklists outline the primary tasks that must be completed and factors that must be considered before, during, and after each statutory dependency hearing. The black letter sections provide a basic overview of the hearings for new attorneys as well as tips on how to effectively advocate for clients in problem situations.

The fact sheets are organized topically rather than procedurally and give additional information on complex areas of dependency practice. Their purpose is to give the practitioner a sufficient understanding of specific complex topics such that he or she will have, at a minimum, a foundation to provide effective advocacy in cases that require specialized knowledge.

The case summaries give practitioners brief descriptions of the seminal cases that have shaped the practice of dependency law today.

The guide is paginated by major sections: H for “Hearings,” F for “Fact Sheets,” and S for “Summaries of Seminal Cases.”

Please note that unless indicated otherwise, all citations are to the California Welfare and Institutions Code.

It is our hope that this manual will be as useful on the counsel table as it will be on your desk. We welcome your comments and suggestions on ways we can improve this publication to better meet your needs.



HEARINGS

INITIAL / DETENTION

Detention Hearing Checklist: Child's Attorney

BEFORE

- Review petition and supporting paperwork for sufficiency of petition, bases for detention, reasonable efforts/services, jurisdictional issues (other states or countries), efforts to place with relatives.
- Analyze for existing or potential conflicts.
- Begin discussions/negotiation with opposing counsel.
- Introduce self to client; explain role as counsel and advocate, confidentiality, privileges. (§ 317f.)
- Interview client in private in age-appropriate manner regarding relevant issues (i.e., allegations, placement preferences, siblings, health issues, school of origin [pending exams, IEP's], any pending delinquency matters, immigration status, treatment in current placement, access to phone calls and visits with parents).
- Interview relatives and interested persons present re allegations, visitation, placement options, ASFA restrictions. Get relevant information on home environment, criminal background, need for funding. Assist with referral for CLETS and LiveScan.
- Formulate position on whether child should be detained, sufficiency of petition, whether reasonable efforts were made to prevent detention/placement.

DURING

- Be aware of the law and applicable burdens of proof.
- Did the department meet its burdens (prima facie, reasonable efforts, etc.)?
- Select relevant case law to cite.
- Request appropriate orders, such as those needed to facilitate
 - Placement with relative or nonrelative extended family member.



- Visitation with parents, relatives, and other appropriate persons.
- Services for entire family.
- Restraining orders. (§ 213.5.)
- Crisis counseling (e.g., grief).
- Necessary medical treatment.
- Assessments (psychological, physical, educational, regional center).
- School-related issues (placement near school of origin, transfer of records, IEP, tutoring).
- Transportation funds (to facilitate visitation, school attendance, counseling).
- Special services (i.e., pregnancy/parenting, gay/lesbian/bisexual/transsexual youth).
- Special funding (Victim of Crimes, section 370, emergency needs of caretakers).
- Ensure court addresses
 - Placement.
 - Services for family (reunification if removed, maintenance if not).
 - Parentage.
 - Indian heritage (ICWA).
 - Visitation with parents, siblings, and other appropriate persons.
 - Any other specifically requested orders.
 - Setting next hearing.

AFTER

- Consult with child to explain court rulings and answer questions.
- Send letter to caretaker with contact information and summary of court orders.
- File necessary forms/motions if pursuing rehearing, demurrer, or writ of mandate.

Detention Hearing Checklist: Parent's Attorney

BEFORE

- Review petition and supporting paperwork for
 - Legal sufficiency of the allegations.
 - Timeliness of filing.
 - Notice. (§ 319.)
 - Reasonable efforts made to prevent/eliminate need for removal.
 - Potential jurisdictional issues.
 - Efforts to place with relatives.
- Analyze for existing or potential conflicts.
- Begin discussion/negotiation with opposing counsel.
- Introduce self to client; explain role as counsel and the focus of a detention hearing.
- Obtain basic information (contact addresses and numbers, parentage, relatives, tribal members).
- Encourage system buy-in when appropriate and address client's concerns.
- Impress upon the client the significance of these proceedings.
- Interview relatives and interested persons present regarding allegations, visitation, placement options, ASFA restrictions. Get relevant information on home environment, criminal background, need for funding. Assist with referral for CLETS and LiveScan.
- Formulate position on whether child should be detained, sufficiency of petition, whether reasonable efforts were made to prevent detention/placement.
- Evaluate need for testimony or mandatory one-day continuance. (§ 322.)

DURING

- Be aware of the law and applicable burdens of proof.
- Did the department meet its burdens (prima facie, reasonable efforts, etc.)?
- Select relevant case law to cite.
- Request appropriate orders, such as those needed to facilitate
 - Placement with relative or nonrelative extended family member.
 - Visitation with client, relatives, and other appropriate persons.
 - Services for entire family.
 - Restraining orders. (§ 213.5.)
- Ensure that court addresses
 - Placement.
 - Services for family (reunification if removed, maintenance if not).
 - Parentage.
 - Indian heritage (ICWA).
 - Visitation with parents, siblings, and other appropriate persons.
 - Any other specifically requested orders.
 - Setting next hearings (including need for special interim hearings).
 - Time waivers.

AFTER

- Consult with client to explain court rulings and reinforce client's ability to "fix the problems."
- Establish an action plan for client (i.e., get into services, get restraining order, clean up house).
- Provide contact information and next court date, and explain role of social worker.
- File necessary forms/motions if pursuing rehearing, demurrer, or writ of mandate.

Black Letter Discussion and Tips

The initial hearing is the first held after a petition is filed to declare a child a dependent of the juvenile court. If the child has been taken into custody, this first hearing is called a detention hearing and the court must determine at that time whether the child should be released to the parent or remain detained. Additionally, counsel will be appointed and the court must make certain inquiries and orders. The court will also have its first opportunity to review and assess the evidence proffered by the county social services agency and any additional evidence presented by the parties and their counsel relevant to the child's detention. (§§ 315, 319.)

TIMING OF HEARING

If the child has not been removed from the custody of a parent, the initial hearing must take place within 15 judicial days of the date the petition was filed. (Cal. Rules of Court, rule 5.670(a).) When a child has been detained, a petition to declare him or her a dependent must be filed within 2 court days, 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. (§§ 313, 315; Cal. Rules of Court, rule 5.670(b) & (d).)

NOTICE

Notice of the date, time, and location of the hearing, with a copy of the petition attached, 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. (§ 290.2.) If the whereabouts of the parent are unknown, the agency must exercise due diligence (i.e., conduct a good faith inquiry that is thorough and systematic) to locate and notice the parent. Failure to properly notice a parent of the commencement of dependency proceedings violates due process and is considered "fatal" in that it deprives the court of personal

jurisdiction over the parent. (*In re Claudia S.* (2005) 131 Cal.App.4th 236.) Insufficient notice could mean the jurisdictional and subsequent findings are subject to reversal. (*In re Arlyne A.* (2000) 85 Cal. App.4th 591, 598–600.)

COUNSEL FOR THE CHILD

1. Appointment

The court must appoint counsel for the child absent a finding that the child would not benefit from counsel. This determination is within the court's discretion and is based on the best interest of the minor. In order to find that the child would not benefit, the court must find that the child understands the nature of the proceedings and is able to communicate and advocate effectively with the court, all counsel, and the professionals involved. (Cal. Rules of Court, rule 5.660(b).) Practically speaking, independent counsel will be appointed in virtually all dependency cases. (*In re S.D.* (2002) 102 Cal. App.4th 560, 563.) Counsel may be any member of the bar, including a district attorney or public defender, so long as that attorney does not represent any party or county agency whose interests conflict with the child's. (§ 317(c); Cal. Rules of Court, rule 5.534(g).) The court may relieve counsel even before jurisdiction terminates if it determines that representation no longer benefits the child. (*In re Jesse C.* (1999) 71 Cal.App.4th 1481, 1490.)

2. Conflicts

If asked to represent several children in the same family, counsel should conduct a conflicts analysis, guidelines for which are provided in rule 5.660(c) of the California Rules of Court. The court may appoint one attorney to represent all siblings unless an actual conflict exists or there is a reasonable likelihood that an actual conflict will arise. (*Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423; *In re Celine R.* (2003) 31 Cal.4th 45, 56–57.) Standing alone, the following circumstances do not necessarily constitute an actual conflict

or likelihood of conflict: if siblings are of different ages, have only one parent in common, have different permanent plans or some appear more adoptable than others, express conflicting desires regarding nonmaterial issues, or give conflicting accounts of nonmaterial events. (Cal. Rules of Court, rule 5.660(c).)

Note that attorneys have a continuing duty to evaluate the interests of each sibling, and if an actual conflict arises, the attorney must notify the court and make a request to withdraw from representing some or all of the siblings. The attorney may continue to represent one or more, so long as continued representation of some siblings will not prejudice the interests of those formerly represented and the attorney has not exchanged any confidential information with the former client(s) whose interests conflict with those of the remaining client(s). (*Id.*, rule 5.660(c).)

If an attorney requests to be relieved because of a conflict, the court may make an inquiry as to the appropriateness of the request in order to determine whether an actual conflict of interest exists. However, the court cannot require an attorney to disclose confidential communications. (*Ibid.*; *Aceves v. Superior Court* (1996) 51 Cal. App.4th 584.)

3. The Child's Representative

a. Child's Attorney

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. Counsel must interview children age four and older and communicate the client’s wishes to the court. However, counsel cannot advocate for return to a parent if, to the best of his or her knowledge, return would pose a threat to the child’s safety and protection. (§ 317(e).) An attorney for a child must be more than a “mouthpiece” for the child. Further, the Court of Appeal has concluded that a child’s attorney may even advocate for a position

directly contrary to that of the child's stated wishes if evidence indicates that the desired result would be unsafe. (*In re Alexis W.* (1999) 71 Cal.App.4th 28, 36.)

Although not required to perform the duties of a social worker, counsel must investigate the child's interests beyond dependency and report to the court any other interests that may need administrative or judicial intervention. (§ 317(e); Cal. Rules of Court, rule 5.660(g).) If the child is injured and has a cognizable tort claim, this duty can be especially critical given restrictions on recovery that may be imposed by the statute of limitations.

The attorney is the holder of the child's psychotherapist-client and physician-patient privilege unless the court finds the child is of sufficient age and maturity to give informed consent. (§ 317(f); also see Children's Rights fact sheet.)

b. CAPTA GAL

Under the federal Child Abuse Prevention and Treatment Act (CAPTA) and state law, every child who is the subject of dependency proceedings must be appointed a guardian ad litem (CAPTA GAL), who may be an attorney or a Court Appointed Special Advocate (CASA). (§ 326.5; 42 U.S.C. § 5101 et seq.; Cal. Rules of Court, rule 5.662(c).) Generally, the CAPTA GAL must obtain a firsthand understanding of the case and the child's needs and make recommendations to the court as to the child's best interest. (Cal. Rules of Court, rule 5.662(d).) In California, the specific duties and responsibilities of an attorney serving as CAPTA GAL are the same as those for counsel for the child in dependency and are outlined in section 317(e) and rule 5.660 of the California Rules of Court. (See *id.*, rule 5.662(e).) The California Supreme Court has recently held that the CAPTA GAL's responsibilities also extend through appeal and include the duty to pursue an appeal or authorize appellate counsel to seek dismissal of an appeal when in the child's best interest. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 680–681.)

SOCIAL WORKER'S REPORT

The social worker must submit a report for the detention hearing detailing

- Reasons for removal,
- Need for continued detention,
- 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. (§§ 319, 306.5; Cal. Rules of Court, rule 5.676.)

BURDEN OF PROOF AND STATUTORY ELEMENTS

1. Release or Continued Detention

After reviewing the social worker's report and any other evidence proffered, the court *must* order the child released to the parent's custody unless the petitioner has made a prima facie showing that

- The child falls within section 300;
- Continuance in the parent's custody is contrary to the child's welfare; *and*
- Any of the following:
 - There is 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,
 - The child left a previous court-ordered placement, or
 - The child is unwilling to return home and had been physically or sexually abused by someone living there. (§ 319; Cal. Rules of Court, rules 5.676, 5.678.)



2. Prima Facie Case Defined

The Court of Appeal has determined that prima facie evidence is “that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however, be contradicted, and other evidence is always admissible for that purpose.” (*In re Raymond G.* (1991) 230 Cal.App.3d 964, 972, citation omitted.) In the context of dependency hearings, therefore, the social worker’s report will stand as true unless and until contrary evidence is presented to rebut the assertions made.

3. Evidentiary Nature of Hearing

At the initial hearing the court *must* examine the parents and other persons with relevant knowledge and hear relevant evidence that counsel for the child or parents desire to present. (§ 319; Cal. Rules of Court, rule 5.674(a).) The parents, guardians, and child have a right to confront and cross-examine anyone examined by the court during the hearing and can assert the privilege against self-incrimination. Parties also have the right to cross-examine the preparer of any reports submitted to the court. If that right is asserted and the preparer is not made available, the court may not consider that report or document in making its detention findings. (§ 311(b); Cal. Rules of Court, rule 5.674(d).)



TIP Although it may not be common practice to present evidence at a detention hearing, counsel should carefully consider doing so. In making its prima facie determination the court must consider unrebutted evidence (such as the social worker’s report) to be true, making presentation of rebuttal evidence critical. Remember that the issue at this hearing is not the truth of the allegations in the petition but rather whether there is a showing of risk of harm to the child sufficient to justify the need for continued detention. Additionally, counsel may want to present evidence concerning services or protective measures that would allow the child’s safe release to a parent’s custody.

COURT ORDERS, INQUIRIES, AND FINDINGS

1. Jurisdictional Issues

Subject matter jurisdiction for dependency proceedings (as well as all custody proceedings in California) is controlled by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). (Fam. Code, § 3400 et seq.; *In re Stephanie M.* (1994) 7 Cal.4th 295, 310.) The purpose of the UCCJEA is to avoid interstate jurisdictional conflicts on custody issues, and failure to follow it may deprive a court of jurisdiction. Generally, a California dependency court has exclusive jurisdiction over an action if California was the child's home state, i.e., if the child lived in the state with a parent for at least the six months prior to filing of the petition. (Fam. Code, §§ 3402(g), 3421(a)(1), 3422.) Even if California is not the home state, a court may take temporary emergency jurisdiction if the child is present in the state *and* has been abandoned or needs protection from mistreatment or abuse. (*Id.*, § 3424(a).) Additionally, caution should be exercised when one or both parents reside outside the United States, as all proceedings are subject to reversal as void if service of notice is not proper under the Hague Service Convention. (*In re Alyssa F.* (2003) 112 Cal.App.4th 846; for further discussion of the UCCJEA, the Hague Conventions, and the Parental Kidnapping Prevention Act (PKPA), see Jurisdictional Issues fact sheet.)



TIP If there are indications that another state or country may be involved, the initial/detention hearing is the time at which counsel should raise the issue and make appropriate requests of the court.

2. Reasonable Efforts

(To Prevent or Eliminate the Need for Removal)

At detention, the court must determine whether or not the agency made reasonable efforts to prevent the need for the child's removal from the home and whether there are services that would obviate the need for further detention. Services to be considered may include



case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemaking, parenting training, transportation, and referrals to public assistance (e.g., MediCal, food stamps). (§ 319(d).) In addition, *prior* to removal, the social worker is *required* to consider whether a nonoffending caretaker can provide for and protect the child and/or whether the alleged perpetrator will voluntarily leave and remain out of the home, thereby preventing the need for further detention. (§ 306(b)(3).)



TIP Removal from parental custody should be the exception, not the rule. Under the Welfare and Institutions Code, not only must the social worker consider reasonable means to maintain the child safely in the home, but peace officers also may not take a child into temporary custody absent imminent danger of physical or sexual abuse or an immediate threat to the child's health or safety. (§§ 305, 306(b).) The statutory scheme underlying dependency makes it clear that the extreme interference with the family unit that detention creates should occur only in emergency situations where attempts to alleviate the danger have either failed or are unreasonable to attempt.



TIP Note that even if the court determines that the child's welfare requires continued detention, the court can find that the agency did not make reasonable efforts prior to removal. In the appropriate case, counsel may wish to advocate for such a finding.

3. Findings Necessary for Funding of Relative Caregivers / Title IV-E

Title IV-E of the Social Security Act sets out specific judicial findings and orders that must be made in order to ensure federal reimbursement to counties for the care of children in out-of-home placements. (42 U.S.C. § 672; see also fact sheet on funding.) *At the initial detention hearing, the court must make the following findings* for Title IV-E eligibility:

- Continuance in the home of the parent or legal guardian is contrary to the child's welfare, and
- Temporary placement and care is vested with the child protective agency pending disposition.

These findings *must be made at the first hearing on the case* in order for a child detained with a relative to be eligible for federal foster care funding at the *Youakim* rate, which is significantly higher than that available under state funding. If the proper language does not appear on the minute order, *Youakim* funding will be denied, and nunc pro tunc orders will not correct the problem. Note that the findings above are also required under California law when the court orders a child detained. (§ 319(b), (c) & (e).)



TIP An omission of the proper findings from a minute order may be corrected only if the transcript shows they were in fact made on the record. Because the results of omitting the Title IV-E findings are so costly, it is best for everyone in the courtroom to ensure that the proper findings are made on the record at the initial hearing.



TIP Federal law also links *Youakim* funding to a requirement that a finding must be made within 60 days from the date of removal that the agency exercised reasonable efforts to prevent or eliminate the need for removal. (45 C.F.R. § 1356.21(b)(1).) Given the additional window of time the agency has to elevate its efforts to the proper standard, a finding of “no reasonable efforts” at detention therefore does not permanently preclude federal backing for relative foster care funds. Thus counsel for parents and children should urge the court at detention to critically review the agency's efforts and hold the agency to their statutory mandate.

4. Parentage Inquiry

The court must make inquiries as to the identity and whereabouts of any fathers, presumed, biological, or alleged. Additionally, if given sufficient information, the court may make determinations as to



paternity status. (§ 316.2; Cal. Rules of Court, rule 5.635.) Even if a man claiming to be the father appears at the initial hearing, the parentage inquiry must take place and include questions regarding, for example, the mother's marital status (past and present), any existing declarations of paternity, and qualifications as a presumed father under the criteria of Family Code section 7611. In some cases an issue of legal maternity may arise, e.g., when a child's birth mother has a same-sex domestic partner. (See also Parentage fact sheet.)



TIP Early determination of a child's parentage can be important as it may affect release and relative placement decisions. On the other hand, because presumed status conveys rights to custody, reunification, and visitation, the court should not be too quick to enter such a finding before sufficient information has been gathered and considered. (See also Parentage fact sheet.)

5. Indian Child Welfare Act (ICWA)

The court has an affirmative duty to ascertain whether a child who is the subject of the petition is an Indian child as defined in ICWA. (25 U.S.C. § 1901 et seq.) Information suggesting that a child may be an Indian child under ICWA triggers statutory notification requirements for all subsequent hearings unless and until the court properly determines that the act does not apply. (Cal. Rules of Court, rule 5.664; see also fact sheet on ICWA.)

6. Services to the Child and Family and Ancillary Orders

a. Family Maintenance/Preservation

If the court determines that a child can be safely returned to a parent with supportive services, it shall order that those services be provided. The services to be considered in making this determination include, but are not limited to, counseling, emergency shelter care, out-of-home respite care, emergency in-home caretakers, teaching and demonstrating homemaking, transportation, referrals to public assistance agencies, or return of the child to a nonoffending care-

giver with orders limiting the abusive person's contact with the child. (§§ 319(d), 306; Cal. Rules of Court, rule 5.678(b).)

b. Family Reunification

If the child remains detained, the court shall, if appropriate, order that services to the family be provided as soon as possible to assist in reunification. (§ 319(e).) Prompt initiation of services is especially important for parents, as the 18-month time limit for reunification is measured from the date of initial removal. Participation by a parent in services is not deemed an admission to the allegations and cannot be used as evidence against him or her. (§ 16501.1(f)(11)(B).)

c. Child-Specific Services

The child's attorney should request that the court order services targeted to the child's specific needs. These could include crisis counseling, assessments (e.g., medical, psychological, developmental, educational), or assistance in obtaining the child's belongings from the parental home.

Additionally, orders should be requested to ensure that the child's educational rights, as outlined in Assembly Bill 490 (Stats. 2003, ch. 862), are properly addressed. (See fact sheet on educational rights.) Specifically, the court can temporarily limit a parent's right to make educational decisions and appoint another responsible adult to do so if the parent is unable, unwilling, or unavailable to do so; the agency has made diligent efforts to secure the parent's participation; and the child's educational needs cannot be met without such an order. (§ 319(g).)

d. Visitation

At the initial hearing the court shall make orders regarding visitation between the child and other persons, including the parents, siblings, and other relatives. (Cal. Rules of Court, rule 5.670.) These orders are based on an assessment of whether contact pending the jurisdictional hearing would be beneficial or detrimental to the child and may specify frequency and manner of contact as well as place any restrictions

deemed necessary. As with placement, when siblings who are very dependent upon each other have been separated, it is especially critical to ensure they are afforded frequent visits until they can be reunited.

e. Restraining Orders

From the time the petition is filed until the petition is dismissed or jurisdiction terminates, the court has the authority to issue restraining orders. (§ 304; Cal. Rules of Court, rule 5.620(b).) They may be issued to protect the child who is the subject of the dependency proceedings, any other child living in the household, or a parent, guardian, or caregiver regardless of whether the child currently resides with that person. The court may issue a temporary restraining order ex parte but must then set a noticed order-to-show-cause hearing within 20 days. (§ 213.5; Cal. Rules of Court, rule 5.630.) At that hearing the court may issue a restraining order for up to three years; no court (other than a criminal court) may issue any orders contrary to the dependency restraining order. (Cal. Rules of Court, rule 5.630.5.)

POSSIBLE OUTCOMES

1. One-Day Continuance

If the parent, legal guardian, or child requests a one-day continuance of the detention hearing, the court must grant it. (§ 322; Cal. Rules of Court, rule 5.672.) Upon continuing the case, unless it is ordering release to the parent, the court must find that continuance of the child in the parent's home is contrary to the child's welfare and detain the child in the interim. (§ 319(c).) Note that these findings must be made at the first appearance in order to preserve federal funding entitlement for the future. All temporary findings will be reevaluated at the continued hearing and are not made with prejudice to any party. (Cal. Rules of Court, rule 5.672.)



TIP Counsel may want a continuance for any number of reasons, e.g., to gather more evidence, arrange for testimony regarding the need for detention, allow the agency more time to inves-

tigate the situation, or ensure that counsel has the opportunity for a face-to-face interview with a child client who was not brought to court for the initial hearing.

2. Release to Parent

a. No Prima Facie Showing

The court *must* release the child to the parent absent a prima facie showing that

- The child falls within section 300;
- Continuance in the home is contrary to the child's welfare;
and
- Any of the following:
 - There is 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;
 - The child left a previous court-ordered placement; or
 - The child is unwilling to return home and was physically or sexually abused by someone living there.

(§ 319; Cal. Rules of Court, rules 5.676, 5.678.)



TIP Remember that in evaluating the evidence, the court will consider the information contained in the social worker's report to be true unless rebutted. Therefore it may be critical to exercise your client's right to put additional relevant evidence before the court. (§ 319(a). See also discussion on the definition of prima facie cases in the "Burden of Proof and Statutory Elements" section earlier in this black letter discussion.)

b. Services Are Available to Prevent the Need for Further Detention

The court must release the child to the parent and order that services be provided to ensure the safety and well-being of the child if it is



shown that such services are available. Services to be considered include, but are not limited to, emergency shelter care, in-home caretakers, and referrals to public assistance. (§ 319(d)(1)–(2).)

c. Offending Caregiver Is Ordered Out of the Home

Prior to removal the social worker is required to consider whether the child can safely remain in the home if the offending caregiver voluntarily moves out and remains out of the family home. (§ 306(b)(3).) This is still an option at detention, at which time the court may make orders for provision of supportive services and monitoring of the situation to ensure the child’s safety. (§ 319(d)(1)–(2).)



TIP Restraining orders against the alleged offender may be a useful tool in crafting a protective plan to allow the child to return to a parent’s custody.

3. Detention From the Custodial Parent

Under section 319, upon detaining a child, the court must order that temporary care and custody of the child be vested in the agency. The court may then place the child in an emergency shelter, a licensed foster home, or the assessed home of a relative or a nonrelative extended family member. (§ 319(e) & (f); Cal. Rules of Court, rule 5.678(e).)

a. Release to a Noncustodial, Nonoffending Parent

A parent who was not living in the same home and who had nothing to do with the circumstances resulting in removal may come forward at detention seeking to care for the child. Section 319 does not specifically address release to the home of a previously noncustodial, nonoffending parent. Rather, the statute discusses “removal from,” “continuance in,” or “return to” the home of the parent(s) from whom the child was detained. However, prior to the detention hearing—upon taking the child into custody—the social worker is required to “immediately release the child to the custody of the child’s parent, guardian or responsible relative” unless there are no such persons, they are

not willing to provide care for the child, or continued detention is necessary for the child's protection. (§ 309.)

Note that release to a parent does not trigger the same statutory and regulatory restrictions that apply to placement with a relative, such as assessment of physical home requirements or criminal conviction limitations. (§ 361.2(a) & (e)(1).) Additionally, California appellate courts have held that the Interstate Compact on the Placement of Children (ICPC) does not apply to release to a nonoffending parent residing in another state. (*In re Johnny S.* (1995) 40 Cal. App.4th 969; but see subsequently enacted rule 5.616 of the California Rules of Court and ICPC regulation 3; for more in-depth discussion, see fact sheet on the ICPC.)



TIP In the appropriate case, counsel should advocate for placement with a previously noncustodial parent who was not involved in the incident that led to the child's removal. It can be argued that the language of section 309 implicitly requires this outcome and serves the child's best interest by avoiding repeated moves and placement in foster care. Also, a due process argument can be made that a nonoffending parent has a right to custody that should not be summarily abrogated by the offending parent's actions.



TIP Alternatively, if the child's attorney opposes release to a previously noncustodial parent, counsel could argue that the court should not consider placement with a noncustodial parent until the dispositional hearing as that is the first point at which that possibility is directly addressed under dependency statutes. (§ 361.2.) Furthermore, argument against release can always be framed in terms of detriment to the child (e.g., lack of prior relationship, separation from siblings, interference with reunification with the offending parent). (See *In re Luke M.* (2003) 107 Cal.App.4th 1412 [denial of placement with out-of-state parent at disposition].)



b. Detention With a Relative

Upon detaining a child, the court must determine if there is a relative or a nonrelative extended family member (NREFM) who has been assessed by the agency and is willing and able to care for the child. A “relative” is defined as an adult related by blood, adoption, or affinity (via marriage) within the fifth degree of kinship, which includes stepparents, stepsiblings, all “great, great-great or grand” relatives, and the spouses of those persons, even if divorce or death ended the marriage. (§ 319(f).) Affinity exists between a person and the blood or adoptive kin of his or her spouse. (Cal. Rules of Court, rule 5.502(a).) All relatives should be considered, but preferential consideration for placement at detention shall be given only to grandparents, aunts, uncles, or siblings of the child. (§ 319(f).) A NREFM is defined as an adult who has an “established familial or mentoring relationship with the child” that has been verified by the agency. (§ 362.7.)



TIP It is critical that the issue of who will serve as the caretaker is addressed as early as possible, and that all efforts are made to place the child with appropriate relatives or NREFM’s. Reasons for this include minimization of the trauma of detention by releasing the child to familiar surroundings and people; access to siblings and extended family members, thereby allowing the child to maintain important relationships; consistency in placement and reduction of multiple moves; and, if efforts to reunify ultimately fail, promotion of permanency, given the statutory preferences favoring a permanent plan that allows a child to remain with existing caretakers to whom he or she is attached. (See § 366.26(c)(1)(D) & (k).)

(i) Assessment and Approval

Assessment and approval of a placement are the responsibility of the agency, which also has a duty to make diligent efforts to locate and place with relatives. (§§ 361.3(a), 16000(a); Fam. Code, § 7950.) The assessment includes an in-home inspection to determine the safety of the home and the suitability of the prospective caregiver, includ-

ing a criminal records check (using the California Law Enforcement Telecommunications System [CLETS]) and a child abuse background check on the caregiver and all adults residing in the home. (§§ 309(d), 319, 361.4; see Relative Placement fact sheet.)

(ii) Interstate Compact on the Placement of Children (ICPC)

If the potential caretaker lives in a state other than California, placement can only be made under the terms of the ICPC. An expedited or priority placement request can be made if the child is younger than two years old, is in an emergency shelter, or has previously spent a substantial amount of time in the home. (Fam. Code, § 7900 et seq.; Cal. Rules of Court, rule 5.616; see also fact sheet on the ICPC.)



TIP Investigation of the proposed home under the ICPC can, unfortunately, take a long time to complete. Therefore, if it appears to be in the child's best interest to make an interstate move, a request should be made as soon as possible to initiate the ICPC process.

c. Siblings

When children are detained, the social worker has a statutory obligation to place siblings and half-siblings together “to the extent that it is practical and appropriate.” (§ 306.5.) If this is not done, the social worker must inform the court in the detention report of continuing efforts being made to place the children together or of any reasons why such efforts are not appropriate. (§ 16002.)



TIP The child's counsel should always assess the nature of the relationship between siblings, especially those who often have relied primarily on each other for support in the family home prior to detention. When closely bonded siblings have been separated, it is incumbent upon the child's attorney to draw the court's attention to the problem and request orders to facilitate their joint placement as soon as possible.



4. Alternatives to Jurisdiction

a. Informal Supervision

If the social worker determines that there is a probability that the dependency court will take jurisdiction but that the conditions placing the child at risk may be ameliorated without court intervention, the agency may seek to dismiss the petition and proceed with a program of informal supervision of the child. This outcome requires the consent of the parent and does not preclude filing of a later petition if the family does not participate in and benefit from the services offered. (§ 301.) However, the agency cannot dismiss a petition over the objection of the child's counsel. Instead the agency must notify parties and afford them the opportunity to be heard. (*Allen M. v. Superior Court* (1992) 6 Cal.App.4th 1069, 1074.)



TIP By definition, at the time of a detention hearing the agency will seldom be immediately amenable to a section 301 dismissal. However, if the case appears to be appropriate for this type of resolution, counsel should ask that the possibility be addressed in the report prepared for jurisdiction/disposition.

b. Dismissal

Once a petition has been filed, the court may dismiss the petition if doing so is in the interests of justice and the minor's welfare, so long as neither the parent nor the minor is in need of treatment or rehabilitation. (§ 390.) Decisional law does not directly address the issue of whether the court may dismiss over the agency's objection; however, it is clear that dismissal requires consent of the child. The child is entitled to an evidentiary hearing at which the court has a duty to protect the child's welfare by determining whether dismissal is in the interests of justice. (See generally *Taylor M. v. Superior Court* (2003) 106 Cal.App.4th 97, 107.)



TIP It may be the rare case in which a court feels that it has enough information before it to warrant a section 390 dismissal at the initial hearing, but counsel should be aware of this option.

SETTING THE NEXT HEARING

1. Prerelease Investigation Hearings

If the child has not been released to the home of a relative or a NREFM seeking placement, a hearing may be requested to review the results of the agency's assessment of that home. These hearings are usually called prerelease investigations (PRI's) or interim relative placement hearings, and they are usually set within a week of the detention hearing.



TIP Setting such a hearing pushes the agency to complete the assessment in a timely manner and should expedite the placement process, thus lessening the time a child must spend in foster care.

2. Rehearings

There are several scenarios under which a party can seek a rehearing on the court's decision regarding detention.

a. No Notice to the Parent

If the parent or guardian was not present and did not receive actual notice of the initial hearing at which the child was detained, he or she may file an affidavit asserting lack of notice with the clerk of the court and the clerk must set the matter for a rehearing within 24 hours, excluding weekends and holidays. This hearing follows the same procedures as those set out for the initial detention hearing. A parent who received proper notice but failed to appear is not entitled to a rehearing absent a showing that his or her absence was due to good cause. (§ 321; Cal. Rules of Court, rule 5.680.)

b. A Rehearing on the Prima Facie Case

The child, parent, or guardian may request that a further hearing be set for presentation of evidence of the prima facie case following a detention order. This rehearing must be set within 3 days excluding weekends and holidays, although the court may continue the matter for no more than 5 judicial days if a necessary witness is unavailable.



The rehearing is conducted in the same procedural manner as the initial hearing. In the alternative, the court may set the matter for a contested adjudication within 10 court days. (§ 321; Cal. Rules of Court, rule 5.680(d).)

c. Matter Heard Initially by a Referee or Commissioner

Any party may apply for a rehearing within 10 days of service of a copy of an order made at a detention hearing by a referee or commissioner who is not sitting as a temporary judge. After reading the transcript, a judge of the juvenile court may grant or deny the application. Additionally, juvenile court judges may, on their own motions, order a rehearing. All rehearings are to be conducted de novo before a judge of the juvenile court. (§§ 250, 252, 253, 254; Cal. Rules of Court, rule 5.542.)

3. Demurrer

A section 300 petition must allege details that, if true, demonstrate current harm or illness or substantial risk of future harm to the child. A parent or child may challenge the sufficiency of the petition with a motion akin to a demurrer. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1133.) Any party maintaining that the allegations are not sufficient to state a cause of action must give notice of intent to file a demurrer at the initial/detention hearing. Generally, if the demurrer is sustained, the court must afford the agency “a timely opportunity” to amend the petition to cure its deficiencies.

 **TIP** Appellate authority is split as to whether failure to demur at the detention hearing waives appeal on the sufficiency of the petition. (*In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 397; *In re James C.* (2002) 104 Cal.App.4th 470, 481.) Therefore, to protect the client’s appellate rights, a record should be made at the trial court level of any claims that the petition fails to state facts supporting jurisdiction.

4. Prejurisdictional Settlement Conferences

Following the initial hearing, the case may be set for a pretrial resolution conference (PRC) (also called a settlement and status conference or pretrial readiness conference) at which the parties will attempt to resolve the petition by reaching agreement as to amended language, placement of the child, and details of the dispositional case plan. Such an informal approach is in keeping with the Legislature's intent that, when issues of fact or law are not contested, dependency cases should be resolved quickly and through nonconfrontational means so as to maximize all parties' cooperation with any dispositional orders the court may issue. (§ 350(a); Cal. Rules of Court, rule 5.534(b).) Such methods of resolution can also protect a child client from the emotional trauma of participating in a contested hearing and can ease the process of family reunification.

In courts where the local practice is to proceed to adjudication on the date set for the resolution conference if the parents do not appear, notice must clearly indicate that possibility. Without proper scheduling and notice of a jurisdictional hearing, the trial court cannot make jurisdictional findings at a resolution conference/PRC hearing. (*In re Wilford J.* (2005) 131 Cal.App.4th 742.) Dual PRC/jurisdictional hearings are permissible but only if the notice clearly states the nature of the scheduled hearings and the orders that may be made even if a party fails to appear.

5. Mediation

Parties may choose to use mediation. "Dependency mediation" is defined as "a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power." (Cal. Rules of Court, rule 5.518(b)(1).) It is nonadversarial and focuses on child protection and safety with the goal of reaching a settlement that is mutually acceptable to all parties. The child has a right to participate accompanied by his or her attorney. (*Id.*, rule 5.518(d)(2)(B).) Negotiations are confidential and the mediator cannot make any reports or recommendations to the court other than

laying out the terms of any agreement reached by the parties. (*Id.*, rule 5.518(c)(2)(D).)



TIP To expedite resolution of the case, mediation can be set either on the same day as the resolution conference or with a backup trial date in the event the case does not settle.

6. Contested Adjudication

When a child has been ordered detained, a contested adjudication must take place within 15 court days of the detention order. Otherwise, the jurisdictional trial must occur within 30 days. (§ 334.) Hearings set under these statutory timelines are sometimes called no-time-waiver trials. A party is deemed to have waived the limits unless a no-time-waiver trial is requested or an objection is made to any requests for continuances. (*In re Richard H.* (1991) 234 Cal. App.3d 1351, 1362.)

If these time limits are waived, the code does not clearly set a maximum time limit for adjudication; however, the dispositional hearing should occur within 60 days of the child's detention absent exceptional circumstances and may in no case be delayed longer than six months after removal. (§ 352(b).) These timelines thus frame the outer limits for the jurisdictional hearing as well because it must occur before disposition. Note, however, that there appears to be no prescribed remedy if either the jurisdictional or the dispositional hearing is not held within the specified time limits. The appellate court specifically rejected the argument that such time limits are jurisdictional and that their violation requires dismissal of the case and release of the child, as such a result would defeat the underlying purpose of dependency proceedings—the protection of children. (*In re Richard H.*, *supra*, 234 Cal.App.3d at p. 1351.)



TIP Counsel should be especially mindful, however, of the potentially detrimental effects of delays in resolution caused by multiple continuances. Counsel can rely heavily on the code in arguing against a continuance, as none may be granted that is contrary

to the child's interests and the court must "give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352(a).)

JURISDICTION

Jurisdiction Hearing Checklist: Child's Attorney

BEFORE

- Conduct independent investigation.
 - Conduct discovery—make informal requests and motion to compel if necessary. (Cal. Rules of Court, rule 5.546.)
 - Review documents—social services agency and police reports, social worker's notes, medical records.
 - Interview potential witnesses.
- Interview client in age-appropriate manner re
 - Accuracy and completeness of information in report.
 - Position as to truth of allegations.
 - Desired outcomes and wishes regarding direction of litigation.
- Counsel client in age-appropriate manner on alternative strategies and probable outcomes.
- Assess and formulate position on
 - Strength of social services agency's evidence supporting each allegation, especially whether there is a nexus between the alleged behavior and risk to the child.
 - Current situation and risk of harm to the child.
 - Need for contested adjudication.
 - Need for child's testimony, and if it should be in chambers. (§ 350(b).)
- If adjudication is to be contested,
 - Evaluate need for expert testimony.
 - Issue subpoenas.
 - Prep witnesses including child client.
 - Exchange witness lists with other counsel.
 - File joint statement of issues, motions in limine, or trial briefs as required.



DURING

- Be aware of law and applicable burdens of proof.
- If adjudication is contested,
 - Make appropriate objections on the record to preserve issues for appeal.
 - Consider motion to dismiss at conclusion of social services agency's case. (§ 350(c).)
Note: The child has the right to present evidence in support of the petition before the court rules on a section 350(c) motion. (*Allen M. v. Superior Court* (1992) 6 Cal.App.4th 1069.)
 - At close of evidence consider request to amend petition to conform to proof. (*In re Jessica C.* (2001) 93 Cal.App.4th 1027.)
 - Advocate identified position in keeping with any additional evidence received.
- Request appropriate interim orders pending disposition.
 - Placement (e.g., release to parent, to relative, with siblings).
 - Services for child and/or family to ameliorate problems or facilitate return.
- Ensure court addresses setting next hearing—disposition must be within 60 days (never more than six months) of detention hearing. (§ 352(b).)

AFTER

- Consult with child to explain court rulings and answer questions.
- File necessary forms/motions if pursuing rehearing or extraordinary writ.

Jurisdiction Hearing Checklist: Parent's Attorney

BEFORE

- Conduct independent investigation.
 - Conduct discovery—make informal requests and motions to compel if necessary. (Cal. Rules of Court, rule 5.546.)
 - Subpoena records, including police reports and medical records if necessary.
 - Review all documents, including social worker's notes.
 - Interview potential witnesses.
- If client in custody, ensure that a transportation order is issued.
- Anticipate client's reaction and interview re
 - Accuracy and completeness of information in report.
 - Position as to truth of allegations.
 - Desired outcomes and wishes as to direction of litigation.
- Counsel client on alternative strategies and probable outcomes.
- Assess and formulate position on
 - Strength of social services agency's evidence supporting each allegation, especially whether there is a nexus between the alleged behavior and risk to the child.
 - Current situation and risk of harm to the child.
 - Whether any presumptions apply under section 355.1.
 - Need for contested adjudication.
 - Need for child's testimony (§ 350(b)) and client's wishes regarding this issue.
- Negotiate with opposing counsel (are there combined jurisdiction and disposition issues?).
- If adjudication is to be contested,
 - Evaluate need for expert testimony and physical evidence.
 - Issue subpoenas.
 - Prep all witnesses, including your client, for direct or cross-examination.



- Exchange witness lists with other counsel.
- File joint statement of issues, motions in limine, applicable section 355 objections.
- File trial brief.
- Use pretrial hearing as opportunity to get input on your case from bench.
- Evaluate need to request a continuance. (§§ 352, 355(b)(2).)

DURING

- Be aware of law and applicable burdens of proof.
- Make appropriate objections on the record to preserve issues for appeal.
- Consider motion to dismiss after social services agency's and children's case. (§ 350(c).)
- At close of evidence, consider request to amend petition to conform to proof. (*In re Jessica C.* (2001) 93 Cal.App.4th 1027.)
- Request appropriate interim orders pending disposition (i.e., placement and services).
- Ensure court addresses setting next hearing—disposition must be within 60 days (never more than six months) of detention hearing. (§ 352(b).)

Note: Continuances can be granted only for good cause and never if contrary to the interests of the minor. (§ 350(a).)

AFTER

- Consult with client to explain court rulings and answer questions.
- File necessary forms/motions if pursuing rehearing or extraordinary writ.
- Set tentative deadlines with client for events to occur (begin services, increase visits).

Black Letter Discussion and Tips

The purpose of the jurisdictional hearing is to make a factual determination about whether the child has been abused or neglected as defined in section 300(a)–(j).

NOTICE

Notice at this determinative stage of the proceedings is considered jurisdictional. If reasonable efforts to locate and notify the parent are not made, jurisdictional findings (and all subsequent orders) may be subject to reversal. (See *In re Arlyne A.* (2000) 85 Cal. App.4th 591, 599.)

1. Content

Notice must contain the name of the child(ren) involved; the date, time, place, and nature of the hearing; the subdivisions of section 300 under which the petition has been filed; and a copy of the petition. It must also contain a statement that the court may proceed in the absence of the person notified, and that those notified have a right to counsel but may be liable for a portion of the costs of legal representation and of the child's out-of-home placement. (§ 291(d).)

2. Persons and Entities Entitled to Notice

Notice must be provided to the parent or guardian, subject child if age 10 or older, attorneys of record, and dependent siblings and their caregivers and attorneys at least 5 days before the hearing if the child is detained and 10 days prior if not. If there is no parent residing in California or the whereabouts of both parents are unknown, notice must be served on the adult relative living nearest to the court. Further, if there is reason to believe that an Indian child may be involved, notice of the hearing and the tribe's right to intervene must be served on any known Indian custodian and tribe at least 10 days before the hearing or, if unknown, on

the Bureau of Indian Affairs at least 15 days prior to the hearing. (§ 291(a) & (c).)

3. Method of Service

If the persons required to be noticed were present at the initial hearing and the child is detained, notice may be by personal service or by first-class mail. If they were not at the initial hearing, notice must be by personal service or certified mail, return receipt requested. If the child is not detained, notice may be by personal service or first-class mail. (§ 291(e).)

TIMING OF HEARING

If the child is detained, the hearing must be set within 15 court days of the date that the order for detention was made. If the child is not detained, the hearing must be held within 30 days of the date the petition was filed. (§ 334; Cal. Rules of Court, rule 5.670(f).) The time limits are considered waived if counsel did not invoke them at the detention hearing, and the absence of an objection to an order continuing the hearing beyond these time frames is deemed consent to a continuance. (§ 352(c); see also Initial/Detention black letter discussion.)



TIP Hearings held within the time frames outlined in section 334, sometimes referred to as no-time-waiver hearings, are the exception rather than the rule. A continuance is often in the parties' best interest to allow sufficient time for a thorough investigation. However, refusing to waive time limits can be an effective advocacy tool and should be used whenever appropriate.

Although no outside limit is set for determining jurisdictional issues, under section 352 the disposition hearing for a detained child must take place, absent exceptional circumstances, within 60 days of, and under no circumstances more than six months after, the detention hearing. (§ 352; Cal. Rules of Court, rule 5.550.) Because the jurisdiction hearing must occur before disposition, the statutes and decisional law controlling the latter also control the former.

The Court of Appeal has held that violation of the statutory timelines does not deprive the juvenile court of jurisdiction because such an outcome would run counter to the central goal of dependency law—the protection of children. (*In re Richard H.* (1991) 234 Cal.App.3d 1351.) However, the time constraints of section 352 should not be treated lightly and, in cases of unwarranted delay, juvenile courts have been directed to conduct jurisdiction and disposition hearings on a day-to-day basis until completed. (*Renee S. v. Superior Court* (1999) 76 Cal.App.4th 187; *Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238.) Further, the time limits of section 352 have been found to take precedence over an incarcerated parent’s right under Penal Code section 2625 to be present at the jurisdictional hearing. (See *D.E. v. Superior Court* (2003) 111 Cal.App.4th 502.)

CONTINUANCES

A hearing to determine whether a child is described under section 300 can be continued for a number of reasons under several statutory bases.

1. Good Cause

Upon the request of any party, or the court’s own motion, the court may continue the jurisdiction hearing beyond the section 334 time limits, although no continuance may be granted that is contrary to the interests of the child. In assessing the child’s interests the court must “give substantial weight” to

- The child’s need for prompt resolution of his or her custody status,
- The need to provide the child with a stable environment, and
- Damage to the child from prolonged temporary placements. (§ 352(a); Cal. Rules of Court, rule 5.550(a).)

Continuances can be granted only on a showing of good cause and only for the time necessary. Alone, none of the following is considered good cause:

- Stipulation between counsel,
- Convenience of the parties,
- Pending resolution of a criminal or family law matter, or
- Failure of an alleged father to return a certified mail receipt of notice. (§ 352(a); Cal. Rules of Court, rule 5.550(a).)

2. Social Worker's Late Report

The social study, or social worker's report, must be provided to all parties or their counsel "within a reasonable time before the hearing." If this has not been done, the court may grant a party's request for a continuance for up to 10 days. (§ 355(b)(3).) As pointed out by the California Supreme Court, the rights conferred under section 355 (to object to hearsay in the social study and subpoena witnesses whose statements are contained in the report) are meaningless if the report is not received a reasonable time in advance. (*In re Malinda S.* (1990) 51 Cal.3d 368, 385, fn. 21.)



TIP A "reasonable time" is not defined under either the statutes or the case law. However, there is a good argument that it should be 10 days in advance of the hearing, which is the time required for service of all reports for status review and 366.26 hearings. (§§ 364.05, 366.05; Cal. Rules of Court, rule 5.727(c).) Unless a no-time-waiver hearing has been set, counsel should request that the court calendar a date for receipt of the report to allow enough time to file timely 355 objections to hearsay, subpoena witnesses, and prepare clients for trial if necessary.

3. Unavailable Witness

Unless the child is detained, the court may continue the hearing an additional 10 days if it determines that a necessary witness who is currently unavailable will become available within the extended period. (§ 354.)

4. Appointment of Counsel

Prior to beginning the jurisdiction hearing, if the court determines that a party entitled to counsel desires representation but is unable to afford payment for services, the court must appoint counsel as required under section 317. The court may continue the matter for up to seven days to allow time for appointment of counsel or to enable the attorney to become familiar with the case and prepare for the hearing. (§ 353.)

PRETRIAL DISCOVERY

The basic requirements for discovery are laid out in rule 5,546 of the California Rules of Court. The rule explicitly states that it is to be liberally construed to foster informal discovery. (Cal. Rules of Court, rule 5,546(a).) The court, however, retains inherent power to order production or limitation of disclosure on a showing of good cause. (*In re Dolly A.* (1986) 177 Cal.App.3d 195, 222; *Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 202.)

The county social services agency has an ongoing, affirmative duty to disclose all evidence and information within its possession or control that is favorable to the parent or child. (Cal. Rules of Court, rule 5,546(c)–(k).) Promptly after filing the petition the county social services agency must provide or make available for copying to the parent and child all relevant police, arrest, and crime reports. (Cal. Rules of Court, rule 5,546(b).) Upon a timely request, the county social services agency must also disclose

- Any relevant probation reports relating to the child or parent;
- Records of statements, admissions, or conversations by the child, parent, or any alleged coparticipant;
- Names, addresses, and records of any statements or conversations with all persons interviewed in the process of the county social service agency's investigation;

- Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments, or comparisons;
- Photographs or physical evidence; and
- Records of prior felony convictions of intended witnesses. (*Id.*, rule 5,546(d).)

In addition, the county social services agency must turn over all information in its possession regarding a detained child to the child’s attorney within 30 days of a request. (§ 317(f).)

The parent is under an obligation to disclose any relevant material or information within the parent’s possession or control upon a timely request by the county social services agency. (Cal. Rules of Court, rule 5,546(e).) All items to which a party is entitled must be provided in time to “permit counsel to make beneficial use of them.” (*Id.*, rule 5,546(g).)

The court may limit discovery, through barring access or excision of material, upon a showing of privilege or other good cause. (*Id.*, rule 5,546(g) & (h).) The court may also impose sanctions for failure to comply with discovery, including dismissing the case, prohibiting the party who failed to disclose from introducing the undisclosed material into evidence, granting a continuance, or any other measure it deems proper. (*Id.*, rule 5,546(j).)



TIP

Counsel for parents and children should hold the county social service agency to its duty to comply with discovery requirements. Doing so should prevent the all-too-common scenario of receiving critical information when it is too late to conduct further investigation, interview potential witnesses, or otherwise effectively prepare to counter the evidence.



TIP

Counsel should not conduct a contested proceeding without first having reviewed the social worker’s case notes. Though counsel cannot access material that falls within attorney-client privilege or work product (and parents’ attorneys cannot view confidential placement information), the social worker’s handwrit-

ten and typed notes (often called chronological notes or Title XXs) are discoverable and should be carefully reviewed.

BURDENS OF PROOF

1. Generally

The county social services 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. (§ 355(a); Cal. Rules of Court, rules 5.534(d), 5.684(f).)

2. Rebuttable Presumptions

Once established, the presumptions created under section 355.1(a) and (d) shift the burden of producing evidence from the county social services agency to the opposing party or parties. The prima facie presumption survives only until rebutted. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1041.)

a. Injuries Not Ordinarily Sustained Absent Parental Neglect

A finding by the court, based on competent professional evidence, that a child's injuries or detrimental condition are not of the sort that would usually occur except as the result of the parent's unreasonable or neglectful acts or omissions amounts to prima facie evidence that the child is described by section 300 (a), (b), or (d). (§ 355.1(a).)

This presumption applies only when supported by expert testimony or other professional evidence. (*In re Esmeralda B.*, *supra*, 11 Cal.App.4th, at p. 1041; see also *In re E.H.* (2003) 108 Cal.App.4th 659, 670 [discusses when presumption is not necessary and court can sustain based on a "res ipsa loquitur" type of argument].)

b. Sexual Abuse by Parent or Other Adult in the Home

A finding by the court that the parent or any other person who resides with, or has care or custody of, the child has been (1) convicted in California or another state of a crime constituting sexual abuse as defined in Penal Code section 11165.1, (2) found to have committed

sexual abuse in a prior dependency case in California or another state, or (3) convicted of a felony requiring registration as a sexual offender, amounts to prima facie evidence that the child is described by section 300 (a), (b), (c), or (d). (§ 355.1(d).)

This presumption applies to noncustodial as well as custodial parents and guardians. (*In re John S.* (2001) 88 Cal.App.4th 1140, 1145.)



TIP It is important to remember that these presumptions are rebuttable. The parent (or child) must counter the presumption by presenting expert testimony that the child's injury could have occurred accidentally, for example (see *In re Esmeralda B.*, *supra*, 11 Cal.App.4th at p. 1036), or by demonstrating that the person in question's status as sex offender does not pose a risk to the child.

PROCEDURE

1. Child and Parent Missing and Whereabouts Unknown

Although the juvenile court may exercise emergency jurisdiction to make initial protective orders concerning a child whose whereabouts are unknown, it has no authority to further proceed or make any jurisdictional or dispositional findings so long as the whereabouts of the child and parent remain unknown. (See *In re Claudia S.* (2005) 131 Cal.App.4th 236.)

2. Appointment of Counsel

Prior to beginning the jurisdiction hearing, if the court determines that a party entitled to counsel desires representation but is unable to afford payment for services, the court must appoint counsel as required under section 317. (§ 353; Cal. Rules of Court, rule 5.534(g) & (h).) However, the court is not required to appoint counsel for a parent who does not appear or request counsel. (*In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1648.)



TIP All counsel have a vested interest in ensuring that diligent efforts are made to locate all parents (alleged and presumed) and that they are afforded the opportunity to appear and be represented. The failure to provide notice can negatively affect the jurisdictional integrity of the entire proceedings. (See *In re Arlyne A.* (2000) 85 Cal.App.4th 591, 599.)

3. Parent's Right to Appear and Procedure in His or Her Absence

a. Generally

A parent is entitled to due process in dependency matters relating to the control and custody of the parent's child, which requires not only proper notice but also an opportunity to appear and be heard. (See *In re Stacy T.* (1997) 52 Cal.App.4th 1415, 1424.) A parent's failure to appear at the adjudication should not be treated as a "default." (*Id.* at p. 1422 [use of that term in regard to dependency proceedings is "inaccurate and misleading"].) Unless proper notice has been given that the court will make jurisdictional findings even in the party's absence, the court cannot proceed with adjudication. (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 753 [disapproving of the practice of setting and noticing a pretrial resolution conference (PRC) or settlement conference and proceeding to jurisdiction if a parent fails to appear].)

b. Incarcerated Parents

An incarcerated parent has the statutory right to be noticed of and to be present at any hearing in which the county social services agency seeks to adjudicate the child as a dependent. If the court is informed that the parent wishes to be present, it must issue an order for the parent to be brought before the court. The proceeding to adjudicate a petition under section 300 should not go forward without the physical presence of the parent or of the parent's counsel unless the court has received a signed waiver of appearance. (Pen. Code, § 2625.) However, the time limits of



section 352 have been found to take precedence over an incarcerated parent's right under Penal Code section 2625 to be present at the jurisdictional hearing. (See *D.E. v. Superior Court* (2003) 111 Cal.App.4th 502.)

4. Child's Participation

a. Presence

The child is a party, entitled not only to notice but also to the right to appear. If a child over 10 years of age is not present at the hearing, the court must ensure that notice was proper and inquire as to why the child is absent. (§§ 317.5(b), 349; Cal. Rules of Court, rule 5.534(n).)

b. Testimony

(i) Whether Can Be Compelled

Parents have the statutory right to use the subpoena process to compel the appearance and testimony of witnesses, as well as the right to cross-examine and confront witnesses. (§§ 311, 341; Cal. Rules of Court, rules 5.534(j), 5.682(b).) The court's refusal to allow a parent to call the child as a witness at the jurisdiction hearing has been found to violate due process. (See *In re Amy M.* (1991) 232 Cal. App.3d 849, 867.) Under certain circumstances, however, a child could be found unavailable to testify under Evidence Code section 240, but only if it is established through expert testimony that, as a victim of a crime, the child could not testify without suffering substantial trauma. (Evid. Code, § 240; see *In re Christina T.* (1986) 184 Cal.App.3d 630, 634.)

(ii) Competency

Under the Evidence Code, any person is qualified to testify as a witness regardless of age unless incapable of expressing himself or herself on the issues before the court or incapable of understanding the obligation to tell the truth. (Evid. Code, §§ 700, 701(a).) Before tes-

tifying, the child must be administered an oath or, if under the age of 10, may be asked only to promise to tell the truth. (*Id.*, § 710.)

The bench officer's determination of competency will not be overturned on appeal absent an abuse of discretion. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 857.) In dependency proceedings, the court may reserve its determination of competency until after direct examination has been conducted. (Evid. Code, § 701(b).)

A child whose testimony is generally "lucid, candid and consistent" can be found competent even if some of the statements are bizarre or even clearly the product of hallucinations. (*In re Amy M.*, *supra*, 232 Cal.App.3d at p. 858.) Inconsistencies in a child's testimony go to credibility, not competency. (*In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1299.)

(iii) In-Chambers Testimony

The child may testify in chambers, outside the presence of the child's parent, so long as the parent's counsel is present and the court finds any of the following:

- Testimony in chambers is necessary to ensure truthful testimony,
- The child is likely to be intimidated by a formal courtroom setting, or
- The child is afraid to testify in the presence of his or her parent. (§ 350(b); Cal. Rules of Court, rule 5.534(c).)

The parent may have the child's in-chambers testimony read back by the court reporter. (§ 350(b); Cal. Rules of Court, rule 5.534(c).)

The court has the inherent power to devise ways to facilitate the child's testimony, including the use of closed circuit television as well as in-chambers testimony. (*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1266–1267.)

Parent's counsel must be present in chambers during the child's testimony. (*In re Laura H.* (1992) 8 Cal.App.4th 1689, 1695–1696.) However, there is split authority on whether that right is considered waived for appellate purposes if no objection is raised during trial.



(*Ibid.* [mere acquiescence is not equivalent to a knowing, personal waiver]; but see *In re Jamie R.* (2001) 90 Cal.App.4th 766, 771 [mother's silence waived her statutory right to have counsel present].)

5. Uncontested Hearings

A parent may waive a full hearing on the jurisdictional issues by admitting to the allegations in the petition (as pled or amended), pleading no contest, or submitting the determination to the court based on the information before it. (Cal. Rules of Court, rule 5.682(e).) The plea must be made personally by the parent. (*Id.*, rule 5.682(d).) The Judicial Council form, *Waiver of Rights* (JV-190), must be signed by the parent and the parent's counsel, and the court must determine that the parent read the form, understood all of its provisions, and signed willingly. (*Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 570.) The parent must make an express personal waiver of his or her trial rights. (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377.)

Upon accepting either a plea or a submission, the court must find and state on the record that it is satisfied that

- Notice is proper;
- Parent understands the nature of the allegations;
- Parent understands the possible consequences of his or her plea or submission;
- Parent has freely and voluntarily entered the plea or submission; and
- Parent has knowingly and voluntarily waived the right to
 - A trial on the issues,
 - Assert the privilege against self-incrimination,
 - Confront and cross-examine adverse witnesses, and
 - Use the subpoena process to compel the attendance of witnesses on his or her behalf. (Cal. Rules of Court, rule 5.682(e), (f).)

Although use of the mediation process is encouraged (§ 350(a)(2)), the court is not bound by any mediated or negotiated resolution. (See *In re Jason E.* (1997) 53 Cal. App.4th 1540, 1545.)



TIP Great care must be taken to ensure that the parameters of stipulations or mediated agreements are clear in order to avoid potential problems with waiver upon appeal. (See *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181 [handwritten stipulation contained numerous interlineations and deletions, leaving unclear whether mother submitted on merely the report or also on the recommendations].)

a. Pleas—Admission or No Contest

Both an admission and a no-contest plea waive subsequent objection to the sufficiency of the petition. (*In re Tommy E.* (1992) 7 Cal. App.4th 1234, 1237.) However, even if the parent admits, the court must find that there is a factual basis for the admission. (Cal. Rules of Court, rule 5.682(f).)

b. Submissions

A party may submit the matter for the court's determination based on the information before the court, often simply on the social worker's report. (*Id.*, rule 5.682(e).) This does not waive the right to appeal the sufficiency of the evidence in support of jurisdiction. (See *In re Tommy E.*, *supra*, 7 Cal.App.4th at p. 1234.) However, there is a split of authority as to whether submission on the report waives appeal on the sufficiency of the petition itself. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; compare *In re Shelly J.* (1998) 68 Cal.App.4th 322, 328; see also the discussion on demurrers in "Setting the Next Hearing," in the Initial/Detention black letter discussion.)

After submission of the matter for the court's determination based on the social worker's report, argument as to the truth of the contents of the report is not appropriate. However, the court should hear argument on the import of the facts and whether they form a sufficient legal basis to sustain jurisdiction. The court must weigh



the evidence, and if it does not establish by a preponderance of evidence that the child is described under section 300, the petition should be dismissed.



TIP Counsel must be careful to make it clear when the client is submitting only on the report (or other evidence before the court) and not on the social worker's recommendation. The latter waives a party's right to appeal jurisdictional issues. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589–590.)

6. Contested Hearings

a. Generally

The goal of dependency is to protect the child, not to punish a parent. (*In re La Shonda B.* (1979) 95 Cal.App.3d 593, 599.) The court may assume jurisdiction over a child regardless of whether the child was in the physical custody of only one or both parents. (§ 302.) The circumstances triggering the petition may only involve the conduct of one parent; however, even a parent against whom no allegations have been filed has a right to contest whether the child should come within the court's jurisdiction.

The county social services agency may not unilaterally dismiss a petition over the objection of the child. The child has a right to present evidence and require the court to determine whether the child is described under section 300. (*Allen M. v. Superior Court* (1992) 6 Cal.App.4th 1069, 1074; *Taylor M. v. Superior Court* (2003) 106 Cal. App.4th 97, 107.)

b. Evidence

Admissibility of evidence is controlled by the Evidence Code as it applies to civil cases, with the exception of certain marital privileges and the procedures laid out in sections 355 and 355.1 pertaining to presumptions affecting the burden of production and hearsay contained in the social worker's report. (Cal. Rules of Court, rule 5.684(b).)

(i) Social Worker’s Report and Hearsay Contained Within It

The social study (any written report provided by the social worker to the court and all parties) and hearsay contained within it are admissible at a jurisdictional hearing under the so-called social study exception. The only restrictions are that the social worker/preparer must be available for cross-examination and the parties must be given an opportunity to subpoena and cross-examine the witnesses whose statements are contained in the report. (§ 355(b); Cal. Rules of Court, rule 5.684(c); see also *In re Malinda S.* (1990) 51 Cal.3d 368, 382–383.)

The court must permit cross-examination of all of the social workers who prepared reports submitted to the court if requested by parent’s counsel, even if the parent is not present. (*In re Dolly D.* (1995) 41 Cal.App.4th 440, 445; *In re Stacy T.*, *supra*, 52 Cal. App.4th at p. 1425 [reiterating that there is no such thing as a “default” in dependency and that an absent parent retains the right to cross-examine the preparer of the social study through counsel].)

If a timely objection is made to specific hearsay in a report, that hearsay evidence cannot be the sole basis of any jurisdictional finding unless any one of the following applies:

- It is otherwise admissible under any statutory or decisional exception;
- It was made by a child under 12 who is the subject of the hearing, and the statement is not shown to be unreliable because of fraud, deceit, or undue influence;
- It was made by a police officer, health practitioner, social worker, or teacher; or
- The declarant is available for cross-examination. (§ 355(c)(1)(A)–(D); Cal. Rules of Court, rule 5.684(d).)



TIP Even a timely objection will not exclude hearsay that is contained in the social study. The statement will still be admitted under the “social study exception,” but the court cannot exclusively rely on it to sustain any allegations unless one of the

section 355(c)(1) criteria is established. (See Hearsay in Dependency Hearings fact sheet.)

(ii) Other Hearsay

The “child hearsay” or “child dependency” exception to the hearsay rule allows admission of out-of-court statements made by a child who is subject to dependency proceedings, regardless of whether the child is competent to testify, so long as

- All parties are notified of the intent to use the statements,
- There are sufficient surrounding indicia of reliability, and
- The child is either available for cross-examination or evidence corroborates the statements. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29.)

The court should consider a number of factors in determining the reliability of statements made by a child unavailable for cross-examination, including the following:

- Spontaneity and consistency of repetition,
- Mental state of the child,
- Use of unexpected terminology based on the child’s age, and
- Lack of motive to fabricate on the part of the child. (*In re Cindy L.*, *supra*, 17 Cal.4th at pp. 30–31.)

The Sixth Amendment right to confrontation does not apply to civil proceedings such as dependency and therefore does not bar admission and use of statements made by a child who is incompetent to testify. (*In re April C.* (2005) 131 Cal.App.4th 599, 611.)

 **TIP** The decisional child hearsay/dependency exception was created prior to the amendment of section 355, which created the “social study” exception. Although the California Supreme Court concluded in *In re Lucero L.* (2000) 22 Cal.4th 1227 that corroboration is no longer required for admissibility of statements within a social study, it did not reject the child dependency exception itself. In fact, the court spoke favorably of and relied heavily upon the underlying rationale in reaching its conclusions. Therefore, if a party seeks

to introduce a child's hearsay statement from a source other than the social study, the *Cindy L.* criteria should be argued in determining admissibility. (See Hearsay in Dependency Hearings fact sheet.)



TIP The “social study exception” only covers hearsay statements contained in the social worker’s reports. Other hearsay is still governed by the Evidence Code, section 1200 et seq., and remains generally inadmissible unless an objection is countered with a valid exception. However, if no objection is made, the statement will come in as evidence and the issue is waived for appellate purposes.

(iii) Privilege Against Self-Incrimination

Any person called to testify in a dependency hearing may assert the privilege against self-incrimination. (Cal. Rules of Court, rules 1421(a), 5.682(b).) However, unlike in criminal proceedings, the parent (or any witness) may be compelled to testify and be treated as an adverse witness under Evidence Code section 776. Further, if a witness refuses to answer a question or produce evidence based upon the privilege against self-incrimination, the court may (upon a request by the county social services agency) grant immunity and order the witness to answer the question or produce the evidence. Any answer, evidence, or information derived therefrom cannot be used against the witness in a juvenile court or criminal proceeding. (*Id.*, rule 5.548(b) & (d).)



TIP Although the parent’s testimony itself is not admissible in evidence in any other action or proceeding under section 355.1(f), this “use” immunity does not truly protect a parent from prosecution derived from the “fruits” of that testimony. For example, testimony in the dependency action that is inconsistent with that in another proceeding can be used for impeachment purposes. Additionally, information derived from testimony in dependency can be accessed by the district attorney and law enforcement and used as a basis for further investigation, the subsequent “fruits” of which may be admissible at hearings on criminal or other matters. Counsel should advise clients to use caution because of



the possible consequences of testifying and the limitations of any immunity conferred.

(iv) Inapplicability of Certain Privileges

The privileges not to testify or to be called as a witness against a spouse and the confidential marital communication privilege, as found in Evidence Code sections 970 and 980, do not apply in dependency proceedings. (Evid. Code, §§ 972, 986; Cal. Rules of Court, rule 5.684(e).)

(v) Expert Testimony/Documentary Evidence

Under section 730 of the Evidence Code, at any time before or during trial the court may appoint an expert at county expense to investigate, submit a report, and/or to testify. Expert testimony must be limited to opinion on subjects deemed to be sufficiently beyond common experience that the opinion rendered will be of assistance to the trier of fact. (Evid. Code, § 801.) Such evidence may often be needed to determine whether injuries were accidental or intentional or, in cases of alleged failure to thrive, whether a child's weight loss was due to a medical condition or purposeful starvation. (See *Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 202.) Expert testimony is always required to establish the presumption under section 355.1(a) that a child's injury or detrimental condition would not have occurred absent unreasonable or neglectful conduct by the parent.

A parent cannot be forced to undergo a psychological evaluation for adjudicatory purposes. (*Laurie S. v. Superior Court, supra*, 26 Cal. App.4th at p. 202 [at the prejurisdictional phase, allegations of a parent's mental illness do not justify such intrusive discovery].)

(vi) Privileges of the Child

Either the child, if of sufficient age and maturity, or the child's counsel holds the psychotherapist-client, physician-patient, and clergy-penitent privileges. If invoked by the child, counsel may not waive the privilege, but if counsel invokes, the child may waive. (§ 317(f).)

The psychotherapist-patient privilege does not apply to court-ordered psychological examinations. (Evid. Code, § 1017; *In re Mark L.* (2001) 94 Cal.App.4th 573, 584.) Further, the Court of Appeal has held that, although the privilege does protect the details of therapy and confidential communications between the child and the child's regular therapist or psychiatrist, it does not bar revelation of "circumscribed information to accomplish the information-gathering goal of therapy," such as reports of general therapeutic progress. (See *In re Kristina W.* (2001) 94 Cal.App.4th 521, 528; *In re Mark L.*, *supra*, 94 Cal.App.4th at p. 584.)

c. Motions to Dismiss

(i) Prior to Hearing

The county social services agency cannot dismiss a petition, either unilaterally or upon stipulated agreement with the parent, over the objection of the child's counsel. The county social services agency is required to show cause why the petition should be dismissed. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077 [supplemental petitions under section 387 are to be treated in this regard the same as original petitions].) The court retains the responsibility in such situations to determine whether dismissal is in the interests of justice and the welfare of the child. (*Allen M.*, *supra*, 6 Cal.App.4th at p. 1074.)

(ii) On a Section 350(c) or Non-suit Motion

At the close of presentation of evidence by the county social services agency and the child, the court may, on its own motion or that of the parent or child, assess whether or not the burden of proof has been met. If the court finds that it has not, the petition must be dismissed and the child released from custody. If the motion is not granted the parent and/or child may offer evidence without first having reserved the right to do so. (§ 350(c); Cal. Rules of Court, rule 5.534(d).)

The court may not dismiss the petition before taking evidence and testimony that the child wishes to offer. (*Guadalupe A. v. Superior Court*

(1991) 234 Cal.App.3d 100, 106.) However, a parent has no right to oppose dismissal of a dependency petition against the other parent or to present further evidence if the court determines that a section 350(c) motion should be granted. (See *In re Eric H.* (1997) 54 Cal.App.4th 955.).

BASES FOR JURISDICTION

1. Generally

The express legislative intent is that nothing in section 300 should “disrupt the family unnecessarily or intrude inappropriately into family life, prohibit the use of reasonable methods of parental discipline, or prescribe a particular method of parenting.” (§ 300(j).) Further, any determination under section 300 involving a parent with a physical disability (such as blindness or deafness) must focus on whether the parent’s disability prevents the parent from exercising care and control. Additionally, no child shall be considered at risk of abuse or neglect solely based on the parent’s age or parent’s status as dependent minor or foster child. (*Ibid.*)

Each allegation in a petition must be supported by proof sufficient to allow it to stand on its own. In other words, a count cannot be sustained unless, when tested against the evidence, it alone would support a finding that a child is a dependent even if all other counts were dismissed.

2. Enumerated Bases for Jurisdiction

Jurisdiction over the child is taken based on demonstrated harm or risk of harm to the child that falls within one of the descriptions enumerated in section 300(a)–(j).

a. Severe Physical Harm

The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted by the parent that is non-accidental.

“Serious physical harm” does not include age-appropriate spanking to the buttocks if there is no evidence of serious physical injury.

“Substantial risk” may be based on

- The manner in which a less serious injury was inflicted,
- A pattern or history of repeated inflicted injuries on the child or siblings, or
- A combination of the above and other acts by the parent indicative of risk. (§ 300(a).)



TIP At disposition findings under this section can have serious implications as to whether family reunification services can be provided if the child is found to have been severely physically abused or is removed from a parent for a second time because of physical or sexual abuse. (See § 361.5(b)(3),(6) & (7),(c); see also Disposition black letter discussion.)

b. Failure to Protect

The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of the failure or inability of the parent to adequately supervise or protect the child or as a result of the willful or negligent failure to

- Supervise the child or protect him or her from a person with whom the child was left, or
- Provide adequate food, clothing, shelter, or medical treatment, or
- Provide regular care for the child because of the parent’s mental illness, developmental disability, or substance abuse.

In all cases in which a child is found to be described under this section, the child shall remain a dependent only so long as is necessary to protect the child from the risk of suffering serious physical harm or illness. (§ 300(b).) A child cannot be found to be described under this subsection solely because of homelessness.

In the special situation where a parent withholds treatment or treats through prayer based upon the tenets and practices of a recognized church or religion, the court cannot find failure to provide adequate medical care unless the medical care was necessary to protect the child from serious physical harm or illness. In making its determination, the court must examine the nature and risks of the

treatment or nontreatment proposed by the parent compared to the risks, if any, of that proposed by the county social services agency and the likelihood of the success of each.

The county social services agency carries the burden to prove a connection or nexus between the current conditions alleged and a substantial risk of harm to the child in the future. In the seminal case *In re Rocco M.* ((1991) 1 Cal.App.4th 814, 820) the appellate court held that in order to sustain dependency under section 300(b), the juvenile court must find substantial evidence that, at the time of the jurisdiction hearing, the following three elements are met: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) serious physical harm or illness to the minor or a substantial risk of such harm or illness.

The long line of cases that follow *Rocco M.* reach the conclusion that “the purpose of section 300, subdivision (b) is to protect the child from a substantial risk of *future* serious physical harm and that risk is determined as of the time of the jurisdictional hearing.” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397; see also *In re David M.* (2005) 134 Cal.App.4th 822; *In re Alysha S.* (1996) 51 Cal.App.4th 393.)

The relevant question is whether there is a substantial risk of harm in the future based on the current situation. In making that determination, “[w]hile evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.” (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.) “Previous acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur.” (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565, citations omitted; see also *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.)

The mere fact that a parent is mentally ill is not sufficient to sustain a section 300(b) finding unless it is specifically shown how the child will be harmed. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830; see also *In re Janet T.* (2001) 93 Cal.App.4th 377; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.)

Nor will a parent's continuing substance abuse problems necessarily support a finding of dependency unless they are shown to pose a substantial risk to the child's well-being. (*In re David M.*, *supra*, 134 Cal. App.4th at p. 830; see also *Jennifer A. v. Superior Court* (2005) 117 Cal. App.4th 1322, 1346 [mother's single dirty test for marijuana at 366.22 hearing did not equate to a finding of substantial risk of detriment].)

A parent's failure to ensure a child's regular attendance at school is an insufficient basis for a finding that the child is currently at substantial risk of serious physical injury or illness. (*In re Janet T.*, *supra*, 93 Cal.App.4th at p. 389.)

By itself, a parent's history of criminal convictions (unless one or more convictions falls within those included in the section 355.1(d) presumption) will not support a finding of substantial risk. (*In re Sergio C.* (1999) 70 Cal.App.4th 957, 960.)

Chronic messiness has been found insufficient to sustain a finding of substantial risk that justifies removal of a child from the parental home because no nexus was drawn showing that the conditions had resulted or were likely to result in an unsanitary environment, illness, or accident. (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1005 [no clear and convincing evidence at disposition on a supplemental petition of substantial risk].)



TIP Note that *In re Paul E.* involved an appeal of a dispositional order to remove that must be based on clear and convincing evidence, not merely a preponderance of the evidence as required at jurisdiction. However, the analysis of substantial risk in this case (as well as in other disposition appeals) can be used in argument at jurisdiction so long as the circumstances of the cases cited are clearly identified.



TIP At disposition findings under this section can have serious implications regarding whether family reunification services can be provided if the parent is found to have failed to provide regular care for the child as a result of the parent's extensive, abusive, and chronic substance abuse. (§ 361.5(b)(13) & (c); see also Disposition black letter discussion.)

c. Severe Emotional Harm

The child is suffering or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or unreasonably aggressive behavior toward self or others, as a result of the conduct of the parent, or the child has no parent capable of providing appropriate care. The court may not find that a child is described by this section if the parent's failure to provide adequate mental health treatment is

- Based on a sincerely held religious belief, and
- A less intrusive judicial intervention is available. (§ 300(c).)

Jurisdiction cannot be sustained under this section absent evidence that the child is suffering from severe anxiety, depression, withdrawal, or untoward aggressive behavior. In *In re Brison C.*, a child's aversion to his father was understandable in the context of the bitter custody battle between the parents and did not rise to the level of severe emotional disturbance required under the statute. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1380.)

d. Sexual Abuse

The child has been, or there is substantial risk that the child will be, sexually abused by the parent or a member of the household, or the parent has failed to adequately protect the child from sexual abuse when the parent knew or reasonably should have known that the child was in danger of sexual abuse. (§ 300(d).) "Sexual abuse" is defined under the Penal Code section 11165.1 as

- Sexual assault—including but not limited to rape, statutory rape, incest, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, and child molestation; or
- Sexual exploitation—including but not limited to the promotion or encouragement of prostitution or live performance of obscene sexual conduct, and depiction of a child engaged in obscene conduct. (*Ibid.*; Pen. Code, § 11165.1.)

A “member of the household” is defined as any person continually or frequently found in the same household as the child. (Cal. Rules of Court, rule 5.502((a)(16).)

The Court of Appeal has held, in at least one case, that a male sibling who was not personally molested and had not witnessed the rape of his sister was properly found to have been sexually abused and at substantial risk of future sexual abuse within the meaning of subsection 300(d). (See *In re Karen R.* (2001) 95 Cal.App.4th 84, 89 [by forcibly raping daughter, father showed conduct so “sexually aberrant” that both male and female children were placed at substantial risk]; but see *In re Rubisela E.* (2000) 85 Cal.App.4th 177 [male siblings were not found dependent under section 300(j) as insufficient showing was made that sexual abuse of sister placed them at substantial risk].)

The appellate court has found that a parent’s nude photos of children engaged in sexual conduct fall within the Penal Code definition of “sexual exploitation” and justify dependency intervention pursuant to section 300(d). (*In re Ulysses D.* (2004) 121 Cal.App.4th 1092, 1098.)



TIP Counsel should be prepared to challenge whether the alleged improper conduct actually qualifies as sexual abuse under the Penal Code and case law definitions of sexual abuse. At disposition findings under this section can have serious implications regarding whether family reunification services can be provided if the child is found to have been severely sexually abused or is removed from a parent for a second time because of physical or sexual abuse. (See § 361.5(b)(3),(6) & (7), (c); see also Disposition black letter discussion.) In addition, a true finding under section 300(d) is a basis for invoking the section 355.1(d) presumption in any subsequent petitions filed involving the parent.

e. Serious Physical Injury to a Child Under Age Five

A child under the age of five has suffered severe physical abuse inflicted by the parent or inflicted by a person known by the parent, if,

in the latter case, the parent knew or reasonably should have known that the person was physically abusing the child.

“Severe physical abuse” includes any of the following:

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

A child cannot be subsequently removed at disposition from the parent’s home on the sole basis of severe physical abuse unless severe physical abuse was specifically alleged in the petition. (§ 300(e).)

The identity of the abuser need not be known to sustain an allegation under section 300(e). Nor does it have to be proved that the parent had actual knowledge of the child’s abuse when the child was never out of the parent’s custody and the parent reasonably should have known of the abuse. (*In re E.H.* (2003) 108 Cal.App.4th 659, 670.)



TIP At disposition findings under this section can have serious implications as to whether family reunification services can be provided if the court finds that the child was declared a dependent under section 300(e) because of the parent’s conduct. (§ 365.1(b)(5) & (c); see also Disposition black letter discussion.)

f. Death of Another Child

The child’s parent caused the death of another child through abuse or neglect. (§ 300(f).)

The court must look at the circumstances surrounding the child’s death and beyond the terms of any plea agreement in a collateral criminal case to determine whether the parent’s conduct caused the death. (See *In re Jessica F.* (1991) 229 Cal.App.3d 769 [finding, under the prior statute that required a conviction,

that mother's conduct, pled to as child endangerment, had in fact caused the death of her son].)

The juvenile court's finding that a parent "caused" the death of a child was supported because her failure to intervene and protect her son from repeated beatings by her boyfriend amounted to gross or criminal negligence that was causal even though she did not strike the fatal blow. (See *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933.) The proper legal standard for determining whether a parent's negligence falls within subsection 300(f) is criminal, not civil.



TIP At disposition findings under this section can have serious implications as to whether family reunification services can be provided. (§ 361.5(b)(4) & (c); see also Disposition black letter discussion.) Moreover, a true finding on a section 300(f) allegation has serious permanent consequences; it will always provide a basis for the court to take jurisdiction over subsequent children. However, the passage of time and changed circumstances can be argued to moderate dispositional orders for younger siblings.

g. Parent Is Unable or Unwilling to Care for Child

The child has been left without any provision for support, has been voluntarily surrendered under the Safe Haven/Safe Surrender program (Health & Saf. Code, § 1255.7), and has not been reclaimed within 14 days; has a parent who is incarcerated or institutionalized and who cannot arrange for the care of the child, or lives with a relative or other person who is unable or unwilling to provide care or support for the child; or the parent's whereabouts are unknown and reasonably diligent efforts to locate the parent have failed. (§ 300(g).)

"There is no 'Go to jail, lose your child' rule in California." A parent need not have arranged for care of his or her child immediately upon incarceration; rather, the issue under section 300(g) is whether, as of the time of the jurisdiction hearing, the parent can make such arrangements. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077–1078.) It is irrelevant whether the person chosen to provide



care is suitable for the long term; section 300(g) requires only that the parent arrange adequately for the child's care. (*In re Monica C.* (1994) 31 Cal.App.4 296, 305.)



TIP Petitions often contain section 300(g) allegations, particularly when a parent's whereabouts are initially unknown. Counsel should ensure that such counts are dismissed when the parent is located. Additionally, at disposition, findings under this subsection can have serious implications as to whether family reunification services can be provided if the court finds that the child was willfully abandoned in a manner that constituted a serious danger to the child. (§ 361.5(b)(9) & (c); see also Disposition black letter discussion.)

h. Failed Adoption

The child has been freed by relinquishment or termination of parental rights from one or both parents for 12 months and an adoption petition has not been granted. (§ 300(h).)

i. Cruelty

The child has been subjected to an act or acts of cruelty by the parent or by a member of his or her household, or the parent has failed to adequately protect the child from an act or acts of cruelty when the parent knew or reasonably should have known that the child was in danger of being subjected to cruel acts. (§ 300(i).)

A "member of the household" is defined as any person continually or frequently found in the same household as the child. (Cal. Rules of Court, rule 5.501((a)(16).)

j. Harm to Sibling

The child's sibling has been abused or neglected as defined in section 300(a), (b), (d), (e), or (i), and there is substantial risk that the child will be abused or neglected as defined in those subdivisions.

In making its determination as to substantial risk, the court shall consider the following:

- Circumstances surrounding the abuse or neglect of the sibling,

- Age and gender of each child,
- Nature of the abuse or neglect of the sibling,
- Mental condition of the parent, and
- Any other probative factors. (§ 300(j).)

The mere fact that an older sibling had been the subject of a sustained dependency petition four years earlier was insufficient to support jurisdiction under section 300(j). (*In re David M.*, *supra*, 134 Cal. App.4th 822.) Similarly, a true finding under section 300(j) is unwarranted where no evidence from the sibling's prior case is submitted and no showing is made linking the sibling's status as a dependent to any substantial risk posed to the child in question. (*In re Ricardo L., Jr.*, *supra*, 109 Cal.App.4th at p. 552.) However, the doctrine of collateral estoppel prevents relitigation of the sibling's prior dependency adjudication. (*In re Joshua J.* (1995) 39 Cal.App.4th 984.)

A finding of sexual abuse under section 300(d) of a female child will not necessarily support jurisdiction over her brothers. (*In re Rubisela E.*, *supra*, 85 Cal.App.4th at p. 177 [evidence of sexual abuse of oldest daughter may be sufficient to show substantial risk to younger sister but not as to brothers]; but see *In re Karen R.*, *supra*, 95 Cal.App.4th at p. 91 [father's forcible rape of daughter posed risk under section 300(j) to son as well].)

POSSIBLE OUTCOMES

1. Petition Dismissed

a. No Basis for Jurisdiction

If the court finds that the child is not described under any of the subdivisions of section 300, it must dismiss the petition and order that any child detained in out-of-home custody be released to the custody of the parent. (§ 356.)

b. Informal Supervision

In instances where the court finds that the child is described under section 300, it may, without adjudicating the child to be a dependent,



order the county social services agency to provide services to keep the family together and place the child and parent under the supervision of the social worker for six months. (§ 360(b).) If the family is unwilling or unable to cooperate during the period of supervision, the social worker must file a petition alleging that the previous disposition was ineffective, and the court must set a new hearing at which it may dismiss the petition or order that a new disposition hearing be set. (§ 360(c).)



TIP This may be a very appropriate resolution in “close cases” in which the court does find a basis for jurisdiction but the current circumstances of the family do not seem to warrant full court oversight, merely services from and supervision by the social worker. Note also that this resolution, unlike informal supervision under section 301, does not require the consent of the county social services agency; it can be unilaterally imposed by the court.

2. A Finding That the Child Is Described by Section 300

a. Immediate Disposition

After finding that the child is described by section 300, the court may proceed directly to hear evidence on the appropriate disposition for the child. (§ 358(a).)

b. Continue the Disposition Hearing to a Later Date

(i) Discretionary

The court may continue the disposition hearing on its own motion or that of the child so long as the county social services agency is not recommending denial of family reunification services. If the child is detained, the continuance must not exceed 10 judicial days. (§ 358(a)(1).) If the child is not detained the case may be continued for 30 days with an extension of 15 additional days allowable upon a finding of cause. (§ 358(a)(2).)



(ii) Mandatory

The court must continue the proceedings for a maximum of 30 days if the recommendation is to deny provision of family reunification services. During that time the social worker must notify each parent of the recommendation and that a permanency planning hearing under section 366.26 will be set at which parental rights may be terminated, if no services are offered. (§ 358(a)(3).)



TIP Timing of the disposition hearing can be very important, and counsel may have many reasons for requesting a continuance. For example, additional time may be needed for a parent to make alternative housing arrangements apart from a spouse who poses a risk to the child. Conversely, counsel may want to go to disposition immediately if conditions are already in place for a child's return home or if entry of a dispositional order is needed to initiate a placement request under the Interstate Compact on the Placement of Children (ICPC). Whatever the ultimate time frame, counsel must not lose sight of the fact that jurisdiction and disposition are inextricably related, and that the time limits for provision of reunification services are measured from the date of the child's initial removal.



DISPOSITION

Disposition Hearing Checklist: Child's Attorney

BEFORE

- Reinterview client re desires and position on
 - County social services agency's recommendation.
 - Placement (with parent, previously noncustodial parent, relative, current caretaker).
 - Need for services (e.g., counseling, tutoring).
 - Visitation with parents, siblings, grandparents, and others.
- Assess and formulate position on
 - Current risk of substantial danger to child if in custody of one or both parents, i.e., need for removal from custody of parent(s).
 - Services and resources necessary to maintain child safely in parent's custody.
 - Preferred placement if removal is necessary.
 - Need for continued jurisdiction if child in custody of previously noncustodial parent.
 - Provision of family reunification services to one or both parents.
 - Case plan and individualized services needed for family and child.

DURING

- Inform court of child's wishes—however, per section 317(e), cannot advocate for return if return conflicts with the child's safety and protection.
- Advocate positions identified above in keeping with any additional evidence received.
- Request appropriate orders, such as
 - Limitation of parent's educational rights and appointment of responsible adult to make educational decisions. (§ 61(a).)



- Case plan specific to the family and child. (§ 16501.1.)
- Special services (e.g., regional center referral, counseling for sexual abuse victims).
- Specific versus general placement order. (*In re Robert A.*, (1992) 4 Cal.App.4th 174; *In re Cynthia C.* (1997) 58 CalApp.4th 1479.)
- Ensure that court addresses
 - Placement.
 - Services for family (reunification if removed, maintenance if not).
 - Visitation with parents, siblings, grandparents, and other appropriate persons. (§§ 362.1, 362.2(h).)
 - Whether the social services agency has made reasonable efforts to prevent or eliminate the need for removal.
 - Setting the next hearing. (§§ 364/JR, 366.21(e), 366.26.)

AFTER

- Develop timeline of important dates and calendar reminders.
- Consult with child to explain court rulings and answer questions.
- Send letter to caretaker with contact information and summary of court orders.
- File necessary forms/motions if pursuing rehearing, appeal, or writ.

Disposition Hearing Checklist: Parent's Attorney

BEFORE

- Review disposition report. Does it address items in section 358.1?
- Reinterview client and strategize regarding desires and position on
 - County social services agency's recommendation.
 - Placement (with client, previously noncustodial parent, relative, current caretaker).
 - Need for services, and whether they are reasonably tailored to client's needs.
 - Ability to substantially comply with case plan within allotted time.
 - Visitation with client, siblings, grandparents, and others.
- Assess and formulate position on
 - Current risk of substantial danger to child if in custody of one or both parents, i.e., need for removal from custody of parent(s).
 - What can be done to prevent/eliminate need for removal (services, change in living arrangement, etc.).
 - Alternatives short of removal. (§§ 301, 360(b).)
 - Need for continued jurisdiction if child in custody of previously noncustodial parent.
 - Case plan/individualized services needed for family and children.
 - Need for interim hearings.
- Is there a possibility of no services/bypass? (§ 361.5(b) or (e).) If so,
 - Learn position of bench and other counsel.
 - Exercise right to 30-day continuance? (§ 358(a)(1).)
 - Prepare to address best interest exception. (§ 361.5(c).)
 - Review need for expert testimony.



DURING

- Advocate positions identified above in keeping with any additional evidence received.
- Request appropriate orders, such as
 - Case plan specific to the family and children. (§ 16501.1.)
 - Special services (e.g., foreign language, geographical concerns).
 - Specific versus general placement order. (*In re Robert A.*, (1992) 4 Cal.App.4th 174; *In re Cynthia C.* (1997) 58 Cal.App.4th 1479.)
- Ensure court addresses
 - Placement.
 - Services for family (reunification if removed, maintenance if not).
 - Visitation with client, siblings, grandparents, and other appropriate persons. (§§ 362.1, 362.2(h).)
 - Whether the social services agency has made reasonable efforts to prevent or eliminate the need for removal.
 - Setting the next hearing. (§§ 364/JR, 366.21(e), 366.26.)

AFTER

- Develop timeline of important dates and calendar reminders.
- Consult with client to explain court rulings and answer questions.
- Discuss interim objectives with client (when should services have begun, when should visitation increase, etc.), and instruct client to contact you when appropriate.
- File necessary forms/motions if pursuing rehearing, appeal, or writ.



Black Letter Discussion and Tips

A disposition hearing is held following a finding that describes a child to be within the jurisdiction of the juvenile court pursuant to section 300. At the hearing, the court must determine whether or not the child should be declared a dependent and, if so, decisions must be made as to continued parental custody and control, placement and visitation, who shall receive reunification services, and what services are appropriate. It is also the time at which a petition seeking de facto parent status may first be heard. (See section on de facto parents in Caregivers fact sheet.)

TIMING OF HEARING

Although the jurisdictional and dispositional phases are bifurcated, the disposition hearing may occur on the same day that jurisdictional findings are made. Alternatively, the hearing may be continued, but for no more than 45 days if the child is not detained. If the child is detained, the hearing must take place within 30 days of adjudication if the county social services agency is recommending that reunification services not be offered to one or both parents, and within 10 court days if provision of services is recommended. (§ 358; Cal. Rules of Court, rule 5.686.)

For a child who has been detained, absent exceptional circumstances, no continuance can be granted that would delay the disposition hearing to a date more than 60 days after the detention hearing. Under no circumstances can disposition take place more than six months after the same date. (§ 352; Cal. Rules of Court, rule 5.550.) The Court of Appeal has held that violation of these timelines does not deprive the juvenile court of jurisdiction because such an outcome would run counter to the central goal of dependency law—the protection of children. (*In re Richard H.* (1991) 234 Cal.App.3d 1351.) However, case law also makes it clear that the time constraints of section 352 should not be treated lightly, and, in cases of unwar-

ranted delay, juvenile courts have been directed to conduct jurisdiction and disposition hearings on a day-to-day basis until completed. (*Renee S. v. Superior Court* (1999) 76 Cal.App.4th 187; *Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238.) The time limits of section 352 take precedence over an incarcerated parent's right under Penal Code section 2625 to be present at the hearing. (See *D.E. v. Superior Court* (2003) 111 Cal.App.4th 502.)



TIP Counsel should carefully weigh the pros and cons of continuances during the early stages of a dependency action. Some delay may be beneficial—for example, if a parent is attempting to make alternative housing arrangements or produce enough clean drug tests to reassure the court that there is no need to order the child removed. However, the clock for reunification begins ticking upon the child's detention, and a parent's efforts to regain custody can be severely hampered if delays in court proceedings lead to delays in participation in programs and services.

NOTICE

Notice must be provided to the parent or guardian, subject child if age 10 or older, attorneys of record, and dependent siblings and their caregivers and attorneys. Further, if there is reason to believe that 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. (§ 291; Cal. Rules of Court, rule 5.664.) The manner of service and content of the notice is the same as that required for adjudication, including the time, date, place, and nature of the hearing and the potential consequences of failure to attend. (§ 291.) In addition, the parent must be noticed of any recommendation to deny reunification services and be informed that, if the court does not order services, a permanency hearing will be held at which parental rights could be terminated. (§ 358.)



SOCIAL WORKER'S REPORT

If the social worker's report (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. (Cal. Rules of Court, rule 5.690(a).) The report must address numerous issues, including the following:

- Whether the county social services agency has considered as a possible solution to the family's problems providing child welfare services (i.e., family preservation and family reunification services such as parenting classes) and whether the parents have been offered these services (§§ 358.1, 16500 et seq.);
- The basis for any recommendation to deny reunification services (Cal. Rules of Court, rule 5.690);
- A reunification case plan that is designed to identify and resolve problems so that the child can safely return to the family home (§§ 358, 358.1, 16501.1);
- The identified concurrent plan for the child should reunification fail, and the willingness of the caregiver to provide legal permanency if needed (§§ 358(b), 358.1(b)(i));
- Whether the parents have been informed of their right to relinquish the child for adoption (§ 358.1(g));
- Recommendations regarding visitation with the parents, siblings, and grandparents (§ 358.1, 16501.1; Cal. Rules of Court, rule 5.690);
- A description of the relationship among dependent siblings, detailing the strength of existing bonds, the children's expressed desires to live with or visit each other, the county social services agency's efforts to place siblings who have been separated together, and the nature and frequency of visitation between any siblings placed apart (§§ 358.1, 16501.1);
- An assessment of the appropriateness of any relative placement (§§ 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. (§ 358.1).



TIP

The report should not merely make a conclusory statement but must detail specific measures that have been attempted or explain why such measures are not available or not appropriate. This information goes directly to the determination the court must make under section 361(d) as to whether reasonable efforts have been made to prevent or eliminate the need for removal from the parental home.

BURDENS OF PROOF

The county social services 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. (§ 361(c); Cal. Rules of Court, rule 5.695(d); *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169 [“heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children”].) “Clear and convincing evidence” has been defined as that which “requires a high probability, such that the evidence is so clear as to leave no substantial doubt.” (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.)

Clear and convincing evidence is required even if the child is to be placed after removal with the other, previously noncustodial, parent. (*In re Katrina C.* (1988) 201 Cal.App.3d 540.) Similarly, a finding of detriment to the child sufficient to deny placement with a previously noncustodial parent must be based on clear and convincing evidence. (*In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 700; see also *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426 [the finding of detriment may be based on emotional harm the child is likely to suffer if separated from siblings and need not be related to any misconduct by the noncustodial parent].) The county social services agency also bears the burden of proof at the clear and convincing level if it seeks



to deny reunification services to a parent. (§ 361.5(b); Cal. Rules of Court, rule 5.695(f).)

PROCEDURAL AND EVIDENTIARY ISSUES

The social study, and any hearsay contained within it, is admissible as competent evidence at disposition. (§§ 281, 358(b); *In re Keyonie R.* (1996) 42 Cal.App.4th 1569.) Testimony of the social worker is not a prerequisite to its admission, although a party may always request that the preparer be present for cross-examination. (§§ 281, 358(b); *In re Corey A.* (1991) 227 Cal.App.3d 339.) Additionally, parties have the right to subpoena and cross-examine witnesses and to present relevant evidence. (§ 341; Cal. Rules of Court, rules 5.534(j), 5.690(b); see *In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1130–1132 [court may not punish parents for failure to appear at prior hearings by refusing to let them testify; due process mandates that a party be allowed to testify where credibility is at issue].)

Reports and/or testimony from an expert appointed under Evidence Code 730 may be received on any relevant topic. Although decisional law holds that orders for psychological evaluation of a parent are improper prior to adjudication, once allegations have been sustained expert opinion may be needed to determine what services are needed to deal with the issues that led to dependency. (*Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 213.) In addition, expert opinions are permissible at disposition to determine whether a parent is capable of utilizing reunification services (§ 361.5(b)(2); *In re Christina A.* (1989) 213 Cal.App.3d 1073, 1076–1077) and whether services are likely to prevent the recurrence of abuse or neglect (§ 361.5(c); *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 560).



TIP In some closely contested cases it may be advisable to independently retain an expert, to either rebut or bolster the anticipated testimony of a court-appointed expert.

POSSIBLE OUTCOMES

1. Court Declines Jurisdiction—Dismissal of Petition

The court has the discretion to set aside the jurisdictional findings and dismiss the petition when the interests of justice and interests of the minor so require. (§ 390.) The court also has the discretion, without declaring dependency, to order the county social services agency to provide informal supervision for a period of 6 to 12 months. (§ 360(b).) If, during the period of supervision, the family is unable or unwilling to cooperate with services, the county social services 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. (§ 360(c).)



TIP Unlike dismissal under a section 301 contract, orders made under sections 390 and 360(b) do not require the county social services 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 have no need for judicial oversight.

2. Entry of Legal Guardianship (With or Without Taking Jurisdiction)

The court may enter an order establishing a legal guardianship either in addition to or in lieu of declaring 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. (§ 360(a); Cal. Rules of Court, rule 5.695(b).) A guardian may not be appointed until the court has read and considered the assessment

required under section 361.5(g), which includes an analysis of the eligibility and appropriateness of the prospective guardian. (§§ 360(a), 361.5(g), 16010(b).) Appointment of a guardian pursuant to section 360 is not subject to the criminal history restrictions and exemption requirements of section 361.4. (*In re Summer H.* (2006) 139 Cal. App.4th 1315, 1333–1334 [the inquiry under section 360 is “not whether the proposed guardian meets licensing requirements imposed on foster placements, but whether a plan for guardianship either developed or approved by the parent is in the child’s best interests”].)



TIP

Although orders for guardianship may be made at the initial disposition hearing, a continuance is often needed because the 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 Kin-GAP funding will not be available until the child has been placed with the guardian for 12 consecutive months following the establishment of a dependency guardianship. (See Relative Placements fact sheet.)

3. Child Is Adjudicated a Dependent

Upon declaring 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. (§ 360(a); Cal. Rules of Court, rule 5.695(a) & (c).) The court may permit the child to remain in the parent’s custody with services provided by the county social services agency or, if clear and convincing evidence dictates removal from the parent, order that the child be released to the noncustodial parent, or place the child under the care and custody of the county social services agency. (§§ 361, 361.2, 362; Cal. Rules of Court, rule 5.695(a) & (d).)



a. Home of Parent

(Supervision With Family Maintenance 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 county social services agency. The parents can be required to participate in child welfare services, counseling, and educational programs, including parenting classes, and follow orders designed to ensure the child's regular attendance at school. (§ 362(b), (c) & (d).)

The court cannot order a child removed from the custody of a parent and then immediately return the child to the home for a "visit" or "trial placement." Such orders are outside the court's jurisdiction because they are inconsistent with the requirement that removal only occur on clear and convincing evidence that there are no means short of removal to protect the child from substantial danger. (§ 361(c); *Savannah B. v. Superior Court* (2000) 81 Cal.App.4th 158, 161–162; *In re Andres G.* (1998) 64 Cal.App.4th 476, 483.)

b. Grounds for Removal From a Parent

Pursuant to section 361(c), removal of a child from the parent's custody requires clear and convincing evidence that, at the time of the dispositional hearing, any of the following conditions exist:

1. There is or would be a substantial danger to the child's physical or emotional well-being if returned to the custodial home, *and* there are no reasonable means to protect without removal.

• Substantial Danger

The Court of Appeal has found that this standard, the most frequent basis for removal, "embodies an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parent's homes where it was safe to do so." (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) The danger to the child must be *substantial*. (See *In re Paul E.* (1995) 39 Cal.App.4th 996, 1005 [chronic messiness alone, unless it causes illness or injury, does not create a substantial

danger]; *In re Jasmine G.*, *supra*, 82 Cal.App.4th at p. 290 [social worker's belief that parents lacked proper parenting skills and understanding of child was insufficient to find substantial danger].)

- **No Reasonable Means to Protect**

Removal also requires clear and convincing evidence that there are no reasonable means to protect the child if he or she is allowed to remain in the home. (§ 361(c)(1).) The court must consider, as a possible reasonable means to protect the child, the options of removal of the abusive person from the home or retention of custody by a nonoffending parent who has a viable plan to protect the child from future harm. (*Ibid.*) The court cannot remove a child from a nonoffending parent absent clear and convincing evidence of a substantial risk of future physical harm to the child. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 698 [removal from temporarily incarcerated parent who had made an appropriate alternative plan for the child's care was improper].) “[O]ut-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. It is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525 [order of removal reversed where services were available and mother had been fully cooperative, but social worker wanted child removed to secure continued cooperation].)

2. The parent is unwilling to have physical custody of the child.

3. 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.

4. 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.

5. 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 is unknown after reasonable location efforts have failed. (§ 361(c)(1)–(5); Cal. Rules of Court, rule 5.695(d).)

c. 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. (§ 361.2.) If the court is considering placing a child in foster care, the child has the right to make a brief statement, although the court may disregard the child's stated preferences. The child's right to express his or her views on placement is not limited to the initial dispositional decision but extends to all future hearings at which a change in placement or return to the parent is being considered. (§ 399.)

(i) With a Previously Noncustodial, Nonoffending 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 well-being. (§ 361.2(a).) Detriment must be found by clear and convincing evidence. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.)

However, the detriment identified need not be based on the conduct of the noncustodial parent. (See *In re Luke M.* (2003) 107 Cal. App.4th 1412, 1425–1426 [court properly considered any factors that would cause detriment in denying placement with out-of-state father, including emotional trauma caused by disruption of sibling relationship].) A finding of detriment cannot be solely based on a parent’s incarceration for a limited time if that parent has made a plan for care of the child by a suitable third party. (*In re Isayah C.*, *supra*, 118 Cal. App.4th at p. 700.)

Compliance with the Interstate Compact on the Placement of Children (ICPC) is not required for placement with a parent residing in another state; however, nothing prevents use of an ICPC evaluation as an information-gathering tool to assess the possibility of detriment. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1572–1575 [disapproving of conflicting portions of California Rules of Court, rule 5.616].)

When a child is removed from a legal guardian, the parent is entitled to a contest on the question of whether return of the child to parental custody under section 361.2 is appropriate. (See *In re Catherine H.* (2002) 102 Cal.App.4th 1284.)

Upon placing a child with a previously noncustodial parent, pursuant to section 361.2(b) the court has the following options:

1. Terminate jurisdiction with an order awarding legal and physical custody to that parent, and provide reasonable visitation to the previously custodial parent. (§ 361.2(b)(1).)

The court’s analysis must involve a two-step process: first, it must determine if placement with the previously noncustodial parent would be detrimental to the child, and, second, only after placing the child with that parent does the court turn to the separate question of whether there is a need for ongoing supervision necessitating continuing jurisdiction. (See *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1134–1135.)



TIP Counsel for all parties should actively seek to protect their clients' future as well as immediate interests when drafting juvenile court custody orders or so-called exit orders under section 362.4, as such custody and visitation orders cannot be modified later in family court absent a significant change of circumstances and a showing that the requested change is in the child's best interest. (§§ 302(d), 362.4; see also Termination of Jurisdiction fact sheet.)

2. Continue jurisdiction with an order that the county social services agency conduct a home visit within three months. Then, after considering the social worker's report on the visit and any concerns raised by the child's current caregiver, either terminate jurisdiction or retain it with supervision and services to either or both parents. (§ 361.2(b)(2).)

3. Continue jurisdiction and supervision with orders providing reunification services to the previously custodial parent, family maintenance services to the parent assuming custody, or both.

Section 361.5(a)(3) gives the court discretion to deny reunification services to the parent from whom the child was removed while providing services solely for the purposes of stabilizing a permanent home with the previously noncustodial parent. (See *In re Erika W.* (1994) 28 Cal.App.4th 470, 476.)

(ii) 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 county social services agency. (§ 361.2(e).) Preferential consideration must be given to a relative's request for placement, meaning that such placements shall be considered and investigated first. Only grandparents and adult aunts, uncles, and siblings are entitled to preferential consideration for placement. (§ 361.3(c).) The preference continues to apply any time the child needs to be again placed after disposition, so long as parental rights have not been



terminated. (§ 361.3(a) & (c); see *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.)

Although they do not receive preference for placement, non-relative extended family members are generally treated the same as relative caregivers under the statutes controlling placement. (§ 362.7.) The county social services agency is responsible for investigating and advising the court on the appropriateness of potential caregivers. The assessment must include an in-home inspection to determine the physical safety of the home and a criminal history check of all the adults in the home. (§ 364; see also Relative Placements fact sheet for detailed discussion.)

 **TIP** In order to ensure that any subsequent removal from a caregiver by the county social services agency must be pursued under the protective requirements of a section 387 petition, counsel should request that the court make a specific, rather than general, placement order. The process of directing placement with a specific person was endorsed by the Court of Appeal in *In re Robert A.* (1992) 4 Cal.App.4th 174; but see *In re Cynthia C.* (1997) 58 Cal.App.4th 1479 [under a general order vesting custody and responsibility for suitable placement with the county social services agency, placement changes may be made at the discretion of the county social services agency, subject only to judicial review for abuse of discretion].)

(iii) With a Sibling

There is a strong preference in dependency law to place children with their siblings whenever possible, so long as joint placement is not shown to be detrimental to any of the children. The Legislature has mandated that the county social services agency make diligent efforts to ensure placement of siblings together and provide for frequent interaction when siblings are not together, or that it explain to the court why such arrangements are not appropriate. (§§ 306.5, 361.2(i), 16002.)

(iv) In Foster Care

In order to facilitate reunification, placement should be in the parent's home county unless a child is placed with a relative. (§ 361.2(f).) If a child needs to be placed again, the court may place a child out-of-county if it finds that the particular needs of the child so require; however, the parent must be given notice and an opportunity to object. (§ 361.2(g).) A child may only be placed in an out-of-state facility or group home if stringent requirements are met under section 361.21.

Children under the age of six cannot be placed in a group home unless the court finds it necessary to allow an adequate assessment for planning purposes. If a group home placement is made for a young child, it cannot exceed 60 days unless the need for additional time has been documented and approved. (§ 319.2.)

d. Provision of Reunification Services

(i) Who Is Eligible

Access to family reunification services is not a right guaranteed by the Constitution but rather is a benefit based on statutory provisions. (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 475.) Pursuant to the statutes, if a child is removed, the court must order provision of reunification services to the mother and legally presumed father unless the child has been voluntarily relinquished, 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 on a finding of benefit to the child. (§ 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 nine years), and degree of detriment if services

are not provided. (§ 361.5(e); Cal. Rules of Court, rule 5.695(f)(12).) Neither difficulty in providing services nor low prospects of successful reunification excuses the requirement that the county social services agency must make a good faith effort to provide services specially tailored to the family's circumstances. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010; see also the section on incarcerated parents in the Parents' Rights fact sheet.)

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



TIP The court does have discretion when ruling on a petition to terminate a dependency guardianship to request that the county social services agency provide services through an informal supervision arrangement (as in section 301) for the purpose of safely maintaining the child in the guardian's home. (§ 366.3(b); Cal. Rules of Court, rule 5.740(c); *In re Carlos E.*, *supra*, 129 Cal.App.4th at pp. 1418–1419; see also “Termination of a Legal Guardianship” in the Motions for Modification black letter discussion.)

De facto parents do not have the same substantive rights as parents or guardians and are not entitled to reunification services. (*In re Jamie G.* (1987) 196 Cal.App.3d 675, 684; see also the section on de facto parents in the Caregivers fact sheet.)

(ii) Grounds for Denial or Bypass

As noted above, it is presumed that the county social services agency will be required to provide reunification services to a parent. (*In re Mary M.* (1999) 71 Cal.App.4th 483, 487.) However, both federal and state law delineate some “aggravated circumstances” in which “the general rule favoring reunification is replaced by a legislative



assumption that offering services would be an unwise use of governmental resources.” (See 42 U.S.C. § 671(a); § 361.5(b)(1)–(15); *In re Baby Boy H.*, *supra*, 63 Cal.App.4th at p. 478.) The following subsections of 361.5(b) lay out the statutory bases for denial or “bypass” of reunification:

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 denial of reunification services pursuant to this subsection, however, the county social services 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. (§ 351.5(d); Cal. Rules of Court, rule 5.695(f)(8).) Further, unlike the other bases for bypass, a finding under this subsection does not give the court the discretion to set a section 366.26 hearing within 120 days of denial of reunification services. (§ 361.5(f); Cal. Rules of Court, rule 5.695(f)(8)–(13).)

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 (as described in Family Code sections 7824, 7826, and 7827) only if competent evidence from mental health professionals establishes that the parent is unlikely, even with services provided, to be able to adequately care for the child. (§ 362.5(c); Cal. Rules of Court, rule 5.695(f).) Findings must be based on evidence from at least two experts, each of whom is either a doctor or a surgeon certified by the American Board of Psychiatry and Neurology or a licensed psychologist with a doctoral degree in psychology and at least five years’ postgraduate experience in the field. However, failure to object to the expert’s qualifications waives the issue on appeal. (*In re*

Joy M. (2002) 99 Cal.App.4th 11, 17–18.) Case law conflicts on whether the experts must agree as to the parent’s capacity to utilize services. (Compare *Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474 with *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 841.) The court may properly deny reunification services under the disentanglement doctrine if a parent refuses to cooperate with a psychological evaluation ordered by the court to determine the applicability of section 361.5(b)(2). (*In re C.C.* (2003) 111 Cal. App.4th 76, 85–86.)



TIP Although the county social services 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 testify as to the parent’s ability to benefit from services as well as to the nature of the relationship between the parent and child.

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

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

4. The parent caused the death of another child through abuse or neglect.

The Court of Appeal has 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.)

Once the court finds section 361.5(b)(4) to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

In determining whether reunification would be in the child’s best interest, the court can properly consider the factors listed in section 361.5(h), including the severity of the abuse to the deceased child, the emotional trauma suffered by the surviving sibling, and that child’s wishes as to reunification. (*Patricia O.*, *supra*, 69 Cal. App.4th at pp. 942–943.)

In addition, analysis of the surviving child’s best interest must include not only the parent’s efforts to ameliorate the causes of the dependency action but also the gravity of all the problems that led to court intervention, the child’s need for stability and continuity, and the strength of the relative bonds between the surviving child, the parent, and the current caregiver. (*In re Ethan N.* (2004) 122 Cal. App.4th 55, 66–67.)

5. The current petition was sustained under section 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 section 300(e).)

The parent need not be identified as the perpetrator of the abuse; in fact, the identity of the abuser need not have been determined in either this subsection or the underlying section 300(e). It is only necessary that the parent or someone known to the parent physically abused the child and the parent “knew or reasonably should have known”

of the abuse. (*In re Kenneth M.* (2004) 123 Cal.App.4th 16, 21–22.)

In such cases, 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 because of a close and positive attachment between the parent and child. (§ 361.5(c).) The county social services agency has a statutory obligation to investigate and advise the court as to whether reunification is likely to be successful and whether the lack of an opportunity to reunify would be detrimental to the child. (*Ibid.*; *In re Rebekah R.* (1994) 27 Cal.App.4th 1638, 1652–1653 [order denying reunification services vacated because of county social services agency’s failure to investigate and advise].) However, the county social services agency need only make a reasonable prediction about the likelihood of success; it need not prove that services would not be successful. (*Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 163.)

6. The child was declared a dependent because of 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 section 361.5(b)(6).)

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).) In making this determination the court must consider all relevant information including the factors listed in section 361.5(h). (§ 361.5(h); Cal. Rules of Court, rule 5.695(f)(10).) These factors include the following:

- The specific act or omission comprising the severe sexual abuse or severe physical harm,
- The circumstances surrounding the abuse,
- The severity of the emotional trauma suffered by the child or child's sibling,
- Any history of abuse of other children by the offending parent,
- The likelihood that the child may be safely returned to the parent within 12 months with no continuing supervision, and
- The child's desires as to reunification with the parent.

Section 361.5(h) applies only when the abuser has been identified as the parent or guardian of the child who is the subject of the disposition hearing. (*In re Kenneth M.* (2004) 123 Cal.App.4th 16, 21.) The relationship of the victim to the dependent child in question is pivotal—this subsection does not apply if the severe physical harm was to a foster sibling or co-ward of a guardianship but does apply if the victim was a half-sibling. (See *In re Taryann W.* (2002) 97 Cal.App.4th 675; *Anthony J. v. Superior Court* (2005) 132 Cal.App.4th 419.)

The manner of inflicting the severe physical harm can be through omission rather than commission. (*Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292, 301 [the parents' failure to seek necessary medical treatment for child's broken leg constituted the infliction of severe physical harm].)

7. The parent has been denied reunification services for a sibling because of 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)).

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).) In making this determination the court

must consider all relevant information including the factors listed in section 361.5(h).

The parent need not be identified as the perpetrator of the abuse; in fact, the identity of the abuser need not have been determined for this subsection to apply. It is only necessary that the parent or someone known to the parent physically abused the child and the parent “knew or reasonably should have known” of the abuse. (*In re Kenneth M.*, *supra*, 123 Cal.App.4th at pp. 21–22.)

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, not the parent who was the victim of the incest or abuse.)

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

9. The court sustained a section 300(g) count 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. (See Health & Saf. Code, § 1255.7; see also Safe Haven/ Safe Surrender fact sheet.)

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)



TIP If jurisdiction was taken solely under section 300(g) based on a voluntary surrender under the Safe Haven statute, the court should set a section 366.26 hearing within 120 days to facilitate a fast-track adoption. (See Safe Haven/ Safe Surrender fact sheet regarding the appropriate way to handle such cases.)

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.

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

This provision does not change the general policy that reunification remains the priority in dependency and that a parent's failure to reunify with a sibling should not "reflexively" lead to denial when a new case arises. (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464 [proving "reasonable efforts to treat" does not require a showing that the problem has been "cured"].) The court must find by clear and convincing evidence that the parent did not make reasonable efforts to treat prior problems, not that efforts to reunify in the instant case would be "fruitless." (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 97.)

There is disagreement in the case law as to whether a juvenile court may utilize this provision to deny family reunification services as to a child immediately after terminating family reunification services as to the sibling. The crux of the issue is whether the time frame during which the "subsequent efforts" must have taken place is measured from the date of the sibling's removal from the parental home or from the date that reunification services for the sibling were terminated. (Compare *Cheryl P.*, *supra*, 139 Cal.App.4th at pp. 98–99 with *In re Harmony B.* (2005) 125 Cal.App.4th 831 [denial of services to a child may occur on the same day as termination of services as to the sibling].)

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.

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

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.)

12. The parent was convicted of a violent felony pursuant to Penal Code section 667.5. (*Note:* The list of crimes includes murder, rape, and kidnapping and is the same as that for "nonexemptible crimes" found in the Relative Placements fact sheet.)

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

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.

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (*Ibid.*)

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. (*In re Brian M.* (2000) 82 Cal.App.4th 1398.) However, completion of a drug rehabilitation program does not preclude denial of reunification services when the parent has repeatedly relapsed. (*Randi R. v. Superior Court* (1998) 64 Cal.App.4th 76.)

14. The parent waives reunification services.

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5(c).)

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

Once the court finds the above to be true by clear and convincing evidence, reunification services cannot be ordered unless the court also finds by clear and convincing evidence that reunification is in the best interest of the child. (*Ibid.*)

(iii) 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 the child entered foster care, which is defined as the date of the jurisdictional hearing or the date 60 days after initial removal, whichever is earlier. For children younger than three years, services are generally limited to 6 months from the date the child entered foster care. Services may be extended to a maximum of 18 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 the parent was not provided with reasonable services. (§ 361.5(a); see also Status Reviews black letter discussion.)

These time limits do not apply to bar services to a parent who had received services and successfully reunified with the child in a

previous dependency proceeding. (*Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188–1189 [with termination of jurisdiction, the parent-child relationship returns to its former status, and in any new proceeding all the original statutory protections once again apply].) Similarly, reunification services must be provided at disposition on a supplemental or subsequent petition if a child is being removed from parental custody for the first time in an ongoing case, unless one of the exceptions under section 361.5(b) is found to apply. (*In re Joel T.* (1999) 70 Cal.App.4th 263, 268.)

However, if a child had been removed from a parent’s custody, returned, and then redetained, the time limits of section 361.5 are not tolled for the period of time the child was in the parental home. (§ 361.5(a)(3).) In other words, the case will not return to “square one” for purposes of reunification; rather, the questions of whether and how much reunification will be offered will be determined based on the section 361.5 criteria. (*In re Carolyn R.* (1995) 41 Cal.App.4th 159, 165–166; see Subsequent and Supplemental Petitions black letter discussion.) Further, the statutory time limits describe maximum periods, not guaranteed minimums. The court has the discretion to terminate reunification efforts at any time after granting them depending on the circumstances. (See *In re Aryanna C.* (2005) 132 Cal. App.4th 1234 [termination of services proper after only three months when father had missed assessments, tested positive for drugs twice, missed almost all visits, and was incarcerated pending trial].)



TIP Given the 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 to ensure that visits are consistent and as frequent as possible.

(iv) Case Plan With Tailored Services

The case plan has been identified by the Legislature as the “foundation and central unifying tool in child welfare services.” It is intended to meet the needs of the child while in foster care by both



ensuring the safety of the child and providing services designed to improve conditions in the parent's home in order to facilitate the child's safe return or permanent placement. (§ 16501.1(a).) A written case plan is to be completed, preferably incorporating the input of the child and parent, within 60 days of initial removal or by the date of the disposition hearing, whichever is earlier. (§ 16501.1(d) & (f).)

The plan must describe the reunification services to be provided and those needed to maintain and strengthen relationships of any siblings placed apart. (§§ 16002, 16501.1(d), (f) & (g).) The reunification services identified in the case plan must be tailored to serve the particular needs of the family and should usually include provisions for frequent visitation, a vital component of all reunification plans. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972; see also Visitation fact sheet.)

The court can make any and all reasonable orders for the care, maintenance, and support of a child who has been adjudicated dependent, including orders directing a parent to participate in counseling or educational programs such as parenting classes. Foster parents and relative caregivers may also be directed to participate in programs deemed to be in the child's best interest. (§ 362(a) & (c).)



TIP Counsel can, and should, have a great deal of input into what services are appropriate and necessary to reunify the family and ensure the child's well-being. For example, minor's counsel might consider the need for services such as specialized mental health services (e.g., section 370 funds for treatment); independent living programs (ILP's) and other emancipation readiness referrals; daycare or after-school care; tutoring and other educational support; and minor parent services.

4. Ancillary Orders and Other Issues

Upon declaring the child to be a dependent, the court may make "any and all" orders reasonably necessary for the child's care, maintenance, and support. (§ 362(a).)

a. Joinder

The court may join any governmental agency or private service provider that has failed to meet a legal obligation to provide services to the child. (*Ibid.*; Cal. Rules of Court, rule 5.575; see also *Southard v. Superior Court* (2000) 82 Cal.App.4th 729.) However, the court has no authority to order services until the joined party has been given notice and an opportunity to be heard and has verified that the child is eligible for the services in question. (§ 362(a); Cal. Rules of Court, rule 5.575.)



TIP Joinder can be a very effective tool to gain cooperation by employing the court's power when agencies such as the regional center, the department of mental health, or the local school district fail to provide mandated services to disabled clients.

b. Orders Involving a Parent

(i) Generally

After the court takes jurisdiction, it may make any orders it finds to be within the child's best interest. Whether or not the child has been removed from parental custody, the court may direct the parent to participate in child welfare programs including counseling, parenting education, and any other programs it deems reasonably necessary to eliminate the conditions that resulted in dependency. The court may also make orders intended to ensure the child's regular attendance at school. (§ 362(b), (c) & (d).)

The court may not, however, order a nonoffending parent to participate in any programs, including parenting, absent a showing that the parent or minor would benefit or that participation is necessary to avoid the risk of future neglect or abuse by another. (*In re Jasmine C.* (2003) 106 Cal.App.4th 177, 180.)



TIP Objections to any component of the case plan must be made at the trial level or the issue may be considered waived for appellate purposes. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re*



Aaron B. (1996) 46 Cal.App.4th 843, 846.) In addition, a challenge to dispositional orders and/or the underlying jurisdictional findings must be filed within the statutory time limit of 60 days or res judicata may be invoked. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.)

(ii) Limits on a Parent’s Educational Rights

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. (§ 361(a).) If the child qualifies for special education services, the court must refer the case to the local school district to appoint a surrogate parent under the Education Code. The court may make educational decisions for the child only if it cannot identify a responsible adult or foster parent to do so and the child is not eligible for a surrogate parent because the child is not identified as a special education student. (*Ibid.*; see Education Laws, Rights, and Issues fact sheet.)



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.

c. Orders Involving the Child

(i) Dependent Minor’s Parents

It is the stated goal of the Legislature to preserve families headed by children who are themselves dependents. To do so the court may order the county social services agency to provide services specifically targeted at developing and maintaining the parent-child bond, such as child care or parenting and child development classes. Additionally, every effort shall be made to place a minor parent with his or her child in a foster setting that is as familylike as possible, unless the court finds that placement together poses a risk to the child. (§ 16002.5.)

(ii) Drug Testing

Under the broad authority of the juvenile court to make orders for the care and treatment of dependent children under sections 202(a) and 362(a), the court may order the child to undergo drug testing if necessary to ensure the child's health, safety, and well-being. Drug testing that is properly limited does not violate a dependent child's constitutional right to privacy. (*Carmen M. v. Superior Court* (2006) 141 Cal.App.4th 478 [there was specific and documented justification for the order, and testing was properly limited in that it was part of an ongoing recovery program and could not be used for law enforcement purposes].)

d. Visitation

(i) With a Parent

Visitation is the most critical of all services. When a child is removed from the parent's custody and reunification services are granted, visitation between the parent and child must be arranged to occur as frequently as possible, "consistent with the well-being of the child." The caregiver's address may be kept confidential, and no visitation may jeopardize the child's safety. (§ 362.1.) It is generally improper to deny visitation absent a finding of detriment to the child. (*In re Luke L.* (1996) 44 Cal.App.4th 670, 679.)

Continued contact through visitation is a critical component of reunification. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580; see also Visitation fact sheet.) An incarcerated or institutionalized parent should receive visitation "where appropriate." (§ 361.5(e)(1).) In order to deny visitation to an incarcerated parent, the court must find clear and convincing evidence of detriment to the child, and neither the age of the child alone nor any other single factor forms a sufficient basis for such a finding. (See *In re Dylan T.* (1998) 65 Cal.App.4th 765; see also sections on incarcerated parents in the Parents' Rights and Visitation fact sheets.)



(ii) With Siblings

A reunification case plan must provide for, and the county social services agency has the obligation to ensure, frequent and ongoing visitation between dependent siblings who are placed apart, absent clear and convincing evidence that interaction would be detrimental to either child. (§§ 362.1(a), 16002(b).) Even when no reunification services are offered and the case is set for a hearing under section 366.26, the court must still consider the impact of sibling relationships on visitation and placement and make orders accordingly. (§ 362.1(b); see also the Relative Placements and Visitation fact sheets.)

(iii) With Grandparents

Upon determining that a child must be removed from the parent's custody, the court must consider whether the child's best interest is best served by ordering visitation with the grandparents. (§ 361.2(h).)



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. It is much easier to maintain relationships with 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.

**JUDICIAL REVIEW
OF PLACEMENT
WITH PARENT**

Judicial Review of Placement With Parent Checklist (§ 364): Child's Attorney

BEFORE

- Social worker's report provided 10 days before hearing. (§ 364(b).)
- Contact child to discuss in private child's
 - Progress in programs such as counseling and how things are going at home.
 - Position on the social services agency's recommendation.
 - Needs and wishes re programs and services if jurisdiction continues.
 - Desires re custody and visitation if jurisdiction is terminated.
- Contact parent (after obtaining permission to do so from parent's counsel) re
 - Child's progress in programs.
 - Child's performance in school.
 - Any perceived need for continued services.
- Contact service providers such as teachers and therapists re
 - Opinions on child's well-being.
 - Need for continued court supervision and/or services.
- Formulate position on
 - Need for continued jurisdiction.
 - Custody issues, e.g., legal/physical custody, visitation, restraining orders.
 - Whether to request a contested hearing.

DURING

- Inform the court of the child's desires as to custody and visitation.
- If advocating for continued jurisdiction,
 - Request additional counseling for child and/or family.



- Request family preservation or stabilization services and/or funding.
- Is contested hearing necessary?
- If advocating for termination of jurisdiction,
 - Request any appropriate custody orders.
 - Ensure visitation/no contact/restraining orders continue.
- Ensure the court
 - Terminates jurisdiction unless conditions exist that would justify original assumption of jurisdiction or are likely to exist without continued supervision.
 - Orders additional services if jurisdiction continues.
 - Enters family law orders re custody and visitation.

AFTER

- Consult with child to explain court orders and rulings and answer questions.
- Ensure that the child knows what to do if problems arise in the future.
- File necessary forms/motions if pursuing an appeal or emergency writ.



Judicial Review of Placement With Parent Checklist (§ 364): Parent's Attorney

BEFORE

- Ascertain that social worker's report is provided 10 days before hearing. (§ 364(b).)
- Request and review delivered service logs/chronological notes.
- Ensure all court-ordered programs and services were provided in a timely fashion.
- Contact client to formulate hearing position and discuss his or her
 - Progress in programs such as counseling and how things are going.
 - Position on the social services agency's recommendation.
 - Needs and wishes re programs and services if jurisdiction continues.
 - Desires re custody and visitation if jurisdiction is terminated.
- Contact opposing counsel regarding their position on recommendations and follow up as necessary.
- Contact service providers such as teachers, therapists, etc., re
 - Opinions on family's progress.
 - Need for continued court supervision and/or services.
- Formulate argument regarding
 - Need for continued jurisdiction.
 - Custody issues, e.g., legal/physical custody, visitation, restraining orders.
 - Whether mediation is necessary.
 - Whether to request a contested hearing.
 - Whether existing service referrals will continue even if dependency is terminated.



DURING

- Inform the court of the positives and negatives.
- If advocating termination of jurisdiction,
 - Request any appropriate custody orders.
 - Ensure visitation/no contact/restraining orders continue.
- Ensure the court
 - Terminates jurisdiction, unless conditions exist that would justify original assumption of jurisdiction or are likely to exist without continued supervision.
 - Orders additional services if jurisdiction continues.
 - Enters family law orders re custody and visitation.

AFTER

- Consult with client to explain court orders and rulings and answer questions.
- File necessary forms/motions if pursuing an appeal or emergency writ.
- Ensure client has access to services if needed.



Black Letter Discussion and Tips

Section 364 controls periodic reviews for a child who has been declared a dependent and is under the supervision of the court but has been returned to, or allowed to remain in, the custody of one or both parents or a guardian. The focus of the hearing is on whether the child's safety and well-being can be maintained in the parental home if court jurisdiction is terminated. The court must close the case unless conditions exist that would justify initial assumption of jurisdiction over the child or if such conditions would be likely to arise if supervision and services were discontinued. If the court does find that such conditions exist, the case should remain open with services provided for another six months. These hearings may be called family maintenance review hearings, judicial reviews (JR's), or, simply, 364 hearings.

TIMING OF THE HEARING

Under the code, a case must be set for a review within six months of the date of the dispositional order retaining the child in the home of the parent and every six months thereafter for the duration of dependency jurisdiction. (§ 364(a); Cal. Rules of Court, rule 5.710(a)(2).) Additionally, a section 364 review should be held within six months after an order returning a child to the parental home under continuing jurisdiction and within every six months thereafter until jurisdiction is terminated.

NOTICE

Notice describing the type of hearing, any recommended changes in status or custody of the child, and a party's rights to be present, to have counsel, and to present evidence must be served between 15 and 30 days before the hearing. Service must be by personal service or by first-class or certified mail to the last known address of the mother, the father (presumed and any receiving services), the legal guardians,



the child and dependent siblings if age 10 or older (otherwise to their caregivers and attorneys), and all attorneys of record on the case. If there is reason to believe the child is an Indian child, notice must also be given by registered mail (return receipt requested) to the Indian custodian and tribe if known or to the Bureau of Indian Affairs. (§ 292.)



TIP Defects in notice or failure of the county social services agency to transport a child or incarcerated client may provide the good cause needed for a section 352 continuance to buy counsel additional time if necessary (e.g., to further investigate last-minute information) without revealing any concerns to the court and other parties.

RECEIPT OF SOCIAL WORKER'S REPORT

The social worker must prepare a report for the hearing addressing the services provided to, and the progress made by, the family in alleviating the initial problems that required the court's intervention. The report must contain a recommendation as to the need for further supervision and *must be filed with the court and given to all parties at least 10 days before the review hearing.* (§ 364(b).) Under section 364.05 (applicable to Los Angeles County only), if the report is not received as required, the hearing must be continued, absent the parties' express waiver. Absent waiver by all parties, the court may proceed only if it finds that the statutory presumption of prejudice is overcome by clear and convincing evidence. (§ 364.05; see also *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 553–558.)

BURDEN OF PROOF AND STATUTORY ELEMENTS

If recommending continued jurisdiction, the agency carries the burden to show by a preponderance of evidence that conditions still exist that would justify initial assumption of jurisdiction under section 300 or that such conditions are likely to occur without continued supervision. The court must terminate jurisdiction if the agency



fails to meet the burden. However, the parent's failure to participate regularly in court-ordered programs is considered prima facie evidence that jurisdiction continues to be necessary. (§ 364(c); Cal. Rules of Court, rule 5.710(e)(1).)

OTHER PARENT RECEIVING FAMILY REUNIFICATION

1. Child Remained in the Home of One Parent

At least one appellate court has held that when a child is allowed to remain in the custody of one parent but is removed from the custody of the other parent who is ordered to vacate the familial home but to whom reunification services are provided, the six-month review is properly conducted under the procedures and standards of section 364 rather than those of section 366.21(e). Thus, the focus of the hearing must be on whether conditions still exist that would initially justify jurisdiction and thereby necessitate further supervision. (*In re N.S.* (2002) 97 Cal.App.4th 167, 171–172.)

 **TIP** The court in *In re N.S.* found that not only did the father's full compliance with the case plan support his return to the family home, but no evidence was presented to indicate that conditions still existed that would justify assumption of jurisdiction, and therefore the court was required to terminate jurisdiction. (*In re N.S.*, *supra*, 97 Cal.App.4th at p. 173.) Note that by allowing the offending parent to move back into the family home, the court implicitly made the requisite six-month review finding, i.e., that there would be no risk in returning the child to his custody. This illustrates the point that, regardless of what title is given to such a hearing, in such situations counsel should consider both issues—whether return of the parent who was removed from the home poses a substantial risk to the child and whether there is a need for continued supervision.

2. Child Was Placed With Previously Noncustodial Parent

There will be instances in which the court conducts a 6-, 12-, or 18-month review of reunification efforts while the child is living in the

home of a previously noncustodial parent with whom he or she was placed pursuant to section 361.2. Under these circumstances, if both parents are receiving services, “the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.” (§ 361.2(b)(3).) The appellate court has held that resolution of such situations is strictly a custody determination with no prevailing presumptions—the court must choose which, if either, parent should be given custody based on analysis of the best interest of the child. However, the need for continued supervision and whether return to the original custodial parent would pose a substantial risk of detriment should be examined, as both are relevant to the issue of custody. (*In re Nicholas H.* (2003) 112 Cal. App.4th 251, 267–268.)



TIP The child’s attorney must have extensive input into the decisions made in these situations. Formulation of your position is a complex task based on consultation with the client, investigation of the living situation in the noncustodial parental home, and assessment of the child’s attachment to the previously custodial parent, as well as the progress of that parent in resolving the problems that caused removal. Additionally, a realistic assessment and prognosis of the timeline and possibility for reunification, and analysis of the client’s bonding to siblings and permanency needs, should be taken into account.



TIP Note the apparent statutory conflict between the directive in section 361.2, to consider custody to either parent, and the wording of section 366.21(e) and rules 5.710(h), 5.715(c)(2), and 5.720(c)(2) of the California Rules of Court, which appear to restrict the possibilities to continued placement with the noncustodial parent. Given this tension in the law, counsel should be prepared to craft arguments to support any desired outcome, including shared custody. (See Initial/Detention and Disposition black letter discussions.)



SCOPE OF EVIDENCE PRESENTED

Even if the problems leading to the court's initial intervention have been resolved, the court must consider conditions that would form a separate basis for jurisdiction. The court may also hear evidence on issues other than the need for continuing supervision at the judicial review. Because the juvenile court is given the power under section 362.4 to make orders as to visitation and custody when terminating jurisdiction, the appellate court has found that it is imperative that the court have the ability to hear all relevant evidence prior to making those orders. (*In re Roger S.* (1992) 4 Cal.App.4th 25, 30–31; *In re Michael W.* (1997) 54 Cal.App.4th 190, 195–196; but see *In re Elaine E.* (1990) 221 Cal.App.3d 809, 814.) Additionally, section 302(d) makes juvenile court exit orders “final” orders, not modifiable by the family court absent a significant change of circumstance; therefore, to deny parties the opportunity to present evidence on custody and visitation would deprive them of due process.

POSSIBLE OUTCOMES OF HEARING

1. Terminate Jurisdiction (JT)

The court must terminate jurisdiction unless the agency proves by a preponderance of the evidence that conditions still exist that would justify initial assumption of jurisdiction under section 300 or that such conditions are likely to occur without continued supervision. (§ 364(c).) Exit orders regarding custody and visitation must be issued, even in situations where they may not appear necessary, in order to protect the child and custodial parent against any potential future claims by a noncustodial parent or prospective guardian. (§§ 302(c) & (d), 362.4; Cal. Rules of Court, rule 5.700.)

2. Continue Jurisdiction

If the court continues jurisdiction with the child in the home of one or both parents, it should order family maintenance services tailored to assist the family in eliminating the conditions that require

continued supervision. (§ 364(b); Cal. Rules of Court, rule 5.710(e).) The case should then be set for another judicial review within six months. (§ 364(d).)

3. Transfer Custody From One Parent to Another

At the time of the hearing, if the child is living with a previously noncustodial parent who is receiving services, the court may transfer custody back to the parent from whom the child was initially detained if the court determines that is in the best interest of the child. (*In re Nicholas H.*, *supra*, 112 Cal.App.4th at pp. 267–268; see also “When the Child Is Placed With Previously Noncustodial Parent” in the Status Reviews black letter discussion.)



TIP Removal of the child from the parental home to relative or foster care is *not* an option at a hearing conducted solely as a section 364 review. If seeking removal, the agency must file a supplemental petition under section 342 or 387 recommending removal, which then triggers forward the procedures and protections provided from an initial detention hearing. (§§ 342, 387; Cal. Rules of Court, rule 5.565; see also Subsequent and Supplemental Petitions black letter discussion.) Additionally, removal from the home of a parent can be sought under a section 388 petition, which requires a noticed hearing at which the petitioner has the burden to show by clear and convincing evidence that the same grounds for removal exist as those required at disposition under section 361(c). (§ 388; Cal. Rules of Court, rule 5.570(f); see also Subsequent and Supplemental Petitions black letter discussion.)

FAMILY LAW OR EXIT ORDERS AND RESTRAINING ORDERS

Pursuant to section 362.4, the dependency court has the power to issue orders affecting custody and visitation upon terminating its jurisdiction over children who have not yet reached the age of 18 years. Physical and legal custody may be vested as sole or joint. Further,

the court may issue restraining or protective orders as provided for in section 213.5. These orders shall be filed with the superior court in any pending family court matters (such as dissolution, custody, or paternity cases) or can be the basis for opening a new file. Sometimes referred to as exit orders or family law orders (FLO's), these orders of the juvenile court are binding and cannot be modified or terminated by the family court absent a showing of a significant change of circumstances. (§§ 302(d), 362.4; Cal. Rules of Court, rule 5.700.)



TIP Given the often long-term constraints imposed by exit orders, crafting them presents a situation in which clients are heavily reliant on their dependency attorneys, especially because future custodial disputes will usually occur in family court where clients often cannot afford representation. Therefore, counsel must be mindful of the client's future as well as immediate needs when negotiating exit orders. Advocates should keep in mind, and make sure that their clients understand, that failure to comply with exit orders may result in re-removal and reinitiation of dependency proceedings.

CONTINUING JURISDICTION

If the court determines that continued jurisdiction is necessary, it shall continue the case for another review in no more than six months. At that time the same procedures are followed to decide whether the case should remain open. If retaining jurisdiction, the court must order continued services. (§ 364(d); Cal. Rules of Court, rule 5.710(e)(1).)



STATUS REVIEWS

Status Reviews

Checklist: Child's Attorney

BEFORE

- Ensure social worker's report provided 10 days before hearing. (§ 366.21(c).)
- Ensure all court-ordered programs and services were timely provided.
- Check for efforts to place siblings together.
- Contact child to discuss in private his or her position on
 - Social services agency's recommendation.
 - Visitation during period of supervision (e.g., frequency, quality).
 - Feelings about placement (relationship with those in home, methods of discipline, house rules, ability to participate in age-appropriate activities, attitude of caregiver toward parent and caregiver's cooperation with visitation and family phone calls).
 - Progress in counseling or other programs.
 - Progress in school (e.g., grades, need for tutoring, extracurricular activities).
 - Health (generally, and any specific medical problems).
- Contact caregiver to discuss
 - Child's behavior at home and in school, reactions to parent's visits/phone calls.
 - Provision of services by the social services agency (funding, transportation, etc.).
- Contact service providers such as teachers and therapists to discuss
 - Opinions on child's well-being and progress.
 - Risk of detriment if child is returned, recommended timelines if not.



- Formulate position on
 - Return to the custody of the parent.
 - Continued provision of family reunification services if child is not returned.
 - Whether reasonable services were provided (to the child as well as the parent).
 - Termination of jurisdiction for child placed with previously noncustodial parent.
 - Whether to request a contested hearing.

DURING

- Be aware of the law and applicable burdens of proof.
- Inform court of child's wishes—however, per section 317(e), cannot advocate for return if it conflicts with the child's safety and protection.
- Inform court of independent investigation results and request appropriate orders.
- Request contested hearing (if appropriate or necessary).
- Ensure court addresses
 - Return (must unless doing so creates a substantial risk of detriment).
 - Whether reasonable services were provided.
 - Whether to continue services if not returning child.
 - If terminating services, setting a .26 permanency hearing or ordering long-term foster care (only if child is not proper adoption subject and has no prospective legal guardian).

AFTER

- Consult with child to explain court orders and rulings and answer questions.
- Send letter to caretaker (or parent—with counsel’s permission—if child returned) with contact information and update.
- File necessary forms/motions if pursuing an appeal, writ, rehearing, or emergency writ.

Status Reviews

Checklist: Parent's Attorney

BEFORE

- Ensure social worker's report provided 10 days before hearing.
(§ 366.21(c).)
- Request and review delivered service logs/chronological notes.
- Ensure all court-ordered programs and services were provided in a timely fashion.
- Review case plan ordered at last hearing.
- Check for efforts to place siblings together.
- Contact client to discuss possible outcomes and position on
 - Social services agency's recommendation.
 - Frequency and quality of visitation.
 - Feelings about current caregiver.
 - Progress in services: Can client articulate what has been learned?
 - Any educational issues with children.
 - Contact with social worker.
- Contact caregiver, if appropriate, to discuss reunification and any other issues.
- Contact service providers to discuss
 - Opinions on client's well-being and progress.
 - Any risk of detriment if child is returned or recommended timelines.
- Formulate position on
 - Return.
 - Continued provision of family reunification services if child is not returned (be sure to check the dates of the referrals).
 - Whether reasonable services were provided (to the child as well as the parent).
 - Termination of jurisdiction for child placed with previously noncustodial parent.
 - Whether to request a contested hearing.

- If return will not occur, is placement with relative or NREFM possible?
- Are there grounds to terminate services? If so, be prepared to address or set for contest.
- Contact opposing counsel to discuss position and remove as much mystery from hearing as possible.

DURING

- Be aware of applicable law and burdens (“shall return” standard, regular participation and substantive progress, substantial probability of return, 366.21(g) criteria).
- Inform court of client’s wishes.
- Acknowledge positives and update court on client’s situation and progress in services.
- Request contested hearing (if appropriate or necessary).
- Ensure court addresses
 - Return (must unless doing so creates a substantial risk of detriment).
 - Whether reasonable services were provided.
 - Whether to continue services if not returning child.
 - If setting a 366.26 hearing, request for bonding/attachment assessment.
 - If terminating services, request continued visitation.

AFTER

- Consult with client to explain court orders and rulings and answer questions.
- File necessary forms/motions if pursuing an appeal, writ, rehearing or emergency writ.
- Set tentative deadlines for next steps (i.e., unsupervised visits in six weeks, meeting in four weeks, possible 388, etc.).

Black Letter Discussion and Tips

During reunification, when children are placed out of the parental home, the Welfare and Institutions Code requires that a status review be conducted by the court every six months from the date of disposition until the child is returned to parental care and custody or that reunification services be terminated and the section 366.26 hearing set. These hearings must address the safety of the child and the continuing necessity for placement, the reasonableness of the social services agency's efforts to return the child to a safe home and to finalize permanent placement should reunification fail, whether it is necessary to limit the parent's right to make educational decisions, and the status of relationships with dependent siblings (including efforts to place them together and visitation). (§ 366(a)(1)(A)–(E); Cal. Rules of Court, rules 5.710–5.720.) The court must review the parent's progress to determine whether the child can be returned (i.e., whether return poses a substantial risk of harm) and, if not, whether reunification services should be continued or terminated. (§§ 366.21(e) & (f), 366.22; Cal. Rules of Court, rules 5.710–5.720.)

TIME LIMITS FOR HOLDING REVIEW HEARINGS

1. Generally

The determination of which statute (and therefore which legal standard) is applicable at a review hearing is made based upon the time elapsed since the child's initial removal, not on the number of reviews a court has conducted after disposition. (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501.) For example, if disposition did not take place until one year after the children were detained, the first review hearing should be set for 18 months after the date of removal, deemed a section 366.22 hearing, and conducted accordingly.



2. For the 6-Month Review

Under section 366.21(e), the first status review hearing for a child in foster care shall be held 6 months after the date of the dispositional hearing. Note, however, that the California Rules of Court measure the time period differently, requiring the hearing to be 6 months after the date the child entered foster care, which is defined as the date of the jurisdictional hearing or the date 60 days after the initial removal, whichever is earlier. (§ 361.5(a); Cal. Rules of Court, rule 5.710(a).) If the jurisdictional and dispositional hearings are held in a timely fashion (i.e., within 60 days of detention as statutorily required), there will be no conflict between these methods of measurement. However, if there is a conflict, note that at least one appellate court has ruled that the 6-month review must be held within 6 months of the date the child entered foster care even if that date is less than 6 months from disposition. (*In re Christina A.* (2001) 91 Cal. App.4th 1153, 1164–1165.)

3. For the 12-Month Review

The 12-month review or permanency hearing must be held within 12 months of the date the child entered foster care as defined in section 361.5(c) (i.e., the date of the jurisdictional hearing or the date 60 days after removal, whichever is earlier). (§ 366.21(f); Cal. Rules of Court, rule 5.715(a).) Therefore, if jurisdiction and disposition were delayed and yet the section 366.21(e) hearing was set a full 6 months after disposition, the “12-month hearing” should occur less than 6 months after the “6-month hearing.”

4. For the 18-Month Hearing

The section 366.22 hearing must be held within 18 months of the initial removal of the child from the parent or guardian’s custody. (§ 366.22; Cal. Rules of Court, rule 5.720.) “Initial removal” is defined as the date on which the child was taken into custody by the social worker or deemed taken into custody when put under a hos-

pital hold pursuant to section 309(b). (Cal. Rules of Court, rule 5.502(a)(15).)

NOTICE

Notice describing the type of hearing, any recommended changes in status or custody of the child, and a statement of the party's rights to be present, to have counsel, and to present evidence must be served between 15 and 30 days before the hearing. Service must be by personal service or first-class mail to the last known address of the mother, the father(s) (presumed and any receiving services), the legal guardians, the child and dependent siblings if age 10 or older (otherwise to their caregivers and attorneys), the foster caregiver or agency, and all attorneys of record on the case. If there is reason to believe the child is an Indian child, notice must also be given by registered mail (return receipt requested) to the Indian custodian and tribe if known or to the Bureau of Indian Affairs. (§ 293; Cal. Rules of Court, rules 5.524, 5.710.)



TIP Defects in notice, or failure of the agency to transport a child or incarcerated client, may provide the good cause needed for a section 352 continuance to buy counsel additional time if necessary (e.g., to further investigate last-minute information) without revealing any concerns to the court and other parties.

RECEIPT OF SOCIAL WORKER'S REPORT

The social worker must prepare a supplemental report for each of the status review hearings. The report must describe the services offered to the family and the progress made by them, make recommendations for court orders, and describe concurrent planning efforts for permanency in the event of failed reunification. (Cal. Rules of Court, rules 5.524(c), 5.715(b), 5.710(b).) It must also address all the criteria listed in section 366.1, such as whether the parent's educational



rights should be limited and what efforts are being made to maintain sibling relationships. (§ 366.1.)

This report must be filed with the court and given to all parties at least 10 days before the review hearing. Despite the clear language of the statutes requiring early service to all parties, reports are often provided late, sometimes on the day of the hearing itself. The appellate court has addressed this problem and held that the statutory requirement to provide the report at least 10 days in advance of the review hearing is mandatory. Further, the court found that failure to provide the report as required violates due process as it deprives the parent and child of the opportunity to review and adequately prepare to counter the social worker's recommendations. As such, the court held that such a violation is per se reversible error absent either an express waiver or a continuation of the hearing. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 553–558.) Section 366.05 (applicable to Los Angeles County only) mandates a continuance of the review hearing if a report was not provided as specified absent an express waiver of all parties. Otherwise, the court may proceed only if it finds that the statutory presumption of prejudice is overcome by clear and convincing evidence. (§ 366.05.)



TIP If in your client's best interest, consider not waiving the requirement that status review reports be provided to all parties and counsel at least 10 days before the hearing. As the court in *Judith P.* noted, the 10-day period affords counsel the opportunity not only to review the report and recommendations but also to gather evidence, subpoena witnesses, and consult with the client—in other words, to “meet the minimum standards of practice.” (*Judith P.*, *supra*, 102 Cal.App.4th at p. 548.) If counsel consistently refuse to acquiesce to the untimely provision of reports, one hopes compliance with the law will become routine.

BURDENS OF PROOF AND STATUTORY ELEMENTS

At each review hearing during reunification, the court must return the child to the parent or guardian unless the agency proves by a preponderance of the evidence that return would create a substantial risk of detriment to the child. A parent's failure to participate regularly and make substantive progress in court-ordered programs is prima facie evidence of detriment. (§§ 366.21(e) & (f), 366.22(a); Cal. Rules of Court, rules 5.710(e), 5.715(c), 5.720(c).)

The agency also carries the burden to show that reasonable reunification services have been offered or provided. The standard of proof on this issue at the 6- and 12-month hearings is statutorily set at clear and convincing evidence. (§ 366.21(g)(2).) If the court finds at either of these hearings that reasonable services have not been provided, it must order that services be provided until the next review. (§ 366.21(e) & (f).)

Section 366.22 is silent as to the standard to be applied at an 18-month review. Decisional law is split on the issue, with one court holding that clear and convincing evidence is necessary while another concluded that a showing by the preponderance of the evidence will suffice. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 794; *Katie V. v. Superior Court* (2005) 130 Cal. App.4th 586, 595.)

REASONABLE SERVICES

The court must make a finding at each review hearing under section 366 as to whether or not the agency provided reasonable services to the parent or guardian. During the period that family reunification is in place, the reasonableness inquiry must focus on the sufficiency of the agency's services to aid in the safe return of the child to the parent's custody. The plan for reunification must be individually tailored to address the unique needs and circumstances of each family. And, although services need not be perfect, the agency must show that it identified the problems resulting in removal, offered



appropriate corrective services, and kept in contact with the parents and made reasonable efforts to assist them. The agency must provide services that accommodate a parent's special needs; however, the standard is not what might be provided in an ideal world but whether or not the services under the given circumstances were reasonable. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.)

Visitation is a critical element of reunification and services must be provided to facilitate visits as frequently as possible. In cases in which family or conjoint therapy is a necessary prerequisite to visitation, the agency must ensure that such therapy takes place.

Incarcerated parents must be provided with reasonable reunification services absent a showing under section 361.5(e) that efforts to reunify would be detrimental to the child. The agency must identify services available to an institutionalized parent and assist in arranging them. Visitation should usually be a component of the case plan so long as distances involved are not excessive. (See Parents' Rights fact sheet.)



TIP In determining whether reasonable services have been provided, it is often helpful to compare the date when services were ordered to the dates of referrals and to the dates that services actually became available to the parent or child.

TIME LIMITS ON REUNIFICATION

1. Child Under Three at Time of Removal

Services to reunify a parent or guardian with a child who was under the age of three years at the time of removal should not exceed six months from the date the child entered foster care. (§ 361.5(a)(2).) However, services must be extended if the court finds that the agency failed to provide reasonable services or if the court finds there is a substantial probability that the child can be safely returned within the extended period. (§§ 361.5(a), 366.21(e); Cal. Rules of Court, rule 5.710(f)(1)(E).)





TIP Note that the court is not required to terminate reunification services at the six-month hearing even if the parent of a child under three has failed to participate regularly and make substantive progress in court-ordered programs. (§ 366.21(e); Cal. Rules of Court, rule 5.710(f)(1).) Under the statutory scheme, the court “may” make such a decision, and “may” is defined as permissive, i.e., discretionary. (Cal. Rules of Court, rule 5.502(b).) Therefore, if the court has the discretion to extend services for a parent who is noncompliant, it follows that the court may also extend services for a parent who is participating and making some progress but is not quite able to meet the standard of “substantial probability of return.”



TIP In a recent decision, the Court of Appeal held that the juvenile court has the discretion to terminate reunification services at any time after ordering them even if less than six months have elapsed. (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234.) Counsel should be aware of the facts of this case and be prepared to distinguish them if opposing an attempt by the agency to terminate services early under this “disentitlement doctrine,” which is based on the rationale that a parent who does not take advantage of and participate in services is no longer entitled to receipt of that assistance.

2. Child Three or Older at Time of Removal

Parents and guardians of a child three or older at the time of removal are generally entitled to receive reunification services for 12 months from the date the child entered foster care. (§ 361.5(a)(1).) Thus the 6-month review for a child this age will usually serve as a check on the progress of all parties to determine if return is appropriate and/or to give the court an opportunity to address whether additional services or changes to existing orders are needed. However, under certain circumstances the court has the discretion to terminate reunification at the 6-month hearing and set a hearing under section 366.26.



(§ 366.21(e); see “Possible Outcomes of Hearing” later in this black letter discussion.)

Reunification services must be extended beyond the 12-month limit if the court finds that the agency failed to provide reasonable services. Additionally, services shall be extended if the court finds there is a substantial probability that the child can be safely returned within the extended period. (§§ 361.5(c)(3), 366.21(g)(1).)

3. Eighteen-Month Outside Limit

The maximum period for provision of court-ordered services is capped at 18 months from the initial removal from the parent. (§§ 361.5(a)(3), 366.22.) “Initial removal” is defined as the date on which the child was taken into custody by the social worker or was placed on a hospital hold under section 309(b). (Cal. Rules of Court, rule 5.502(a)(15).) Only under “exceptional circumstances” may this period be exceeded. In such cases, the subsequent hearing is also conducted pursuant to section 366.22.

4. When Child Has Been Redetained From Parent

The 18-month time limit applies even if the child was in the physical custody of the parent for some period of time during the dependency case. In other words, statutory time limits are not tolled if a child is placed in the home of a parent at disposition or some later time but then is subsequently redetained. (§ 361.5(a)(3).) Thus, reunification efforts in an ongoing dependency case can be reinstated when a supplemental petition is sustained, but the duration of further reunification is circumscribed by section 361.5, which measures all time limits from the date of the child’s initial removal. (*In re N.M.* (2003) 108 Cal.App.4th 845.)



WHEN CHILD IS PLACED WITH PREVIOUSLY NONCUSTODIAL PARENT

There will be instances in which the court conducts a 6-, 12-, or 18-month review of reunification efforts while the child is living in the home of a previously noncustodial parent with whom he or she was placed pursuant to section 361.2. Under these circumstances, if both parents are receiving services, “the court shall determine, at review hearings held pursuant to section 366, which parent, if either, shall have custody of the child.” (§ 361.2(b)(3).) The appellate court has concluded that resolution of such situations is strictly a custody determination with no prevailing presumptions—the juvenile court must choose which, if either, parent should be given custody based on analysis of the best interest of the child. It found that sections 364, 366.21, and 366.22 were not controlling. However, the juvenile court should proceed with its determinations as to the need for continued supervision and the assessment of whether return to the original custodial parent would pose a substantial risk of detriment, as both are relevant to the issue of custody. (*In re Nicholas H.* (2003) 112 Cal. App.4th 251, 267.)



TIP The child’s attorney must have extensive input into the decisions made in these situations. Formulation of your position is a complex task based on consultation with the client, investigation of the living situation in the noncustodial parental home, assessment of the child’s attachment to the previously custodial parent as well as the progress of that parent in resolving the problems that caused removal, a realistic assessment and prognosis of the timeline and possibility for reunification, and analysis of the client’s bonding to siblings and permanency needs.



TIP Note the apparent statutory conflict between section 361.2’s directive to consider custody to either parent and the wording of section 366.21(e) and rules 5.710(h), 5.715(c)(2), and 5.720(c)(2) of the California Rules of Court, which appear to restrict the option



at a review hearing to continued placement with the noncustodial parent. Given this tension in the law, counsel should be prepared to craft arguments to support any desired outcome, including shared custody.

POSSIBLE OUTCOMES OF HEARING

1. Return to the Parent or Guardian

At all out-of-home review hearings, the legislative goal of family reunification is furthered by the statutory presumption that the court “shall order the return of the child to the physical custody of his or her parent or legal guardian” absent a finding by a preponderance of the evidence that return would create a substantial risk of detriment to the child’s well-being. (§ 366.21(e); Cal. Rules of Court, rule 5.710(e)(2)–(3).) If the child is returned home, the court will most likely continue the case for a section 364 review in six months and order family maintenance services to be provided in the interim.



TIP At a 6-month hearing under the California Rules of Court, the court may terminate jurisdiction upon return. (Cal. Rules of Court, rule 5.710(e)(2).) Practically speaking, however, the court will rarely be comfortable with cutting off all supervision immediately upon return. Also note that the California Rules of Court governing 12- and 18-month hearings do not even address this possibility.

2. Continue Family Reunification Services

There are several circumstances under which the court either has the discretion to, or must, order continued provision of reunification services. These include the following:

a. Child With Previously Noncustodial Parent

Regardless of age, if the child is placed with a previously noncustodial parent under section 361.2, the court may continue services to one or both parents if it finds that continued jurisdiction is necessary. Note that under these circumstances the court may, in the

alternative, either return custody to the parent from whom the child was detained or terminate jurisdiction with a custody order to the previously noncustodial parent. (§ 361.2(b)(2); Cal. Rules of Court, rule 5.715(c)(2).)

b. No Reasonable Services

Regardless of the child's age, at a 6- or 12-month hearing the court *must* continue provision of reunification services to the next review if it finds that reasonable services have not been provided. (§ 366.21(e) & (g)(1).)

c. Substantial Probability of Return

At a 6-month hearing, if a child was under the age of three at the time of removal or is a member of a sibling group as defined in section 361.5(a)(3), the court shall order continued services to the next review date on finding that there is a substantial probability that the child may be returned to the parent within 6 months. (§ 366.21(e) & (g)(1); Cal. Rules of Court, rule 5.710(f)(1)(E).) Similarly, a finding of substantial probability of return within 18 months of the child's initial removal from the home at a 12-month hearing mandates additional reunification services until the section 366.22 hearing date. In order to find "substantial probability" the court must find that the parent meets all of the factors outlined in section 366.21(g)(1).

d. Exceptional Circumstances / Special Needs Parent

Section 366.22 states that the court can do only two things at the 18-month review hearing: it can return the child to the parent, or, if that cannot be done safely, it must terminate reunification services. Upon terminating reunification, the court must set a selection and implementation hearing if not immediately ordering long-term foster care. However, the juvenile court may circumvent (or at least delay) this decision by continuing the 366.22 hearing pursuant to section 352 and granting additional reunification services in the interim in the case of "exceptional circumstances." (*In re Elizabeth R.* (1995) 35 Cal. App.4th 1774.) This method of continuing the 18-month hearing and



ordering reunification services until the continued date has also been employed by the court on a finding that the agency had previously failed to offer or provide reunification services. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1017.)

3. Order That the Child Remain in Long-Term Foster Care

At the 12- or 18-month hearing the court has the discretion to order a child into long-term foster care (i.e., another planned permanent living arrangement). However, this requires clear and convincing evidence of a compelling reason that it is in the child's best interest not to hold a section 366.26 hearing and that the child is not a proper subject for adoption and there is no one willing to accept legal guardianship. This order is made based on the child's current circumstances and does not preclude setting a section 366.26 hearing at a later date to consider a more permanent plan. (§ 366.21(g)(3); Cal. Rules of Court, rule 5.715(d).)



TIP Note that this outcome can, in some situations, be the best alternative for a child. It can be argued that the standard for finding that a child is “not a proper subject for adoption” is a more flexible one than that required at a 366.26 hearing at which the court must determine whether a child is “likely to be adopted,” although both findings must be shown by clear and convincing evidence. Long-term foster care (LTFC) or another planned permanent living arrangement (APPLA) may be the only way to avoid termination of parental rights, as once a child is found “likely to be adopted,” termination can be avoided only if one of the enumerated exceptions applies.

4. Terminate Reunification and Set a 366.26 Hearing

At any of the review hearings, if the court does not return the child, continue reunification services, or order the child into long-term foster care, it must terminate reunification services and set a selection and implementation hearing under section 366.26. (§§ 366.21(g), 366.22; Cal. Rules of Court, rule 5.715(d)(3).)

At a six-month hearing, the court *may* terminate reunification services and set a section 366.26 hearing in any of the following situations (note, however, that this outcome is discretionary, *not* mandatory, under the code):

a. Parent Noncompliant With Case Plan—Child Under Three

If the child was under the age of three at removal and the court finds by clear and convincing evidence that the parent or guardian failed to participate regularly and make substantial progress in court-ordered programs, services may be terminated. (§ 366.21(e); Cal. Rules of Court, rule 5.710(f)(1)(E).)

b. Parent Noncompliant With Case Plan—Sibling Group

If any member of a sibling group was under age three at removal, reunification for any or all of the children may be terminated for the purpose of maintaining the children together in a permanent home. This applies only to siblings who were simultaneously removed from the parental home. (§§ 361.5(a)(3), 366.21(e).) The court is to consider many factors in making its decision, including the strength of the sibling bond, the detriment to each child if ties are broken, the likelihood of finding a permanent home for all, and the ages, wishes, and best interest of each child. (§ 366.21(e); Cal. Rules of Court, rule 5.710(g).)

c. Child Abandoned and Parent’s Whereabouts Unknown

Regardless of the age of the child, the court may terminate services if a child was declared a dependent under section 300(g) because of abandonment and there is clear and convincing evidence that the parent’s or guardian’s whereabouts remain unknown. (§ 366.21(e); Cal. Rules of Court, rule 5.710(f)(1)(A).)

d. Parent Has Failed to Visit for Six Months

On clear and convincing evidence that the parent or guardian has failed to visit or contact the child within the last six months the court may set a 366.26 hearing and terminate reunification services. (§ 366.21(e); Cal. Rules of Court, rule 5.710(f)(1)(B).) Failure

to contact and/or visit can be the sole basis for termination of reunification at this stage and does not require an initial jurisdictional finding of abandonment under section 300(g). (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998.) The age of the child is irrelevant.

e. Parent Convicted of Certain Felony

Clear and convincing evidence that the parent or guardian has been convicted of a felony indicating parental unfitness justifies termination of reunification services. (§ 366.21(e); Cal. Rules of Court, rule 5.710(f)(1)(c).) As above, the age of the child is not taken into consideration.

f. Parent Is Deceased

Finally, proof that the parent is now deceased terminates reunification efforts involving a child of any age. (Cal. Rules of Court, rule 5.710(f)(1)(d).)

EXCEPTIONAL CIRCUMSTANCES JUSTIFYING EXTENDED REUNIFICATION

Reunification services may be extended beyond the mandatory 18-month limit if the court finds that “exceptional circumstances” so warrant. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774.) The *Elizabeth R.* court found that reasonable services had not been provided to a mentally ill mother who was institutionalized for much of the reunification period and denied visitation during that time. This “special-needs parent” had substantially complied with her reunification plan but needed more time for stabilization before her children could be safely returned. The court reasoned that “section 366.22 was not designed to torpedo family preservation” and concluded that under the unusual circumstances presented, the mother must be provided with additional services until the continued hearing date.

However, exceptional circumstances sufficient to trigger the discretion to extend services are limited to intervening or external events that prohibit the parent’s completion of the reunification

plan and do not include a parent's own failings such as relapse. (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377.)



TIP By their nature, such situations should be rare; however, counsel should be aware of this possible outcome. Analysis of the child's individual needs, the child's connection to the parent, and the likelihood of return with extended services should all enter into a court's determination of whether to extend services beyond the section 366.22 hearing.

SIBLING GROUP

A "sibling group" is defined as two or more children related to each other as full or half-siblings by blood, adoption, or affinity through a common biological or legal parent. (§ 361.5(a)(3).) Affinity is a relationship based on marriage connecting the blood or adoptive relatives of spouses. (Cal. Rules of Court, rule 5.502(a)(1).)

At a six-month hearing, in determining whether to terminate reunification services and set a 366.26 hearing for one or more members of a sibling group, the court must consider, and the social worker's report must address, the following factors in reaching its decision:

- Whether the siblings were removed as a group,
- The closeness and strength of the sibling bond,
- The ages of the siblings,
- The appropriateness of maintaining the sibling group together,
- The detriment to the child if sibling ties are not maintained,
- The likelihood of finding a permanent home for the group,
- Whether the group is placed together in a preadoptive home,
- The wishes of each child, and
- The best interest of each member of the sibling group. (*Id.*, rule 5.710(g); *In re Abraham L.* (2003) 112 Cal.App.4th 9, 14.)





TIP Remember that this outcome is discretionary and is not a “one-size-fits-all” resolution. Each child’s situation should be individually considered.

SUBSTANTIAL PROBABILITY OF RETURN

In order to find a substantial probability of return the court must find that the parent or guardian has done all of the following:

- Consistently contacted and/or visited the child(ren),
- Made significant progress in resolving the problems that led to detention, *and*
- Demonstrated the capacity and ability to complete the case plan and to provide for the child’s safety and medical, physical, and special needs. (§ 366.21(g)(1); Cal. Rules of Court, rule 5.710(f)(1)(E).)

SUBSTANTIAL RISK OF DETRIMENT

“Substantial risk of detriment” is not statutorily defined. Recently, however, the Court of Appeal found that, while vaguely worded, the phrase must be construed as imposing a fairly high standard. “It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.” Rather the substantial risk must be shown to involve basic parenting concepts, such as a child’s need for food, shelter, safety, health care, and education. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789–790.) Further, generalized criticism, such as that a parent failed to internalize therapeutic concepts, has been found to be “simply too vague to constitute substantial, credible evidence of detriment.” (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1751.)



The risk of detriment, however, does not have to involve the same type of harm that resulted in the court's initial intervention. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) Nor does a parent's compliance with the reunification plan necessarily entitle him or her to return of the child if the court finds that return would be detrimental. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131; *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689.)

ONGOING CONCERNS

1. Limitation of Educational Rights

At each review hearing, the court must consider, if it has not done so already, and the social worker's report must address, whether the parent's right to make educational decisions for the child should be limited. (§ 366.1(e).) If it does make such an order the court shall also appoint a responsible adult pursuant to the criteria in section 361(a) to make such decisions for the child. A "responsible adult" may be the foster parent or relative caregiver, a Court Appointed Special Advocate (CASA), or another adult willing to take on the responsibility. The child's attorney, social worker, and group home staff may *not* hold educational rights. (See fact sheet on educational rights.)

2. Placement With Relatives

Following disposition, each time a new placement must be made for the child, the agency is required to give preferential consideration to a relative's request for placement. (§ 361.3(d).) This preference persists, even after termination of reunification, up to the point when parental rights are severed. (*Cesar V. v. Superior Court* (2001) 91 Cal. App.4th 1023.)

3. Sibling Relationships

The code requires ongoing efforts to maintain and strengthen sibling relationships, specifically to place dependent siblings together unless the court determines that it is not in the best interest of one or more

of the children. The agency has a continuing statutory duty to make diligent efforts to place siblings together and to facilitate frequent visits during the period they are separated. (§§ 366.1(f), 16002.)



TIP Ensure that the court addresses this issue at every review hearing and demand that the agency fulfill its responsibilities. This may include setting a contested hearing on the issue of reasonable efforts when appropriate.

4. Visitation

Parental visitation during reunification is critical and must be addressed at each review hearing. Further, even once reunification is terminated, the parent or guardian must be allowed continued visitation unless there is a showing that it would be detrimental to the child. If appropriate, the court should also make visitation and other orders necessary to maintain the child's relationships with persons important to him or her. (§ 366.21(h); Cal. Rules of Court, rule 5.715(d)(4); see Visitation fact sheet.)



SELECTION AND IMPLEMENTATION

Selection and Implementation Checklist (§ 366.26): Child's Attorney

BEFORE

- Ensure social worker's report is provided 10 days before the hearing. (Cal. Rules of Court, rule 5.725(c).)
- Interview child re
 - Desires as to placement and permanency plan.
 - Continued contact with parents, siblings, other relatives.
 - Position on social services agency's recommendation.
 - Child's wishes to be present or not at the hearing. (§ 366.26(h)(2).)
- Discuss permanency options with caregiver including guardianship, open adoption, and postadoption sibling contact. (§ 366.29.)
- Assess and formulate position on
 - Appropriate permanent plan.
 - Whether to set contested hearing on
 - Adoptability.
 - Difficulty in placing child.
 - Parental or sibling bond.
 - Appropriateness of guardianship.
 - Whether jurisdiction should terminate if plan is guardianship (Kin-GAP).
- If contesting, prepare and proceed as for jurisdictional hearing.
Note: Section 355(b) does not apply.



DURING

- Inform court of the child's wishes. (§ 366.26(h)(i).)
- Advocate positions identified above in keeping with any additional evidence received.
Note: The proponent of a section 366.26(c)(i) exception carries the burden to prove the detrimental circumstances constituting a compelling reason not to terminate.
- Request court to make appropriate findings and orders for referrals (i.e., Special Immigrant Juvenile Status (SIJS) visa, regional center, IEP, etc.).
- When parental rights are terminated and when appropriate, request that caregivers be designated as “prospective adoptive parents” if they meet section 366.26(n) criteria.
- If legal guardianship is entered, request appropriate orders as to
 - Visitation with parents.
 - Termination of dependency jurisdiction. (§ 366.3.)

AFTER

- Consult with child to explain court rulings and answer questions.
- Send letter to caretaker with contact information and summary of court orders.
- File necessary forms/motions if pursuing rehearing, appeal, or writ.

Selection and Implementation Checklist (§ 366.26): Parent's Attorney

BEFORE

- Ensure social worker's report is provided 10 days before the hearing. (Cal. Rules of Court, rule 5.725(c).)
- Consider discussing permanency options with caregiver if appropriate. (§ 366.29.)
- Ensure client's presence if in custody.
- Was notice proper?
- Interview client re
 - Possibility of filing a section 388.
 - Continued contact with child.
 - Position on social services agency's recommendation.
 - Possible outcomes and posthearing remedies (e.g., future section 388, appeal, etc.).
 - Whether to set contested hearing.
- If contesting (section 355(b) does not apply),
 - Is further investigation regarding adoptability necessary?
 - Obtain delivered service logs and incident reports.
 - If child is specifically adoptable, obtain information on suitability of caretaker.
 - Who can testify re one of the section 366.26(c)(1) exceptions?
 - Is an expert necessary to testify or assist with preparing cross-examination?
- Negotiate/discuss hearing strategy with opposing counsel.
- If ICWA applies, is there an expert report? (Remember that the beyond-a-reasonable-doubt standard applies.)



DURING

- Inform court of the client's wishes.
- Advocate positions identified above in keeping with any additional evidence received.
Note: The proponent of a section 366.26(c)(1) exception carries the burden to prove the detrimental circumstances constituting a compelling reason not to terminate.
- Request mediation to address postadoption contact.
- Enter all specific and general objections to preserve record.
- If a legal guardianship or a planned permanent living arrangement is entered, request appropriate orders as to
 - Visitation.
 - Termination of dependency jurisdiction. (§ 366.3.)
 - Continued services for child (parents may be able to avail themselves of these).

AFTER

- Evaluate client's state of mind. Is assistance needed?
- Consult with client to explain court rulings and answer questions.
- File notice of appeal (if rights are terminated).
- If rights are not terminated, set timelines and future goals for client.

Black Letter Discussion and Tips

This hearing, held pursuant to Welfare and Institutions Code section 366.26, is sometimes called a selection and implementation hearing but more often simply a .26 (two-six) hearing. It is held after the denial or termination of family reunification efforts. As such, the focus is no longer on reunification of the family as originally constituted but on determining and putting into effect the plan that will best provide the child with a stable and permanent home.

NOTICE AND SERVICE

1. Content

Notice shall inform the recipient of the time, date, place, and nature of the hearing and indicate that the court will, at that time, select a plan of adoption, guardianship, or long-term foster care. The notice must also contain the permanency recommendation, inform parties of their rights to appear and be represented by counsel, and, in cases involving an Indian child, inform the parties of the tribe's right to intervene. (§ 294(e).)

2. Persons and Entities Entitled to Notice

Notice must be served on the mother, all presumed and alleged fathers, the child (if age 10 or older), the caregivers and attorneys for any dependent siblings, dependent siblings (if age 10 or older), grandparents whose addresses are known if the parent's whereabouts are unknown, all counsel of record, the child's present caregiver, any Court Appointed Special Advocate (CASA) volunteer, and any de facto parent. If the court has reason to believe an Indian child is involved, notice shall also be sent to any known tribes or Indian custodians; otherwise it should be sent to the Bureau of Indian Affairs. (§ 294; Cal. Rules of Court, rule 5.725(b).)



3. Method of Service

The accepted means of service varies depending on the identity of the recipient and such factors as the amount of information known about the recipient, that person's presence at prior hearings, and the recommendation for permanency.

a. Parent

Proper notice is critical at this stage of the proceedings. The parent has both a constitutional and a statutory right to notice, and failure to attempt to give notice as required is a structural defect requiring automatic reversal. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114–1116.)

 **TIP** The purpose of termination is not to punish a parent but to free a child for adoption. Rights cannot be terminated for only one parent (unless the other is deceased or rights have already been relinquished or otherwise terminated); therefore the rights of the mother and any unknown, alleged, or presumed fathers must all be terminated. (Cal. Rules of Court, rule 5.725(h).) All parents, even those who are difficult to identify or locate, must be properly noticed to protect the integrity of the proceedings. Further, decisional law is rife with reversals based on inadequate notice under the Indian Child Welfare Act (ICWA). (See, e.g., *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704.) In order to protect the finality of the termination order, counsel for the child should carefully review the adequacy of notice for the .26 hearing.

b. Identity and Whereabouts Are Known

Regardless of the recommendation, a parent who was present at the hearing at which the .26 hearing was scheduled and directed by the court to appear is deemed to have received actual notice. Subsequent notice need only be by first-class mail at the parent's usual residence or place of business. (§ 294(f)(1).)

If the parent was not present when the hearing date was set, notice may be by personal service; certified mail, return receipt re-

requested (so long as the county social services agency receives a return receipt signed by the parent), or substitute service with follow-up by first-class mail. (§ 295(f)(2)–(5).) Notice by first-class mail to the parent’s usual residence or business is sufficient if the recommendation is guardianship or long-term foster care. (§ 294(f)(6).)

c. Identity Known But Whereabouts Unknown

If the court determines that due diligence has been exercised, based on an affidavit filed with the court 75 days before the hearing, describing efforts to locate and serve the parent, and the recommendation is for guardianship or long-term foster care, no further notice to the parent is required. If the recommendation is adoption,

- Service may be on the parent’s attorney by certified mail, return receipt requested; or
- By publication for four consecutive weeks if no attorney represents the parent.

In all cases in which the parent’s whereabouts are unknown, notice must be served by first-class mail on the grandparents if their identities and addresses are known.

If the parent’s address becomes known, notice must immediately be served as described under section 294(f)(2)–(6). (§ 294(f)(7).)

d. Identity and Whereabouts Unknown

If the court determines that efforts conducted with due diligence have been unsuccessful in identifying one or both parents, and no one has come forward claiming parentage, the court may dispense with notice. However, if the recommendation is for adoption, the court may order notice by publication (once a week every four weeks) if it determines that publication is likely to lead to actual notice of the parent. (§ 294(g).)

e. Due Diligence to Locate a Parent

Parental rights cannot be terminated unless the county social services agency has fulfilled its constitutional obligation to exercise due diligence in its efforts to notify the parent of the upcoming hearing.

Reasonable or due diligence requires an inquiry conducted in good faith that is systematic and thorough. (*In re Megan P.* (2002) 102 Cal. App.4th 480, 489 [termination of parental rights reversed owing to inexcusably insufficient efforts to locate father, who had been sending payments to the county's child support division for the entire time the case was before the dependency court].) Even where the affidavit appears sufficient, notice is invalid if the petitioning party has ignored the most likely means of locating the parent. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 599 [county social services agency ignored relative's information about father's possible whereabouts].)



TIP

Notice is critical, especially if the recommendation is to terminate parental rights. Counsel should check carefully to ensure that all searches have been reasonable and that the county social services agency has pursued the most likely means of finding a parent.

f. Child

Notice to the child may be by first-class mail. If there is reason to believe the case involves an Indian child, notice to the tribe must be by registered mail, return receipt requested. (§ 294(h)(i); Cal. Rules of Court, rule 5.664(f).)

4. Time for Service

In most instances, service must be completed at least 45 days before the date of the hearing. For notice by mail, service is deemed complete 10 days after mailing. If an Indian child is involved, notice to the tribe, Indian custodian, or Bureau of Indian Affairs must be completed at least 10 days prior to the hearing. If publication is ordered, it must be completed at least 30 days before the date of the .26 hearing. (§ 294(c).)

5. Notice for Continued Hearings

After an initial finding of proper notice has been made, subsequent notice for continued hearings under section 366.26 need only be made

by first-class mail to the last known address or by any other means reasonably calculated to provide notice, so long as the recommendation remains the same. If the recommendation is changed, notice must be served as required for the initial .26 hearing. (§ 294(d).)

TIMING OF HEARING

The .26 hearing must be set within 120 days of the court's order denying or terminating reunification services. (§§ 361.5(f), 366.21(e) & (g)(2), 366.22(a).)

CONTINUANCES

The court may continue a .26 hearing for no more than 30 days if necessary in order to appoint counsel or allow newly appointed counsel to become acquainted with the case. (§ 366.26(g).)

Additionally, the court may grant any party's request for a continuance so long as it is not contrary to the interests of the minor. Continuances can only be granted for good cause and only for the period of time necessary. (§ 352.)

ASSESSMENT / SOCIAL WORKER'S REPORT

Upon setting the matter for a .26 hearing, the court must order the county social services agency to prepare an assessment that includes

- Current search efforts for absent parent(s);
- Review of the amount and nature of contact between the child and parent and other family members since the date of original placement;
- Evaluation of the child's medical, developmental, academic, mental, and emotional status;
- Preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or guardian,



including a check of criminal records and child abuse referral history;

- Duration and character of the relationship between the child and any identified prospective adoptive parent or guardian and a statement from the child (if age and developmentally appropriate) concerning placement, adoption, or guardianship;
- Description of the efforts to be made to identify a prospective adoptive parent or guardian; and
- Analysis of the likelihood that the child will be adopted if parental rights are terminated. (§§ 361.5(g), 366.21(i).)

The agency report must be provided to the court and all parents at least 10 calendar days before the .26 hearing. In addition, a summary of the recommendations must be provided to the current caregiver, any CASA volunteer, and to the tribe of an Indian child. (Cal. Rules of Court, rule 5.725(c).)

BURDENS OF PROOF

The petitioner carries the burden to prove by clear and convincing evidence that the child is likely to be adopted. (§ 366.26(c)(1); Cal. Rules of Court, rule 5.725(e).) At the .26 hearing the focus is on the child, and the county social services agency has no burden to show fault on the part of the parent. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 [by the time termination is considered, the danger to the child from parental unfitness has already been well established through prior judicial determinations that the evidence of detriment is clear and convincing]; but see *In re Gladys L.* (2006) 141 Cal.App.4th 845 [rights of a parent against whom no allegations were ever filed and no judicial findings of unfitness or detriment have previously been made cannot be terminated].)

Once adoptability has been established, the burden shifts to the party claiming that termination would be detrimental to the child to prove one of the exceptions enumerated under section



366.26(c)(1)(A)–(E) by a preponderance of the evidence. (Cal. Rules of Court, rule 5.725(e)(3); *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.)

PROCEDURE

1. Appointment of Counsel

At the beginning of a .26 hearing the court must appoint counsel for any dependent child not already represented unless it finds that the child would not benefit from representation. The court must also appoint counsel for any unrepresented parent who appears and is unable to afford counsel unless that right is knowingly and voluntarily waived. (§ 366.26(f).) The court may continue the proceedings for up to 30 days to allow any newly appointed counsel to become familiar with the case. (§ 366.26(g).)

2. Incarcerated Parent’s Right to Appear

An incarcerated parent has the statutory right to be noticed of and to be present at any hearing in which the county social services agency seeks to terminate his or her parental rights. If the court is informed that the parent wishes to be present, it must issue an order for the parent to be brought before the court. No proceeding to terminate parental rights may go forward without the physical presence of the parent or of the parent’s counsel unless the court has received a signed waiver of appearance. (Pen. Code, § 2625.)

3. Child’s Participation in the Proceedings

a. Presence and Opportunity to Be Heard

The child must be allowed to attend the hearing if the child or the child’s counsel requests to do so or if so ordered by the court. If any child age 10 or older is not present, the court must inquire as to whether notice was proper and why the child is not present. (§ 366.26(h)(2).)



The court must consider the wishes of the child and act in the child's best interest. (§ 366.26(h)(1).) When considering the child's wishes there is no requirement that direct statements be elicited from the child as to termination of parental rights, especially if such inquiry is inappropriate based on the child's age or mental state. (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592.) The court need only attempt to explore the child's feelings as to the biological parents, any prospective adoptive parents, caregivers, and current living situation and to make inferences as to the child's wishes. (*In re Julian L.* (1998) 67 Cal.App.4th 204, 208.) The court is required to consider the child's wishes but is not required to follow them, except that the court may not terminate parental rights over the objection of a child age 12 or older. (§ 366.26(c)(1)(B); see *In re Joshua G.* (2005) 129 Cal.App.4th 189.)

b. Testimony in Chambers

The child may testify in chambers, outside the presence of the child's parent, so long as the parent's counsel is present and the court finds any of the following:

- Testimony in chambers is necessary to ensure truthful testimony,
- The child is likely to be intimidated by a formal courtroom setting, or
- The child is afraid to testify in the presence of his or her parent. (§ 366.26(h)(3)(A).)

4. Evidence

a. Right to Contested Hearing

An alleged father has no right to a contested .26 hearing. Due process for an alleged father requires only notice and an opportunity to elevate his paternity status prior to the .26 hearing. At the .26 hearing, neither paternity nor reunification is a cognizable issue. (*In re Christopher M.* (2003) 113 Cal.App.4th 155.)



No parent has an unfettered right to a contested hearing to attempt to establish that one of the exceptions to termination applies. The court may require an offer of proof and deny full presentation of evidence and confrontation and cross-examination of witnesses if it determines that the evidence offered will not be relevant or have significant probative value. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122; *In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053.) Due process is a flexible concept, and cross-examination of the social worker, report preparer, or any other witness may not be required if an offer of proof does not demonstrate its relevancy to establishing the exception claimed. (See *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)



TIP All the decisions mentioned above center on attempts by a parent to establish an exception to termination at a point in the .26 hearing when the burden of proof has shifted to the proponent of the exception. It could be argued that a contest on the child's adoptability (an element that must be proved by the county social services agency) should be routinely granted as that situation is more akin to that encountered in pre-permanency status review hearings (i.e., § 366.21(e) & (f) and 366.22 hearings) when the petitioner bears the burden of proof and the court cannot require an offer of proof from a parent as a prerequisite for obtaining a contested hearing. (See *In re James Q.* (2000) 81 Cal.App.4th 255, 266.)

b. Hearsay in Assessments and Court Reports

Hearsay contained in reports submitted by the county social services agency is admissible and is considered competent evidence on which the court may base its findings. (*In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1572–1573; see also Hearsay in Dependency Hearings fact sheet.) Further, due process does not require cross-examination of the social worker as a prerequisite to admissibility of the assessment report. (*In re Jeanette V., supra*, 68 Cal.App.4th at p. 817.)



c. Bonding/Attachment Studies

It is the obligation of the party proffering an exception to termination based on a closely bonded relationship to request a bonding study; the court has no sua sponte duty to do so. (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) The contents of a bonding study arranged by a parent, and conducted without the knowledge or consent of the court or child’s attorney, is discoverable; its admissibility is not barred by the attorney work product rule or the patient-psychotherapist privilege. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1168.)

5. Concurrent 388 Motion for Return or Resumption of Reunification

Once reunification services have been terminated and a case has been set for a .26 hearing, the focus of the court must shift to the child’s need for permanency and stability. Return to the parent is not an issue. However, section 388 petitions provide the parent with an “escape mechanism” to present new evidence to the court before decisions are made as to permanency and provide a balancing of the parent’s interest in reunification with the child’s need for stability and permanency. Procedurally, the issues and claims raised by a 388 petition requesting return of the child or resumption of reunification services should be considered and decided before the .26 hearing is conducted. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

If the court grants a 388 petition and orders resumption of reunification services, the .26 hearing should be taken off calendar and the next hearing must be set for and conducted under the standards of a section 366.22 review hearing—not as a continued .26 hearing. (See *In re Sean E.* (1992) 3 Cal.App.4th 1594, 1599 [the order for further reunification services implicitly conflicts with the findings necessary to set a section 366.26 hearing, and therefore the latter must be vacated]; see also the Status Reviews and Motions for Modification black letter discussions.)

6. Adoptability

In order to terminate parental rights, the court must first find by clear and convincing evidence that the child is likely to be adopted. The fact that the child is not yet placed in a preadoptive home or with a caregiver who is willing to adopt is not a basis for finding that the child is not likely to be adopted. (§ 366.26(c)(1); Cal. Rules of Court, rule 5.725(e)(1)(2); *In re Marina S.* (2005) 132 Cal.App.4th 158 [a completed home study is not required before the court may terminate parental rights].) The child is the focus of the inquiry, i.e., whether anything about the child’s “age, physical condition and emotional state” will make it difficult to find an adoptive home. Characteristics, such as age, of any identified prospective adoptive parent are irrelevant. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733.) However, when a child who is older or who has serious special needs is found to be only “specifically adoptable” by one identified family, the court must consider whether the prospective adoptive family can meet the child’s needs. This inquiry is conducted at the general level and should not delve into details such as the specifics of the family’s educational plan for the child. (See *In re Carl R.* (2005) 128 Cal.App.4th 1051.)

Although the county social service agency has the burden to establish adoptability, objections to the sufficiency of the adoption assessment report are waived if no objection is made in the trial court. (*In re Urayna L.* (1999) 75 Cal.App.4th 883.) There is a split of authority as to whether the ultimate issue of the child’s adoptability can be waived for appellate purposes if no objection is raised in the trial court. (See *In re Brian P.* (2002) 99 Cal.App.4th 616 [a parent is not required to object to the county social service agency’s failure to carry its burden of proof; fragmentary and ambiguous statements were not convincing evidence of the likelihood of adoption]; but see *In re Crystal J.* (1993) 12 Cal.App.4th 407.)



7. Additional Findings

Once a finding of adoptability has been made, any of the following circumstances are considered a sufficient basis for termination of parental rights:

- Reunification services have been denied under section 361.5(b) or (e)(1),
- The parent's whereabouts have been unknown for six months,
- The parent has failed to visit or contact the child for six months,
- The parent has been convicted of a felony indicating parental unfitness, or
- Reunification services have been terminated under section 366.21(e) or (f), or section 366.22. (§ 366.26(c)(1).)

In practice, these additional findings do not create a procedural hurdle for the county social services agency, as a .26 hearing can be set only after an order denying or terminating reunification services has been made.

8. Exceptions—Bars to Termination

If the child has been found to be adoptable and one of the above bases applies, the court must terminate parental rights unless the court finds a compelling reason that termination would be detrimental to the child because one of the following exceptions under 366.26(c)(1)(A)–(E) is established by a preponderance of the evidence:

a. Regular Visitation and Benefit of Continuing Relationship

This is a two-pronged test under which the parent or guardian must first establish that he or she has maintained regular visitation and contact with the child. (§ 366.26(c)(1)(A); Cal Rules of Court, rule 5.725(e)(1)(B)(i).)



TIP This requirement makes it critical that counsel ensure that visitation continues after denial or termination of reunification services, preferably under circumstances that allow for easy compliance and provide avenues for liberalization. Attorneys must

impress upon their clients the importance of consistent visitation. Lack of visitation “will not only prejudice a parent’s interests at a section 366.26 hearing but may virtually assure the erosion (and termination) of any meaningful relationship between mother and child.” (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1480.)

The second prong requires proof that the child would benefit from continuing the relationship. In making this finding, the court must balance the security provided by a permanent adoptive home against the benefit of a continued relationship with the parent. The seminal cases, *In re Autumn H.* (1994) 27 Cal.App.4th 567, 570 and *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, hold that although interaction between a parent and child always confers “some incidental benefit to the child,” the significant bond required to establish this exception must be based on frequent contact with one who stands in a “parental role.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 574; *In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.) This standard is high but not insurmountable, and the analysis of the benefit to the child of continued contact must be viewed in the context of whatever visitation the parent has been allowed. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537–1538 [upheld finding that section 366.26 (c)(1)(A) exception applied].) Particularly with an older child, a relationship might be found to be so strong and beneficial that its termination would be detrimental to the child, despite a lack of day-to-day contact. Each case must be individually examined, taking into account such factors as the age of the child, the percentage of the child’s life that was spent living with the parent, the positive and negative aspects of interaction between the parent and child, and the child’s specific characteristics and needs. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349–1350.)



TIP Again, the importance of consistent visitation is clear; in fact, its critical role cannot be overstated. The only way that a child and parent will be able to build and maintain a relationship strong enough to sustain a (c)(1)(A) exception is through frequent,



high-quality visitation. If a case appears headed for a recommendation of termination of parental rights, counsel should consider requesting a bonding study and, whether or not that request is granted, lining up witnesses who can document the strength of the parent-child relationship as observed during visits.

b. Child Age 12 or Older Objects

The court cannot terminate parental rights if a child age 12 or older objects to termination. (§ 366.26(c)(1)(B).) This is logical, given that no adoption can be finalized without the consent of the child if age 12 or older. (Fam. Code, § 8602.)



TIP Although it is not dispositive, an objection by a younger child, especially one nearing the age of 12, should be put on the record. It should also be pointed out that the adoptive approval process can take several months, if not a year or more, to complete, so a child who is nearing 12 and is vehemently opposed to adoption may become a legal orphan if the child refuses to consent when the adoption is ready to be finalized.

c. Child Placed in a Residential Treatment Facility

Termination is deemed detrimental when the child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent identification of a permanent family placement for the child if the parents cannot resume custody when residential care is no longer needed. This exception is invoked only in relatively rare situations involving severely disabled children who are institutionalized. Proceeding by this exception keeps open both the options of return to the parent and permanent placement at a later time. (§ 366.26(c)(1)(C); *In re Jeremy S.* (2001) 89 Cal.App.4th 514 (overruled on other grounds by *In re Zeth S.* (2003) 31 Cal.4th 396, 413–414); see also *In re Ramone R.* (2005) 132 Cal.App.4th 1339.)



d. Child Bonded to Caregiver

Who Is Unwilling or Unable to Adopt

This exception applies to a child living with a relative or foster parent who is unwilling or unable to adopt owing to exceptional circumstances, not including unwillingness to accept legal or financial responsibility for the child, but who is willing to provide a stable and permanent home and removal from the caregiver would be detrimental to the child's emotional well-being. This exception does not apply if

- The caregiver is a nonrelative and the child is under age six, or
- The child is a member of a sibling group in which a sibling is under age six and the children are or should be permanently placed together. (§ 366.26(c)(1)(D).)

The phrase “exceptional circumstances” is not statutorily defined. One appellate court has held that “mere family preference is insufficient.” (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1298; see also *In re Zeth S.*, *supra*, 31 Cal.4th at p. 410.) However, a more recent case held that the court must consider family preference when assessing a 366.26(c)(1)(D) claim or the term “unwilling” in the statute becomes meaningless. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 536 [appellate court reversed termination of parental rights and directed entry of guardianship, finding that the grandmother's preference for guardianship, combined with the potential disruption that adoption might cause to the child's relationship with two nondependent siblings also living with grandmother, equaled “exceptional circumstances”].)

 **TIP** Counsel should become familiar with *In re Fernando M.* as it not only describes a successful (c)(1)(D) challenge but also contains language critical of the common practice by county social service agencies, threatening to remove the child and placing him or her elsewhere for adoption, thereby forcing relative caregivers to adopt. See also the concurrence in *In re P.C.* (2006) 137 Cal. App.4th 279, 288–289, which criticizes the same practice.



e. Substantial Interference With a Child’s Sibling Relationship

Detriment to the child sufficient to bar termination of parental rights can be based on a finding that adoption would substantially interfere with a child’s sibling relationship. (§ 366.26(c)(1)(E).) Although section 366.26 does not contain a definition of “sibling,” the term should be defined broadly to implement the Legislature’s intent “to preserve, to the greatest extent possible, the relationships and contacts between siblings.” (*In re Valerie A.* (2006) 139 Cal.App.4th 1519, 1520.)

A parent has standing to assert the exception as a party potentially directly aggrieved by the decision, as does the child who is being considered for adoption. (See *In re L.Y.L.* (2004) 101 Cal.App.4th 942, 951; *In re Hector A.* (2005) 125 Cal.App.4th 783, 791.)

In order to be entitled to appear and be heard at a child’s .26 hearing, a sibling must file a petition under 388(b) seeking sibling recognition. The sibling need not demonstrate that he or she is likely to be successful in showing detriment to the child, but only that a sufficient sibling bond exists that the court should hear evidence about the relationship before making a permanency decision for the child. (*In re Hector A.*, *supra*, 125 Cal.App.4th at p. 793.) A child does not lose status as a sibling for purposes of raising the 366.26 (c)(1)(E) exception after being adopted. (*In re Valerie A.*, *supra*, 139 Cal.App.4th at pp. 1523–1524.)

Relevant factors in determining the nature and extent of the relationship include, but are not limited to, the following:

- The child and sibling shared significant common experiences;
- The child has existing strong, close bonds with the sibling;
- Ongoing contact is in the child’s best interest in terms of the long-term effect on the child’s well-being, assessed by balancing the benefits of permanence offered by adoption compared to the benefits of maintaining the sibling relationship; or
- The child was raised in the same home as a sibling.
(§ 366.26(c)(1)(E); Cal. Rules of Court, rule 5.725(e)(1)(B)(v).)



However, living together is not a required factor and is not determinative of the outcome of the analysis. (*In re Naomi P.* (2005) 132 Cal.App.4th 808, 824.)

The detriment is viewed only as it applies to the child who is the subject of the .26 hearing, not as to the sibling. (*In re Hector A.*, *supra*, 125 Cal.App.4th at p. 791.) However, the sibling's close bond with the child for whom adoption is proposed may provide indirect evidence of the subject child's best interest sufficient to support the exception. (*In re Naomi P.*, *supra*, 132 Cal.App.4th at p. 823 [testimony of three older siblings especially informative when the subject of the hearing was only three years old]; *In re Celine R.* (2003) 31 Cal. App. 4th 45, 55 [sibling's relationship may be relevant in assessing the effect of adoption on an adoptive child].)

The proponent of the exception must prove that the children are bonded and also that the child in question would suffer detriment if the relationship were severed. (*In re Megan S.* (2002) 104 Cal. App.4th 247, 252 [although child was bonded to adult sibling, no psychological study or other evidence was introduced to prove that severance of the relationship would be detrimental to the child].)

Note: See H-224 regarding section 366.26(c)(1)(F).



TIP No General “Best-Interest” Exception

The exceptions to termination of parental rights enumerated in section 366.26(c)(1)(A)-(E) are exclusive; there is no general “best-interest” exception. (*In re Josue G.*, *supra*, 106 Cal.App.4th at p. 734.) In situations where counsel believes that termination is not in a child's best interest and no exception applies, use of a 388 motion is the appropriate method for raising a challenge. Of course, in order to be successful, the motion must demonstrate changed circumstances as well.

9. Reasonable Efforts or Services

The court cannot terminate parental rights if it has found, at each and every hearing at which it was required to address the issue, that no reasonable efforts were made or that reasonable services were



not offered or provided. (§ 366.26(c)(2); Cal. Rules of Court, rule 5.725(e)(1)(A) & (f)(1).) Orders terminating parental rights have been reversed when the appellate court found that the trial court erred in concluding that reasonable services had been provided when, in fact, there had been none. (See *In re Precious J.*, *supra*, 42 Cal.App.4th at p. 1463 [no reasonable services were provided owing to failure of county social services to facilitate any visits for incarcerated mother]; *In re David D.* (1994) 28 Cal.App.4th 941, 953–954 [there is no meaningful difference between a case with no reunification plan and one in which a plan was developed but not effectuated; total lack of visitation amounted to a lack of reasonable services].)

POSSIBLE OUTCOMES

1. Termination of Parental Rights and Referral for Adoption

If a child is found likely to be adopted and none of the enumerated exceptions is established, the court must terminate parental rights and place the child for adoption.

a. Rights of All Parents Must Be Terminated

Termination of parental rights should take place simultaneously for all parents. The court cannot terminate the rights of just one parent unless the other parent previously relinquished custody, had his or her parental rights terminated by another competent court, or is deceased. (Cal. Rules of Court, rule 5.725(a).) This is because the stated purpose of termination is to free a child for adoption, and that cannot happen until the rights of all parents, including any alleged or unknown fathers, have been terminated. (*Id.*, rule 5.725(h).) It is procedural error for the court to terminate the mother's and father's rights in two separate hearings. (*In re Vincent S.* (2001) 92 Cal.App.4th 1090, 1093.)

b. Finality of Order

An order terminating parental rights is conclusive and binding on the child, parent(s), and any person notified under section 294.



(§ 366.26(i)(1); Cal. Rules of Court, rule 5.725(f)(2).) The juvenile court has no power to set aside or modify the termination order except under the very limited circumstances described in section 366.26(i)(2).

The court may reinstate parental rights upon a petition filed by a dependent child who has not yet been adopted three years after the date of the order terminating parental rights and for whom the court has determined that adoption is no longer the permanent plan goal. (§ 366.26(i)(2).) The petition for reinstatement may be filed before three years have elapsed if the agency responsible for adoptions stipulates that the child is no longer likely to be adopted. The child personally or through his or her counsel may file a section 388 petition seeking reinstatement, and if the request appears to be in the child's best interest, the court must set a hearing to consider the matter. At that hearing, the court must reinstate parental rights if it finds by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest.



TIP Section 366.26(i)(2), which became effective January 1, 2006, is retroactive, applying to all freed children in the dependency system. It was enacted at the urging of child advocates in an attempt to resolve the problem of “legal orphans,” i.e., those children whose parents’ rights have been terminated but who have not been adopted and have become long-term dependents of the state with no legal family. This section provides a procedural mechanism to reverse termination of parental rights and revert to an earlier state of the dependency process, thereby triggering the duty of the court, the county social services agency, and all counsel to reexamine the possibilities for the child’s permanency.

c. Adoptive Preference

The adoption application of any current caregiver (who is a relative or a foster parent) must be given preference over other applications. This preference applies when it has been determined that the child

has substantial ties to the caregiver and removal from that home would be seriously detrimental to the child’s emotional well-being. “Preference” means that, if the application is found satisfactory when processed, the caregiver’s adoptive home study will be completed before any other applications are processed. (§ 366.26(k).)

Section 366.26(k) does not differentiate between relative and foster caregivers. The focus is on the child’s current living situation at the time that parental rights are terminated, and the child’s need for stability and permanency is presumed to be best served by remaining in the current home if the caregiver is seeking adoption. (See *In re Sarah S.* (1996) 43 Cal.App.4th 274, 285 [by its plain language this subsection overrides other statutory preferences for relative placement when the issue is placement for adoption].)

The current-caregiver preference should persist even if a caregiver indicated, prior to the court’s decision to terminate parental rights, a preference for guardianship and a belief that the (c)(1)(D) exception should apply. (*In re P.C.* (2006) 137 Cal.App.4th 279, 289–292 [disapproving of the county social services agency’s practice of coercing caregivers into adopting, and clarifying that “the caregiver may seek an alternative permanency plan and also remain entitled to the statutory preference for caretaker adoption under section 366.26, subdivision (k)”].)

d. Posttermination Placement Changes

Effective January 1, 2006, section 366.26(n) provides procedural protections against removal of a child from the home of a person identified as a prospective adoptive parent. At the .26 or any subsequent hearing, the court may designate the current caregiver as a prospective adoptive parent if

- The child has lived with the caregiver for six months or more, and
- The caregiver expresses a commitment to adoption, and
- The caregiver has taken at least one step to facilitate adoption.

The steps for facilitating adoption may include, but are not limited to,

- Applying for or cooperating with an adoption home study,

- Being designated by the court or county social services agency as the adoptive family,
 - Requesting de facto parent status,
 - Signing an adoptive placement agreement,
 - Discussing a postadoption contact agreement,
 - Working to overcome identified impediments to adoption, and
 - Attending required classes for prospective adoptive parents.
- (§ 366.26(n).)

Except in emergency situations (immediate risk of physical or emotional harm), the child may not be removed from the prospective adoptive parent's home without prior notice. If either the child or the prospective adoptive parent files a petition objecting to the removal, the court must hold a hearing at which it will determine whether removal is justified based on a best-interest standard. (*Ibid.*; see also Caregivers fact sheet.)

Prior to enactment of section 366.26(n), the county social services agency had sole discretion over all placements from the date of termination of parental rights until filing of the petition for adoption, and removals could be challenged only as an abuse of discretion. Under that standard, the court may not interfere with the county social service agency's placement decisions unless shown to be "patently absurd or unquestionably not in the minor's best interests." (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721, 724–725; see also Relative Placements fact sheet.)



TIP Section 366.26(n) represents a dramatic change in the way that posttermination placements must now be treated. It provides freed children and their caregivers with a more effective means of challenging placement changes and places the responsibility of deciding whether a change is in the child's best interest with the court, not the county social services agency. However, counsel should be mindful that section 366.26(n) does not cover caregivers who do not qualify as prospective adoptive parents (such as those who have not had the child in their care for six months or



longer or who have not “taken steps” to facilitate adoption, such as requesting de facto status). These situations will most likely still be treated under the *Theodore D.* standard.

2. Adoption Identified as Goal and Hearing Continued If Child Is Difficult to Place

If the court finds that the child has a probability of adoption but is difficult to place and there is no identified prospective adoptive parent, it may continue the case for no more than 180 days to allow the county social services agency to seek an adoptive family. The court may take this step only if it has determined that termination would not be detrimental to the child (i.e., that none of the 366.26(c)(1) exceptions applies). Under this option, parental rights stay intact for the time being but adoption is identified as the permanent goal. (§ 366.26(c)(3).)

The finding that a child has a probability of adoption must be proved by clear and convincing evidence. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1351 [no evidence supported finding of probability of adoption for a special-needs child with several failed placements whose behaviors included head-banging and feces-smearing].)

During the 180-day period, in an effort to locate an adoptive family, the county social services agency must contact other public and private adoption agencies and ask the child (if age 10 or older) to identify persons important to him or her. At the continued hearing, the court does not readdress the issues already determined (such as inapplicability of the (c)(1)(A) exceptions) but is limited to either terminating parental rights or appointing a legal guardian. (§ 366.26(c)(3).)

- A child can only be designated as “difficult to place” based on
- Membership in a sibling group;
 - The presence of a diagnosed medical, physical, or mental handicap; or
 - The child’s age (seven years or older). (*Ibid.*)

Current placement in the same home is not required for children to qualify as members of a sibling group. (*In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1438.)

There is a split of authority as to whether a section 366.26(c)(3) finding is appealable, with *In re Ramone R.*, *supra*, 132 Cal.App.4th at p. 1339 and *In re Gabriel G.*, *supra*, 134 Cal.App.4th at p. 1428 holding that findings such as “difficult to place” and “probability of adoption” are appealable, but *In re Cody C.* (2004) 121 Cal.App.4th 1297 and *In re Jacob S.* (2002) 104 Cal.App.4th 1011 concluding that appeal is premature because no final rulings have yet been made.



TIP This provision can be effectively used to prevent termination of parental rights for a child who, because of special needs, might otherwise become a “legal orphan”—a situation that, even if it is now considered remediable under section 366.26(i)(2), should be avoided at all costs given the emotional trauma that it can cause the child. A finding that a child is difficult to place appropriately puts the pressure on the county social services agency to prove through action that it can find an adoptive home for a child (or group of children) whose prospects for adoption seem limited.

3. Appointment of a Legal Guardian

If the court finds that adoption will not be in the child’s best interest because one of the exceptions under 366.26(c)(1)(A)–(E) applies, it may appoint the current caregiver or another appropriate person as the child’s legal guardian. (§ 366.26(b), (c)(4)(A) & (d); Cal. Rules of Court, rule 5.725(e)(6).) The court may also base a guardianship order on a finding that reasonable reunification services were never provided or that the county social services agency failed to find an adoptive home for a difficult-to-place child within the 180-day period. (§ 366.26(c)(3); Cal. Rules of Court, rule 5.725(e)(6).)

Before entering an order of guardianship, the court must read and consider the guardianship assessment prepared pursuant to section 361.5(g), 366.21(i), or 366.22(b). Legal guardianship must be



considered before long-term foster care so long as it is in the child's best interest and a suitable guardian is available. (§ 366.26(d).)

With the consent of the county social services agency, following termination of parental rights the court may also appoint a guardian to serve until finalization of the adoption. (§ 366.26(j).)



TIP Appointment of a guardian pending adoption may be an important advocacy option, especially in the case of a disabled child whose medical or educational needs may frequently require someone with the legal authorization to make decisions and sign consent forms.

4. Long-Term Foster Care or Another Planned Permanent Living Arrangement

In the statutory scheme of dependency, the least favored outcome is an order placing the child in long-term foster care. Such an order must be reviewed every six months under section 366.3. (§ 366.26(b)(4) & (c)(4)(A).)

The child cannot be in two permanent plans simultaneously, so, when ordering a child into long-term foster care, the court must terminate any existing guardianships. (*In re Carrie W.* (2003) 110 Cal. App.4th 746, 760.)



TIP The *In re Carrie W.* decision does not contradict the provision under section 366.26(j) allowing the court to appoint a guardian after termination of parental rights while adoption is pending, as in that instance there remains only one permanent plan—adoption. Guardianship is granted only as a temporary measure to expedite legal decisionmaking until the adoption can be finalized.

If the child's current caregiver (relative or foster parent) to whom the child has substantial psychological ties is unwilling to be named guardian but is willing and capable of providing a stable and permanent home, the child shall not be removed if the court finds that removal would be seriously detrimental to the child's emotional well-being. (§ 366.26(c)(4)(A).)





TIP If challenging a child's proposed or new placement, counsel should be aware of an important provision, section 366.26(c)(4)(A).

If the court has ordered long-term foster care or another planned permanent living arrangement with a relative caregiver, the court may authorize that caregiver to make decisions and provide legal consent for the child's medical care. (§ 366.27(a).) The court may also limit the parent's right to make educational decisions for a child in long-term foster care or another planned permanent living arrangement and appoint the caregiver as the responsible adult authorized to do so. (§ 366.27(b).)

ANCILLARY ORDERS AND OTHER ISSUES

1. Visitation

If the court orders the child into a plan of either guardianship or long-term foster care, it must also enter orders for visitation with the parent unless it finds by a preponderance of the evidence that visitation would be detrimental to the child. (§ 366.26(c)(4)(c); Cal. Rules of Court, rule 5.725(e)(6).) The court cannot delegate authority to the guardian to determine whether or not visits will occur and, if authorizing visitation, must also make orders as to frequency and duration. (*In re M.R.* (2005) 132 Cal.App.4th 269, 274–275.)

2. Termination of Jurisdiction Under Legal Guardianship

Once a nonrelative has been appointed as legal guardian, the court may either continue jurisdiction over the child as a dependent or terminate dependency jurisdiction while maintaining jurisdiction over the child as a ward of the legal guardianship. If a relative with whom the child has been placed for the prior 12 consecutive months is appointed guardian, the court must terminate dependency jurisdiction under the Kin-GAP program unless the guardian objects or exceptional circumstances exist. If dependency jurisdiction is dismissed



under these circumstances, the court retains jurisdiction over the child as a ward of the legal guardianship. (§ 366.3(a); see also Termination of Jurisdiction fact sheet.)

3. Designation of Prospective Adoptive Parent

The court can designate the current caregiver as a prospective adoptive parent if all the conditions of section 366.26(n) are satisfied.



TIP If the caregiver qualifies, counsel should consider requesting this designation as soon as possible (i.e., at the first .26 hearing) to protect the child’s placement. Note that the language of the statute does not require parental rights to have been terminated before this designation can be made.

4. Orders Necessary for Referral to Special Immigrant Juvenile Status

Undocumented dependent children can apply for permanent resident status under the Special Immigrant Juvenile Status (SIJS) program. In order to apply, the child must have been deemed “eligible for long-term foster care,” which, under federal law, means that family reunification is no longer a viable option. Children who have been referred for adoption or placed in a guardianship are eligible in addition to those for whom long-term foster care is the identified permanent plan.

The child must also have been the subject of a finding by the juvenile court that it is not in his or her best interest to be returned to the country of origin and that the child must continue to be under the jurisdiction of the juvenile court. (8 C.F.R. § 204.11; see also Immigration fact sheet.)



TIP Counsel for a child who was born in a foreign country and who is not a legal immigrant should ensure that the court makes the appropriate findings at the .26 hearing and that the child is referred for SIJS.



**REVIEW OF
PERMANENT PLAN**

Review of Permanent Plan Checklist (§ 366.3): Child's Attorney

BEFORE

- Review social worker's report to ensure that social services agency is
 - Providing all court-ordered services.
 - Facilitating visitation orders.
 - Making all efforts to ensure child placed in a safe and permanent home.
 - Taking action to identify and maintain relationships with persons important to children 10 or older who have been in a group home for six months or more.
- Contact child to discuss in private
 - Progress in school, counseling, or other programs.
 - Feelings about placement and any particular concerns or problems.
 - Feelings about permanent plan and/or emancipation.
 - Visitation/contact with parent, siblings, and others.
- Contact caregiver re
 - Any impediments to adoption or guardianship.
 - Provision of services to the child by the social services agency to meet any special needs.
 - Child's progress in school, counseling, and other programs.
- Consider termination of jurisdiction—is it in the child's best interest?
- Consider return to home of parent or reinstatement of reunification/parental rights.



DURING

- Inform court of the child's wishes and any identified needs.
- Object to termination of jurisdiction if not in child's best interest (e.g., if child is pursuing legalization through Special Immigrant Juvenile Status [SIJS], or Kin-GAP funding is not yet available).
- Request any appropriate orders (e.g., limitation of parent's educational rights).
- Consider asking for hearing if it appears agency arbitrarily moved child.
- Ensure court addresses
 - Whether reasonable efforts were made to finalize permanent plan.
 - For children in planned permanent living arrangement / long-term foster care,
 - Appropriateness of all permanent plans, including return to parent.
 - Reinstatement of reunification. (§ 366.3(e)(10).)
 - Continuing necessity and appropriateness of placement.
 - Adequacy of services provided to the child.
 - Sufficiency of efforts made to place siblings together and facilitate contact.
 - Adequacy of efforts to identify and facilitate relationships with individuals important to children 10 or older. (§ 366.3(e)(3).)
 - Provision of services for transition to independent living for children 16 years of age or older. (§ 366.3(10).)
 - Whether to limit the parent's right to make educational decisions.
 - Whether setting a .26 hearing is in the child's best interest.



AFTER

- Consult with child to explain court orders and rulings and answer questions.
- Send letter to caretaker with contact information and update on orders and rulings.
- If in client's interest, file a 388 motion seeking change/modification of orders.
- File necessary forms/motions if pursuing an appeal, writ, or emergency writ.

Review of Permanent Plan Checklist (§ 366.3): Parent's Attorney

BEFORE

- Contact client to discuss
 - Current situation and progress in any programs or services.
 - Possibility of filing a 388 motion.
 - Visitation and contact, including sibling contact. (§ 16002(e).)
 - Updated contact information.
 - Appropriateness of current placement.
- Review social worker's report to ensure that social services agency is
 - Continuing contact with client and visitation as ordered.
 - Continuing contact with relatives and important people.
 - Making efforts to locate a permanent home.
 - Providing necessary services to the child (including independent living skills for a child 16 and older).
 - Noticing parent: Service no earlier than 30 days nor later than 15 days before hearing. (§ 295.)
- Contact caregiver, if appropriate, to discuss
 - Current contact with client and siblings and willingness to continue if jurisdiction terminated.
 - Whether guardianship is appropriate.

DURING

- Inform court of the client's wishes.
- Request whether client can avail self of any orders relating to the child's services (e.g., family therapy).
- Ensure court addresses
 - Continued contact and reunification possibilities. (§ 366.3(e).)
 - Whether reasonable efforts have been made to finalize permanent placement.

- Exit orders if terminating jurisdiction prior to emancipation.
- Section 39I requirements (if child has reached age of majority).

AFTER

- Consult with client to explain court orders and rulings and answer questions.
- Set timelines and future goals for client.
- File necessary forms/motions if pursuing an appeal or emergency writ.



Black Letter Discussion and Tips

As long as a child's case remains open under dependency jurisdiction, periodic reviews of the permanent plan (RPP's) (sometimes called permanency reviews) must be conducted to assess the child's safety and the appropriateness of plans and services to effectuate permanency. (§ 366.3(d); Cal. Rules of Court, rule 5.740(b).) If the identified permanent plan is adoption or guardianship, the court must ensure that the plan is completed as expeditiously as possible. (§ 366.3(a); Cal. Rules of Court, rule 5.740(a).) At least once a year, a court review must be conducted for a child in long-term foster care, at which time all options for permanency must be considered including return to the home of the parent. (§ 366.3(g); Cal. Rules of Court, rule 5.740(b)(6).)



TIP

Permanency reviews are intended to keep the case actively moving—to achieve a permanent plan, which can be adoption, guardianship, return to the parent's custody, or entry of another planned permanent living arrangement. Attorneys carry a heavy responsibility to ensure that the child is not just “warehoused” and that all efforts are expended to get the child into a safe, loving, and permanent home.

TIMING AND SETTING OF REVIEW HEARINGS

A case review must be held at least once every six months following termination or denial of reunification services. (§ 366.3(a); Cal. Rules of Court, rule 5.740(a)(b).) Generally the review may be conducted by either a court or a local review board/administrative panel. However, the review must be before a court if

- The child has been freed and placed for adoption;
- The child, parent, or guardian requests court review;
- Twelve months have passed since an order placing the child in long-term foster care was made or since the last 366.26 hearing; or



- It has been 12 months since the last court review. (§ 366.3(d); Cal. Rules of Court, rule 5.740(b); see also *In re Dakota H.* (2005) 132 Cal.App.4th 212, 226.)

NOTICE

Notice must describe the type of hearing, any recommended changes in the child's status or custody, and any recommendation that a new section 366.26 hearing be set to select a more permanent plan. Notice must be served between 15 and 30 days before the hearing. Service must be by first-class mail to the last known address of the mother, the presumed father, the legal guardians, the child and dependent siblings if age 10 or older (and their caregivers and attorneys), the child's caregiver (relative, foster parent, Indian custodian, foster family agency, or community care facility), and all attorneys of record on the case. If there is reason to believe the child is an Indian child, notice must also be sent by registered mail (return receipt requested) to the Indian custodian and tribe if known or to the Bureau of Indian Affairs and must include a statement that the Indian custodian or tribe may intervene at any point in the proceedings. Parents whose rights have been terminated are not entitled to notice, nor are alleged fathers unless the county social services agency is recommending that the court set a new section 366.26 hearing. (§ 295; Cal. Rules of Court, rule 5.740(a)(4).)

BURDEN OF PROOF AND STATUTORY ELEMENTS

For a child in long-term foster care, continued care is presumed to be in the child's best interest unless a parent seeking further reunification proves by a preponderance of the evidence that such efforts are the child's best alternative. (§ 366.3(g); Cal. Rules of Court, rule 5.740(b)(5).) The Court of Appeal has held that this standard mirrors that required in a hearing on a section 388 petition, i.e., the parent carries the burden to show by a preponderance of the evidence that the requested change (resumption of reunification services) is

in the child's best interest. (*Nahid H. v. Superior Court* (1997) 53 Cal. App.4th 1051, 1068, 1071.)

At each permanency review for a child in long-term foster care the court must consider all permanency planning options including return to the home of the parent. (§ 366.3(g); Cal. Rules of Court, rule 5.740(b)(6).) However, the burden and standard of proof for return at a permanency review are not directly stated in section 366.3(g), aside from the presumption that continued care is in the child's best interest. Decisional law clarifies that the social services agency need not continue to prove the parent unfit at each status review; rather, as at a section 388 hearing, the burden has shifted to the parent to prove changed circumstances and that return would be in the child's best interest. (See *In re Dakota H.* (2005) 132 Cal. App.4th 212, 226.)

Only on finding compelling reasons that return home, placement for adoption, and appointment of a guardian would not be appropriate permanency plans may a court order another planned permanent living arrangement for a child in long-term foster care. The court must set a selection and implementation hearing unless it finds clear and convincing evidence of a compelling reason that doing so is not in the best interest of a child in long-term foster care because the child is being returned to the home of a parent, is not a proper subject for adoption, or there is no one willing to accept legal guardianship. (§ 366.3(g).)

Each six-month review for a child in a placement other than with a guardian must address progress to provide a permanent home, the child's safety, and each of the following:

- Continuing necessity for and appropriateness of the placement;
- Identification of and actions to maintain relationships with individuals (other than siblings) important to a child age 10 or older who has been in out-of-home placement for six months or longer;
- Continuing appropriateness of the child's permanent plan;



- Extent of agency’s compliance with plan and reasonableness of its efforts to return child to a safe home and finalize the permanent plan;
- Whether parent’s educational rights should be limited under section 361;
- Adequacy of services to the child, including those required under section 391 for teens nearing emancipation;
- Extent of parent’s progress in alleviating or mitigating problems necessitating foster care;
- Likely date child may be returned to a safe home or placed for adoption, guardianship, or another planned permanent arrangement;
- Whether the child has dependent siblings and if so
 - Nature of the relationship;
 - Appropriateness of developing or maintaining the relationship;
 - If not placed together, efforts to do so or why not appropriate, and the frequency of visits;
 - Impact of the sibling relationship on the child’s placement and permanency planning; and
- For children age 16 and older, services to assist in the transition to independent living. (§ 366.3(e).)

Additionally, if parental rights have been terminated and adoptive placement has been ordered, the agency’s report should address

- Child’s present placement;
- Child’s current physical, mental, and educational status;
- Whether the child has been placed with a prospective adoptive parent and, if not, efforts to identify a prospective adoptive parent and progress in search for an adoptive placement;
- Whether the adoptive placement agreement has been signed and filed;



- If the child has not been adoptively placed, identification of and actions to maintain relationships with individuals (other than siblings) important to the child;
- Appropriateness of postadoptive sibling contact pursuant to section 366.29;
- Any impediments to adoption or adoptive placement; and
- Anticipated date of adoptive placement or finalization of the adoption. (§ 366.3(f).)

REASONABLE EFFORTS / SERVICES

After termination of reunification, the reviewing body must make a determination at each review as to the reasonableness of the social services agency's efforts to make and finalize a permanent plan. (§ 366.3(d)(4), (e)(4)(10) & (f)(12).) The focus of the review is to assess the agency's compliance with the child's case plan (i.e., the adequacy of services to the child) as well as the reasonableness of efforts to "return the child to a safe home" or otherwise finalize a permanent placement. (§ 366.3(e)(4) & (6).)



TIP Minor's counsel should evaluate the services currently being provided to the child with special attention paid to the issues delineated in sections 366.3(e) and (f) in light of the client's specific circumstances. If the child's needs are not being adequately met or new problems that require intervention have arisen, the case plan may need to be updated and a request made for appropriate services. Further, if court-ordered services in the existing case plan have not been provided and informal attempts at resolution through the social worker have failed to resolve the deficiencies, counsel might consider requesting a contested hearing on the reasonableness of the agency's efforts.



RIGHT TO CONTEST

Unless parental rights have been terminated, a parent has a right to have notice of and participate in section 366.3 status review hearings. (§ 366.3(e)(10); Cal. Rules of Court, rule 5.740(a).) The right to participate necessarily includes the right to challenge a proposed order through presentation of testimony or other evidence, cross-examination of witnesses, and argument. (*In re Kelly D.* (2000) 82 Cal.App.4th 433, 439–440.) A parent has the right to have notice of and to contest any recommended changes, such as modifications to visitation. (*Id.* at p. 440.) The right to contest extends to challenges to the contents of the report and the appropriateness of continued long-term foster care for the child. (*In re Josiah S.* (2002) 102 Cal. App.4th 403, 417.)

A parent does not, however, have the right to contest the court’s decision that changed circumstances warrant setting a selection and implementation hearing under section 366.26. (See *San Diego County Department of Social Services v. Superior Court (Sylvia A.)* (1996) 13 Cal.4th 882, 891–892.) Nor is a parent necessarily entitled to a contested hearing on the issue of return; the court need only “consider” that option after accepting an offer of proof. (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147.)

POSSIBLE OUTCOMES OF HEARING

1. Return Home

Both the Welfare and Institutions Code and the California Rules of Court make it clear that for a child in long-term foster care, the option of return to the parent’s custody is always on the table at a section 366.3 review. (§ 366.3(e)(1), (4) & (7), (g); Cal. Rules of Court, rule 5.740(b)(6) & (7).) Section 366.3(g) explicitly states that “the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent...” Additionally, each six-month review must address the “extent of progress the parents or legal guardians have made toward



alleviating or mitigating the causes necessitating placement in foster care.” (§ 366.3(e)(7).) However, the court need only “consider” return; a parent does not have the right to a contested hearing on the issue if the parent’s offer of proof is found insufficient. (*Maricela C.*, *supra*, 66 Cal.App.4th at p. 1147.)

2. Reinstate Reunification Services

Following termination of reunification services, return to the parent or guardian is no longer the focus of the court’s proceedings. In fact, it is presumed that continued out-of-home care is in the best interest of the child unless the parent can show by a preponderance of evidence that reinstatement of reunification services is the child’s best alternative. However, if the parent does successfully meet this standard, the court has the discretion to order resumption of reunification services for a period not to exceed six months. (§ 366.3(e); Cal. Rules of Court, rule 5.740(b)(5).)

3. Set a Section 366.26 Hearing

At the 12-month hearing for a child in a plan of long-term foster care, the court must set a section 366.26 hearing absent clear and convincing evidence that there is a compelling reason that such a hearing is not in the child’s best interest. Compelling reasons include return of the child to the parent’s home or a finding that the child is not the proper subject for adoption and there is no one to assume guardianship. (§ 366.3(g); Cal. Rules of Court, rule 5.740(b)(7).)

At any section 366.3 review, the court may set a selection and implementation hearing *sua sponte* if it determines that circumstances have changed since entry of the original permanent plan of long-term foster care. (Cal. Rules of Court, rule 5.740(b)(3).) Additionally, the court may set a hearing to consider a more permanent plan on finding changed circumstances based on the request of any party (including the social services agency); the filing of a section 388 petition is not a necessary prerequisite. (*San Diego County Department of Social Services*, *supra*, 13 Cal.4th at pp. 891–892.) Neither a 388

petition nor a separate noticed hearing are necessary in order for the court to set a new selection and implementation hearing to consider change from guardianship to adoption. (See § 366.3(c); *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1106–1108.)

4. Terminate Jurisdiction

The court cannot close the case of a child under age 18 absent return to a parent or finalization of guardianship or adoption. There are several circumstances, though, under which the court may terminate jurisdiction at a section 366.3 review, including the following:

a. Return to a Parent

Although this option is possible, rarely would a court be comfortable with releasing a child from long-term foster care to a parent and then immediately terminating jurisdiction. The code does not specify the procedure to be followed when a child is returned to the parental home under section 366.3(g), but the court will usually at least want to maintain supervision and provide services for a period of time to ensure that the return is safe and successful. If jurisdiction is to be terminated, however, any appropriate exit or family law orders regarding custody and/or visitation should be made. (§ 362.4; see also Termination of Jurisdiction fact sheet.)

b. Finalization of Adoption

The court must terminate jurisdiction upon finalization of adoption. (§ 366.3(a); Cal. Rules of Court, rules 5.730(g), 5.740(a)(2).)

c. Appointment of Legal Guardian

When a nonrelative is appointed legal guardian the court has the discretion to continue dependency jurisdiction or to terminate the dependency case while retaining jurisdiction over the child as a ward of the legal guardianship. (§ 366.3(a); Cal. Rules of Court, rule 5.740(a)(3).) If a relative with whom the child has been placed for the preceding year is appointed guardian, the court must close the dependency case under the Kin-GAP funding program unless

the guardian objects or the court finds exceptional circumstances. After closing the dependency case, the juvenile court retains jurisdiction of the child as a ward of the guardianship under section 366.4. (§ 366.3(a).)



TIP Funding under Kin-GAP is only equivalent to the base rate for foster care. Ensure that the guardian understands that closing the case under Kin-GAP will result in the loss of all supplemental funding, such as the increased rate for children with medical or emotional and behavioral problems (so-called F and D rates) as well as funds for daycare. (See further discussion in fact sheets on funding and termination of jurisdiction.)

d. Child Reaches Age of Majority

Once the dependent has reached the age of 18, the court has the discretion to terminate jurisdiction if doing so is in the youth's best interest. (§ 391.) Note that jurisdiction may be retained until the youth reaches age 21. (§ 303.) Before a case is closed, the court must address whether the agency has provided the emancipating youth with the documents, information, and services required under section 391. (§§ 366.3(e)(6), 391.) The JV-365 form, *Termination of Dependency Jurisdiction—Child Attaining Age of Majority* (essentially a checklist of the section 391 requirements), must be provided to the court, child, parent or guardian, and Court Appointed Special Advocate (CASA) at least 10 days before the hearing. (Cal. Rules of Court, rule 5.740(d).)

The decision to terminate jurisdiction is discretionary, conducted under a best-interest standard based on an analysis of whether closing the case poses an existing or a reasonably foreseeable threat of harm. This standard requires analysis of the specific facts and circumstances of the dependent youth's current situation.

Case law provides some factors for consideration in assessing whether termination is appropriate: (1) case properly closed for 18-year-old who refused all services (*In re Holly H.* (2002) 104 Cal. App.4th 1324); (2) maintenance of jurisdiction solely to provide



special assistance to finance college was inappropriate (*In re Robert L.* (1998) 68 Cal.App.4th 789); (3) termination of jurisdiction improper for 19-year-old who had not yet graduated from high school but was cooperative with agency and school, and fact that federal reimbursement to the county for foster care ceases when a child turns 18 is irrelevant to the required consideration of the dependent's best interest (*In re Tamika C.* (2005) 131 Cal.App.4th 1153). (See also Termination of Jurisdiction fact sheet.)



TIP If the youth is an undocumented immigrant with a pending application for Special Immigrant Juvenile Status (SIJS) *do not allow jurisdiction to be terminated* until legal permanent resident status has been granted. (See further discussion in Immigration fact sheet.)

5. Placement in Another Planned Permanent Living Arrangement

At the review for a child in long-term foster care, the court may determine that the child should be placed in another planned permanent living arrangement (APPLA) only if it finds compelling evidence that neither return to the parent, adoption, or legal guardianship is in the child's best interest. (§ 366.3(g).) The phrase "another planned permanent living arrangement" is not synonymous with "long-term foster care" but was added to the dependency statutes to meet federal funding requirements and is intended to "permit creative solutions for safe, permanent living arrangements for minors who could no longer reside with their parents." (*In re Stuart S.* (2002) 104 Cal. App.4th 203, 208–209.) It is an option that should be invoked rarely and must be based on a compelling reason such as (1) an older teen seeking emancipation as a goal; (2) a foster placement committed to raising the child while allowing frequent visitation with a disabled parent to whom the child is strongly bonded; or (3) an alternate plan identified by the tribe for an Indian child. (*Id.* at p. 208; 45 C.F.R. § 1356.21(h)(3).)





TIP Be careful that a finding that the child is in APPLA is not made if in fact the child is merely in long-term foster placement with no commitment for stability. An APPLA finding may be interpreted to relieve the agency from addressing all the concerns of section 366.3(e) at future reviews as well as from its continuing duty to pursue a more permanent plan.

6. Continue in Long-Term Foster Care Until Next Review

An order that a child remain in long-term foster care can be made only if the court finds clear and convincing evidence of a compelling reason not to set an implementation and selection hearing. Compelling reasons may include a determination by the agency that it is unlikely that the child will be adopted or that one of the exceptions under section 366.26(c)(1) applies. (§ 366.3(g).) If the court does continue the child in long-term foster care, it must continue supervision and set the case for a review within six months, at which time it (or the local review board) must address continuing efforts to return the child to the home or to finalize a permanent placement as well as all the criteria of section 366.3(e). (§ 366.3(d), (e) & (g).) Two permanent plans cannot exist concurrently; therefore an existing guardianship must be terminated once a child is ordered into long-term foster care or another planned permanent living arrangement. (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 760.)



TIP Both federal and state legislators have recognized that foster care does not generally provide permanency but rather subjects a child to multiple placements and, all too often, release from the dependency system at the age of majority with no supportive relationships or structure on which to rely. (*In re Stuart S.*, *supra*, 104 Cal.App.4th at p. 207.) Counsel should pursue court orders and otherwise advocate to ensure that the agency meets its continuing duty to actively facilitate permanency whether through return to a parent, guardianship, adoption, or a genuine APPLA in the appropriate case.



**SUBSEQUENT AND
SUPPLEMENTAL PETITIONS**

Black Letter Discussion and Tips

Once the juvenile court has made a finding that a child is described by section 300, a subsequent petition under section 342 is used to allege new circumstances that may form a separate basis for jurisdiction. A section 387 supplemental petition seeks to change a dependent child's placement with that of a parent or relative to foster care by alleging that the previous disposition has been unsuccessful in the protection or rehabilitation of the child or that the relative's home is no longer appropriate.

Most statutory requirements and relevant appellate decisions are equally applicable to subsequent and supplemental petitions. Therefore, this discussion will initially address the shared standards and procedures and separately address only unique issues.

PROCEDURE, TIMING OF HEARINGS, AND NOTICE

Both subsequent and supplemental petitions are resolved through the same procedural process as that used for an original petition; all the same hearings (detention through disposition) should be held within all the same timelines. (§§ 342, 387(d) & (e); Cal. Rules of Court, rules 5.560(b), 5.565.) Notice requirements are also identical to those for an initial petition. (§ 297(a)(b); Cal. Rules of Court, rule 5.565(c).) As with an initial 300 petition, jurisdictional and dispositional issues must be addressed through a bifurcated hearing. (Cal. Rules of Court, rule 5.565(e); *In re Jonique W.* (1994) 26 Cal. App.4th 685, 691.)



TIP As the remainder of this discussion will cover only the issues particular to subsequent and supplemental petitions, the practitioner should refer to the relevant black letter discussion elsewhere in this manual for information specific to a corresponding phase in the original proceedings (e.g., “Burden of Proof and Statutory Elements” in the Initial/Detention black letter discussion).



TIME LIMITS ON REUNIFICATION

Following adjudication of the petition, the same rules govern the provision of reunification services at the dispositional hearing on supplemental and subsequent petitions. (*In re Barbara P.* (1994) 30 Cal.App.4th 926, 934.) Reunification services must be provided when a child is removed from parental custody for the first time unless circumstances in section 361.5(b) apply. (*In re Joel T.* (1999) 70 Cal.App.4th 263, 268.) Therefore, if the original dispositional order allowed an undetained child to remain in the parent's custody, receipt of family maintenance and/or preservation services in the interim should not bar or reduce the duration of reunification services provided at the subsequent disposition. The timeline for reunification begins anew with the child's actual removal from the parent on the 342 or 387 petition.

However, once they have begun to run, the time limits on reunification specified in section 361.5(a) are not tolled during periods of return to parental custody. (§ 361.5(a)(3).) In other words, if at any time during the existing dependency case the court previously ordered the child removed from the parent's custody, the time limits for reunification are not reset upon re-removal. (*In re Barbara P.*, *supra*, 30 Cal.App.4th at p. 933.) The timeline for reunification is measured from the date of initial detention, when the original petition was filed, even if the child was subsequently returned to the parent's custody at the original disposition. (*In re N.M.* (2003) 108 Cal.App.4th 845, 855.)

In cases involving a second removal, the question at disposition on the subsequent or supplemental petition becomes whether reunification services can still be offered and, if so, for what period of time. This determination centers on the length of time since the child was initially detained, whether the parents were offered and received reasonable services in the interim, and, if past the 12-month date, whether there is a substantial probability of return if services are extended to the 18-month limit. (Cal. Rules of Court, rule 5.565(f); *In*

re N.M., supra, 108 Cal.App.4th at p. 853; see also “Time Limits on Reunification” in the Status Reviews black letter discussion.)

Note that the above constraints on reunification apply only to subsequent or supplemental petitions filed during an open dependency case. If a new section 300 petition is filed involving a child whose prior dependency case had been terminated after successful reunification, the parent is once again entitled to receive services to reunify unless one of the section 361.5(b) criteria applies. (*Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188.)

SECTION 342

The social services agency may file a subsequent petition at any time following a true finding on the allegations in an original 300 petition. The grounds for jurisdiction it states must be unrelated to those initially alleged. (§ 342; Cal. Rules of Court, rule 5.560(b).) The allegations must be new and cannot concern facts or circumstances known to the agency at the time of the initial petition was adjudicated. Reasons for filing a subsequent petition when additional abuse comes to light might include the need for a different case plan offering targeted services or dispositional alternatives. Such a situation might arise, for example, if the sustained allegations involved only inappropriate discipline and the child later makes disclosures concerning sexual abuse.

STATUTORY ELEMENTS

The statutory elements and burdens of proof at each stage of the proceedings on a subsequent petition are the same as those initially required at detention, adjudication, and disposition. (§ 342; Cal. Rules of Court, rules 5.560(b), 5.565(e).)

SECTION 387

A section 387 supplemental petition is appropriately filed when a prior disposition has been unsuccessful in protecting or rehabilitating the child or the child's placement with a relative is no longer appropriate under the criteria of section 361.3. (§ 387(b); Cal. Rules of Court, rule 5.560(c).) It also provides a vehicle for reinstatement of dependency jurisdiction over former dependent youth who were declared 601 or 602 but whose delinquency status has subsequently been terminated. (§ 387(c).)

WHEN A PETITION IS NECESSARY / STANDING TO CHALLENGE REMOVAL

Much of the case law on section 387 centers on the issue of whether the social services agency must file a petition when seeking to change a child's placement and the related issue of whether the caregiver has standing to challenge removal of a child. Removal from a parent clearly requires filing of a petition and initiation of the attendant procedural protections. (§ 387; see *In re Paul E.* (1995) 39 Cal. App.4th 996, 1000, fn. 2.)

However, there is a split of authority on the issue of whether removal from a relative (or nonrelative extended family member) caregiver necessarily requires a petition under section 387. One position holds that if the juvenile court simply enters a "general placement" order at disposition (thereby placing the child in the "care and custody" of the agency), the agency has discretion to remove the child from a relative to a placement it deems more suitable; a supplemental petition is not necessary. Further, the relative's status as a de facto parent does not confer a right to continued placement nor trigger the need for a petition or hearing. (*In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1481, 1490.) But two appellate districts have reached the opposite conclusion, finding that (1) removal from a custodial relative, especially one whose conduct is central to the question of placement, requires filing of a supplemental petition that the relative has standing to contest

(*In re Jonique W.* (1994) 26 Cal.App.4th 685, 693); and (2) a relative caregiver recognized as a de facto parent has standing to challenge a section 387 petition (*In re Joel H.* (1993) 19 Cal.App.4th 1185, 1196).



TIP The safest way to ensure that a relative placement will be protected by the procedural requirements of section 387 is to ensure at the original disposition that the court makes a “specific placement” order with that relative, as authorized under *Robert A.* (*In re Robert A.* (1992) 4 Cal.App.4th 174, 189–190; see also Relative Placements fact sheet.)

Following termination of parental rights, the transfer of exclusive care and custody of the child to the social services agency “necessarily change[s] any previous placement order,” thereby dispensing with the need for a petition under section 387 for any subsequent changes of placement. (*In re A.O.* (2004) 120 Cal.App.4th 1054, 1061.) Removal in such situations would be subject only to judicial review of whether the agency’s actions constituted an abuse of discretion, unless the caretakers qualify as prospective adoptive parents (see TIP below). (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721, 724.) Nevertheless, the court retains the ultimate responsibility for a dependent child’s well-being and has a duty to ensure that the agency consider a child’s best interest when making posttermination placement changes, particularly when the child is removed from a long-term placement. (*In re Shirley K.* (2006) 140 Cal.App.4th 65.)



TIP If a caregiver qualifies as a prospective adoptive parent under section 366.26(n), the agency must now give notice of intent to remove, and a child or caregiver objecting to the new replacement is entitled to a hearing on the matter that will be decided under a best-interest standard. (§ 366.26(n); see also Caregivers fact sheet.)



DISMISSAL OF PETITION

Once a supplemental petition has been filed, the agency cannot unilaterally dismiss it if minor's counsel objects. A hearing must be conducted at which the agency must show cause why the petition should be dismissed, and the court must decide if dismissal is in the interests of justice and the child's welfare. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077–1078.)

BURDENS OF PROOF AND STATUTORY ELEMENTS

The social services agency carries the burden to prove the allegations contained in the petition. (§ 387(b).) Removal from the home of a relative or nonrelative extended family member to a higher level of care (i.e., foster care, group home, or institution) requires proof by a preponderance of the evidence. (*In re Jonique W.* (1994) 26 Cal. App.4th 685, 691.) The agency must show either that the previous disposition has been ineffective in protecting or rehabilitating the child or that placement with a relative is no longer appropriate under the standards of section 361.3. (§ 387(b).) The statutory criteria for determining the appropriateness of a relative placement include, but are not limited to, factors such as

- The child's best interest (including special physical, psychological, educational, medical, or emotional needs);
- The wishes of the parent, relative, and child;
- Proximity to the parents to facilitate visitation and reunification;
- Placement of siblings in the same home;
- The good moral character of the relative and other adults in the home in light of criminal and child abuse/neglect histories;
- The nature and duration of the relationship between the child and relative and the relative's desire to provide permanency if reunification fails;
- The ability of the relative to provide a safe, secure, and stable environment; and

- The safety of the relative's home, i.e., whether the home has been approved pursuant to section 309(d). (See § 361.3.)

Mere withdrawal of the agency's approval of an existing relative placement does not constitute sufficient evidence that the prior disposition was ineffective or that the placement is no longer appropriate under section 361.3. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 547.) The court retains a duty to independently determine the appropriateness of a placement, and the agency does not have unfettered discretion to change court-ordered placements. (*Id.* at p. 542.)

REMOVAL FROM A PARENT

If the petition seeks to remove custody from a parent, the social services agency not only must present clear and convincing proof that the previous disposition has been ineffective in protecting the child, but it must also meet the original dispositional standard for removal under section 361. In other words, there must be clear and convincing evidence that there exists a substantial danger to the child's physical health and that there are no reasonable means to protect the child without removal from the parent's custody. (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1000–1001.) Failure to fully comply with the service plan alone does not constitute clear and convincing evidence of danger sufficient to support removal from the home of a parent. (*Id.* at p. 1004.)



TIP Beware of so-called nondetaining 387s in which the court is urged to sustain the allegations but allow the child to remain home, merely for the purpose of putting additional pressure on the parents. This practice is contrary to the intent as well as the explicit language of section 387, which should be utilized only when the agency can meet its burden by proving that removal from the parent or relative is necessary.



**MOTIONS
FOR MODIFICATION**

Black Letter Discussion and Tips

Once a child has been declared dependent or a guardianship has been ordered under section 360, a request to change, modify, or set aside any order of the court can be made in the form of a section 388 petition. A 388 petition may also be utilized to request termination of jurisdiction, recognition of a sibling relationship, or (under certain circumstances) reinstatement of parental rights. Petitions must be based on a change of circumstance or new evidence and demonstrate that the action requested serves the minor's best interest.

WHEN A 388 PETITION MAY BE FILED AND WHEN NOT NECESSARY

A 388 petition can be filed only after the dispositional hearing, following a declaration of dependency or the entry of a guardianship under section 360.



TIP Methods for requesting a change of order prior to disposition vary from county to county. Some courts routinely use section 388 motions, some utilize local forms, others allow generic civil-style motions to be filed, and still others permit an oral or written request to the court clerk to set the matter on calendar for the court's consideration.

The petitioner may seek “any conceivable change or modification of an existing order.” (§ 388(a); *In re Victoria C.* (2002) 100 Cal. App.4th 536, 543.) For example, petitions under section 388 have been deemed the proper vehicle to challenge dispositional orders and the underlying jurisdictional findings when new admissible and credible evidence raises doubt about the validity of the findings. (See *In re Brandon C.* (1993) 19 Cal.App.4th 1168, 1171–1172 [writ of habeas corpus was denied because issues raised by recantation under the specific facts of the case are more properly addressed under a 388 motion].) Additionally, a due process challenge of the court's jurisdiction based on lack of notice may be properly pursued via



a 388 petition. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 487–488.) In sum, section 388 provides the appropriate method in most instances for requesting any modification of existing orders, and changes that are made outside of this context may constitute reversible error. (See *In re Lance V.* (2001) 90 Cal.App.4th 668 [an order changing mother’s visitation without benefit of 388 petition, notice, or hearing was reversed as it violated due process].)

Certain circumstances, however, do not require the filing of a 388 petition. For example, the court is statutorily empowered at any scheduled permanency review to set a section 366.26 hearing to select a more permanent plan; no 388 petition is needed. (§ 366.3; *San Diego County Department of Social Services v. Superior Court (Sylvia A.)* (1996) 13 Cal.4th 882, 891–892; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1106–1108.) Additionally, although a 388 petition is the common vehicle for termination of a dependency guardianship (see next section), no petition or separate hearing is necessary if the guardian is notified of the recommendation and the issue is addressed in the context of a regularly scheduled hearing. (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 756–757.)

WHO MAY FILE A 388 PETITION

The dependent child (either personally or through his or her attorney or guardian), the parent, or “other person having an interest in a child who is a dependent” may file a 388 petition seeking modification of a prior order or termination of the juvenile court’s jurisdiction. (§ 388(a); Cal. Rules of Court, rule 5.560(e).) Further, “any person,” including the dependent child or a court-appointed guardian ad litem for the child, may file a 388 petition to assert a sibling relationship. (§ 388(b); Cal. Rules of Court, rule 5.560(e).)



TIP Counsel should frequently revisit the circumstances in each case and actively pursue modifications via 388 petitions when the clients’ interests so dictate. In at least one instance, the Court of Appeal upheld a claim of ineffective assistance of coun-

sel where parent's counsel failed to file a 388 petition in a case that was a "clear winner." (See *In re Eileen A.* (2000) 84 Cal.App.4th 1248 [overruled in part on other grounds by *In re Zeth S.* (2003) 31 Cal.4th 396, 413].)

The following considerations apply, depending on the identity of the petitioner.

1. Dependent Child

The court and child's attorney have a statutorily imposed duty to ensure that each dependent child is informed in a developmentally appropriate manner of his or her rights under section 388 and of the forms and procedures needed to pursue a petition for modification, termination of jurisdiction, or assertion of a sibling relationship. (§ 353.1.)

A child for whom parental rights have been terminated may also use section 388 to petition the court for reinstatement of parental rights if

- The child has not yet been adopted more than three years after termination and the court has determined that adoption is no longer the permanent plan; or
- The California Department of Social Services or the licensed adoption agency responsible for the child stipulates that the child is no longer likely to be adopted, regardless of the length of time since the child was freed. (§ 366.26(i)(2).)



TIP Counsel for children should make sure that their clients understand the broad spectrum of issues that can be addressed through a 388 petition, including, but not limited to, changes in visitation (duration, location, necessity for a monitor); the need for additional services such as transportation or tutoring; expansion or discontinuation of therapy; requests to be placed with or to be heard regarding the permanency plan of a brother or sister; and reinstatement of parental rights.



2. Social Worker

The social worker may file a petition, as long as the requested modification is not for a more restrictive level of custody. (Cal. Rules of Court, rule 5.560(e)(2).) In other words, pursuant to this rule of court, the county social services agency may not use a 388 petition to remove a child from the home of a parent or guardian, or to move a child from the home of a relative, to foster care.

3. Biological Parent After Termination of Parental Rights

A biological parent whose parental rights have been terminated is generally viewed as lacking standing to file a modification petition. Except for very narrow circumstances under which a child may petition for reinstatement of parental rights (see above), once the termination order has been issued the juvenile court has “no power to set aside, change, or modify it.” (§ 366.26(i).) Therefore, a petition filed by a biological parent seeking de facto status, visitation, increased contact, or even designation as an “individual . . . important to the child” pursuant to section 366.3(f) is viewed as a collateral attack on the termination that the court has no jurisdiction to entertain. (See *Amber R. v. Superior Court* (2006) 139 Cal.App.4th 897, 902–903.)

4. Any Person With an Interest

The standing conferred in section 388 to “any person with an interest” in the child has been found to be relatively broad in scope. It encompasses de facto parents as well as persons who have not been formally designated as such but who have a strong historical relationship with the child even if not currently serving as caregiver. (See *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 514–516.)

5. Person Asserting a Sibling Relationship

A petition under section 388(b) to assert a sibling relationship is properly filed to request visitation or placement with or near the dependent child; to ask for consideration when the case plan or permanent plan of a dependent child is being devised; or to make any



other request in the dependent child's best interest. Anyone may file the petition, including the dependent child. In order to be considered a sibling for these purposes, a person must be related by blood, adoption, or affinity through a common legal or biological parent. (§ 388(b).) A child does not lose his or her status as a sibling under section 388 if he or she has been adopted. (*In re Valerie A.* (2006) 139 Cal.App.4th 1519, 1523–1524.) A sibling of a child for whom adoption is the proposed plan must file a petition under section 388(b) to be afforded the opportunity to appear at and participate in a section 366.26 hearing. However, as with all 388 petitions, such petitions should be construed liberally. The petitioning sibling need not show that the sibling's position would prevail at the section 366.26 hearing in order to be granted the right to be heard as to the permanency plan, but only that there is a sufficient bond with the child who is the subject of the hearing that "the best interests of that child require full consideration of the impact of interfering with that relationship." (*In re Hector A.* (2005) 125 Cal.App.4th 783, 793–795.)

COURT'S OPTIONS ON RECEIPT OF PETITION

1. Deny, Without a Hearing

The petition must make a prima facie showing *both* that there are changed circumstances/new evidence *and* that the requested modification will be in the child's best interest; if it fails to do so, the court may deny the petition without a hearing. (§ 388; Cal. Rules of Court, rule 5.570(b); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806–807.) The petitioner bears the burden of presenting a prima facie case, but the petition is to be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309–310.) A prima facie showing is made when the facts alleged, if supported by credible evidence, would sustain a favorable decision. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

Mere conclusory statements, unsupported by declarations or other evidence, are insufficient to trigger a hearing. (*In re Anthony W.*



(2001) 87 Cal.App.4th 246, 250.) However, the petitioner need only make a “probable cause” showing and is not required to establish that he or she would prevail on the petition in order to be entitled to a full hearing. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432–433.)



TIP When filing a 388 petition, counsel should ensure that both prongs—changed circumstances and the child’s best interest—are addressed in the petition and are sufficiently supported by attached evidence, such as negative drug tests, program completion certificates, and declarations from caregivers as to the consistency of visitation.

2. Grant, Without a Hearing

If all parties stipulate to the request, the court may grant the petition without conducting a hearing. (Cal. Rules of Court, rule 5,570(d).)



TIP So long as all necessary prima facie showings are made, counsel can have a direct effect on the procedural path of the petition by informing the court of the position of the other parties when filling out the *Request to Change Court Order* (form JV-180). If all parties stipulate to the proposed modification and the court is given sufficient evidence on which to base a favorable ruling, a hearing should not be necessary. Conversely, notification that parties are opposed to the request should trigger a hearing under rule 5,560(d) on the basis that the issue is contested.

3. Set for Hearing

A hearing must be set if the petitioner makes a prima facie showing of changed circumstances/new evidence and that the proposed modification will be in the child’s best interest, a contest appears likely, or the court desires additional evidence on the issues presented. (§ 388(c); Cal. Rules of Court, rule 5,570(d).)



TIME LIMITS FOR A HEARING ON THE PETITION

If a hearing is set on a 388 petition, it must take place within 30 calendar days after the filing of the petition. (Cal. Rules of Court, rule 5.570(d).)

NOTICE

Notice of the date, time, and place of hearing and a copy of the 388 petition shall be served by the court as soon as possible after the petition is filed, but no less than five days before the hearing is to take place. The following people are entitled to notice: the child, the child's social worker, the parent or legal guardian, any dependent siblings, their caregivers and attorneys, counsel of record for all parties, the child's Court Appointed Special Advocate (CASA) (if any), the child's caregiver, and the tribe of a dependent Indian child. (§§ 290.1, 290.2, 291, 297(c), 386, 388(c); Cal. Rules of Court, rules 5.524(e), 5.570(e).) No notice is required for a parent whose parental rights have been terminated. (§§ 290.1(b), 290.2(b), 291(b).) If the child is in the home of the parent or guardian, notice may be by personal service or first-class mail. Otherwise, notice must be by personal service or certified mail, return receipt requested, except in cases involving an Indian child, which require service by registered mail, return receipt requested. (§ 291.)

CONDUCT OF A 388 HEARING

1. Burdens of Proof

The petitioner bears the burden of proof at a hearing on a 388 petition. (Cal. Rules of Court, rule 5.570(f).) Pursuant to rule 5.570(f), if the request is to remove a child from the child's home, clear and convincing evidence of the grounds required for removal under section 361(c) must be presented. A noncustodial parent may petition under section 388 to remove a child from the custodial parent's home but must present clear and convincing evidence in order to prevail. (*In re*



Victoria C. (2002) 100 Cal.App.4th 536, 543.) Additionally, a petition seeking removal of a child to a more restrictive level of placement requires clear and convincing proof that the move is necessary to protect the child's physical or emotional well-being. (Cal. Rules of Court, rule 5.570(f).)

A petition seeking termination of guardianship, if granted, necessarily involves removal from a guardian. However, when such a request is made by a parent seeking return, the lesser standard of proof by a preponderance of the evidence has been found to be appropriate. (See *In re Michael D.* (1996) 51 Cal.App.4th 1074 [jurisdiction had been specifically retained to consider return; mother need only prove changed circumstances and child's best interest by a preponderance of the evidence].)



TIP Although language in *In re Michael D.* implies that the county social services agency can utilize a 388 petition to remove a child from a parent or guardian, this discussion is found in dicta only and is tangential to the controlling factors of the case. *In re Michael D.* centered on return to a parent via termination of a guardianship, and the direction of movement in that case (from the guardian to the parent) was to a lower or less restrictive level of placement—properly triggering the lower standard of proof as required by rule 5.570.

In order to grant a petition seeking reinstatement of parental rights, the court must find by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest. (§ 366.26(i)(2).)

The standard required for all other changes sought is proof by a preponderance of the evidence that there has been a change of circumstances or there is new evidence demonstrating that the proposed change is in the child's best interest. (Cal. Rules of Court, rule 5.570(f); *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Neither statutes nor due process dictate a higher standard for requests



to modify, or even terminate, visitation with a parent. (See *In re Manolito L.* (2001) 90 Cal.App.4th 753, 764.)

2. Right to a Full Evidentiary Hearing

In general, the court has discretion to conduct a 388 hearing by declaration and other written evidence, by live testimony, or both. However, if the petitioner and/or an opposing party has a due process right to confront and cross-examine witnesses or if the requested modification is for removal from the home of a parent or to a more restrictive level of placement, the hearing must be conducted as a full evidentiary hearing under the rules governing disposition. (Cal. Rules of Court, rule 5.570(f).)



TIP A child, parent, or any interested party may file a 388 petition seeking the child's removal from a parent or move to a more restrictive level of placement. However, counsel should consider challenging any attempt by the county social services agency to use a 388 petition to do so, as rule 5.560(e) of the California Rule of Court specifically prohibits the social worker from filing a 388 petition to move a child to a "more restricted level of custody." When the county social services agency seeks to remove the child from a parent, a guardian, or a specific court-ordered placement in an open dependency case, the proper vehicle is a section 342 or 387 petition, both of which provide the parent or guardian, and the child, with the same due process protections afforded in original section 300 filings. (See Subsequent and Supplemental Petitions black letter discussion.)

Due process in the dependency context centers on notice and the right to be heard, which are meaningful only if an opportunity to examine evidence and cross-examine witnesses is provided. The discretion to conduct a hearing only by declaration under rule 5.570(f) is "not absolute and does not override due process considerations." (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851 [de facto parents/former caregivers had due process right to a full hearing



allowing cross-examination of the social worker who prepared the reports].) Also, when there is a clear conflict as to the credibility of various sources, it is an abuse of discretion for the court to deny the petitioner an opportunity for testimony and cross-examination. (See *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1405.)

3. Changed Circumstances

The change need not relate to the dependent child but can be based on a change in the petitioner's circumstances. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 674 [court improperly denied a mother's 388 petition as it did not show change of circumstances although she had successfully reunified with child's three siblings].) In analyzing the adequacy of changed circumstances, the court should consider such factors as the following:

- The nature of the change,
- The ease by which the change could be accomplished, and
- The reason the change was not made earlier in the history of the dependency matter. (*In re Kimberly F.* (1997) 56 Cal. App.4th 519, 531.)

Denial of a 388 petition is proper where circumstances are merely "changing" rather than "changed." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 [denial is appropriate especially if granting the requested modification would delay permanency for a child whose parent has repeatedly failed to reunify]; *In re Carl R.* 128 Cal. App.4th 1051, 1072.)

4. Best Interest

There is no statutory definition of "best interest." However, decisional law does provide some guidance for cases in which the parent has filed a 388 petition to regain custody of the child. Under those circumstances, a best-interest analysis cannot be based on a simple comparison of the parent's and current caregiver's households and the socioeconomic opportunities they each provide. Appropriate



factors to be examined should span a wide range, including but not limited to

- The gravity of the initial problem leading to dependency,
- Reasons why the problem was not resolved in a timely manner, and
- The comparative strengths of the bonds between the child and both the parent and current caregiver. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.)



TIP Counsel can take advantage of the amorphous nature of the best-interest concept by crafting an argument linking the specific facts of the case to the broader goals of dependency law as well as to the specific needs of the child involved.

CONSIDERATIONS WHEN A .26 HEARING IS PENDING

Once reunification services have been terminated and a case has been set for a hearing under section 366.26, the focus of the court must shift to the child's need for permanency and stability. Section 388 petitions provide the parent with an "escape mechanism" to put new evidence before the court at any time before the 366.26 hearing. However, a parent seeking to "revive the reunification issue" at this point in the proceedings bears the burden of rebutting the presumption that continued out-of-home care is in the child's best interest. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Procedurally, the issues and claims raised in a 388 petition requesting return or resumption of reunification should be considered and decided before the section 366.26 hearing. (*Ibid.*) If the court grants the petition and orders resumption of reunification services, the section 366.26 hearing should be taken off calendar and the next hearing set for and conducted under the standards of a section 366.22 review hearing—not as a continued section 366.26 hearing. (*In re Sean E.* (1992) 3 Cal. App.4th 1594, 1599 [the order for further reunification services implicitly conflicts with the findings necessary to set a section 366.26



hearing, and therefore the latter must be vacated]; see Status Review black letter discussion.)

TERMINATION OF A LEGAL GUARDIANSHIP

A 388 petition is the proper vehicle by which to request termination of a legal guardianship established either by prior order of the juvenile court or by the probate court. (§§ 366.3(b), 728; Cal. Rules of Court, rule 1466(c); *In re Carlos E.* (2005) 129 Cal.App.4th 1408, 1421; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 251.) The petition may be filed in the county in which the guardianship was established or any county with current dependency jurisdiction. The petitioner must serve notice at least 15 court days before the hearing on the county social services agency, guardian, child (if age 10 or older), any parents whose rights have not been terminated, and the court. (Cal. Rules of Court, rule 5.740(c).)

The county social services agency must prepare a report for the hearing addressing whether the guardianship could remain intact with the child safely in the guardian's home if services were provided to the child or guardian and, if so, identifying the services needed and a plan for providing them. (§ 366.3(b).)

As with all other section 388 petitions, the petitioner carries the burden of proof. The level of proof required to terminate a guardianship depends on the identity of the petitioner. A parent concurrently seeking return of the child need only provide proof by a preponderance of the evidence that there is a change in circumstances and that the request for termination of the guardianship is in the child's best interest. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1086–1087.) However, the social services agency must present clear and convincing evidence that termination is in the child's best interest. (*In re Alicia O.* (1995) 33 Cal.App.4th 176, 183 [citing rule 5.570(f), which requires the clear-and-convincing standard for removal to a more restrictive level of placement, often as the result of termination of guardianship].)



Following the hearing on the petition, the court may (1) deny the petition to terminate, (2) deny the petition but request that the county social services agency provide services to the child and guardian under informal supervision pursuant to section 301, or (3) terminate the guardianship. (Cal. Rules of Court, rule 5.740(c).) If the guardianship is terminated, the court may resume jurisdiction and set a section 366.26 hearing within 60 days to consider a new permanent plan for the child. The parent may be considered for further reunification services or even as a custodial alternative, but only if the parent proves by a preponderance of the evidence that reunification is the best alternative for the child. (§ 366.3(b); Cal. Rules of Court, rule 5.740(c).)

A guardian appointed by the juvenile court does not have the same rights as one appointed under the Probate Code, and there is no requirement that reunification services be offered prior to termination of a dependency guardianship. (*In re Carlos E.*, *supra*, 129 Cal. App.4th at pp. 1418–1419; *In re Alicia O.*, *supra*, 33 Cal.App.4th at p. 181.) Probate guardians have greater rights and are entitled to reunification services under section 361.5(a) on an original 300 petition if the guardianship remains intact at disposition. However, section 728 authorizes the juvenile court to terminate a probate guardianship at any stage of the proceedings in a dependency case, including detention and jurisdiction, thereby potentially derailing access to reunification services for a former guardian. (See *In re Merrick V.*, *supra*, 122 Cal.App.4th at pp. 250–253.)



TIP Decisional law in this area hinges on very specific fact patterns. Counsel opposed to a petition to terminate guardianship and deny reunification services should be prepared to distinguish the cases mentioned above and frame an argument for services in terms of the court's discretion to order such services when they are shown to be in the child's best interest.



Update for page H-169

f. Substantial Interference With a Child’s Connection to a Tribal Community or Tribe Has Identified Another Permanent Plan

Effective January 1, 2007, the Legislature added section 366.26(c)(1)(F), which states:

The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, 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 the child’s tribal membership rights.

(ii) The child’s tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

The provision gives additional weight to a child’s tribal connections and the tribe’s position taken at the hearing. Given the heightened burden required by the Indian Child Welfare Act to terminate parental rights (see ICWA fact sheet), the provision emphasizes the need for attorneys to be mindful of cases where the ICWA is applicable.



FACT SHEETS

CAREGIVERS

De Facto Parent, Prospective Adoptive Parent, and the Reasonably Prudent Parent

Caregivers, including licensed foster parents, relatives, and nonrelative extended family members, are authorized to make certain decisions for the dependent children in their care under the “reasonable-and-prudent-parent” standard. Further, caregivers who qualify as de facto or prospective adoptive parents are afforded specified rights and standing in dependency proceedings.

DE FACTO PARENT

1. Criteria for De Facto Status

- A de facto parent is a person who, for a substantial period of time, has assumed the day-to-day role of parent by fulfilling the child’s physical and psychological needs for care and affection. (Cal. Rules of Court, rule 5.502(a)(8); *In re B.G.* (1974) 11 Cal.3d 679, 692.)
- Determination of de facto status is based on the above criteria and other relevant factors, such as whether the applicant (1) has “psychologically bonded” with the child and the child with applicant, (2) possesses unique information regarding the child, (3) has regularly attended court hearings, and (4) is subject to future proceedings that may permanently foreclose contact with the child. (*In re Patricia L.* (1992) 9 Cal.App.4th 61, 66–67.)
- Any adult who is found to have caused substantial physical or sexual harm to the child forfeits the opportunity to attain de facto status. (*In re Kiesha E.* (1993) 6 Cal.4th 68, 82.)

2. Rights and Role

of a De Facto Parent in Dependency Proceedings

- Recognition by the court of de facto status gives a present or previous custodian standing to participate as a party at disposition and any hearings thereafter to “assert and protect their own interest in the companionship, care, custody and management of the child.” (*In re B.G.*, *supra*, 11 Cal.3d at p. 693; see also Cal. Rules of Court, rule 5.534(e).)
- A de facto parent is entitled to procedural due process protections to protect his or her interests, including the right to be present, to be represented by counsel, and to present evidence. (Cal. Rules of Court, rule 5.534(e); *In re Jonique W.* (1994) 26 Cal.App.4th 685, 693; *In re Matthew P.* (1999) 71 Cal. App.4th 841, 850.)
- However, the role of de facto parents is limited in dependency, and they are not afforded the same substantive rights as parents or guardians. For example, they are not entitled to reunification efforts, custody, or visitation. (*In re Kiesha E.*, *supra*, 6 Cal.4th at p. 82.)
- Further, it is improper for the court to consider the closeness of the bond between the child and a de facto parent in determining whether the parent’s reunification services should be terminated. (*Rita L. v. Superior Court* (2005) 128 Cal. App.4th 495, 508.)

3. Standing and Appeals Involving De Facto Status

- The individual seeking de facto parent status has the right to appeal denial of that status, but other parties, including the child, do not. (*In re Crystal J.* (2001) 92 Cal.App.4th 186, 192.)
- De facto parents have no standing to appeal removal of the child as they have no right to continued placement or custody. (*In re P.L.* (2005) 134 Cal.App.4th 1357, 1361.)
- In order to terminate de facto status, a 388 petition must be filed and show by a preponderance of the evidence that, as a

result of changed circumstances, the conditions supporting the status no longer exist. (*In re Brittany K.* (2005) 127 Cal. App.4th 1497, 1514.)

PROSPECTIVE ADOPTIVE PARENT (§ 366.26(n))

- At the section .26 or any subsequent hearing, the court may designate the current caregiver as a prospective adoptive parent if
 - The child has lived with the caregiver for six months or more; and
 - The caregiver expresses a commitment to adopt; and
 - The caregiver has taken at least one step to facilitate adoption, which can include, but is not limited to,
 - Applying for or cooperating with an adoption home study,
 - Being designated by the court or county social services agency as the adoptive family,
 - Requesting de facto parent status,
 - Signing an adoptive placement agreement,
 - Discussing a postadoption contact agreement,
 - Working to overcome identified impediments to adoption,or
 - Attending required classes for prospective adoptive parents.
- Except in emergency situations (immediate risk of physical or emotional harm), the child may not be removed from the prospective adoptive parent's home without prior notice.
- Notice of an anticipated move must be given to the court, the prospective adoptive parent (or caregiver who would qualify as such at the time of the proposed removal), the child's attorney, and the child if age 10 or older.
- Any of the persons noticed may file a petition objecting to the removal, and the court must set a hearing within five court days. Alternatively, the court may set the hearing on its own motion, at which it shall determine the following:

- Whether the caregiver meets the above criteria, if he or she has not previously been designated the prospective adoptive parent; and
- Whether removal from the prospective caregiver would be in the child's best interest.
- Designation as a prospective adoptive parent does not confer party status or standing to object to any other of the social services agency's actions, unless the caretaker was also declared a de facto parent prior to the notice of removal.
- Any order made following a noticed hearing is reviewable only by extraordinary writ. (§ 366.28(b).)



TIP Prior to enactment of this statute (effective January 1, 2006), the social services agency had sole discretion over placements posttermination of parental rights, and removals could be challenged only as an abuse of discretion. (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721, 741.) Note that section 366.26(n) does not cover caregivers who do not meet the criteria as prospective adoptive parents; they will still be treated under the *Theodore D.* standard.

CAREGIVER'S DECISIONMAKING AS A "PRUDENT PARENT"

- "Caregivers" is defined as licensed foster parents or approved relative and nonrelative extended family member caregivers (NREFM's). (§ 362.04(a)(1).)
- Caregivers may exercise their judgment as a reasonable and prudent parent—that is, they may make careful and sensible parental decisions that maintain the child's health, safety, and best interest. (§ 362.04(a)(2).)
- They may use this standard in selecting and utilizing babysitters for short-term needs (no more than 24 hours). Babysitters need not comply with social services agency regulations regarding health screening or CPR training. (§ 362.04(b), (c) & (e).)

- All dependent children are entitled to participate in age-appropriate social and extracurricular activities. Caregivers should use the reasonable-and-prudent-parent standard in deciding whether to give permission for a child in their care to participate in such activities, which (in keeping with the babysitting statute) can include short-term or overnight stays at another location. (§ 362.05.)
- It is the caregiver who is authorized to make these normal day-to-day decisions for the dependent child, and the social worker should not substitute his or her judgment for that of the caregiver.
- As of January 1, 2006, babysitters and other persons chosen by the caregiver to provide short-term supervision of the child are exempt from criminal records check requirements. (Health & Saf. Code, § 1522(b)(3).)



TIP The stated intent of these “quality-of-life” statutes is to expand dependent children’s access to age-appropriate activities so that they may have as normal a childhood as possible. Caregivers using the reasonable and prudent parent standard now have the express statutory authority to consent to such activities as sleepovers, school field trips, and sports activities. Note, however, that the other side of the coin—responsibility for a foster child’s actions while participating in an activity—is not addressed in the statutes and may be an additional factor for the caregiver to consider in making decisions as the reasonable and prudent parent.

CHILDREN'S RIGHTS

CONSTITUTIONAL RIGHTS OF DEPENDENT CHILDREN

Children have constitutional interests in dependency proceedings, independent of the constitutional interests of their parents.

Family relationships—Children have fundamental and compelling constitutional interests in their family relationships. (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452.)

Protection and stability—Children have a fundamental constitutional interest in protection from abuse and neglect and in a stable and permanent placement. The turning point at which this interest may outweigh the interests of the parents is reached no later than 18 months after removal from the home. (*In re Manolito L.* (2001) 90 Cal.App.4th 753; *In re Jasmon O.* (1994) 8 Cal.4th 398.)

STATUTORY RIGHTS OF DEPENDENT CHILDREN

California law also entitles children to the following:

Right to make telephone calls when detained (§ 308)—No more than one hour after a peace officer or social worker takes a minor into custody, except where physically impossible, a minor who is 10 or older must be allowed to make at least two telephone calls: one call completed to the minor's parent or guardian and one call completed to the minor's attorney.

Right to counsel (§ 317(c))—The dependency court must appoint counsel for the child unless the court finds that the child would not benefit from having counsel (and the court must state on the record the reasons for such a finding).

Privilege (§ 317(f))—A dependent child, or the child's attorney (with the child's informed consent if the child is old enough to give such consent), may invoke the doctor-patient, therapist-client, or clergy-penitent privilege. If the child invokes the privilege, his or

her attorney may not waive it; but if the child’s attorney invokes the privilege, the child may waive it.

Extracurricular activities (§ 362.05)—A dependent child is entitled to participate in age-appropriate extracurricular, enrichment, and social activities.

Confidentiality of juvenile case files (§ 827)—Only certain persons (including the child; the child’s attorney, parents, or guardians; the county social services agency; court personnel; and other attorneys involved in the case) can inspect a child’s dependency case file or otherwise obtain information about the contents of the file. (See § 827(a)(1)(A)–(O) for complete list of authorized persons.) Note that the right to access a file does not automatically entitle the viewer to copy or disseminate information from the file absent express court authorization to do so. (*Gina S. v. Marin County Dept. of Social Services* (2005) 133 Cal.App.4th 1074, 1078.)

Foster children’s “bill of rights”—The rights of children in foster care are enumerated in section 16001.9(a) and include those related to privacy, medical treatment, and visitation.

RIGHTS REGARDING CONSENT TO HEALTH CARE

By statute, minors can access certain health and mental health care services without parental consent. Also, minors have the right under the California Constitution to consent to abortion. These rights apply to dependent children as well as to the general population.

Mental health treatment (Fam. Code, § 6924(b))—A minor who is 12 or older may consent to mental health treatment or counseling if

- The minor, in the opinion of the attending professional, is mature enough to participate in the services; or
- The minor would present a danger of serious harm to self or to others without the services or is an alleged victim of incest or child abuse.

Prevention or treatment of pregnancy (*Id.*, § 6925)—A minor may consent to medical care related to the prevention or treatment

of pregnancy (including contraception and prenatal care, but not including sterilization).

Abortion—A minor who is capable of informed consent has a constitutional right to consent to an abortion without parental notice or approval. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 [striking down Health & Saf. Code, § 123450 as unconstitutional].)

Treatment for sexually transmitted diseases (Fam. Code, § 6926(a))—A minor who is 12 or older may consent to medical care related to the diagnosis or treatment of sexually transmitted diseases.

Treatment for victims of rape (*Id.*, § 6927)—A minor who is 12 or older and who is alleged to have been raped may consent to medical care related to the diagnosis or treatment of the condition and the collection of medical evidence with regard to the alleged rape.

EDUCATION LAWS, RIGHTS, AND ISSUES

Ensuring that a dependent child's educational needs are met is an important factor in the child's overall well-being and is the responsibility of everyone involved in the dependency process, including attorneys, caregivers, parents, social workers, and the court.

EDUCATION RIGHTS/DECISIONMAKING AUTHORITY

A child under the age of 18 years needs an adult to make education decisions. Knowing which adult has the legal authority to make these decisions is especially important for children who are eligible for (or need to be assessed for) special education services. (§§ 319(g), 361; Gov. Code, § 7579.5; Ed. Code, § 56055.) Different people can serve in this capacity; the dependency court can play a role in determining who should do so.

1. Who Holds Education Rights

a. Parents or Legal Guardians

Parents or legal guardians continue to have the right to make education decisions *unless* their education rights have been limited. However, the juvenile court has the discretion to limit a parent's education rights if that is necessary to meet the child's education needs. If they are limited, the court may reinstate the right to make education decisions at a later date. (See §§ 319(g), 361, 366.1(e); Ed. Code, § 56055; Gov. Code, § 7579.5.)



TIP Ensuring that a parent's right to make education decisions remains intact can be an important part of the reunification process. Often the parent can use this as an opportunity to remain involved in important decisions and demonstrate to the court that he or she is committed to resolving the issues that resulted in



the child's removal from his or her care and is actively working toward reunification.



TIP If a parent's whereabouts are unknown, a restraining order has been issued against the parent, or the parent is unwilling or unable to make education decisions, child's counsel should consider asking the court to limit the parent's education rights. A request to limit education rights might also be appropriate when a parent's problems (such as mental health or substance abuse issues) are so severe that the parent is unable to make responsible decisions. Each situation should be evaluated on a case-by-case basis.

b. Responsible Adults

When the court limits a parent's right to make education decisions, it must appoint a responsible adult to make them. (§ 361.) Judges should consider appointing caregivers, relatives, and Court Appointed Special Advocates (CASA's) as responsible adults.

c. Surrogate Parents

If the court is unable to identify a responsible adult *and* the child is eligible for (or needs to be assessed for) special education services, the school district must appoint a surrogate parent. County social workers, probation officers, or employees of a group home or any other agency that is responsible for the care or education of a child can never be appointed to serve as surrogate parents. These individuals may therefore not consent to services prescribed by individualized education programs (IEP's). (Gov. Code, § 7579.5; 20 U.S.C. § 1415; 34 C.F.R. § 300.519.)

d. Age of Majority

A student has the right to make his or her own education decisions once reaching the age of majority (18) unless deemed incompetent by the court under state law. (§ 361(a)(1); Ed. Code, § 56041.5.)

2. Court Orders Affecting Education Rights

a. Detention

The court may limit the parent's education rights on a *temporary* basis if necessary. This order expires at disposition or dismissal of the petition. Any right to limit education rights must therefore be readdressed at disposition. (§ 319(g).)

b. Disposition and Beyond

The court may limit the right of the parent or guardian to make education decisions at any time after the child has been declared a dependent. Only if the court cannot identify a responsible adult and the child is not eligible for special education services (and does not need to be assessed), may the court, with the input of any interested person, make education decisions for the child. (§§ 361, 366.1(e); Gov. Code, § 7579.5; Ed. Code, § 56055.) Unless the child is in need of special education, the court cannot simply refer the matter to the school district for appointment of a surrogate parent.

TRANSFER AND ENROLLMENT ISSUES

1. McKinney-Vento

The McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.) allows homeless children to

- Remain in the school they attended prior to becoming homeless (their school of origin) until the end of the school year and for the duration of their homelessness, and
- Immediately enroll in school even if lacking the usual requirements.

Children covered by McKinney-Vento are entitled to transportation to and from school. The definition of “homeless” includes children “awaiting foster care placement.” (*Id.*, § 11434a.)

2. Assembly Bill 490

California Assembly Bill 490 (Stats. 2003, ch. 862) provides foster youth with a series of rights related to education that are in keeping with and build on the federal McKinney-Vento legislation. Under AB 490,

- Foster youth are entitled to remain in their school of origin for the duration of the school year when their placement changes and when remaining in the same school is in the child's best interest. (Ed. Code, § 48853.5(d)(1).)
- When a foster child is subject to a change in school placement, the new school must immediately enroll the child even if the child is unable to produce the records or clothing required for enrollment, such as previous academic records, medical records, proof of residency, other documentation, or school uniforms. (*Id.*, § 48853.5(d)(4)(B).)
- Foster youth must be placed in the least restrictive academic placement and attend a mainstream public school unless the child has an IEP requiring placement outside the public school or the person who holds education rights determines it is in the child's best interest to be placed in another educational program. (*Id.*, § 48853.)
- The new school and old school shall ensure that school records are transferred within two days of the child's checking out of the old school and into the new school. (*Id.*, § 48853.5(d)(4)(C).)
- Grades of a foster child may not be lowered because of absences from school owing to a change in placement, attendance at a court hearing, or other court-related activity. (*Id.*, § 49069.5(h).)
- Each public school district and county office of education shall accept, for credit, full or partial coursework satisfactorily completed by a student while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency. (*Id.*, § 48645.5.)

- Every local education agency must have an educational liaison for foster children (foster care liaison). (*Id.*, § 48853.5).



TIP Unlike McKinney-Vento, AB 490 does not contain a transportation mandate. The court and all parties should therefore determine whether the child is “awaiting foster care,” living in emergency shelters, or otherwise “homeless” as defined in McKinney-Vento. If McKinney-Vento does not apply, parties should discuss alternative transportation options, including the possibility of bus passes for older students.



TIP Counsel who feel that a school district is not complying with AB 490 provisions should begin by contacting the school district’s foster care and/or homeless liaison. These liaisons are often very effective at resolving disagreements and educating school staff as to the legal mandates affecting foster youth. The contact information for state and county foster care liaisons is available at www.cde.ca.gov/ls/pfffy/ab490contacts.asp.

GROUP HOMES

A group home may *not* condition residential placement on attendance at a nonpublic school or a school that is agency owned or operated or associated with the home. (*Id.*, § 56366.9; Health & Saf., Code, § 1501.1(b).) A licensed children’s institution or nonpublic, nonsectarian school or agency may not require as a condition of placement that it have educational authority for a child. (Ed. Code, § 48854.)

SPECIAL EDUCATION

“Special education” is defined as “specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs.” (*Id.*, § 56031.) Children who are eligible for special education must have a current IEP that the adult who holds education rights has consented to. (*Id.*, § 56346.)





TIP If possible, attorneys should attend IEP meetings and/or assist the parents and caregivers with referrals to advocates or attorneys who specialize in special education law. Some counties have protocols for matching cases that require the assistance of an attorney with an attorney who specializes in education law.



TIP If you have a client whom you believe is disabled and may qualify for special education services, the parent, foster parent, teacher, or other service provider may refer the child for a special education assessment. (*Id.*, § 56029.) This referral must be made in writing. However, foster youth are often disproportionately labeled disabled, and students, including foster youth, may not be placed in special education without valid assessments and a valid IEP.

ADDITIONAL RESOURCES

For additional information regarding education-related legal issues and rights that affect foster youth—covering such topics as AB 490, education decisionmaking, special education, nonpublic schools, AB 3632/2727 mental health services, school discipline, and special education discipline—see the *Foster Care Education Fact Sheets* produced by the California Foster Care Education Task Force, available at www.clcla.org/train_educat.htm.

FUNDING AND RATE ISSUES

The availability of funding is often a critical factor for relatives or other persons interested in providing care for a child who has been removed from the custody of his or her parent. All foster children should be eligible for some type of funding; however, the type of funding, amount, and source depend on a number of factors.

ELIGIBILITY FOR FEDERAL FUNDING

1. Requirements

a. Generally

Several requirements must be met for a child to be considered eligible for federal funding. Generally a child is eligible if, during the month a voluntary placement agreement (VPA) was signed or the dependency petition was filed, the home of the parent, guardian, or relative from whose custody the child was removed met federal poverty guidelines (i.e., was eligible for federal assistance under the 1996 standards for Aid to Families With Dependent Children [AFDC], which continues to be used for qualification under CalWORKS).

b. Children in Voluntary Placements

Federal funding is available for children in out-of-home placements under a VPA if the above criteria are met. However, this funding is limited to six months; if the child is initially removed on a VPA, the county social services agency must file a dependency petition within 180 days of the date the VPA was signed for continued funding for children who are not returned to the parent's custody.



TIP If funding is denied because the county social services agency failed to file a petition within the specified time limit, urge the caregiver to appeal through a request for an administrative fair hearing. The caregiver and, ultimately, the child should not suffer because the county did not follow the required protocol.



c. Title IV-E

In addition, in order for the caregiver to be federally eligible under Title IV-E of the Social Security Act, the court must make the following findings at the initial hearing on detention:

- Continuance in the home of the parent or legal guardian is contrary to the child's welfare,
- Temporary placement and care is vested with the social services agency pending disposition, and
- The social services agency has made reasonable efforts to prevent or eliminate the need for removal.



TIP If the proper language does not appear in the minute order from *the first hearing*, federal funding will be denied. A deficiency may be corrected if the transcript shows the words were in fact stated on the record but inadvertently left out of the minute order. However, an attempt to add the language at a later time with a nunc pro tunc order will not fix the problem. Because the results of omitting the Title IV-E findings are so costly, it is best for all in the courtroom to ensure that the proper findings are made at the proper time.

2. Disqualifying Criteria or Circumstances

Federal funding is *not* available if

- The child is undocumented,
- The parent from whom the child was removed resides in the same home, or
- The child has turned 18 years old. However, federal funding may be extended to age 19 if the dependent youth is still in high school and is expected to graduate before his or her 19th birthday.



TIP Loss of federal funding is not a legitimate basis for terminating jurisdiction. The juvenile court can maintain jurisdiction until a youth reaches age 21, and if it does so the county must provide funding after federal eligibility ends. Jurisdiction may be

terminated only when it is in a dependent youth's best interest; the county's fiscal concerns do not take precedence. (See *In re Tamika C.* (2005) 131 Cal.App.4th 1153; see also Termination of Jurisdiction fact sheet.)

TYPES OF FUNDING

1. Aid to Families With Dependent Children— Foster Care (AFDC-FC)

Although the AFDC program no longer exists as a general welfare program, federal foster care funds are referred to as AFDC-FC and are provided to children who are federally eligible and living with a non-relative. The level of funding is at either the basic rate or a higher, specialized-care increment depending on the individual child's needs.

2. *Youakim*

The Supreme Court in *Youakim v. Miller* (1976) 425 U.S. 231 held that federal foster care funds could not be withheld from a federally eligible child simply because the child was placed with a relative. "*Youakim*" is now the shorthand term used for federal foster funds paid to a relative caregiver. Funding may be paid at either the basic rate or a specialized-care increment, depending on whether the child has special needs.

3. State Foster Care

These funds are paid for dependent children who are placed with nonrelatives and are not federally eligible. The funding rates, including specialized rates, are the same as those paid under AFDC-FC and *Youakim*.

4. County Foster Care

When federal, state, and other funds are not available, the county in whose care and custody a dependent child has been placed should be responsible for paying for the child's care. This situation might

arise in several circumstances, such as when an undocumented foster youth is awaiting approval of his or her application for Special Immigrant Juvenile Status (SIJS) or when federal foster funds are terminated owing to the youth's age but the court determines that continued jurisdiction is in the dependent's best interest.



TIP These situations are often covered under social services agency policy that will vary from county to county. Each case must therefore be individually assessed and arguments made to the court in terms of local policy and the child's particular circumstances.

5. CalWORKS

CalWORKS is the State of California's welfare program that took the place of, and is still sometimes referred to as, AFDC. Most dependent children who are not federally eligible should be eligible for CalWORKS. A relative who qualifies under the income guidelines may also receive assistance but will need to meet all the program's work requirements and be bound by its time limits. The income of the caregiver is irrelevant if the application is filed for the child only under a Non-Needy Relative Caregiver Grant. CalWORKS payment rates are significantly lower than those under *Youakim*, and funding is not determined on a per-child basis; instead a smaller increment is added for each additional child. For example, three children between birth and four years would receive \$1,275 (\$425 each) under AFDC-FC or *Youakim*, while the total payment under CalWORKS would be only \$787.

6. Kinship Guardianship Assistance Payment (Kin-GAP)

Kin-GAP is a California state program that provides funding for children in relative guardianships after dependency jurisdiction has been terminated and until their 18th birthday. (§ 366.3, 11360–11373.)

To be eligible,

- A child must have lived with the caregiver for at least the 12 consecutive months immediately prior to termination of jurisdiction under the program,
- A legal guardianship must have been established by the juvenile court, and
- Dependency jurisdiction must have been terminated after the two prior conditions were met.

Previously, payments were capped at the basic foster care rate. However, the Kin-GAP Plus Program, effective October 1, 2006, extends eligibility for Kin-GAP to delinquent youth and provides a clothing allowance as well as continued payment of specialized-care increments to children who qualified for higher levels of funding before termination of jurisdiction.

 **TIP** Kin-GAP funding is available regardless of the prior source of funding and even if the caregiver previously received no funds at all. Children's counsel should make sure before jurisdiction is terminated that the required form (SOC 369, *Agency-Relative Guardianship Disclosure*) disclosing current and future funding rates has been filed with the court and reflects the correct amounts.

7. Adoption Assistance Program (AAP)

The AAP is intended to encourage adoptions by providing a continuing funding stream to help families care for children they have adopted. It provides funding for all foster children, regardless of whether any funding was previously available, from the time the prospective adoptive parents sign the adoptive placement agreement until the child's 18th birthday. The rate will be determined prior to finalization and should be the basic rate at a minimum and equivalent to the appropriate specialized-care increment if the child is disabled.

 **TIP** AAP rates are negotiable, and caretakers should be encouraged to educate themselves about the program and seek the maximum available amounts.

8. Supplemental Security Income (SSI)

This is a federal program administered through the Social Security Administration designed to provide funding to low-income children (regardless of their dependency status) who suffer from strictly defined physical or mental disabilities. Although ssi payments are generally higher than basic rates, they are significantly lower than specialized-care increments. Counties are authorized to designate themselves as the payee for dependent children receiving ssi in order to recoup costs for the children's care.



TIP For children with severe disabilities that are likely to persist into adulthood, it is very important to ensure that an ssi application and an evaluation have been completed before the child's 18th birthday, as lifelong eligibility is based on identification of the disability during childhood.

9. Survivor's Benefits

This program is also administered by the Social Security Administration and is available regardless of dependency status. It provides funds for the children of deceased parents who paid Social Security taxes while alive. The amount of payment is proportional to the deceased parent's earnings. The child's income from survivor benefits may impact federal or CalWORKS eligibility.

10. Cash Assistance Program for Immigrants (CAPI)

Children (regardless of dependency or foster care status) who are undocumented or have been legal residents of the United States for less than nine years are eligible for this federal program. The payments are significantly lower than those available through any of the foster care funding streams. (See also Immigration fact sheet.)



FUNDING RATES

1. Basic Rates

The basic rate is the monthly amount paid under AFDC-FC, *Youakim*, and AAP for children who do not qualify for specialized-care increments. The payment increases as the child grows older. Note that some counties (e.g., Los Angeles, Marin, Orange, and Santa Clara) distribute funding at rates higher than the standard amounts. Detailed information on rates is available from the California Department of Social Services in All County Letter No. 05-24, available at www.cass.ca.gov/lettersnotices/2005AllCou_2034.htm.

2. Specialized-Care Increments

Higher amounts of funding are available for children with special medical needs or severe emotional/behavioral problems. The diagnosis and need for additional care must be documented, and the caregiver may need to fulfill certain training requirements in order to continue to provide for the child. Currently, only 55 of the 58 counties have specialized-care systems, and each has its own procedures.

3. Infant Child Supplement

This funding is a statutorily authorized payment that is made on a monthly basis to the caregivers of a dependent parent whose non-dependent child resides in the same placement. The monies are intended to offset some of the extra costs of care for the infant. The supplement remains available even after the parent's dependency case has been terminated under Kin-GAP.



TIP The county social services agency should promptly send the caregiver a notice of action describing any approval, denial, or change in eligibility or funding. If funding is denied (or decreased) and the caregiver wants to contest the action, it is critical that the caregiver be advised to file within 90 days a request for an administrative fair hearing. Caregivers may begin this process by

calling the California Department of Child Support Services' State Hearing Support Section at 800-952-5253.

 **TIP** Funding is a very complex and constantly changing topic that is subject to federal, state, and county procedural requirements. This fact sheet is intended only as a general guide to alert dependency practitioners to issues that may become problematic. When problems do arise, current policy should be clarified utilizing state and county agency Web sites, and legal assistance should be sought from local experts in public assistance law.

HEARSAY IN DEPENDENCY HEARINGS

SOCIAL STUDY EXCEPTION—SECTION 355

All hearsay that is contained in the “social study” (any written report provided by the social worker to the court and all parties) is admissible at a jurisdictional hearing so long as the social worker/preparer is made available for cross-examination and parties have an opportunity to subpoena and cross-examine the witnesses whose statements are contained in the report. (§ 355(b); see also *In re Malinda S.* (1990) 51 Cal.3d 368, 382–383.)

However, if a timely objection is made to specific hearsay in a report, that hearsay evidence cannot be the sole basis of any jurisdictional finding unless any one of the following applies:

- It is otherwise admissible under any statutory or decisional exception;
- It was made by a child under 12 who is the subject of the hearing, and the statement is not shown to be unreliable because of fraud, deceit, or undue influence;
- It was made by a police officer, health practitioner, social worker, or teacher; or
- The declarant is available for cross-examination.

(§ 355(c)(1)(A)–(D).)



TIP Remember that even a timely objection will not exclude hearsay. The statement will still be admitted under the social-study exception, but the court cannot exclusively rely on it to sustain any allegations unless one of the section 355(c)(1) criteria is established.

At all hearings after jurisdiction, the social study is admissible regardless of the availability of the preparer for cross-examination. (See *In re Corey A.* (1991) 227 Cal.App.3d 339, 346–347; and *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387.)





TIP However, the right to confront and cross-examine the preparer of any report admitted into evidence applies at all hearings, as does the right to subpoena the preparer or any witness whose statements are contained in a social study. (§ 355(d); Cal. Rules of Court, rule 1412(j); see also *In re Matthew P.* (1999) 71 Cal.App.4th 841, 849.)

Following jurisdiction, the social study is not only admissible but also any hearsay within it is considered evidence competent to solely support the court's determinations. (*In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1572–1573.)



TIP The “social study exception” only covers hearsay statements contained in the county social services agency's reports. Other hearsay is still inadmissible unless an objection is countered with a valid exception. However, if no objection is made, the statement will come in as evidence and the issue is waived for appellate purposes.

“CHILD HEARSAY,” OR “CHILD DEPENDENCY,” EXCEPTION

The “child hearsay,” or “child dependency,” exception to the hearsay rule allows admission of out-of-court statements made by a child who is subject to dependency proceedings, regardless of whether the child is competent to testify, so long as

- All parties are notified of the intent to use the statements,
- There are sufficient surrounding indicia of reliability, and
- Either the child is available for cross-examination or evidence corroborates the child's statements. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29.)

The statements of a child found incompetent to testify because he or she is unable to distinguish between truth and falsehood (i.e., “truth incompetent”) are admissible under section 355 but cannot be exclusively relied upon as a basis for jurisdiction unless the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1242–1243, 1247–1248.)



The court should consider a number of factors in determining the reliability of statements made by a child unavailable for cross-examination, including the following:

- Spontaneity and consistency of repetition,
- The mental state of the child,
- Use of unexpected terminology based on the child’s age, and
- Child’s lack of motive to fabricate. (*In re Cindy L.*, *supra*, 17 Cal.4th at pp. 30–31.)

The Sixth Amendment right to confrontation does not apply to civil proceedings such as dependency and therefore does not bar the admission and use of statements made by a child who is incompetent to testify. (*In re April C.* (2005) 131 Cal.App.4th 599, 611.)



TIP The decisional “child hearsay/dependency” exception was created prior to the amendment of section 355 that created the “social study” exception. Although the *Lucero L.* court concluded that corroboration is no longer required for admissibility of statements within a social study, it did not reject the child dependency exception itself. In fact, the court spoke favorably of and relied heavily on the underlying rationale in reaching its conclusions. Therefore, if a party seeks to introduce hearsay from a source other than the social study, the *Cindy L.* criteria should be argued in determining admissibility.



TIP The opponent of hearsay under section 355(c)(1)(B) has the burden to show that the statement is inadmissible as a product of fraud, deceit, or undue influence. But if the proponent (usually the petitioner) of a statement by a witness unavailable for cross-examination does not establish its reliability, the court may not exclusively rely on that information in making its jurisdictional findings. (*In re Lucero L.*, *supra*, 22 Cal.4th at pp. 1248–1249.)



IMMIGRATION

A child's immigration status is irrelevant to the applicability of dependency law; in other words, an undocumented child in California has the same right to protection from abuse or neglect as does an American citizen. However, whether the child and/or parent is legally present in the United States can have a significant impact on that individual's access to public services and therefore can have an ancillary effect on the ability to comply with the requirements of a reunification case plan or with a family's ability to provide a healthy, safe, and stable home environment. Additionally, persons who are undocumented live with the continuing possibility of deportation.



TIP Immigration law is very complex and subject to frequent statutory and procedural changes. This fact sheet is intended as a general guideline only. The practitioner should contact an expert in immigration law for detailed assistance.

Counsel should also make sure to be aware of any custody and other prior judicial determinations made in countries or states outside California that may affect the dependency court's jurisdiction. (See "Hague Convention on International Child Abduction" section of the Jurisdictional Issues fact sheet.)



TIP The court should inform noncitizen parents and children that they can seek the assistance of their consulate. In many cases, the consulate can be a tremendous resource—for example, by assisting with access to services, locating and evaluating relatives for potential placement, or providing document translation. Counsel should inquire into whether the client's country has a memorandum of understanding (MOU) outlining the relationship between the court, the county, and the consulate on issues relating to immigrant families.

PATHS TO DOCUMENTED STATUS

1. SIJS

Special Immigrant Juvenile Status (SIJS) (8 C.F.R. § 204.11) provides a mechanism for a dependent child to obtain permanent resident status (i.e., a “green card”) under certain circumstances. In order to be eligible, the child must

- Be younger than 21 years old and unmarried,
- Have been declared a dependent by the juvenile court (which can include delinquency court and probate court),
- Have been deemed “eligible for long-term foster care” (i.e., family reunification is no longer a viable option; thus children who have been referred for adoption or placed in a guardianship are also eligible),
- Have been the subject of a finding by the juvenile court that it is not in the child’s best interest to be returned to the country of origin, and
- Continue to be under the jurisdiction of the juvenile court.

A petition for classification under SIJS may be filed by the child or anyone acting on the child’s behalf (e.g., the social worker). Documentation of the child’s dependency status and the court’s relevant findings must be submitted in support of the petition.



TIP It is critical that the case remain open until the child receives his or her green card, as eligibility will terminate when dependency jurisdiction does, even if a valid petition is still pending. The process can take a long time to complete, so it is very important that counsel pursue this option as soon as the potential need arises and requisite findings have been made. Expediting the SIJS application may even require strategic attempts to negotiate the parent’s waiver of reunification services at disposition in appropriate cases, such as when there seems little hope of return for an older teen.



TIP The appropriate documents for filing for SIJS are available at the www.uscis.gov Web site. Numerous documents

must be submitted for a child who qualifies for SIJS, including, but not limited to, the I-360 (*Petition for Amerasian, Widow(er), or Special Immigrant*), I-485 (*Application to Register Permanent Residence or Adjust Status*), and supporting documents. Practitioners should seek help whenever possible, especially in cases where the child has a criminal history, when dependency is terminating soon, or if the child is about to turn 21.

2. VAWA

Under the Violence Against Women Act (VAWA) (8 U.S.C. § 1154), the undocumented spouse and/or child of an abusive United States citizen or lawful permanent resident may apply for a green card with no need for cooperation from the abuser. If the application is approved, the applicant will first be given “deferred action” (see next section) and employment authorization until he or she can apply for a green card. “Abuse” is defined under VAWA as battery or “extreme cruelty” and need not be physical in nature but can also include psychological or emotional abuse. “Any credible evidence” is sufficient to demonstrate the abuse. Thus, eligibility is likely to be supported by the sustained allegations of abuse or neglect or even police or hospital reports generated in connection with the dependency case. The sex of the applicant is irrelevant. Further, the applicant need not personally have been the victim of the domestic violence so long as the applicant’s parent or child qualifies under VAWA because of abuse.

3. U Visa

The U Visa program (8 U.S.C. § 1101(a)(15)(U)) allows a victim of specified serious crimes who has suffered substantial physical or mental abuse to obtain a nonimmigrant visa and ultimately to apply for lawful permanent residency if he or she has been, is being, or is likely to be helpful in the investigation or prosecution of the crime (requires signed certification from a law enforcement official that the crime occurred in the United States or violated U.S. laws). Given that regulations have not been issued yet, current applicants are

given “deferred action” and employment authorization. “Deferred action” means that the applicant is permitted to remain lawfully in the United States. If the victim is under age 21, the parents, unmarried siblings under age 18, and a spouse and children of that person are also admissible under this program, as are the spouse and children of an applicant victim who is older than 21 years.

4. Other

Some additional programs may provide the means for a client (either child or adult) to obtain legal status; these include the following:

- Asylum for those who fear persecution in their native country based on their race, religion, nationality, political views, or membership in a disfavored social group (can include domestic violence);
- Temporary Protected Status, which provides temporary permission to stay and work in the United States for citizens from specified countries that have suffered devastating natural disasters, civil wars, or other nonpermanent disruptive situations;
- Family-Based Visas, which may be available based on a familial relationship to a United States citizen or lawful permanent resident.



TIP Again, given the complexity of immigration law it is highly recommended that dependency counsel consider referrals to outside counsel. It is possible that ancillary fees may be available to retain an expert in immigration law or that a section 317(e) referral may be appropriate.

ACCESS TO PUBLIC BENEFITS

1. Generally

Dependent children who have been placed in foster care should be covered for all their needs (health, housing, education, etc.) regardless of their immigration status. The information below primarily

becomes an issue of concern for both parents and children if the dependent child has been returned to or remains in the home of the parent.

In 1996 Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRA) (8 U.S.C. § 1601 et seq.), which severely restricts access to public benefits for immigrants deemed “not qualified,” which generally includes all who are undocumented. Under the PRA, any immigrant who is “not qualified” is ineligible for any federal, state, or local benefit, including any welfare, health, postsecondary education, food assistance, or similar benefit. (8 U.S.C. §§ 1611, 1621.)

2. Education

A state cannot deny public elementary and secondary school education to a child on the basis of immigration status. (*Plyer v. Doe* (1982) 457 U.S. 202; *League of United Latin American Citizens v. Wilson* (C.D.Cal. 1995) 908 F.Supp. 755, 785.) However, as noted above, public benefits, such as financial aid relating to postsecondary education, are prohibited for immigrants who are “not qualified.” Currently undocumented immigrants who sign an affidavit stating they are in the process of pursuing legalization or will do so as “soon as eligible” qualify for in-state tuition at California public colleges and universities. (A.B. 540 (Stats. 2001, ch. 814).)

3. Health Benefits

Undocumented adults are generally ineligible for full-scope Medi-Cal as well as for the Healthy Families program. They are eligible, however, for emergency Medi-Cal (which includes labor and delivery), Medi-Cal prenatal care, and Medi-Cal long-term (i.e., nursing home) care. Undocumented children are also generally ineligible for Medi-Cal, but they are eligible for the Child Health and Disability Program (CHDP), which provides preventive health screenings, immunizations, and temporary (two-month maximum), full-scope Medi-Cal.

4. Funding and Income Assistance

Persons who are “not qualified” immigrants are generally ineligible for support from General Assistance, Supplemental Security Income, or CalWORKS/CalLearn, and cannot get food stamps. However, immigration status is irrelevant to eligibility for the Women, Infants and Children (WIC) program as well as for school lunch and breakfast programs.



TIP Assistance in this complex, ever-changing area of law is available from several resources, including the following:

Immigrant Legal Resource Center
1663 Mission St., Ste. 602
San Francisco, CA 94110
www.ilrc.org

National Immigration Law Center (NILC)
3435 Wilshire Blvd., Ste. 2850
Los Angeles, CA 90010
www.nilc.org

Public Counsel
Immigrants' Rights Project
610 South Ardmore Ave.
Los Angeles, CA 90005
<http://publiccounsel.org/overview/irp.html>



INDIAN CHILD WELFARE ACT (ICWA)

The Indian Child Welfare Act (ICWA) was passed by the United States Congress to express the preference for keeping Indian children with their families, deferring to tribal judgment on custody issues, and placing Indian children who must be removed from the parental home with their own families or tribes. All dependency proceedings involving Indian children are governed by ICWA, which imposes minimum federal standards that in some instances differ from and are more stringent than those imposed under the Welfare and Institutions Code for non-Indian children. (See generally 25 U.S.C. §§ 1901–1963; Cal. Rules of Court, rule 5.664.)



TIP In 2006, the Legislature passed Senate Bill 678 (Stats. 2006, ch. 838), which issued sweeping changes to the code by clarifying the role of ICWA in family law, delinquency, and probate cases. This bill further differentiated the role of the court and county social services agency in Indian cases at each stage of a dependency proceeding. As such, counsel handling ICWA cases must consult the applicable statutes prior to hearings in order to review notice requirements and determine whether additional substantive provisions apply.

ELIGIBILITY

1. Definitions

An Indian child is an unmarried person under the age of 18 years who is a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a tribal member. An Indian custodian is any Indian person who has legal custody of an Indian child under tribal law or custom or state law or has temporary physical care, custody, and control of an Indian child whose parent(s) have transferred custody to that person. (Cal. Rules of Court, rule 5.664(a)(3).)



2. Determination of Status

A determination by a tribe, or by the Bureau of Indian Affairs (absent a determination by a tribe to the contrary), that a child is or is not a member of a tribe or that the child is eligible for membership in the tribe is conclusive. (25 U.S.C. § 1911(d).)



TIP Attorneys for parents and children should, whenever appropriate, contact the tribal representative directly. Counsel can assist by providing the tribe with information necessary to establish eligibility, ensure that the parent and Indian child have access to proper services and funding, and relay the party's preferences as to placement. The California Department of Social Services maintains a tribal contact list that can be accessed at www.childsworld.ca.gov/Indianchild_316.htm.

PROCEDURE

1. Inquiry

The court and county social services agency have an affirmative, ongoing duty to inquire whether a child for whom a dependency petition has been filed may be an Indian child or may have Indian ancestors. At a parent's first appearance before the court on a dependency matter, the parent must be ordered to complete form JV-130 (*Parental Notification of Indian Status*) as to possible Indian ancestry and the child's parents or any relative's membership in an Indian tribe. (Cal. Rules of Court, rule 5.664(d).)

2. Rights

a. To Intervene

An Indian child, an Indian custodian, and the Indian child's tribe have the right to intervene at any point in the dependency proceedings. (*Id.*, rules 5.535(i), 5.664(h).)



b. To Counsel

Indigent parents and Indian custodians have the right to court-appointed counsel. (*Id.*, rule 5.664(h).)

c. To Access Case Information

All parties, including the parent, Indian child, Indian custodian, and tribe, and their respective attorneys, have the right to inspect all court documents related to the dependency case. (*Id.*, rule 5.664(h).)

3. Notice

Whenever there is reason to know that an Indian child is involved in a dependency proceeding, the county social services agency must send notice of any upcoming proceedings to the parent, to the Indian custodian, all tribes of which the child may be a member or may be eligible for membership, and, if no tribe can be identified, to the Bureau of Indian Affairs. The obligation to send notice continues until, and if, 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.



TIP Failure to send proper notice under ICWA is central to an inordinate number of appeals that have resulted in reversal. Counsel must always be mindful of the ICWA notice requirements.

4. Burdens and Standards

a. Burden of Proof

The burdens of proof required both to remove a child from a parent's custody and to terminate parental rights are higher than those required under the Welfare and Institutions Code for non-Indian children:



- 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.
- In order for the court to terminate parental rights, proof must be beyond a reasonable doubt and include testimony of a qualified expert witness that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.

Note: See page H-224 regarding section 366.26(c)(1)(F).



TIP It is almost always in a parent's best interest to make all efforts to establish the applicability of the ICWA so that proceedings must be conducted under the heightened burdens described above.

b. Qualified Expert Witness Testimony

In order to place an Indian child into foster care, enter an order of guardianship, or terminate parental rights, the court must require and rule on the testimony from a qualified expert witness that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage. Persons most likely to be considered experts include members of the tribe, or lay or professional persons with substantial education and experience in Indian social and cultural standards. (*Id.*, rule 5.664(a)(10).) An expert witness cannot be a member of the child welfare agency recommending foster care placement. (§ 224.6(a).)

c. Active Efforts

In order to remove from the custody of or terminate the parental rights of a parent of an Indian child, the juvenile court must find that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful. Active efforts must include attempts to utilize available resources offered by the extended family, the tribe, Indian social services agencies, and indi-

vidual Indian caregivers. The court must also take into account the prevailing social and cultural conditions of the Indian child's tribe. (Cal. Rules of Court, rule 5.664(i).)

However, the term "active efforts" is not statutorily defined, and the Court of Appeal has held that active efforts are essentially equivalent to the reasonable efforts standard required for provision of family reunification services in non-ICWA cases. (See *In re Michael G.* (1998) 63 Cal.App.4th 700, 713; *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 997.)



TIP Attorneys should remember that clients are entitled to culturally appropriate services and should advocate for these whenever possible.

5. Special Considerations

a. Placement Preferences—25 U.S.C. § 1915

If an Indian child is removed from parental custody for placement in foster care, placement preferences apply in the following order, absent good cause to the contrary:

- To a member of the Indian child's extended family;
- To a foster home licensed or approved by the Indian child's tribe;
- To a state- or county-licensed, certified Indian foster home; or
- To a children's institution approved by the tribe or operated by an Indian organization that offers a program designed to meet the Indian child's needs. (See also Cal. Rules of Court, rule 5.664(k).)



TIP Designation as a foster home "licensed or approved by the Indian child's tribe" does not necessarily require that the caregivers be members of the tribe. The tribe may alter these placement preferences, and approval of a home can be sought through a tribal representative at any time in the proceedings.



If the child is to be placed for adoption, preferences are as follows:

- To a member of the Indian child's extended family,
- To other members of the Indian child's tribe, or
- To other Indian families.

The court may deviate from the above preferences only on a showing of good cause, which may be based on

- Requests by the Indian child, parent, or Indian custodian;
- The Indian child's extraordinary physical or emotional needs as established by a qualified expert witness; or
- Lack of a suitable family after a diligent search has been made to identify families meeting the preference criteria.

b. Jurisdictional Issues

(i) Full Faith and Credit

Full faith and credit must be afforded to all public acts, records, and judicial proceedings of any Indian tribe. (25 U.S.C. § 1911(d).)

(ii) Exclusive Jurisdiction

If the Indian child resides or is domiciled on a reservation that exercises exclusive jurisdiction, the dependency petition must be dismissed.

(iii) Temporary Emergency Jurisdiction

However, the juvenile court may exercise temporary emergency jurisdiction even when a tribe has exclusive jurisdiction if the child is temporarily off the reservation and there is an immediate threat of serious physical harm to the child. Temporary emergency custody must terminate within 90 days unless the court determines, based on clear and convincing evidence, including the testimony of a qualified expert witness, that returning the child to the parent or Indian custodian is likely to cause serious damage to the child.

(iv) Concurrent Jurisdiction

If the Indian child is not residing or domiciled on a reservation that exercises exclusive jurisdiction, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribe. The juvenile court must transfer the case absent good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer; in the latter instance, the juvenile court retaining jurisdiction must continue to comply with ICWA requirements. (Cal. Rules of Court, rule 5.664(c).)



INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

The Interstate Compact on the Placement of Children (ICPC) is an agreement among member territories and states, including California, that governs “sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption. . . .” (Fam. Code, § 7901, art. 3(b).) The purpose of the ICPC is to facilitate cooperation between jurisdictions for the placement and ongoing supervision of children who are dependents or wards of the court, and it details the procedures that must be followed in making out-of-state placements in such situations.

APPLICABILITY

1. Generally

The ICPC applies to the placement of any dependent child in any other state, the District of Columbia, or the U.S. Virgin Islands. (Cal. Rules of Court, rule 5616(a).) It applies to placement with relatives, nonrelatives, nonagency guardians, residential institutions, group homes, and treatment facilities. (*Id.*, rule 5616(b).)

2. Distinction Between Visit and Placement

An order authorizing a visit that is for a period longer than 30 days, that is indeterminate in length, or that extends beyond the end of a school vacation is considered a placement and therefore is subject to the ICPC. (*Id.*, rule 5616(b).)



TIP Although true short-term visits are not controlled by the ICPC, assistance from the receiving state’s ICPC unit may be helpful in facilitating visits—for example, by conducting background checks or courtesy visits.

3. Previously Noncustodial Parent

According to the California Court of Appeal, the ICPC does *not* apply to placement outside California with a previously noncustodial parent. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1574–1575 [“the ICPC’s overall design (is to) protect children in placements that are substitutes for parental care,” citing *In re Johnny S.* (1995) 40 Cal.App.4th 969, 977]; see also *Tara S. v. Superior Court* (1993) 13 Cal.App.4th 1834.) The court in *John M.* concluded that rule 5616(b) of the California Rules of Court impermissibly extended ICPC compliance requirements to out-of-state parents and, to that extent, is ineffective. (*In re John M., supra*, 141 Cal.App.4th at p. 1575.)

Although compliance with the ICPC is not required for placement with an out-of-state parent, nothing in the ICPC prevents the use of an evaluation as a method of gathering information about a parent before the court makes a finding under section 361.2 regarding whether placement with the previously noncustodial parent would be detrimental to the child. (*In re John M., supra*, 141 Cal. App.4th at p. 1572.) However, an unfavorable recommendation by the receiving jurisdiction cannot be the sole basis for denial of placement, absent other evidence establishing detriment.



TIP The attorney for a nonoffending parent from another state will want to gather as much evidence as possible (such as home photos, work history, letters from employers or clergy) to present to the child’s attorney, social worker, and court so that the court can make informed decisions on the child’s placement in the parent’s custody and termination of jurisdiction.

PROCEDURE

1. Requirements

Prior to placing a child in another state, the sending jurisdiction must notify the designated receiving jurisdiction of the intention to place the child out of state. A child cannot be sent to the new caregivers until the receiving jurisdiction has responded in writing that



it has determined that the placement is not contrary to the child's best interest. (Cal. Rules of Court, rule 5616(d).)



TIP It can be argued that because a child is merely “detained” and not “placed” prior to disposition, an ICPC cannot be initiated until the court makes the dispositional orders removing the child from the custodial parent and placing the child in foster care. However, this is a subtle distinction, and especially given that ICPC assessments can take months to complete, counsel may want to request an ICPC referral from the court as soon as the issue of out-of-state placement arises.

2. Priority Placements

Expedited procedures may be utilized if the placement request qualifies as a “priority.” This requires express findings by the court that either

1. The proposed caregiver is a relative, and
 - The child is under 2 years of age, or
 - The child is in an emergency shelter, or
 - The child has spent a substantial period of time in the proposed caregiver's home; or

2. The receiving jurisdiction has been in possession of a properly completed ICPC request for more than 30 business days and has not sent notice of its determination as to whether the child may be placed. (*Id.*, rule 5616(b)(2).)

The procedure for submitting a priority placement request and for seeking assistance from the receiving jurisdiction in the case of a delayed response (including references to the required Judicial Council forms and a detailed timeline of the process) can be found in rule 5616(f).



TIP Counsel must keep close watch on the time limits for ICPC compliance and approach the court for assistance if the receiving state does not respond in a timely manner. A list of the compact administrators for each of the member jurisdictions and their contact information is available online at <http://ICPC.aphsa.org>.

JURISDICTIONAL ISSUES

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

Apart from the Parental Kidnapping Prevention Act (discussed below), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) exclusively governs subject matter jurisdiction in child custody—including dependency—cases. (Fam. Code, §§ 3400–3465.)

1. Purpose

The purpose of the UCCJEA is to avoid jurisdictional competition between states, to promote interstate cooperation so that custody orders are made in the state that can best decide the issue in the child’s interests, to discourage continuing custody conflicts, to deter child abductions, to avoid relitigation of another state’s custody decisions, and to facilitate enforcement of custody decrees. (See *In re Joseph D.* (1993) 19 Cal.App.4th 678, 686–687 (discussing former UCCJA).)

2. Applicability

Generally speaking, California has jurisdiction over a child who is the subject of a dependency petition if the child has lived in California with a parent for the six consecutive months immediately before the petition was filed *and* there have not been any prior out-of-state custody proceedings involving the child. However, if another state or country has made a “child custody determination” prior to commencement of the California dependency proceedings, or if the child has lived in California for less than six months at the time dependency proceedings are initiated, the California court may be prohibited from exercising jurisdiction, except for temporary emergency jurisdiction.

Under the UCCJEA, a California court has jurisdiction to make an *initial* child custody determination if any of the following are true:

a. Home State

California is the child’s “home state” on the date that proceedings are commenced, or it was the child’s home state within six months prior to commencement of the proceeding and the child is absent from California but a parent or person acting as a parent continues to live in California. (Fam. Code, § 3421(a)(1); see § 3402(g) for definition of “home state.”) Home state jurisdiction has priority over all other bases for jurisdiction under the UCCJEA.

b. Significant Connection

No court of another state has home state jurisdiction as described above, or a court of the child’s home state has declined to exercise jurisdiction because California is the more convenient forum (*Id.*, § 3427), or a party has engaged in unjustifiable conduct (*Id.*, § 3428), *and* both of the following are true:

- The child and at least one parent or person acting as a parent have a significant connection with California, other than mere physical presence; *and*
- Substantial evidence is available in California concerning the child’s care, protection, training, and personal relationships. (*Id.*, § 3421(a)(2).)

c. State With Jurisdiction Has Declined to Exercise It Because of Inconvenient Forum or Unjustifiable Conduct

All courts having jurisdiction under a or b above have declined to exercise jurisdiction because California is the more appropriate forum under Family Code section 3427 or 3428. (*Id.*, § 3421(a)(3).)

d. Default

No court of any other state would have jurisdiction under a, b, or c above. (*Id.*, § 3421(a)(4).)



TIP Physical presence of, or personal jurisdiction over, a parent or child is neither necessary nor sufficient to make a child custody determination. (*Id.*, § 3421(c); but see “Temporary Emergency Jurisdiction,” below). Also, California does not have to en-

force a custody order that was not made in substantial compliance with UCCJEA standards (i.e., without notice and an opportunity to be heard). (See Fam. Code, §§ 3425(b), 3443(a); *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1175–1176.)

3. Temporary Emergency Jurisdiction

Even if a California court does not have jurisdiction to make a child custody determination under the conditions described above, it does have temporary emergency jurisdiction if a child is present in California *and* has either been abandoned or it is necessary in an emergency to protect the child because the child, a sibling, or a parent has been subjected to or threatened with mistreatment or abuse. (Fam. Code, § 3424(a).)

The status of any orders made under temporary emergency jurisdiction and the actions that the California juvenile court must subsequently take are determined by whether or not there are existing custody orders or proceedings in another jurisdiction.

a. Previous Custody Order or Proceedings Commenced in Another State

If another state previously made a child custody determination or if a child custody proceeding is commenced in a state having jurisdiction, any protective order issued by the California court is temporary and must specify an expiration date. The temporary order remains in effect only until an order is obtained from the state having jurisdiction or until the California order expires, whichever occurs first. (*Id.*, § 3424(c).) In addition, the California court must immediately communicate with the court having jurisdiction to determine how best to resolve the emergency. (*Id.*, § 3424(d).)

b. No Previous Custody Order and Proceedings Not Commenced in State With Jurisdiction

If there is no previous child custody determination and no child custody proceeding has been commenced in a state having jurisdiction, any custody order made by the California court remains in effect

until an order is obtained from a state having jurisdiction. If a child custody proceeding is not commenced in a state having jurisdiction and California later becomes the child's home state, then the California custody order becomes a permanent child custody determination if the order so provides. (*Id.*, § 3424(b).)



TIP If there is a previous out-of-state custody order, the court should not proceed with the jurisdictional hearing unless the court of the state with jurisdiction has agreed to cede jurisdiction to California. (See *In re C.T.* (2002) 100 Cal.App.4th 101, 109.)

PARENTAL KIDNAPPING PREVENTION ACT (PKPA)

The federal Parental Kidnapping Prevention Act (PKPA) requires states to give full faith and credit to another state's custody determination so long as it is consistent with the provisions of the PKPA—that is, the state that made the determination had jurisdiction over the custody matter under its own law and one of five specified conditions exists. (See 28 U.S.C. § 1738A(c).) While the PKPA preempts state law, it does not provide for federal court jurisdiction over custody disputes; thus, it is up to state courts to construe and apply the PKPA to decide which state has jurisdiction. (*Thompson v. Thompson* (1988) 484 U.S. 174, 187.) If a California court has jurisdiction under the UCCJEA, conflict with the PKPA is unlikely because the two acts are generally consistent. Like the UCCJEA, the PKPA contains an emergency jurisdiction provision. (28 U.S.C. § 1738A(c)(2)(c).)

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

The Hague Convention on International Child Abduction, implemented in the United States by the International Child Abduction Remedies Act (ICARA), governs jurisdiction in international custody disputes involving participating countries. (42 U.S.C. § 11601 et seq.)

It provides procedures and remedies for return of a child wrongfully removed from, or retained in a country other than, the child's place of habitual residence. (See *id.*, § 11601(a)(4).) Several affirmative defenses are available to a parent who opposes return of a child, including "grave risk" of physical or psychological harm to the child if returned. (See *id.*, § 11603(e)(2); *Gaudin v. Remis* (2005) 415 F.3d 1028.) State courts and United States district courts have concurrent jurisdiction over Hague Convention actions. (42 U.S.C. § 11603(a).)



TIP For more information on the UCCJEA and PKPA, see 2 Kirkland et al., *California Family Law Practice and Procedure* (2d ed. 2005) *Jurisdiction to Determine Custody and Visitation*, section 32.20 et seq. For information on the Hague Convention, see *Special Remedies for Enforcement of Custody and Visitation Orders*, in volume 4 at section 142.50 et seq.



PARENTAGE

TYPES OF PARENTAGE

There are several different categories of parentage. The legal designation a person receives not only affects the rights afforded to that person but also can have an important impact on the procedural path of the entire dependency case.



TIP Despite the complexities of the code and case law, parentage issues must be addressed and resolved as early as possible in a dependency action as these decisions can affect placement, access to family reunification services, and other critical issues. Counsel can request that the court make orders, after an evidentiary hearing if necessary, to clarify the status of any persons who claim parentage and to resolve any conflicting claims regarding parentage.

1. Alleged Father

A man is an alleged father if he appears at a dependency hearing and claims to be the child's father or if he is named by the child's mother as the father.

2. Biological Father

A man is a biological father if his paternity is proved by a blood test but he has not achieved presumed father status. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 499, fn. 15.). This category includes persons adjudicated to be fathers in a prior family law or child support case, either on the basis of blood tests or by default. Additionally, if a man appears at a dependency hearing and requests a finding of paternity on form JV-505 (*Statement Regarding Parentage*), the court must determine whether he is the biological father by ordering a paternity test. (Cal. Rules of Court, rule 1413(h); see *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108; but see *In re Elijah V.* (2005) 127 Cal.App.4th

576 [court may not order a blood test under Family Code section 7541 to defeat a conclusive marital presumption of paternity].)



TIP

In addition, the court has the discretion to order blood tests if in the child's best interest—for example, to create a basis for placement with paternal relatives or to resolve competing claims to biological paternity. However, remember that biological paternity is neither necessary nor sufficient to establish presumed father status.

3. Kelsey S. Father

A man is a *Kelsey S.* father if he is a biological father and he promptly attempts to fulfill parental responsibilities, but he is unable to establish presumed father status through no fault of his own. (*Adoption of Kelsey S.* (1992), 1 Cal. 4th 816 [child's mother would not let father have contact with the child]; *In re Andrew L.* (2004) 122 Cal.App.4th 178 [father's repeated efforts to establish paternity were thwarted by the county social worker].)

4. Presumed Father (Fam. Code, §§ 7540, 7570, 7611(d))

A man qualifies as a 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 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 (*Id.*, § 7611(c)),
3. He has lived with the child and held himself out as the child's father (*Id.*, § 7611(d)), or
4. He and the mother have signed a voluntary declaration of parentage under Family Code section 7570 et seq.



Each of these presumptions can be rebutted under certain circumstances:

Number 1 above can be rebutted only if the husband is proved not to be the biological father, by blood tests requested within two years of the child's birth. (*Id.*, § 7541.)

Numbers 2 and 3 can be rebutted "by clear and convincing evidence" or if there is a competing claim to presumed father status pursuant to Family Code section 7611(c) or (d) that is "founded on weightier considerations of policy and logic." (*Id.*, § 7612; see also *In re Eric E.* (2006) 137 Cal.App.4th 252.)

Number 4 can be rebutted only if blood tests show that the person who signed the declaration is not the biological father. (Fam. Code, § 7576(d).)

5. Presumed Mother

Although paternity issues arise more frequently, issues of maternity may also arise in dependency cases. A woman other than the child's birth mother may be found to be a presumed mother if she is or was the birth mother's domestic partner or she has lived with the child and held herself out as the child's mother. (See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108.)

RIGHTS BASED ON PARENTAGE

- **Alleged fathers** have the right to notice of dependency hearings and an opportunity to show that they should be granted presumed father status. (§ 361.2(b); Cal. Rules of Court, rule 1413(h); *In re Alyssa F.* (2003) 112 Cal.App.4th 846, 855.) They have no right to custody or reunification services. (See *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 435.)
- **Biological fathers** have the right to notice of dependency hearings and must be afforded an opportunity to show that they should be granted presumed father status. The court has

discretion to grant services if to do so is in the child's best interest. (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 726.)

- **Kelsey S. fathers** have the right to notice of dependency hearings and an opportunity to show that they should be granted presumed father status. (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 816.) The court must give a *Kelsey S.* father a fair opportunity to develop a relationship with the child and to fulfill parental responsibilities. Denying a *Kelsey S.* father visitation and other reunification services has been found to violate due process and the dependency statutory scheme. (See *In re Julia U.* (1988) 64 Cal.App.4th 532.)
- **Presumed fathers** are afforded full standing in dependency actions as well as all constitutional and statutory rights and protections provided to “parents” under the Welfare and Institutions Code. (See §§ 311, 317, 319, 335, 337, 361.2, 366.21, 366.22, 366.26, 366.3; *In re Jesusa V.* (2004) 32 Cal.4th 588, 610.) The primary purpose for seeking presumed status in dependency matters is that presumed fathers have the right to reunification services and to custody. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 804.) A request for recognition as a presumed father may be brought by filing a section 388 petition. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 442, fn. 5.)



TIP Relatives of presumed fathers and biological fathers (but not alleged fathers) have the right to preferential consideration for placement of a child. (§ 361.3(b)(2); see also Relative Placements fact sheet.)



PARENTS' RIGHTS REGARDING GAL APPOINTMENTS AND INCARCERATED PARENTS

GAL APPOINTMENTS FOR MENTALLY INCOMPETENT PARENTS

A guardian ad litem (GAL) is a person appointed by the court to protect the rights of an incompetent person. The GAL serves as the party's representative and controls the litigation but may not waive fundamental rights (such as the right to trial) unless there is a significant benefit to the party from doing so. (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454.) A GAL should be appointed for a parent in a dependency case if the parent cannot understand the nature or consequences of the proceedings and is unable to assist counsel in case preparation. (Code Civ. Proc., § 372; Pen. Code, § 1367; see also *In re C.G.* (2005) 129 Cal.App.4th 27.)

Due process requires either the parent's consent or a hearing to determine whether the parent is incompetent before the juvenile court can appoint a GAL. (*In re C.G.*, *supra*, 129 Cal.App.4th at p. 27.) At the hearing, the court should explain to the parent what a GAL is and give the parent an opportunity to be heard on the issue. The court should appoint a GAL only if the preponderance of the evidence shows that the parent has a mental impairment and that the parent does not understand the nature of the case or cannot meaningfully assist counsel.



TIP Counsel should carefully consider the extent to which the client's case will be compromised by the request for and appointment of a GAL, as the parent's mental health and competency may factor into the court's and other counsel's positions on the allegations, reunification services, and the safety of return.





TIP If a parent’s counsel thinks a GAL should be appointed, counsel may either ask the parent to consent (although it is unclear whether a parent who needs a GAL would be competent to give informed consent) or ask the court to set a hearing. (See *In re Sara D.* (2001) 87 Cal.App.4th 661.) Counsel may request that the court hold a closed hearing, that all documents related to the hearing be sealed, and/or that the hearing be conducted in front of another bench officer when the issues of competency coincide with the allegations to be adjudicated. The court may also raise the issue sua sponte, and any party (including minor’s counsel) may bring the issue to the court’s attention.

INCARCERATED AND INSTITUTIONALIZED PARENTS

1. Presence at Hearings

The Penal Code requires that incarcerated parents and their counsel be present for adjudications and hearings set under section 366.26 to terminate parental rights. The court must grant a continuance if the incarcerated parent is not brought to the hearing, unless he or she has waived the right to be present. (Pen. Code, § 2625(d); see *In re Jesusa V.* (2004) 32 Cal.4th 588.)

Penal Code section 2625(d) does not apply to

- Adjudication of a section 300(g) petition (Pen. Code, § 2625(d)),
- A parent incarcerated out of state or in a federal prison (*In re Maria S.* (1998) 60 Cal.App.4th 1309, 1312–1313), and
- Hearings other than adjudication or termination of parental rights—these may be held in the absence of an incarcerated parent so long as the parent’s counsel is present; however, the court has the discretion to order the incarcerated parent to be present under Penal Code section 2625(e).

If a continuance to allow the incarcerated parent to be present would cause the adjudication to occur more than six months after detention, then the child’s right to prompt resolution of the case



under section 352(b) prevails over the parent’s right to be present under Penal Code section 2625. (See *D.E. v. Superior Court* (2003) 111 Cal.App.4th 502.)

2. Jurisdictional Allegations

Under section 300(g), the court may declare a child a dependent if a parent is incarcerated or institutionalized and “cannot arrange for the care of the child.” However, in order for the court to do so, the county social services agency must prove that the parent cannot make an appropriate plan for the child’s care—not just that the parent has not yet done so. (See *In re S.D.* (2002) 99 Cal.App.4th 1068.)

3. Custody, Visitation, and Services

The Court of Appeal has stated that “[t]here is no ‘Go to jail, lose your child’ rule in California.” Section 300(g) is applicable only if an incarcerated parent is unable to arrange for the child’s care. (*In re S.D.*, *supra*, 99 Cal.App.4th at p. 1077.) If a nonoffending parent is incarcerated, the court may not remove the child from that parent’s custody unless (1) the parent is unable to arrange for the care of the child or (2) the parent would not be able to protect the child from future physical harm. (§ 361(c); *In re Isayah C.* (2004) 118 Cal. App.4th 684.)

Reunification services must be provided to an incarcerated parent unless the court finds by clear and convincing evidence that such services would be detrimental to the child. (§ 361.5(e).) In making this finding, the court must consider the

- Age of the child;
- Degree of parent-child bonding;
- Nature of the parent’s crime or illness;
- Length of the sentence or the nature and duration of the parent’s treatment;
- Potential detriment to the child if services are not offered; and
- Views of the child, if 10 or older.

The county social services agency must make a “good faith” effort to provide services unique to each family’s needs and specially tailored to fit its circumstances. Neither difficulty in providing services nor low prospects of successful reunification excuses the duty to provide reasonable services. In light of this, the county social services agency must identify services available to an institutionalized parent and assist in facilitating them. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010, 1014–1015.)

Services to an incarcerated or institutionalized parent may include, for example:

- Providing services to relatives, extended family members, or foster caregivers;
- Counseling, parenting classes, or vocational training if available in the institution;
- Allowing the parent to call the child collect;
- Transporting the child for visits; and
- Arranging visitation. (See § 361.5(e)(1).)

The Welfare and Institutions Code provides for visitation between an incarcerated parent and the child “where appropriate.” (*Ibid.*) The court must find clear and convincing evidence of detriment in order to deny visitation under 361.5(e)(1), and neither the age of the child alone nor any other single factor forms a sufficient basis for such a finding absent a further showing of detriment. (See *In re Dylan T.* (1998) 65 Cal.App.4th 765.)

 **TIP** Visitation must always be a component of the case plan, as it is vital to the reunification process. In fact, reunification services may be deemed inadequate if there has been no visitation arranged by the social services agency for a parent incarcerated within a reasonable distance of the child’s placement. (See *Precious J.* (1996) 42 Cal.App.4th 1463, 1477–1479.)

Penal Code sections 1174 et seq. and 3410 et seq. govern the community treatment program that allows some convicted parents to be released to a private treatment facility in which their children under

the age of six can also reside. If the parent wants to participate in this program, the juvenile court must determine whether the parent's participation is in the child's best interest and will meet the needs of both the parent and the child. (§ 361.5(e)(3).)

RELATIVE PLACEMENTS

Whenever a child must be removed from the family home, placement should be sought with relatives or other persons whom the child knows and is comfortable with in order to minimize the trauma of removal, to maintain consistency and routine (such as attendance at the same school or church or with the same therapist), and to encourage visitation and strengthen ties with parents, siblings, and extended family members.

DEFINITIONS

1. Relative

In the context of serving as a placement resource for a dependent child, a “relative” is defined as an adult related by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all “great, great-great, or grand” relatives and the spouses of those persons, even if divorce or death ended the marriage. (§§ 319(f), 361.3(c)(2); Cal. Rules of Court, rule 5,502(a).) Affinity exists between a person and the blood or adoptive kin of that person’s spouse. (Cal. Rules of Court, rule 5,502(a).)

2. Nonrelative Extended Family Members

A nonrelative extended family member (NREFM) is defined as an adult who has an “established familial or mentoring relationship with the child” that has been verified by the county social services agency. (§ 362.7.) A NREFM is treated as a relative in virtually all aspects of assessment and determination as to the appropriateness of placement.



TIP Note that the relationship must be between the NREFM and the child. As such, unless and until the statute is amended, counsel may need to seek alternatives (such as guardianship) to secure placement of newborns or very young children with appropriate extended family members and friends.



PREFERENCE FOR PLACEMENT WITH RELATIVES

1. Generally

It is the stated intent of the California Legislature to “preserve and strengthen a child’s family ties whenever possible.” Further, when “a child is removed from the physical custody of his or her parents, preferential consideration shall be given whenever possible to the placement of the child with the relative as required by Section 7950 of the Family Code.” (§ 16000(a).) However, preferential consideration for placement is given only to the child’s grandparents and adult aunts, uncles, and siblings. (§ 319(f).)

2. Prior to Disposition

Whenever a child is detained, if an able and willing relative or NREFM requests temporary placement pending the detention hearing, the county social services agency must initiate an assessment of the appropriateness of the placement and may place the child upon completion of that assessment. (§ 309(d).) In the report presented to the court at the detention hearing, the social worker must inform the court whether there are any relatives who are able and willing to take temporary physical custody of the child if needed. (§ 319(b).) Although upon detaining a child the court must order temporary placement and care of the child vested with the county social services agency, it may also order that the child be physically detained in the assessed home of a specific relative or NREFM. (§ 319(e) & (f); Cal. Rules of Court, rule 5.678(e).)



TIP To encourage speedy placement and facilitate effective concurrent planning, counsel should encourage appropriate relatives and NREFMs to visit the child as frequently as possible and to use the time from the earliest days of the case to build and strengthen the network of relationships with persons important to the child.



3. At Disposition

Once a child has been declared a dependent and it has been determined that out-of-home placement is necessary, placement should be with relatives if at all possible (taking into consideration the proximity of the parents and access to visitation) unless that is shown not to be in the child's best interest. The county social services agency has the duty to make diligent efforts to locate and place the child with an appropriate relative. (Fam. Code, § 7950.) Upon removal of a child from parental custody, preferential consideration must be given to relatives who request placement. (§ 361.3(a).) "Preferential consideration" means that the relative seeking placement must be the first to be considered and investigated. However, as at the initial hearing, preferential consideration is given only to grandparents and adult aunts, uncles, and siblings. (§ 361.3(c).)



TIP The court must exercise its independent judgment in determining whether a relative placement is appropriate; it cannot merely defer to the recommendation of the social worker. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 (section 361.3 expressly requires the court to give favorable consideration to an assessed relative and to make its own determination based on the suitability of the home and the child's best interest); see also *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.)

4. After Disposition

Following disposition, any time that a child needs a change in placement, preferential consideration must be given to grandparents and adult aunts, uncles, and siblings. (§ 361.3(d).) This preference for relative placement continues up to and until the time that parental rights are severed. (See *Cesar V.*, *supra*, 91 Cal.App.4th at p. 1023 [even after termination of reunification services, a relative should remain "at the head of the line" when placement decisions are made].)

Before any child can be placed in long-term foster care, the court must find that the county social services agency has made

diligent efforts to locate an appropriate relative placement and that each relative whose name has been submitted as a possible caregiver has been evaluated. (Fam. Code, § 7950(a)(1).)



TIP Again, even in situations where placement with a relative or NREFM may not be appropriate, counsel should continue to encourage frequent contact and visitation with the child.

PLACEMENT

1. Appropriateness

Under section 361.3(a) the social worker must determine whether a relative being considered as a placement resource is appropriate based on (but not limited to) consideration of all of the following factors:

- Child's best interest, including individual physical, medical, educational, psychological, or emotional needs;
- Wishes of the parent, relative, and child;
- Placement of siblings in the same home;
- Good moral character (based on a review of prior history of violent criminal acts or child abuse) of the relative and all other adults in the home;
- Nature and duration of the relationship between the child and relative;
- Relative's desire to care for the child;
- Safety of the relative's home; and
- Ability of the relative to provide a safe, secure, and stable home and the necessities of life; to exercise proper care and control of the child; to arrange safe and appropriate child care if needed; to protect the child from the child's parents; to facilitate court-ordered reunification efforts, visitation with other relatives, and implementation of the case plan; and to provide legal permanence if reunification fails.

However, neither inability to facilitate implementation of the case plan nor inability to provide legal permanence may be the sole basis for denying placement with a relative. (§ 361.3(a).)





TIP Counsel speaking to relatives seeking placement must keep in mind the possibility that reunification may not occur. Regardless of the stage of the proceedings or the legal permanent plan (if determined), relatives must consider providing emotional permanence and a stable home for the child. If a relative insists that placement in his or her home is only temporary, counsel must carefully weigh whether such a placement would be in the child's best interest.

2. Assessment

All potential caregivers must be assessed by the county social services agency before a child can be placed in the home. This is both a federal requirement under the Adoption and Safe Families Act (ASFA) and is mandated by state law. (See § 361.4.) The assessment standards are essentially the same as those required to obtain a foster care license. (§ 309(d).) The assessment includes an in-home inspection to determine the physical safety of the home and an investigation into the suitability of the prospective caregivers and must cover all of the following areas:

a. Criminal History

Prior to placing (or detaining) the child with a relative the court must consider the social worker's recommendations and the relative's history, if any, of prior criminal convictions and alleged child abuse. (*Ibid.*; § 319(f).) A criminal records check, also known as a CLETS (California Law Enforcement and Telecommunications System) check, must be done for all persons living in the home who are age 18 or older and for all adults (other than those providing professional services) who would have "significant contact" with the child. A CLETS check may be conducted for anyone age 14 years or older who is living in the home and who the social worker believes might have a criminal record. (§ 361.4(b).) Additionally, within five court days, a fingerprint clearance check (also known as a LiveScan) must be initiated through the California Department of Justice (DOJ) to



verify the CLETS results, and the DOJ must forward the fingerprints to the FBI for a federal criminal clearance. (*Ibid.*; § 16504.5(b).) If the relative or NREFM meets all requirements for approval except receipt of FBI clearance, the social services agency may conditionally place the child in the home after all adults submit signed statements declaring that they have no criminal history. (§ 309(d)(3).)

b. Child Abuse History

The social worker must initiate a check of the DOJ's Child Abuse Central Index (CACI) through the California Department of Justice for the prospective caregiver and all persons age 18 or older living in the home. (§ 361.4(c).)

c. Home Inspection

The prospective caregiver's home must meet the standards set forth in foster care licensing regulations. (§ 361.4(a); see also Cal. Code Regs., tit. 22, §§ 89317–89388.) The standards include the following requirements:

- No more than two children can share a bedroom;
- Children of the opposite sex cannot share a bedroom unless each child is under five years old;
- No room commonly used for another purpose can be used as a bedroom (i.e., hallway, garage, storage area);
- No bedroom can be used as a general passageway to another room;
- Each child must be provided with an individual bed equipped with clean mattress, linens, blankets, and pillow;
- Each bedroom must have closets and drawer space for the child's clothing and belongings;
- Each infant must have a safe and sturdy bassinet or crib; and
- Except for infants, children may not share a bedroom with an adult.

(Cal. Code Regs., tit. 22, § 89387.)

Exceptions may be granted for certain "deficiencies" (e.g., allowing more than two children to share a bedroom). The social worker

may also resolve problems by implementing a Documented Alternative Plan (DAP) or Corrective Action Plan (CAP).



TIP The county social services agency has the responsibility to alert the potential caregiver to any deficiencies, to assist in creating a “plan of correction,” and to set a time for reassessment. Additionally, the state has created the Kinship/Foster Care Emergency Fund to facilitate relative and NREFM placements by providing funds to correct problems that hamper safe placement. Counsel should be proactive and demand that the agency do what is necessary to facilitate the safe and speedy placement of children with relatives.

3. Possible Court Orders

a. Conditional Placement

The court may conditionally place a child with a relative upon receiving criminal clearances from CLETS and the DOJ while awaiting receipt of the FBI federal records so long as all adults in the household sign statements that they have no criminal history. Placement may subsequently be terminated if results reveal undisclosed criminal convictions. (§ 309(d)(3).)

b. When a Member of the Household Has a Criminal Record

If the results of the CLETS or LiveScan show a criminal conviction for anything other than a minor traffic violation, a child cannot be placed in the home unless and until the county social services agency grants a criminal conviction exemption (sometimes called a waiver). (§ 361.4(d)(2); Health & Saf. Code, § 1522(g); *Los Angeles County Department of Children and Family Services v. Superior Court (Richard A.)* (2001) 87 Cal.App.4th 1161 [the restrictions under section 361.4(d)(2) are mandatory, and the court cannot place a child in a home in which a person has a conviction unless an exemption has been granted].) The juvenile court may, however, set a hearing to determine whether the agency has abused its discretion by failing to seek or by denying an exemption. (*In re Jullian B.* (2000) 82 Cal.App.4th 1337.)

An exemption is granted based on substantial and convincing evidence that the prospective caregiver (or other person in the home with a criminal record) is of such good character as to justify the exemption. An exemption is needed even if the conviction has been expunged or set aside pursuant to Penal Code section 1203.4 or 1203.4(a). (Health & Saf. Code, § 1522(f)(1); *Los Angeles County Dept. of Children and Family Services v. Superior Court (Cheryl M.)* (2003) 112 Cal.App.4th 509.) Some crimes are not subject to exemption, including most sexual crimes and child endangerment offenses involving great bodily harm. (Health & Saf. Code, § 1522(g).)

However, only crimes that are “crimes against an individual” can be considered as nonexemptible, in the context of the Health and Safety Code restrictions under section 1522(g) that prohibit persons from qualifying as relative caregivers or foster parents or from working at child care facilities. (See *Jane Doe v. Rita Saenz* (2006) 140 Cal.App.4th 960 [treating the nonviolent crime of second degree robbery as a nonexemptible crime violates the Equal Protection Clause of the Constitution].) Further, the prohibition against placing a child with a person with a criminal history for which no exemption has been obtained is inapplicable to a guardianship granted at disposition under section 360(a). (*In re Summer H.* (2006) 139 Cal. App.4th 1315; see also Disposition black letter discussion.)

c. In Other Situations Lacking Agency Approval

The court may order a child placed in a home despite lack of approval so long as the county social service agency’s denial is not based on a criminal conviction. The juvenile court has a duty to make an independent placement decision under section 361.3; it cannot merely defer to the social worker’s recommendation. (*Cesar V., supra*, 91 Cal. App.4th at p. 1023.)



TIP

Although the court clearly has the power to make a specific placement order over the objection of the county, counsel should be aware that placement without the approval of the county social services agency can negatively affect funding and render the



family ineligible for federal relative foster care funds (otherwise known as *Youakim* or AFDC-FC).

d. When Relative Lives in Another State

If the potential caregiver lives in a state other than California, the placement process must comply with the Interstate Compact on the Placement of Children (ICPC). (Fam. Code, § 7901; Cal. Rules of Court, rule 1428; see also fact sheet on the ICPC.) However, the ICPC does not apply to release to a previously noncustodial parent living in another state. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1574–1575; see also fact sheet on ICPC.)

 **TIP** The child cannot be sent to a placement in another state unless and until the requirements of the ICPC have been met. This is often a cumbersome and time-consuming process, so a referral should be made as soon as an out-of-state placement resource is identified.

REMOVAL FROM A RELATIVE PLACEMENT

1. While Parental Rights Are Still Intact

a. Generally

Under certain circumstances the county social services agency must file a petition under section 387 when it removes a child from a relative's home, including when the child was specifically ordered by the court to be placed in that home. There is a split of authority as to whether removal from a general placement requires judicial review. (See *In re Cynthia C.* (1997) 58 Cal.App.4th 1479 [no 387 petition is needed]; but see *In re Jonique W.* (1994) 26 Cal.App.4th 685 [a petition is necessary especially where the custodial relative's conduct is at issue]; *In re Joel H.* (1993) 19 Cal.App.4th 1185 [relative de facto parent is entitled to challenge removal]; see also Subsequent and Supplemental Petitions black letter discussion.)

b. Special Versus General Placement Orders

An order at disposition simply placing the child in the care and custody of the county social services agency is deemed a general placement order that, in most circumstances, gives the agency the discretion to make placement changes without bringing the issue before the court. However, the court has the authority to order the agency to place a child in a specific home, thereby triggering procedural protections for the placement. (See *In re Robert A.* (1992) 4 Cal.App.4th 174, 189 [“Although the court does not make a direct placement order itself, it does have the power to instruct the (county social services agency) to make a particular out-of-home placement of a particular dependent child”].)



TIP A “specific placement” order is far preferable to one generally placing the child in the custody of the county social services agency. Removal from the former requires that the county file a supplemental petition under section 387.

c. When Agency Withdraws Approval of Caregiver or Home

The prohibitions in section 361.4 involving a prospective caregiver’s criminal history apply only to initial placement, *not* to removal from an existing placement. Neither a conviction after placement has been made nor delayed recognition of an existing record requires removal from a caregiver; the court has the discretion to allow the child to remain in the home and a duty to make an independent decision. (*Cheryl M., supra*, 112 Cal.App.4th at p. 519.) Further, removal is not mandated from a court-ordered placement merely because the county social services agency withdraws its approval of the relative’s home. (*In re Miguel E.* (2004) 120 Cal.App.4th 521 [the agency does not have absolute authority to change placements, and its approval is only one of the factors that the court considers in reviewing the continuing appropriateness of a placement].)

However, a caregiver’s physical move into a different house triggers a new assessment and approval process. Further, the court does not have the discretion to allow a child to remain with a caregiver if

anyone in the new home has a criminal conviction unless the county social services agency grants an exemption. (*Los Angeles County Dept. of Children and Family Services v. Superior Court (Sencere P.)* (2005) 126 Cal.App.4th 144.)

2. After Termination of Parental Rights

After parental rights have been terminated, the agency responsible for the child's adoption has exclusive care and custody of the child until the adoptive petition is granted. (§ 366.26(j).) This statutory language has been interpreted to give the agency the discretion to terminate or change placements as it sees fit until the adoption petition is granted. The court cannot substitute its judgment for that of the agency; it can merely review whether the agency abused its discretion by acting in a capricious or arbitrary manner. (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721.) However, the ultimate responsibility for the child's well-being remains with the court, which has the responsibility to ensure that posttermination placement decisions are appropriate and in the child's best interest. (See *In re Shirley K.* (2006) 140 Cal.App.4th 65; *Fresno County Department of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626.)

Further, pursuant to section 366.26(n), a child cannot be removed from a caregiver who qualifies as a prospective adoptive parent without notice and the opportunity for a hearing at which the court will determine whether removal is in the child's best interest. (§ 366.26(n); see also Caregivers fact sheet.)

SAFE HAVEN / SAFE SURRENDER

The purpose of the safe-haven/safe-surrender law is to save the lives of newborn infants who otherwise might be abandoned and left to die. It does so by (1) decriminalizing the voluntary “surrender” of such children and (2) guaranteeing parental anonymity. Although in effect since January 1, 2001, there are no appellate opinions interpreting the law, and therefore the only guidance in determining how it should be applied comes from legislative history and the language of the statute itself.

STATUTORY REQUIREMENTS (HEALTH & SAF. CODE, § 1255.7)

The baby must be 72 hours old or younger and voluntarily surrendered to personnel on duty at a designated safe-surrender site (most often a hospital) by a parent or person having lawful custody.

“Lawful custody” means that physical custody is accepted from a person believed in good faith to be the infant’s parent and to have the express intent of surrendering the child. (Health & Saf. Code, § 1255.7(j).)

CONFIDENTIALITY AND ANONYMITY ARE KEY

- The child is identified only by an ankle bracelet that bears a confidential code;
- Although site personnel attempt to provide a medical questionnaire, it may be declined, filled out at the site, or anonymously mailed in, and it shall not require any identifying information about the child, parent, or surrendering party (*Id.*, § 1255.7(b)(3));
- Any identifying information received is confidential and cannot be further disclosed by either site personnel or the county social services agency (*Id.*, § 1255.7(d)(2) & (k));



- Identifying information shall be redacted from any medical information provided by site personnel to the social services agency (*Id.*, § 1255.7(d)(2));
- The agency cannot reveal information identifying the parent or surrendering party to state and national abduction and missing children agencies, although the child’s identifying information (e.g., physical description) shall be conveyed to those agencies (*Id.*, § 1255.7(e)); and
- All such information is exempt from disclosure under the California Public Records Act (*Id.*, § 1255.7(d)(2) & (k)).

PROCEDURE

- The case should be filed as a “g” count only, which specifically covers situations in which “the child has been . . . voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code . . .” (§ 300(g));
- The petition should preserve the anonymity of the child and parent(s), referencing the child only as “Baby Boy/Girl Doe” and the parents only as “John/Jane Doe”; and
- At disposition, no reunification should be provided and the court should set a 366.26 hearing within 120 days. (§ 361.5(b)(9) & (f).)

UNRESOLVED ISSUES

- Does the statute cover children who appear to be the victims of abuse or neglect? In other words, when abuse is suspected, should anonymity extend to the parents if they voluntarily surrender the child?
- Can a baby born with drugs in his or her system be considered a safe-haven baby?
- Can a baby not exposed to drugs and born in a hospital, whose mother’s identity is documented on all the birth records, be “surrendered” to hospital staff as a safe-haven baby?



TIP If identifying information is disclosed but all parties agree that the case should properly be handled under Health and Safety Code section 12555.7, ask the court to direct the social services agency to redact all identifying information from the petition and supporting documentation *or* to seal the file, and direct the agency to refile correctly. An amended birth certificate, with all names deleted pursuant to safe haven on the *Adjudication of Facts of Parentage* form, must be obtained from the California Department of Social Services.

- Does a safe-haven filing obviate the need for notice and the agency's duty to conduct a diligent search?
- What about the rights of the father of the newborn? Are they adequately protected?

Until the statutory law is clarified or the Court of Appeal weighs in, these and other questions about safe haven / safe surrender remain open for debate.



TERMINATION OF JURISDICTION: COMMON ISSUES

The court may terminate jurisdiction at several different stages of the proceedings and under a number of varying scenarios. Some of the more common issues encountered (and pitfalls to be aware of) are covered below.

CUSTODY TO ONE OR BOTH PARENTS

Whenever the court terminates jurisdiction over a child younger than 18 years, the court may enter protective orders (as provided under section 213.5) and/or orders regarding custody and visitation. Orders issued upon termination must be made on Judicial Council form JV-200 (*Custody Order—Final Judgment*) and must be filed in any existing dissolution or paternity proceedings or may serve as the sole basis for opening a file for such a proceeding. (§ 362.4.) Each parent has a right to notice of the intent to terminate jurisdiction and a right to be heard as to the proposed custody and visitation orders. (*In re Kelly L.* (1998) 64 Cal.App.4th 1279; *In re Michael W.* (1997) 54 Cal.App.4th 190; but see *In re Elaine E.* (1990) 221 Cal.App.3d 809.)

Juvenile court custody orders (sometimes called exit orders, family law orders, or FLO's) are final orders and will continue until they are modified or terminated by a superior court. (§ 362.4.) Such visitation and custody orders cannot be subsequently modified unless the court finds both that there is a significant change of circumstances and that the suggested modification is in the child's best interest. (§ 302(d); *In re Marriage of David and Martha M.* (2006) 140 Cal. App.4th 96.)



TIP Given the difficulty of modifying juvenile court custody orders after the fact (and the reality that most clients will be attempting to do so pro per), attorneys should try to carefully

craft the document with the client's long-range, as well as short-term, goals in mind.

SITUATIONS IN WHICH TERMINATION IS IMPROPER

Jurisdiction cannot be terminated for a minor under the age of 18 who is in long-term foster care, even if the child refuses services and is habitually absent from placement without permission (i.e., AWOL). (See *In re Natasha H.* (1996) 46 Cal.App.4th 1151; see also *In re Rosalinda C.* (1993) 16 Cal.App.4th 273 [termination of jurisdiction improper where minors were in long-term placement, not guardianship, with relative in a foreign country].) Additionally, the court cannot terminate jurisdiction over a minor whose whereabouts are unknown. (*In re Jean B.* (2000) 84 Cal.App.4th 1443 [the proper procedure was to issue a protective custody warrant for the child and arrest warrants for the absconding parents, set the matter for periodic review, and take no further judicial action].)



TIP Although the court should not enter dispositional or other orders, the county social services agency has an affirmative obligation to continue search efforts and counsel should be ready to address any new developments in the case.

EMANCIPATING YOUTH

Many children remain in the foster system until they reach the age of majority (18 years old), or “age out.” However, jurisdiction can be maintained over a dependent until his or her 21st birthday. Several factors must be considered in determining whether terminating jurisdiction is appropriate for the individual youth at issue.

1. Provision of Required Services and Documents

Whenever termination is recommended for a youth who has reached the age of majority, under section 391 the county social services agency must do the following:

- Ensure that the youth is present in court, unless the youth does not wish to appear, or that diligent efforts to locate the youth are documented;
- Submit a report verifying that the following information, documents, and services have been provided to the youth:
 - Written information on the case, including family and placement history, the whereabouts of any dependent siblings (unless that information would jeopardize the sibling), and directions on how to access the dependency file under section 827;
 - Applicable documents, including social security card, certified birth certificate, health and education passport, identification card, death certificate of parent(s), and proof of citizenship or legal residency;
 - Assistance in applying for MediCal or other health insurance and referral to transitional housing or assistance in securing other housing;
 - Assistance in applying to and obtaining financial assistance for college or a vocational training program; and
 - Assistance in maintaining relationships with individuals important to the youth.



TIP

Former foster youth are extremely vulnerable to homelessness and poverty as they often have been involuntarily estranged from their families and therefore lack extended family as a system of support to fall back on when times get hard. Therefore, before jurisdiction is terminated, counsel must ensure that the county social services agency has provided all the assistance required under section 391 and that the youth is as well prepared as possible for life outside the dependency system.

2. Standard for Termination of Jurisdiction

Although the court has discretion to terminate jurisdiction after a dependent youth reaches the age of 18, its primary consideration in



deciding whether or not to maintain jurisdiction must be the best interest of the youth. (See *In re Tamika C.* (2005) 131 Cal.App.4th 1153 [the court abused its discretion by placing county's financial concerns above the best interest of the dependent youth]; see also guidelines on 366.3 hearings in Review of Permanent Plan black letter discussion.) However, it has been found improper to keep a case open merely to provide funding to assist with college expenses where there was no showing of potential harm to the dependent youth if jurisdiction were terminated. (See *In re Robert L.* (1998) 68 Cal.App.4th 789.)

3. When Adjustment of Immigration Status Is Pending



TIP If there is a pending petition for an undocumented dependent to receive Special Immigrant Juvenile Status (SIJS), *do not* submit to termination of jurisdiction until the youth has received his or her residency card (green card). The basis for adjustment of immigration status from undocumented to legal is the youth's status as a dependent of the juvenile court. The SIJS petition remains viable until the dependent reaches age 21, but only while dependency jurisdiction is maintained. (See Immigration fact sheet for more detailed discussion.)

TERMINATING DEPENDENCY JURISDICTION UNDER LEGAL GUARDIANSHIP

Once a legal guardianship has been established, the court may either continue supervision or terminate court jurisdiction while maintaining jurisdiction over the child as a ward of the guardianship as authorized under section 366.4. (§ 366.3(a).)

1. With a Nonrelative Guardian

When jurisdiction is terminated with a nonrelative guardian, the child remains eligible for funding and is supervised by a social worker. However, if the dependency case is closed before the child's

16th birthday, the child will not be eligible for services from the California Department of Social Services' Independent Living Program (ILP).

 **TIP** There is talk of remedying this gap in services; practitioners can look for updates on the ILP Web site: *www.ilponline.org*. In the meantime, termination of jurisdiction is discretionary; the child's counsel may want to advocate for keeping the case open until the child turns 16 in order to ensure the availability of this benefit.

2. With a Relative Guardian—Kin-GAP and Kin-GAP Plus

Under section 366.3, the court should terminate dependency jurisdiction over a child in a relative guardianship who is eligible for the Kinship Guardianship Assistance Payment program (Kin-GAP), unless the guardian objects or the court finds that exceptional circumstances require that the case remain open. (§ 366.3(a).) Kin-GAP is a California state program that provides a continuing funding stream and other support for qualified families after dependency jurisdiction has terminated. (§ 366.21(j).)

a. Eligibility

In order to qualify for closure under Kin-GAP,

- The child must have lived with the caregiver for at least the 12 preceding months,
- An order of legal guardianship must have been entered by the dependency court, and
- Dependency jurisdiction must be terminated.

b. Benefits

On October 1, 2006, state Assembly Bill 1808 (Stats. 2006, ch. 75), which funded Kin-GAP Plus, went into effect. Previously funding after termination of dependency was capped at the basic foster care rate. Now, with Kin-GAP Plus, a caregiver can receive specialized-care increments for children with medical or behavioral and emotional

problems. Additionally, relative guardians will now receive the same annual clothing allowance that was provided while the case was open. (See Funding and Rate Issues fact sheet for more detailed information.)

Children in Kin-GAP care will continue to be provided with MediCal health coverage and have access to the ILP program no matter what their age when jurisdiction terminates.



TIP Because Kin-GAP provides funding at the basic foster care rate regardless of whether a child was previously eligible for funding, closing under this program often betters a family's financial situation. With the expansion of funding under Kin-GAP Plus, many cases that were previously kept open only for the higher specialized-care increments can now be closed without concern about negative economic impact.

VISITATION

PARENT-CHILD VISITATION

The focus of dependency law is on preservation of the family as well as on the protection and safety of the child. (§ 300.2.) When a child has been removed from the home, visitation is vital to maintaining family ties.



TIP Modification of existing visitation orders must properly be pursued via a section 388 petition. Changes made without providing notice and an opportunity to be heard violate due process. (*In re Lance V.* (2001) 90 Cal.App.4th 668, 677.)

1. When Child Is Placed With Previously Noncustodial Parent

When the court removes a child from a parent at disposition and places the child with a previously noncustodial parent, the court may make a visitation order regarding the parent from whom the child was removed. (§ 361.2) If the court terminates jurisdiction, any juvenile court orders made at the time as to custody and visitation cannot subsequently be modified in family court unless there is a showing that there has been a significant change of circumstances and that the request is in the child's best interest. (§ 302(d).)



TIP Given the relative finality of such “exit” orders, counsel should try to ensure that future interests are as well protected as possible. Willful violations of such orders by either parent may also lead to additional agency involvement.

2. When Reunification Services Are Offered

Visitation is an essential component of any reunification plan. (*In re Alvin R.* (2003) 108 Cal.App.4th 962.) Any order placing a child in foster care and ordering reunification services must provide for visitation between the parent/guardian and child that is

“as frequent as possible, consistent with the well-being of the child.” (§ 362.1(a)(1)(A).)

a. Court’s Role

The court has the power and duty to review the frequency and adequacy of visitation during the reunification period. (*Alliance for Children’s Rights v. DCFS* (2001) 95 Cal.App.4th 1129.) The court may not delegate to the child’s therapist or to the child the decision whether to allow visits. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126.)

b. County Social Services Agency’s Role

The social worker must address any barriers to visitation (such as the child’s need for therapy before visitation begins). (*In re Alvin R., supra*, 108 Cal.App.4th at p. 962.)

c. Incarcerated Parents

Visitation must be provided to an incarcerated parent “where appropriate.” (§ 361.5(e)(1)(c).) Denial cannot be based solely on the child’s age or any other single factor but must be based on clear and convincing evidence that visitation would be detrimental to the child. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 774.) Reunification services may be found inadequate if no visitation is arranged for an incarcerated parent who is located within a reasonable distance from the child. (*In re Precious J.* (1996) 42 Cal. App.4th 1463, 1476.)

3. When Reunification Services Are Not Offered

Even if reunification services are denied under 361.5(b) or (e)(1), the juvenile court has the discretion to allow ongoing contact unless it finds that visitation would be detrimental to the child. (§ 361.5(f).)

4. When a Section 366.26 Hearing Is Pending

Upon denying or terminating reunification services and setting a section 366.26 hearing, the court must continue to allow visitation

unless it finds that visitation would be detrimental to the child. (§§ 361.5(f), 366.21(h).)



TIP Whenever reunification efforts are denied or terminated, counsel should consider advocating for continued visitation in order to leave the door open for possible 388 petitions or challenges to termination of parental rights under the (c)(1)(A) exception. Consistent visitation is required for a successful showing in the latter case and is a key element in establishing the “best-interest” standard for the former.

5. After Section 366.26 Hearing

a. If Parental Rights Have Been Terminated

Adoptive parents, birth parents, and/or other relatives may voluntarily enter into postadoption contact agreements pursuant to Family Code section 8616.5, which also includes provisions for mediation, modification, and termination as well as limited court enforcement of such agreements.



TIP However, the enforceability of postadoptive contact agreements remains in question; ultimate control appears to be in the hands of the adoptive parents.

b. When Parental Rights Remain Intact

Upon selection of a permanent plan of legal guardianship or long-term foster care, the court must make an order for continued visitation unless it finds by a preponderance of the evidence that visitation would be detrimental to the child. The court cannot delegate to a legal guardian the decision of whether or not to allow visits, although it may leave the time, place, and manner of visits to the guardian’s discretion. (§ 366.26(c)(4)(c); *In re M.R.* (2005) 132 Cal.App.4th 269, 274.)

GRANDPARENT VISITATION

Upon removing a child from the child's parents under section 361, the court must consider "whether the family ties and best interests of the child will be served by granting visitation rights to the child's grandparents" and, if so, must make specific orders for grandparent visitation. (§ 361.2(h).) However, grandparents, even if appointed de facto parents, have no constitutionally protected right to visit their dependent grandchildren. (*Miller v. California Dept. of Social Services* (2004) 355 F.3d 1172.)

SIBLING VISITATION

Any order placing a child in foster care must include provisions for visitation between the child and a dependent sibling unless the court finds by clear and convincing evidence that sibling interaction is detrimental to either child. (§§ 361.2(a)(2), 16002(b); *In re S.M.* (2004) 118 Cal.App.4th 1108.)

- Sibling contact is an ongoing issue subject to juvenile court review throughout the dependency proceedings. (*In re Asia L.* (2003), 107 Cal.App.4th 498.)
- Any person, including the dependent child, may petition the court to assert a sibling relationship and request visitation with a dependent child. (§ 388(b).)
- The county social services agency must facilitate postadoption sibling contact by giving prospective adoptive parents information about the child's siblings and encouraging continued sibling contact. With the adoptive parents' consent, the court may include in the adoption order provisions for postadoption sibling contact. (§§ 366.29, 16002.)



TIP Such provisions have no effect on the continuing validity of the adoption and do not limit the adoptive parents' right to move within or outside the state. Also, the adoptive parents may terminate the sibling contact if they later determine that it poses a threat

to the health, safety, or well-being of the adopted child. In other words, the enforceability of these agreements is questionable.

GENERAL CONSTRAINTS

No visitation order shall jeopardize the safety of the child. (§ 362.1(a)(1)(B).)

- To protect the safety of the child, the court may craft visitation orders in a manner that keeps the child’s address confidential. (*Ibid.*)
- If a parent has been convicted of first degree murder of the child’s other parent, the court may order unsupervised visitation only if the court finds there is “no risk to the child’s health, safety, and welfare.” (§ 362.1(a)(1)(A); Fam. Code, § 3030.)
- The court may not order unsupervised visits in which the person to be visited or anyone in his or her household is required to register as a sex offender as a result of a crime against a child, unless the court finds visits pose “no significant risk to the child” (Fam. Code, § 3030.)
- If visitation is ordered in a case in which a restraining order has been issued, the order must specify the time, day, place, and manner of transfer as designed to protect the child from exposure to domestic violence and to ensure the safety of all family members. (§ 213.5(l); Fam. Code, § 6323(c) & (d).)



TIP In keeping with their clients’ wishes, minors’ and parents’ attorneys should not only focus on whether visitation with parents, siblings, other relatives, and significant others should occur but also consider seeking new orders or filing a 388 petition to modify existing court orders on a wide range of visitation issues, such as frequency and duration, scheduling, location, supervision, and contact outside of visits (e.g., phone calls, mail, attendance at school or sports events). It is important to maintain all existing relationships whenever possible.



**SUMMARIES
OF SEMINAL CASES**

SUMMARIES OF SEMINAL CASES

DETENTION HEARINGS

***In re Celine R.* (2003) 31 Cal.4th 45**

At the time of initial appointment, counsel can accept appointment for multiple siblings unless an actual conflict of interest exists or unless it appears from circumstances specific to the case that it is reasonably likely that an actual conflict will arise.

Counsel for siblings sought review of an order terminating parental rights based on the sibling exception pursuant to section 366.26(c)(1)(E). Minors' counsel accepted appointment for multiple siblings at detention. After termination of reunification services, the younger two siblings were referred for a permanent plan of adoption while the older sibling was not. When the permanent plans were recommended, minors' counsel indicated a conflict; however, the trial court denied appointment of separate counsel. The court upheld the order terminating parental rights but, in assessing the issue of appointment of a single attorney to represent multiple siblings with potentially different permanent plans, determined that any error in not appointing separate counsel was harmless.

JURISDICTIONAL HEARINGS

***In re Malinda S.* (1990) 51 Cal.3d 368**

To establish jurisdiction under section 300, the trial court can consider a social study prepared by the county social services agency as nonhearsay and it can admit it as evidence. Section 355 creates two standards: one governing admissibility and another establishing the level of proof sufficient to support a jurisdictional determination. Social studies meet the burden of proof required under section 355 and constitute competent evidence. For a report to be admissible, due process requires that each party (1) be given a copy of the report, (2) be given an opportunity to cross-examine the investigative officer

and to subpoena and examine persons whose hearsay statements are contained in the report, and (3) be permitted to introduce evidence by way of rebuttal.

***In re Rocco M.* 1 (1991) Cal.App.4th 814**

In order to sustain a petition under section 300(b), the court must find evidence of a substantial danger to the physical health of the minor. While evidence of past conduct may be probative of current conditions, the court must find circumstances at the time of the hearing that subject the minor to the defined risk of harm.

Mother appealed a ruling sustaining a section 300(b) petition, based on general failure to supervise the child because of the mother's drug use, one instance of physical abuse of the child by a caretaker, and the minor's having been neglected as an infant. The Court of Appeal upheld the trial court's jurisdiction only on the grounds that mother subjected the child to a substantial risk of harm that he would ingest hazardous drugs and thus suffer serious harm. The court did not uphold sustaining the section 300(b) petition based on any of the other facts in support because they did not demonstrate a substantial danger to the child.

***In re Nicholas B.* (2001) 88 Cal.App.4th 1126**

At the time of the jurisdictional hearing, a section 300(b) petition must allege specific facts that there is a current substantial risk that the child will suffer serious physical harm as a result of a parent's inability to supervise or protect him or her. There must be evidence that the child is exposed to a substantial risk of physical harm or illness.

One of the allegations involved an isolated incident of the mother's striking the child. Information in the report indicated ongoing inappropriate physical discipline by the father, but it was not pled in the allegations. The court held that there was no evidence that the acts of physical abuse would continue in the future. The facts failed to demonstrate present or future risk of physical harm. The

evidence was also insufficient to sustain a petition under 300(b) alleging that the minor was suffering emotional injury when there was no evidence to support that any emotional trauma was caused by the parents' conduct. The court reversed the order sustaining the petitions.

In re Janet T. (2001) 93 Cal.App.4th 377

Neither the section 300(b) petition nor the reports alleged sufficient facts to support the conclusion that the children were currently at a substantial risk of serious physical injury or illness because of the mother's problems.

Mother appealed the trial court's ruling sustaining petitions based on her failure to ensure regular school attendance and her numerous mental and emotional problems. The court reversed the trial court's decision in that none of the conditions noted existed at the time of the hearing on the petition and none of the sustained allegations claimed that any of the concerning events were the result of, or caused by, the mother's mental and emotional problems. Before courts and agencies can exert jurisdiction under section 300(b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness.

In re Brison C. (2000) 81 Cal.App.4th 1373

In order to sustain a petition for jurisdiction under section 300(c), the court must have evidence that the minor is suffering severe emotional harm caused by the parent's conduct.

A nine-year-old boy was the focus of a battle between his divorcing parents, and the case had been litigated extensively in family court. Parents appealed an order sustaining petitions under section 300(c), and the trial court's orders were reversed and remanded to the family law court. The court held that there was no substantial evidence showing that the boy was seriously emotionally damaged or that he was in danger of becoming so unless jurisdiction was assumed. In the absence of other indications of severe anxiety or

depression, the child's aversion to his father was insufficient to support a finding that he was emotionally disturbed to such a degree that he would come within the jurisdiction of section 300.

In re Rubisela E. (2000) 85 Cal.App.4th 177

In sustaining a petition pursuant to section 300(j), the court must find that the child's sibling has been abused or neglected and there is a substantial risk that the child will be abused or neglected.

Appellant father appealed a decision sustaining petitions that he had molested his daughter and that there was a risk he would molest her sister and brothers. The court upheld the decision as to the petitions regarding Rubisela and her sister; however, the court determined that a substantial risk of abuse or neglect to appellant father's sons was not demonstrated by the social services agency, and petitions pursuant to section 300(j) were dismissed. While there may be cases in which sexual abuse of one child indicates a risk of sexual abuse to siblings, there was no such evidence in this case regarding the appellant's sons. The court reversed the decision as to the male children and dismissed their petitions as there was no evidence of what constituted the substantial risk of harm.

In re E.H. (2003) 108 Cal.App.4th 659

In order for the court to sustain petitions pursuant to section 300(e), the identity of the perpetrator of the physical abuse need not be known.

The court reversed the trial court's determination that because the parents did not identify the perpetrator of the injuries to the child over whom they had exclusive custody, a 300(e) petition could not be sustained.

The social services agency appealed, and the court found that the child suffered severe physical abuse and was never out of the custody of either the mother or the father; thus, they reasonably should have known who inflicted the child's injuries. The statutory requirement was not whether the mother or father actually knew

that the child was injured by someone else but whether they should have reasonably known.

In re S.D. (2002) 99 Cal.App.4th 1068

When an incarcerated parent made arrangements for an appropriate caretaker for her child, the social services agency did not meet its burden of proof under section 300(g) that she was unable to arrange for the care of her child.

Mother appealed from an order terminating her parental rights, although the trial court held that because she was not effectively represented at the jurisdictional hearing, the issue of the 300(g) petition was appealable. The Court of Appeal reversed, finding that in order to sustain the petition pursuant to 300(g), the trial court must find that neither parent is available to take custody because of their incarceration, and that neither parent will be able to arrange for the child's care during the remainder of their incarceration. Such inability to arrange for care is the key fact that allows the court to take jurisdiction over the child of an incarcerated parent when there are no other grounds for doing so.

DISPOSITIONAL HEARINGS

In re Henry V. (2004) 119 Cal.App.4th 522

In order to remove a child from a parent at the dispositional phase of the proceeding, the court must find by clear and convincing evidence that there is substantial danger to the child and that there are no reasonable alternatives to out-of-home placement.

Mother appealed the order removing her child after the court sustained an allegation of a single occurrence of physical abuse by the mother. The court reversed and remanded. Neither the agency nor the trial court considered the single event of physical abuse to be an obstacle to reunification in the near future, but the social worker thought removal would be helpful to secure the mother's cooperation with reunification services. The social worker's suggestion

that out-of-home placement would be useful to secure the mother's further cooperation was not a proper consideration. The statutory grounds for removing a child from parental custody are exclusive, and a mother's fundamental right to the custody of her child is not a bargaining chip.

In re Luke M. (2003) 107 Cal.App.4th 1412

In assessing whether to place with a noncustodial, nonoffending parent under section 361.2, the court can consider the child's relationship to siblings in determining whether the placement will be detrimental.

Father appealed after he had requested placement as a nonoffending parent, and the court placed the child with the paternal aunt and uncle instead. The court affirmed the decision, indicating that the importance of keeping siblings together is an appropriate factor for the court to consider in determining detriment for purposes of its placement decisions.

In re Austin P. (2004) 118 Cal.App.4th 1124

When the court orders placement with a nonoffending parent pursuant to section 361.2, jurisdiction cannot be terminated unless there is no longer a need for ongoing supervision.

Claiming that there was no evidence of detriment to his son, a father appealed a decision by the lower court placing his son with him but continuing jurisdiction. The Court of Appeal affirmed the decision, holding that, absent a showing of detriment, section 361.2 requires a court only to temporarily place a child with a nonoffending parent, not to award custody and terminate jurisdiction. Once the child is placed, the determination to continue jurisdiction is within the court's discretion based on whether conditions necessitate continued supervision.

In re Isayah C. (2004) 118 Cal.App.4th 684

A parent may have custody of a child, in a legal sense, even while delegating the day-to-day care of that child to a third party for a limited period of time.

Father appealed an order denying him placement of his son while he was incarcerated even though he had made plans for relatives to care for the child while he was serving a short jail sentence. The court reversed, holding that section 361.2 required the court to legally place with the nonoffending father, even if he was incarcerated, so long as he was able to arrange for care with relatives during his relatively short incarceration, and that incarceration alone did not constitute a showing of detriment sufficient to deny placement.

REVIEW HEARINGS

Judith P. v. Superior Court (2002) 102 Cal.App.4th 535

Ten days prior to the hearing date, parties are entitled to receive the status report prepared by the social services agency for review hearings. Failure to provide timely service of such a report constitutes a denial of due process, compelling reversal of the trial court's order.

Mother appealed an order terminating her reunification services at a review hearing, saying that she did not receive the status report in time and was denied a continuance to adequately respond to it. The decision was reversed, as failure to provide the report in time or to allow a continuance for the mother denied her both reasonable notice of the issues raised by the report and a reasonable opportunity to prepare to rebut the evidence contained in it.

Sara M. v. Superior Court (2005) 36 Cal.4th 998

Section 366.21(e) permits the court to terminate reunification services whenever it finds by clear and convincing evidence that a parent has failed to contact or visit a child for six months after the

beginning of reunification services, regardless of whether jurisdiction was asserted under section 300(g).

Mother appealed the court's termination of her reunification services for failure to visit her children in the six months prior to the status review hearing. The court's decision was affirmed. The mother made no apparent effort to visit her children even after she was engaged in her reunification plan, and although the petition was not sustained on the basis of abandonment under section 300(g), the court was within its discretion to terminate her reunification.

***In re Abraham L.* (2003) 112 Cal.App.4th 9**

In order for a court to terminate reunification services at a six-month review hearing for a sibling group including children under the age of three, the court must assess and articulate the factors set out in section 366.21(e)(4) and specify the factual basis for its finding.

At a six-month review hearing, the social services agency recommended that the court order continued reunification with the father of siblings who were placed in different relative placements although the father's progress was marginal. The trial court rejected the social services agency's recommendation and set a section 366.26 hearing for all of the siblings. On appeal, the court determined that the trial court failed to cite to the factors articulated in section 366.21(e)(4). The court held that, in addition, the trial court must specify the factual basis for its finding that it is in each individual child's best interest for a section 366.26 hearing to be scheduled for some or all members of the sibling group.

***Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501**

When continuances force a contested review hearing to occur 18 months or more after detention, the 12-month hearing must be treated as an 18-month hearing and the standard used to determine the outcome will be that of a section 366.22 hearing. Twenty-two months after detention, the trial court found that return of the

children to their father would create a substantial risk of detriment, terminated reunification efforts, and set a selection and implementation hearing.

Father appealed, claiming that the standard used should have been the same as that used for a 12-month hearing under section 366.26(f), which he felt would have entitled him to more services. The court affirmed the decision. In order to extend services beyond 18 months, the court would have to find extraordinary circumstances per section 352, and no such evidence was presented here. At this stage of dependency proceedings, if the children are not returned to parental custody, the court must order a hearing set pursuant to section 366.26.

***In re Elizabeth R.* (1995) 35 Cal.App.4th 1774**

At an 18-month review hearing the court can continue the hearing pursuant to section 352 beyond the statutory time frame if extraordinary circumstances exist. The Court of Appeal held that the juvenile court mistakenly believed that it was required to set the case for a selection and implementation hearing per section 366.26, even when extraordinary circumstances existed.

Appellant mother sought review of an order that terminated her parental rights even though her serious mental health condition had dramatically improved and would have allowed her to successfully participate in further reunification services. The court held that the juvenile dependency system is mandated to accommodate the special needs of disabled and incarcerated parents. The trial court could have continued the 18-month hearing provided it was not contrary to the interests of the minor.

***Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689**

At an 18-month hearing, reunification services can be terminated despite the mother's regular participation in services when there is

a substantial risk to the children if they are returned to her care because of her inability to safely parent them.

Mother appealed an order terminating her reunification services, claiming that her regular participation in her reunification plan entitled her to more services. She had never been the full-time caretaker of all the children and had often asked for relief because she could not handle their needs. As a result, the mother's weekend visits had been unsuccessful and had often been cut short. The court affirmed the lower court's order, which relied heavily on expert opinion that despite her participation, the mother was overwhelmed by caring for her children and could not care for them safely.

David B. v. Superior Court (2006) 140 Cal.App.4th 772

A parent has a due process right to a contested review hearing unfettered by the prerequisite of an offer of proof.

Father appealed the lower court's decision that he was not entitled to a contested 18-month review hearing and an opportunity to cross-examine the social worker. The court reversed, indicating that a parent does have a due process right to cross-examine the preparer of the evidence in dependency proceedings, wherein the preparer bears the burden of proof. Rather than it being a fishing expedition, as the social services agency suggested, it is the recognized method by which the parent can test the adverse evidence.

David B. v. Superior Court (2004) 123 Cal.App.4th 768

Absent a showing of substantial risk of detriment, the court, at a status review hearing, cannot terminate reunification services and set a selection and implementation hearing.

The court reversed the lower court's orders, determining that father's desire to inquire about parenting skills did not constitute a substantial risk of detriment, and that if the social services agency considered his living situation to be the only bar to return, they had

failed to provide him reasonable services to remedy that living situation and therefore had to provide further reunification services. The issue at a status review hearing is whether placing the child in the parent's care represents some danger to the child's physical or emotional well-being. The court indicated that the parents who come through the dependency system are typically in need of quite a bit of help, stating, "We have to not lose sight of our mandate to preserve families, and look for passing grades, not straight A's."

In re Precious J. (1996) 42 Cal.App.4th 1463

Where the social services agency failed to provide visitation to an incarcerated parent, the court found that the agency did not facilitate or provide reasonable reunification services.

Mother appealed an order terminating her parental rights, and the court reversed the order terminating her services and setting an implementation hearing per section 366.26. There was no evidence before the lower court that the social services agency provided the incarcerated parent with any services or even attempted to provide visitation. The court determined that services had not been reasonable and ordered the lower court to develop a further reunification plan and set a further review hearing per section 366.22.

In re Alvin R., Jr. (2003) 108 Cal.App.4th 962

At a 12-month review hearing, the court reversed the trial court's order terminating father's reunification services because the social services agency had failed to provide him with reasonable services.

Father appealed the lower court's order in that he had completed the entirety of his case plan and the agency had failed to arrange for conjoint therapy between the minor and the father. Because of the lack of conjoint therapy, visitation never occurred and return was not considered a safe option. The Court of Appeal determined that the lack of visits denied father any meaningful opportunity at reunification and that return could not be accomplished without visitation.

The court ordered a further review hearing and ordered the social services agency to provide reasonable services to the father.

SELECTION AND IMPLEMENTATION HEARINGS

***In re Marilyn H.* (1993) 5 Cal.4th 295**

At a section 366.26 hearing, the court properly limited appellant mother's contested hearing by denying her the opportunity to present evidence of a change of circumstance that would mandate return. At a section 366.26 hearing, the issue of return to a parent is no longer a consideration for a court that must determine the most appropriate permanent plan for the child. Mother's due process was not violated in that the code mandates a shift in focus from reunification with the parent to the child's need for stability and permanence. Mother could have filed a section 388 petition at any point before the court made orders pursuant to 366.26, and her due process right to present evidence as to changed circumstance was protected in this way.

***In re Autumn H.* (1994) 27 Cal.App.4th 567**

At a section 366.26 hearing, a court must order adoption as the permanent plan for a child unless the court finds that evidence that an exception to adoption exists.

The court affirmed the trial court's order terminating mother's parental rights in that she had not shown sufficient evidence pursuant to section 366.26(c)(1)(A). In the dependency scheme, the "benefit from continuing the parent/child relationship" exception means that that relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. If severing the natural parent-child relationship would greatly deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. Severing father's relation-

ship to Autumn was detrimental because the relationship was one of friends, not of parent and child.

In re Brandon C. (1999) 71 Cal.App.4th 1530

Where the strength and quality of the natural parent-child relationship with a positive emotional attachment is sufficient, grounds to deny severance of parental rights through adoption under section 366.26(c)(1)(A) exist.

The court upheld the trial court's order that guardianship was the appropriate permanent plan in that the evidence of benefit of continued contact with the natural parent was sufficient to support the court's decision. The court determined that the benefit of continued contact between mother and children must be considered in the context of the very limited visitation the mother was permitted to have. The mother presented sufficient evidence of regular and consistent visitation with the boys that maintained a close bond between them, such that there was evidence of benefit sufficient to support the court's decision to order guardianship.

In re Fernando M. (2006) 138 Cal.App.4th 529

Where there is a significant relationship with a relative caretaker and evidence that it would be detrimental to remove the children from the relative's home, an exception under section 366.26(c)(1)(D) exists.

An exceptional circumstance did exist where the grandmother was unwilling to adopt the children because a spousal waiver would have been necessary. There was no dispute in the evidence that removing Fernando from the grandmother's home would deprive him of the stability and intimacy he had developed in his daily associations with her and his siblings, and there was no evidence that severing those ties would not detrimentally affect his well-being. While the Legislature has expressed a preference for adoption over other permanent plans, this preference is overridden if one of the exceptions enumerated in section 366.26(c)(1) is found to apply.

***In re Celine R.* (2003) 31 Cal.4th 45**

An exception to adoption exists under section 366.26(c)(1)(E) only if the court finds that severance of the sibling bond would be detrimental to the child who is the subject of adoption, not merely that it would be detrimental to a sibling.

The court upheld an order terminating the mother's parental rights over the appeal of minor's counsel because the evidence suggested that Celine's siblings would suffer if their relationship were severed, but there was no evidence that Celine, who was the subject of the adoption proceeding, would suffer detriment if the sibling relationship were not continued.

REVIEW OF PERMANENT PLANS

***In re Kelly D.* (2000) 82 Cal.App.4th 433**

At a review hearing wherein a modification of a parent's visitation is recommended, the parent has a right to testify and submit evidence, cross-examine adverse witnesses, and argue his or her case.

Father appealed an order denying him a contested postpermanency status review to challenge a proposed modification in his visitation. The court reversed the lower court's decision, saying that the father had a right to receive notice of any substantive proposed modifications in a reasonable amount of time in advance of the hearing, and that appellant had the right to testify and otherwise submit evidence, cross-examine adverse witnesses, and argue the case.

SUPPLEMENTAL PETITIONS

***In re Paul E.* (1995) 39 Cal.App.4th 996**

When a supplemental petition seeking to remove a minor from a parent's custody pursuant to section 387 is filed, the safeguards afforded to parents by section 361 apply just as much to supplemental petitions as they do to initial petitions. The court reversed the lower court's decision removing the children from the parents. The court

still has to have clear and convincing evidence of substantial risk of harm to the child to warrant removal from a parent's home.

In re Jonique W. (1994) 26 Cal.App.4th 685

An appellant de facto parent has standing to participate as a party in a section 387 proceeding seeking to remove the children from him or her and to defend against allegations about his or her conduct.

The court reversed the lower court's order denying the de facto parent the ability to present evidence and otherwise participate as a full party in a contested hearing. Although the social study was admissible proof in the dependency proceeding, the court cannot accept it in lieu of all other evidence, nor does it leave the parties helpless to challenge the contents of the report. The report should be subjected to adversarial testing.

CAREGIVERS / DE FACTO PARENTS

Cesar V. v. Superior Court (2001) 91 Cal.App.4th 1023

The relative placement preference applies when a new placement becomes necessary after reunification services are terminated but before parental rights are terminated.

Parents appealed an order that refused to place their children with their grandmother. The court reversed and held that the juvenile court has the power and the duty to make an independent placement decision under section 361.3 when the children have to be moved. The court must hold a hearing to determine the suitability of placing the children with a relative who requests placement, pursuant to section 361.3.

In re Patricia L. (1992) 9 Cal.App.4th 61

The Court of Appeal has identified several factors relevant to the decision of whether a person falls within the definition of a de facto parent. Those considerations include whether the child is psychologically bonded to the adult, whether the adult has assumed

the role of a parent on a day-to-day basis for a substantial period of time, whether the adult possesses information about the child unique from that of other participants in the process, whether the adult has regularly attended juvenile court hearings, and whether a future proceeding may result in an order permanently foreclosing any future contact with the adult. If some or all of these factors apply, it is immaterial whether the adult is the child's current or immediately succeeding custodian.

A de facto grandmother who was no longer the caretaker appealed an order terminating her de facto status. The court reversed the order. It was clearly in the child's best interest to have a consistent relative, who had in the past served as a primary caretaker, continue to hold de facto status to appear and present evidence with respect to the child's continuing needs and placement.

CONTINUANCES

Jeff M. v. Superior Court (1997) 56 Cal.App.4th 1238

When a jurisdictional trial has continued excessively, the Court of Appeal can order the trial court to conduct trial every court day, all day, without further continuances except for good cause until the trial is concluded and the matter is fully adjudicated.

Father filed a writ requesting an order for the court to conduct the trial on a day-to-day basis until completed. Court congestion alone is not good cause to continue the trial when balanced with the minor's need for prompt resolution of his or her custody status.

CHILDREN'S RIGHTS

In re Tamika C. (2005) 131 Cal.App.4th 1153

Terminating dependency to relieve a social services agency of its financial obligation after a dependent reaches the age of 19 is not a sufficient basis for termination of the minor's dependency and does not comply with requirements of section 391.

The minor appealed an order terminating her dependency before she graduated from high school and before her 19th birthday. The order was reversed in that the agency had turned the burden of proof on its head. The fact that a child turns 18 does not mandate that court jurisdiction be terminated. If a child's funding is dependent on continued jurisdiction, the agency bears the burden of showing that exceptional circumstances exist if the agency seeks to terminate the court's jurisdiction.

PARENT'S RIGHTS

***In re Sara D.* (2001) 87 Cal.App.4th 661**

At the jurisdictional hearing, before appointment of a guardian ad litem, a parent or legal guardian is entitled to an informal hearing and an opportunity to be heard.

Appellant mother challenged her inability to be heard on whether she needed a guardian ad litem after her attorney simply requested the appointment and the request was granted without hearing. The court indicated that the trial court should have explained the purpose of a guardian ad litem and the reason her attorney felt one should be appointed and that she should have been given an opportunity to respond. The court also found that the trial court made the appointment on insufficient evidence based on conclusory statements of counsel and not on assessment of the mother's ability to understand and assist her counsel with the proceeding. The lower court's decision was reversed.

***In re Jesusa V.* (2002) 97 Cal.App.4th 878**

An incarcerated parent has a right to be present at a jurisdictional hearing, and the language of Penal Code section 2625 indicating that the petition may not be adjudicated without the physical presence of the prisoner *or* the prisoner's attorney does not mean that the court can proceed in the prisoner's absence so long as the attorney is present. The language in the relevant statute should be interpreted

to be the conjunction “and,” rather than “or,” so that it contemplates both the prisoner and his attorney being present unless the prisoner specifically waives his or her right to be present. The lower court’s order was reversed in that the prisoner parent had requested to be present and the court denied the request and proceeded to adjudicate the case. The physical presence of the prisoner is a procedural prerequisite to adjudication of the petition, and an adjudication in the prisoner’s absence is an act in excess of the court’s power.

D.E. v. Superior Court (2003) 111 Cal.App.4th 502

The mandatory timelines set forth in section 352 require that the case go forward and that the disposition be decided within six months of protective custody. This requirement overrides the due process right of a prisoner parent to be physically present before the case can be adjudicated. Any conflict in goals between section 352 and Penal Code section 2625 must be resolved in favor of section 352 and the child’s right to prompt resolution of custody status. The lower court’s order proceeding in the prisoner’s absence was affirmed.

HEARSAY IN DEPENDENCY PROCEEDINGS

In re Keyonie R. (1996) 42 Cal.App.4th 1569

Social studies are admissible hearsay pursuant to section 281, and the court properly considered a social study at a selection and implementation hearing to determine any matter involving custody, status, or welfare of the minor.

Mother appealed the order terminating her parental rights in that the social study was considered evidence upon which the trial court based its determination that adoption was the appropriate plan. The order was affirmed and the social study was properly considered.

In re Cindy L. (1997) 17 Cal.4th 15

The “child hearsay” or “child dependency” exception to the hearsay rule allows admission of out-of court statements made by a child

who is subject to dependency proceedings, regardless of whether the child is competent to testify, so long as all parties are notified of the intent to use the statements, there are sufficient surrounding indicia of reliability, and the child is either available for cross-examination or evidence corroborates the statements. The court should consider a number of factors in determining reliability, including spontaneity and consistency of repetition, the mental state of the child, use of unexpected terminology based on the child's age, and the child's lack of motive to fabricate.

Father appealed a decision of the lower court sustaining petitions based in part on its consideration of out-of-court statements of a young child who would not otherwise be a legally competent witness. The court affirmed the decision, indicating that although the child was unavailable to be cross-examined, her statements were corroborated by a physical examination that indicated sexual abuse and were therefore reliable.

In re Lucero L. (2000) 22 Cal.4th 1227

The statements of a child found incompetent to testify because of his or her inability to distinguish between truth and falsehood are admissible under section 355 but cannot be exclusively relied upon as a basis for jurisdiction unless the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability.

Father appealed a judgment sustaining petitions that he had molested his daughter based on hearsay statements made by her. The daughter could not at the time of testimony distinguish between the truth and a lie. The court affirmed the lower court's decision; given the consistency over a considerable period of time of the child's statements, the court found them to be reliable. In determining the statements to be reliable the court did not also have to find the statements to have been corroborated.

INTERSTATE COMPACT ON PLACEMENT OF CHILDREN

In re Johnny S. (1995) 40 Cal.App.4th 969

The ICPC is inapplicable to placements with a parent, and ICPC approval is not mandatory for a California court to place a child with a parent residing in another state.

Mother appealed an order placing the child out of state with a nonoffending father. The court affirmed the decision in that the court must first consider a nonoffending parent after removing a child from the custodial parent. If the placement requires monitoring, California could monitor the case or enter into a voluntary agreement with the receiving state to provide supervision.

In re Emmanuel R. (2001) 94 Cal.App.4th 452

A juvenile court can allow a temporary visit with a parent in another state even if that parent has not been approved for placement pursuant to the ICPC. The court affirmed the trial court's order allowing a visit with a father for summer and Christmas holidays even though the father's home was not approved for placement. The ICPC does not bar a court-approved visitation with a parent in that ICPC approval is not required for a simple visit and the compact differentiates between visits of short duration and placements of longer duration. The court found that the visits were in the minor's best interest.

PARENTAGE

Adoption of Kelsey S. (1992) 1 Cal.4th 816

The court cannot unilaterally preclude the child's biological father from becoming a presumed father by just considering best interest. The court recognized the significance of the biological relationship and held that terminating his parental rights with just a best-interest analysis violated the father's constitutional rights.

The father of a child born out of wedlock sought custody of his child. Two days after the birth of the child, the father filed an action to establish paternity. The father then sought to stop the mother

from proceeding with her plans for adoption of the child and sought to have custody as the preferential placement. The parental relationship of a biological father is worthy of constitutional protection if the father has demonstrated a commitment to parental responsibility. In such a case, the court can terminate parental rights only on a showing that by clear and convincing evidence the father is unfit; otherwise the father is allowed to withhold his consent to adoption. The matter was reversed.

***In re Nicholas H.* (2002) 28 Cal.4th 56**

A parent can qualify as the presumed father under Family Code section 7611(d) even if he is not the child's biological father. The lower court's decision denying the nonbiological father presumed status was reversed.

When the mother was pregnant with the child, she moved in with the parent. The parent was not the biological father, but both mother and the parent wanted the parent to act as the child's father. The parent participated in the child's birth, was listed on the birth certificate, and provided a home for the mother and the child for several years. The court held that where there is no competing presumption or party seeking to become the child's father, the social relationship is more important than actual biology in determining the presumption. Given the strong social policy in favor of preserving the ongoing father-and-child relationship, the conflict should be weighed in favor of granting presumed status. The court held that the constitutional protection afforded biological fathers under *Adoption of Kelsey S.* extends to men who are not biological fathers but who meet the other criteria for presumed father status. The presumption created by Family Code section 7611(d) can be rebutted only by clear and convincing evidence.

INDEXES

TOPICAL INDEX

A

- AAP. *See* Adoption Assistance Program
- Abandonment, reunification services denial/bypass and, H-66, H-97, H-141
 - safe-haven/safe-surrender program and, H-97, F-78
- Abduction of child
 - prevention of (Parental Kidnapping Prevention Act/PKPA), F-52
 - reunification services denial/bypass and, H-100
- Abortion, dependent child's right to consent to, F-11
- Absent from placement without permission (AWOL), termination of jurisdiction improper and, F-82
- Abuse. *See* Child abuse; Sexual abuse
- Active efforts (to prevent/eliminate need for removal), under Indian Child Welfare Act (ICWA), F-40-41
- Adjudication, contested, H-30-31
- Adjudication of Facts of Parentage* form, for safe-haven baby, F-79
- Admissibility of evidence. *See* Evidence
- Admission by parent, at jurisdictional hearing, H-50, H-51
- Adoption, H-170-174. *See also* Parental rights, termination of
 - advising parent of right to relinquish child for, H-79
 - caregiver unwilling/unable and, exception to termination of parental rights and, H-167, S-15
 - change from guardianship to, H-194
 - child opposed to, H-166
 - "difficult to place" findings and, H-174-175
 - failed, as basis for jurisdiction, H-66
 - fast-track, § 366.26 hearing for, H-97
 - finalization of, termination of jurisdiction and, H-194
 - guardian appointed pending, H-176
 - identification of as goal, continuing case and, H-174-175
 - for Indian child, preferences and, F-42
 - likelihood of (adoptability), H-163
 - additional findings for termination of parental rights and, H-164
 - burden of proof of, H-158-159, H-163
 - contest on, H-161
 - continuing selection and implementation hearing and, H-174-175
 - parent-child visitation after, F-89
 - permanency review/hearing and, H-187, H-190-191
 - preference to relative/foster parent and, H-171-172
 - prospective adoptive parent and. *See* Prospective adoptive parent
 - referral for, H-170-174

Adoption, cont'd.

- sibling-child contact after, F-90–91
- sibling status not affected by, H-215
- unlikely, petition for reinstatement and, H-171, H-213
- Adoption Assistance Program (AAP), F-23
- Adoption and Safe Families Act (ASFA), F-69
- AFDC. *See* CalWORKS
- AFDC-FC. *See* Aid to Families With Dependent Children—Foster Care
- Affinity, sibling group and, H-143
- Agency-Relative Guardianship Disclosure* form (SOC 369), Kin-GAP funding and, F-23
- “Age out,” termination of jurisdiction and, H-195–196, F-82–84, S-18–19
- Aid to Families With Dependent Children—Foster Care (AFDC-FC), F-21
 - placement without approval of social services and, F-72–73
- Alcohol abuse. *See also* Substance abuse
 - parental, reunification services denial/bypass and, H-99–100
- Alleged father, F-55. *See also* Parent
 - contested selection and implementation hearing (§ 366.26/two-six hearing) and, H-160
 - rights of, F-57
- Anonymity, in safe-haven/safe-surrender program, F-77–78
- Another planned permanent living arrangement, H-140, H-176–177
 - order for at permanency review/hearing, H-189, H-196–197
- Appeals. *See also* Reversal
 - CAPTA GAL’s responsibilities for, H-12
 - competency determination and, H-49
 - of denial of funding, F-19
 - exemption of court-ordered psychological examination from privilege and, H-57
 - failure to send proper notice under Indian Child Welfare Act (ICWA) and, F-39
 - of finding under § 366.26(c)(3), H-175
 - jurisdictional/dispositional hearing time limits and, H-30, H-41, H-77–78, S-20
 - mediated agreements and, H-51
 - need for § 387 petition/standing to challenge removal and, H-204–205, S-16–17
 - parent’s counsel’s presence during in-chambers testimony by child and, H-49–50, H-160
 - submission on social worker’s report and, H-51
 - substantial danger as standard for, H-84–85
 - time limits on six-month review and, H-130
 - time limits on reunification and, H-135
- APPLA. *See* Another planned permanent living arrangement

Application to Register Permanent Residence or Adjust Status (I-485) form, F-33
 Approval of placement. *See* Assessment/approval of placement
 ASFA. *See* Adoption and Safe Families Act
 Assault. *See also* Child abuse
 sexual, H-62. *See also* Sexual abuse
 Assembly Bill 490 (Stats. 2003, ch. 862), H-19, F-16–17
 Assembly Bill 540 (Stats. 2001, ch. 814), F-35
 Assembly Bill 1808 (Stats. 2006, ch. 75), F-85
 Assessment/approval of placement
 under Interstate Compact on the Placement of Children (ICPC), H-25, F-47
 with legal guardian, H-83, H-175
 with relative/NREFM, H-24–25, H-89, F-66, F-69–71
 under Interstate Compact on the Placement of Children (ICPC), H-25
 physical move to different home and, F-74–75
 pre-release investigation hearing and, H-27
 social worker’s report for disposition hearing and, H-79
 Asylum, permanent resident status and, F-34
 Attachment/bonding studies
 discoverability/admissibility of, H-162
 parent-child relationship as exception to termination of parental rights and,
 H-166
 Attorneys. *See also* Child’s attorney; Parent’s attorney
 checklists for
 for detention hearing, H-5–8
 for disposition hearing, H-73–76
 for judicial review of placement with parent (§ 364), H-109–112
 for jurisdiction hearing, H-35–38
 for permanency review/hearing, H-181–186
 for selection and implementation hearing (§ 366.26/two-six hearing),
 H-149–152
 for status reviews, H-123–128
 court-appointed
 for initial/detention hearing, H-10–11, S-3
 for jurisdiction hearing, H-43, H-46–47
 for selection and implementation hearing (§ 366.26/two-six hearing),
 H-159
 input into reunification services by, H-102
 notifying of hearing
 disposition hearing, H-78
 judicial review of placement with parent (§ 364), H-113–114, S-9
 jurisdiction hearing, H-39–40
 modification motion/§ 388 petition hearing, H-217
 permanency review/hearing, H-188

Attorneys, notifying of hearing, cont'd.

selection and implementation hearing (§ 366.26/two-six hearing),

H-153

status reviews, H-131

right to access case information under Indian Child Welfare Act (ICWA)

and, F-39

Attorney work product rule, bonding/attachment studies and, H-162

Aunt. *See also* Relative

preferential consideration for placement with, H-24, H-88–89, F-66, F-67

AWOL (absent from placement without permission), termination of jurisdiction

and, F-82

B

Babysitters, reasonable-and-prudent-parent standard in selection of, F-6

Best interest of child. *See also* Child's safety/protection

burden of proof at permanency review/hearing and, H-188–189, H-193

continuing relationship with parent in, exception to termination of parental

rights and, H-164–166, S-14–15

court-appointed counsel and, H-10

exceptions to termination of parental rights and, exclusive not general,

H-169

guardianship and, H-82–83, H-175

modification of custody/visitation (exit) orders and, H-88, F-81, F-87

participation in selection and implementation hearing (§ 366.26/two-six

hearing) and, H-160

paternity testing and, F-56, S-22–23

posttermination placements and, H-173, H-205, F-75

reinstatement of parental rights and, H-171

removal from prospective adoptive parent's home and, H-173, H-205, F-75

representing, H-11–12

reunification services denial/bypass and, H-82, H-93, H-94, H-95, H-96,

H-97, H-98, H-99, H-100

§ 388 petition and, H-215, H-216, H-218, H-220–221, F-87

termination of jurisdiction and, H-195, F-84

“Bill of rights,” foster children's, F-10

Biological father, F-55–56. *See also* Parent

rights of, F-57–58

Birth certificate, amended, for safe-haven baby, F-79

Blood tests, for paternity. *See* Paternity tests

Bonding/attachment studies

discoverability/admissibility of, H-162

parent-child relationship as exception to termination of parental rights and,

H-166

Burdens of proof

- for contested review hearing, social services bearing, S-12
- for disposition hearing, H-80–81
- under Indian Child Welfare Act (ICWA), F-39–40
- for initial/detention hearing, H-13–14
 - child's release/continued detention and, H-13, H-21
 - evidentiary nature of hearing and, H-14
 - prima facie case definition and, H-14
- for judicial review of placement with parent (§ 364), H-114–115
- for jurisdiction hearing, H-45–46
- for permanency review/hearing, H-188–191
- for § 387 petition, H-206–207, S-16–17
- for § 388 petition hearing, H-217–219
 - with pending .26 hearing, H-221
 - termination of legal guardianship and, H-222
- for selection and implementation hearing (§ 366.26/two-six hearing), H-158–159
 - adoptability and, H-158–159, H-161, H-163
- for status reviews, H-133
- for subsequent and supplemental petitions, H-206–207

Bureau of Indian Affairs

- Indian child status determination and, F-38
- notifying of hearing, F-39
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113–114
 - jurisdiction hearing, H-40
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153, H-156
 - status reviews, H-131

C

- CACI. *See* Child Abuse Central Index
- California Assembly Bill 490 (Stats. 2003, ch. 862), H-19, F-16–17
- California Assembly Bill 540 (Stats. 2001, ch. 814), F-35
- California Assembly Bill 1808 (Stats. 2006, ch. 75), F-85
- California Codes. *See Table of California Codes*
- California Law Enforcement and Telecommunications System (CLETS), for criminal records check for detention/placement with relative, H-25, F-69–70
- California Rules of Court. *See Table of California Rules of Court*
- CalWORKS, F-22
- CAP (Corrective Action Plan), F-71
- CAPI (Cash Assistance Program for Immigrants), F-24
- CAPTA GAL, H-12. *See also* Guardian ad litem

Caregiver. F-3–7. *See also* Caretaker

- adoptive preference and, H-171–172
- CalWORKS eligibility and, F-22
- case summaries and, S-17–18
- child’s subsequent removal from, H-89
- definition of, F-6
- educational decisions by, H-177, F-14
- fact sheet on, F-3–7
- for Indian child. *See* Indian custodian
- medical decisions by, H-177
- notifying of hearing
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113–114, S-9
 - jurisdiction hearing, H-39–40, H-47
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153
 - status reviews, H-131
- offending, removal of from home, child’s release to parent and, H-22
- as prospective adoptive parent, H-172–174, H-178, F-5–6
 - removal of child from, H-173, F-5–6, F-75
 - § 387 petition for, H-205
- as reasonable and prudent parent, F-6–7
- relative. *See* Relative
- removal of child from, § 387 petition and, H-204–205, H-219, F-73–74
- social services agency withdrawal of approval of, F-74–75
- unwilling/unable to adopt, exception to termination of parental rights and, H-167, S-15

Caretaker. *See also* Caregiver

- deciding on, H-24
- out-of-state, Interstate Compact on the Placement of Children (ICPC) and, H-25, F-45–47, F-73. *See also* Interstate Compact on the Placement of Children
- placement with. *See also* Placement
 - assessment/approval of, H-24–25, H-89, F-74–75
 - prerelease investigation hearing and, H-27

CASA. *See* Court Appointed Special Advocate

Case information, in Indian child dependency proceedings, right to access to, F-39

Case plan, H-101–102. *See also* Reunification services

- noncompliance with
 - as prima facie evidence for continuing jurisdiction, H-115

- Case plan, noncompliance with, cont'd.*
- as prima facie evidence of detriment, H-133
 - termination of reunification services and, H-135, H-141
 - objections to, at trial level, H-103-104
 - permanency review/hearing for assessment of, H-191
 - visitation in, H-102, H-134, F-62, F-87-88, S-13-14
- Case summaries, S-3-23. *See also name of party in Table of Cases*
- Cash Assistance Program for Immigrants (CAPI), F-24
- Chambers, testimony in. *See In-chambers testimony*
- Changed circumstances
- modification of custody/visitation (exit) orders and, H-88, H-117, H-119, F-81, F-87
 - proving, at status review, H-189
 - § 388 petition and, H-215, H-216, H-218, H-220, H-222, S-14
 - visitation and, F-87
 - setting a § 366.26 hearing and, H-193
- CHDP. *See* Child Health and Disability Program
- Checklists
- for child's attorney
 - for detention hearing, H-5-6
 - for disposition hearing, H-73-74
 - for judicial review of placement with parent (§ 364), H-109-110
 - for jurisdiction hearing, H-35-36
 - for permanency review/hearing, H-181-183
 - for selection and implementation hearing (§ 366.26/two-six hearing), H-149-150
 - for status reviews, H-123-125
 - for parent's attorney
 - for detention hearing, H-7-8
 - for disposition hearing, H-75-76
 - for judicial review of placement with parent (§ 364), H-111-112
 - for jurisdiction hearing, H-37-38
 - for permanency review/hearing, H-185-186
 - for selection and implementation hearing (§ 366.26/two-six hearing), H-151-152
 - for status reviews, H-127-128
- Child, under age five, serious physical injury to
- as basis for jurisdiction, H-63-64
 - reunification services denial/bypass and, H-64, H-94-95
 - sibling victim and, H-96-97
 - at age of majority, termination of jurisdiction and, H-195-196, F-82-83, S-18-19
 - age of, time limits on reunification and, H-100, H-134-136

Child, under age five, serious physical injury to, cont'd.

- death of (another child)
 - as basis for jurisdiction, H-64–65
 - as grounds for reunification services denial/bypass, H-65, H-93–94
 - dependent. *See* Dependency, declaration of
 - failure to protect. *See* Failure to protect
 - as incest victim, reunification services denial/bypass and, H-97
 - at jurisdiction hearing
 - presence of, H-48–50
 - testimony by, H-48–50, H-54, F-28–29, S-20–21
 - mental health of
 - as basis for jurisdiction, H-62, S-5–6
 - privilege with respect to court-ordered psychological examination and, H-57
 - missing/whereabouts unknown
 - jurisdictional/dispositional findings and, H-46
 - termination of jurisdiction improper and, F-82
 - notifying of hearing
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113–114, S-9
 - jurisdiction hearing, H-39–40, H-48
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing),
H-153, H-156, H-159
 - status reviews, H-131
 - objection to termination of parental rights by, H-166
 - parent unwilling/unable to care for
 - as basis for jurisdiction, H-65–66, F-61, S-7, S-9
 - as grounds for removal, H-85, H-86
 - as grounds for reunification services denial/bypass, H-66, H-97
 - privileges of, H-56–57, F-9–10
 - redetained, time limits on reunification services and, H-136, H-202–203
 - return of to parent. *See* Child's release, to parent
 - rights of, F-9–11
 - § 388 petition filed by, H-171, H-212, H-213
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-159–160
 - in-chambers testimony by, H-160
 - special-needs, adoptability of, H-163
 - substantial danger to, as grounds for removal from parent, H-84–85, S-7–8
- Termination of Dependency Jurisdiction—Child Attaining Age of Majority*
(JV-365) form supplied to, H-195
- “truth incompetent,” “child hearsay” or “child dependency” exception and,
F-28, S-21

Child, under age five, serious physical injury to, cont'd.

undocumented

- access of to public benefits, F-34–36
- Cash Assistance Program for Immigrants (CAPI) and, F-24
- education rights and, F-35
- eligibility for permanent resident status under VAWA and, F-33
- funding and income assistance for, F-24, F-36
- health benefits for, F-35
- right to protection and, F-31
- Special Immigrant Juvenile Status (SIJS) program and, H-178, F-32–33
 - preventing termination of jurisdiction until legal permanent resident status granted and, H-196, F-32, F-84
- visitation with parent and. *See* Parent-child visitation

Child abuse

- another child's death caused by
 - as basis for jurisdiction, H-64–65
 - as grounds for reunification services denial/bypass and, H-65, H-93–94
 - background check for, for detention/placement with relative, H-25, F-69, F-70
 - child under age five and, H-63–64
 - as grounds for reunification services denial/bypass, H-64, H-94–95, H-96–97
 - dependent child's relationship to victim of, reunification services denial/bypass and, H-96
 - eligibility for permanent resident status under U Visa and VAWA, F-33–34
 - emotional
 - as basis for jurisdiction, H-62, S-5–6
 - as grounds for removal, H-85
 - forfeiture of opportunity to attain de facto status and, F-3
 - as grounds for removal, H-84–86
 - identity of abuser not known and, H-64, S-6
 - reunification services denial/bypass and, H-59, H-93, H-95–96
 - safe-haven/safe-surrender program and, F-78
 - severe physical harm and, H-58–59, H-63–64, S-4–5
 - sexual. *See* Sexual abuse
 - of sibling
 - as basis of jurisdiction, H-63, H-66–67, S-6
 - as grounds for removal, H-86
 - as grounds for reunification services denial/bypass, H-93, H-95–96, H-96–97
- Child Abuse Central Index (CACI), for check for detention/placement with relative, F-70

- Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem (GAL), H-12. *See also* Guardian ad litem
- Child care classes, court-ordered. *See also* Case plan
 - for dependent minor parent, H-104
 - parent's failure to participate in, as prima facie evidence for continuing jurisdiction, H-115
- Child custody. *See* Custody
- "Child dependency" hearsay exception, H-54–55, F-28–29, S-20–21
- Child and family services. *See also* Case plan; Reunification services
 - child-specific, H-19
 - court order for provision of, H-18–19, H-21–22
 - incarcerated parent and, H-90–91, F-61–63
 - parent's failure to participate in
 - as prima facie evidence for continuing jurisdiction, H-115
 - as prima facie evidence of detriment, H-133
 - termination of reunification services and, H-135, H-141
 - prevention of further detention and, H-21–22
 - reasonable
 - active efforts under Indian Child Welfare Act (ICWA) and, F-40–41
 - assessment of at permanency review/hearing, H-191
 - assessment of at status reviews, H-133–134
 - efforts to prevent/eliminate need for removal and, H-15–16
 - exception to termination of parental rights based on lack of, H-169–170, S-13
 - extension of reunification services based on lack of, H-136, H-139, S-12–13, S-13–14
 - guardianship order based on lack of, H-175
- Child Health and Disability Program (CHDP), immigrant status not affecting eligibility for, F-35
- "Child hearsay" exception, H-54–55, F-28–29, S-20–21
- Child neglect. *See* Neglect
- Child-parent relationship, benefit of continuing, exception to termination of parental rights and, H-164–166, S-14–15
- Children's rights, F-9–11
 - case summaries and, S-18–19
 - consent to health care and, F-10–11
 - constitutional, F-9
 - statutory, F-9–10
- Child's abandonment, reunification services denial/bypass and, H-66, H-97, H-141
 - safe-haven/safe-surrender program and, H-97
- Child's abduction
 - prevention of (Parental Kidnapping Prevention Act/PKPA), F-52

Child's abduction, cont'd.

- reunification services denial/bypass and, H-100
 - Child's attorney. *See also* Attorneys
 - dependent child's right and, F-9
 - dismissal of subsequent and supplemental petitions and, H-206
 - for disposition hearing, checklist for, H-73-74
 - establishing legal permanent resident status and, H-178, H-196, F-32, F-84
 - for Indian child, contacting tribal representative and, F-38
 - for initial/detention hearing, H-10-12
 - appointment of, H-10
 - checklist for, H-5-6
 - as child's representative, H-11-12
 - multiple siblings/conflict of interest and, H-10-11, S-3
 - input into reunification services by, H-102
 - for judicial review of placement with parent (§ 364)
 - checklist for, H-109-110
 - placement with previously noncustodial parent and, H-116
 - for jurisdiction hearing
 - appointment of, H-46
 - checklist for, H-35-36
 - Kin-GAP funding forms and, F-23
 - limiting parent's educational rights and, F-14
 - for permanency review/hearing
 - assessment of reasonable efforts/services for permanency and, H-191
 - checklist for, H-181-183
 - Special Immigrant Juvenile Status (SIJS) application and, H-196, F-32, F-84
 - § 388 petition filed by, H-171, H-212, H-213
 - notice of hearing and, H-217
 - for selection and implementation hearing (§ 366.26/two-six hearing)
 - adequacy of notice and, H-154
 - appointment of, H-159
 - checklist for, H-149-150
 - Special Immigrant Juvenile Status (SIJS) application and, H-178
 - social service agency discovery requirements and, H-44
 - for status reviews
 - checklist for, H-123-125
 - child placed with previously noncustodial parent and, H-137-138
- Child's best interest. *See* Best interest of child
- Child's detention, H-22-25. *See also* Child's removal; Detention hearing;
- Placement
 - jurisdiction hearing timing and, H-40
 - redetained child, time limits on reunification and, H-136, H-202-203

Child's detention, cont'd.

- with relative, H-24–25, H-88–89, F-65–75. *See also* Relative, detention/
placement with
 - assessment/approval and, H-24–25, H-89, F-66, F-69–71
 - physical move to different home and, F-74–75
 - Interstate Compact on Placement of Children and, H-25, F-45–47, F-73. *See also* Interstate Compact on the Placement of Children
 - prerelease investigation hearing and, H-27
 - social worker's report recommendations and, H-79
- release to noncustodial/nonoffending parent and, H-22–23, H-83, H-85, H-86–88
- to parent, H-21–22, H-83, H-84. *See also* Noncustodial/nonoffending parent, child's release to

Child's release. See also Placement

- jurisdiction hearing timing and, H-40
- to noncustodial/nonoffending parent, H-22–23, H-83, H-85, H-86–88. *See also* Noncustodial/nonoffending parent, child's release to
- to parent, H-21–22, H-83, H-84
 - burden of proof at detention hearing and, H-13, H-21
 - judicial review of (§ 364), H-107–119. *See also* Judicial review of placement with parent
 - at permanency review/hearing, H-189, H-192–193, H-194
 - § 388 motion for, H-162, H-169, H-171, H-213, H-221, S-14
 - § 388 petition for termination of guardianship and, H-218, H-222
 - at status reviews, H-138
 - substantial probability of, H-139, H-144
- to relative, H-24–25, H-88–89, F-65–75. *See also* Relative, detention/
placement with

Child's removal, H-22–25, H-86–90. See also Child's detention; Detention hearing; Placement

- agency's withdrawal of approval of caregiver or home and, F-74–75
- grounds for, H-84–86
- from legal guardian. *See* Legal guardianship, termination of
- not considered at § 364 review, H-118
- petition necessary for, H-204–205, H-207, S-16–17
- placement after, H-86–90
- from prospective adoptive parent, H-173, F-5–6, F-75
 - § 387 petition and, H-205
- reasonable efforts to prevent/eliminate need for, H-15–16
- social services use of § 388 petition and, H-214, H-219
- specific rather than general placement order and, H-89, H-204, F-73, F-74
- standing to challenge, H-204–205, S-17
- subsequent and supplemental petitions for, H-118, H-207, S-16–17
 - burdens of proof and, H-206–207

Child's removal, subsequent and supplemental petitions for, cont'd.

- dismissal of, H-206
- necessity for, H-204–205
- standing to challenge, H-204–205, S-17
- time limits on reunification services and, H-19, H-69, H-100–101, H-134–136
- age at time of removal and, H-100, H-134–136
- supplemental and subsequent petitions and, H-202–203
- time limits for review hearings based on time of, H-129–131, S-10–11

Child's safety/protection

- continuances and, H-41
- failure to provide for, as basis of jurisdiction, H-59–61, S-3–5
 - sexual abuse and, H-62–63
- timeline violations and jurisdiction and, H-30, H-40–41, H-77–78, S-18
- visitation orders and, F-91

Child support, presumed father and, F-56

“Chronological notes,” social worker's, discoverability of, H-44–45

Circumstances, changes in. *See* Changed circumstances

Clean living conditions, failure to provide, as basis for jurisdiction/grounds for removal, H-61, H-84

Clear and convincing evidence

- of adoptability, at selection and implementation hearing (§ 366.26/two-six hearing), H-158, H-163, H-174
- for child's removal from home, H-80–81, H-84–85, S-7
 - at § 388 petition hearing, H-217–218
- Indian Child Welfare Act (ICWA) and, F-40
- for long-term foster care, H-140
- for reinstatement of parental rights, at § 388 petition hearing, H-218
- that reunification is in best interest of child, H-93, H-94, H-95, H-96, H-97, H-98, H-99, H-100
- for reunification services denial/bypass, H-80–81
 - abuse and, H-93, H-95
- as standard of proof of reunification services provision, H-133
- for subsequent and supplemental petition for removal from parent, H-207, H-217–218
- termination of legal guardianship under § 388 petition and, H-222

Clergy-penitent privilege, child's, H-56–57, F-9–10

CLETS. *See* California Law Enforcement and Telecommunications System

Code of Federal Regulations. *See* Table of Code of Federal Regulations

Codes, California. *See* Table of California Codes

Collateral estoppel, sibling abuse as basis for jurisdiction and, H-67

Commissioner, matter heard by, rehearing and, H-28

Community treatment program, residential, for incarcerated parent, F-62–63

Competency of child, H-48–49, F-28, F-29, S-20–21

Competency of child, cont'd.

- right to confrontation and, H-54, F-29
- Concurrent jurisdiction, for Indian child, F-43
- Conditional placement, F-71
- Confidentiality
 - child's attorney and, H-5, H-12
 - child's privileges and, H-56-57, F-9-10
 - discovery limitations and, H-44
 - of juvenile case files, dependent child's right to, F-10
 - in safe-haven/safe-surrender program, F-77-78
- Conflict of interest, representation of siblings at initial/detention hearing and, H-10-11, S-3
- Confrontation, right to, admissibility of child's statements and, H-54, F-29
- Conjoint therapy, as prerequisite to visitation, provision of, H-134
- Constitutional rights, of dependent children, F-9
- Consulate, issues relating to immigrant families and, F-31
- Contact agreements, postadoption, F-89
- Contested adjudication, H-30-31
- Contested hearing
 - jurisdiction, H-52-58
 - evidence admissibility and, H-52-57
 - motions to dismiss and, H-57-58
 - permanency (§ 366.3), H-192, S-16
 - selection and implementation (§ 366.26/two-six), H-160-161
 - alleged father's right and, H-160
 - evidence admissibility and, H-160-161
- Continuance
 - for detention hearing
 - one-day, H-20-21
 - time limits for adjudication and, H-30-31, F-60-61
 - for disposition hearing, H-68-69, H-77-78
 - discretionary, H-68, H-77-78
 - guardianship orders and, H-83
 - mandatory, H-69, H-77-78
 - social worker's report availability and, H-79
 - incarcerated parent's right to be present at hearing and, F-60
 - for judicial review of placement with parent (§ 364), receipt of social worker's report and, H-114, S-9
 - for jurisdiction hearing, H-40-41, H-41-43
 - appointment of counsel and, H-43
 - case summaries and, S-18
 - for good cause, H-41-42, S-18
 - social worker's late report and, H-42

- Continuance, for jurisdiction hearing, cont'd.*
 - unavailable witness and, H-42
 - § 352. *See also* Welfare and Institutions Code, § 352 in *Table of California Codes*
 - defects in notice and, H-114, H-131
 - for selection and implementation hearing (§ 366.26/two-six hearing), H-157
 - adoption as goal and, H-174–175
 - appointment of counsel and, H-159
 - notice of, H-156–157
 - social worker's report availability and, H-42, H-79, H-114, S-9
 - for status reviews
 - defects in notice and, H-131
 - extending services and, S-11
 - social worker's report availability and, H-132
- Contraception, dependent child's right to consent to, F-10–11
- Corrective Action Plan (CAP), F-71
- Counsel. *See also* Attorneys; Child's attorney; Parent's attorney
 - dependent child's right to, F-9. *See also* Court-appointed counsel
- Counseling, for parent, court-ordered, H-102, H-103, S-13–14. *See also* Case plan
 - failure to participate in as prima facie evidence for continuing jurisdiction, H-115
- County, placement outside of, H-90
- County foster care funds, F-21–22
- County social services agency. *See* Social services
- Court-appointed counsel. *See also* Child's attorney; Parent's attorney
 - dependent child's right to, F-9
 - for Indian parents/custodian, F-39
 - for initial/detention hearing, H-10
 - multiple siblings/conflict of interest and, H-10–11, S-3
 - for jurisdiction hearing, H-46–47
 - continuance and, H-43
 - for selection and implementation hearing (§ 366.26/two-six hearing), H-159
- Court Appointed Special Advocate (CASA)
 - educational decisions and, H-145, F-14
 - as guardian ad litem, H-12
 - notifying of hearing
 - modification motion/§ 388 petition hearing, H-217
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153
 - social worker's report for selection and implementation hearing (§ 366.26/two-six hearing) provided to, H-158
 - Termination of Dependency Jurisdiction—Child Attaining Age of Majority* (JV-365) form supplied to, H-195
- Court-ordered programs, for parent, H-102, H-103–104. *See also* Case plan

Court-ordered programs, for parent, cont'd.

- failure to participate in
 - as prima facie evidence for continuing jurisdiction, H-115
 - as prima facie evidence of detriment, H-133
 - termination of reunification services and, H-135, H-141
- Court-ordered psychological examination, of child, privilege and, H-56
- Court orders/inquiries/findings. *See also specific type*
 - at disposition hearing
 - ancillary orders and, H-102–106
 - challenge to, H-104
 - at initial/detention hearing, H-15–20
 - ancillary orders and, H-18–19
 - child/family services and, H-18–19
 - funding of relative caregivers (Title IV-E) and, H-16–17, F-20
 - one-day continuance and, H-20
 - Indian Child Welfare Act (ICWA) and, H-18
 - jurisdictional issues and, H-15
 - parentage inquiry and, H-17–18
 - reasonable efforts (to prevent/eliminate need for removal) and, H-15–16
 - restraining orders and, H-18–19
 - modification of, by § 388 petition, H-211–223. *See also* Modification, motions for
- Courts of Appeal. *See* Appeals
- Credibility, inconsistencies in child's testimony and, H-49
- Crime, victim of, eligibility for permanent resident status under U Visa and, F-33–34
- Criminal conviction
 - detention/placement with relative and, H-25, H-89, F-69–70, F-74–75
 - possible court orders and, F-71–72
 - removal from caregiver and, F-74
 - of intended witnesses, in pretrial discovery, H-44
 - of parent
 - denial/bypass of reunification services and, H-99
 - failure to protect and, H-61
 - termination of parental rights and, H-164
 - termination of reunification services and, H-142
- Criminal conviction exemption (“waiver”), F-71, F-72, F-75
- Cross examination
 - child unavailable for, “child hearsay” or “child dependency” exception and, F-28–29
 - of social worker, H-53, H-81, H-161, F-27–28, S-3–4, S-12
 - full evidentiary hearing on 388 petition and, H-219–220
- Cruelty, as basis of jurisdiction, H-66
- Current-caregiver preference, H-171–172
- Custodial parent. *See also* Parent

Custodial parent, cont'd.

- child's detention/removal from, H-22–25, H-86–90. *See also* Child's removal; Placement
 - not considered at § 364 review, H-118
 - supplemental petition for, H-118, S-16–17
- sexual abuse history and, H-46
- Custody. *See also* Placement
 - after dependency declaration, H-83–102
 - judicial review of placement with parent (§ 364) and, H-107–119
 - exit orders and, H-117, H-118–119, F-81
 - scope of evidence and, H-117
 - termination of jurisdiction and, H-117, H-118–119, F-81
 - transfer of from one parent to another at, H-118
 - jurisdictional issues and, F-49–53, F-81
 - Hague Convention on International Child Abduction and, F-52–53
 - for initial/detention hearing and, H-15
 - when no previous custody order and proceedings not commenced in state with jurisdiction, F-51–52
 - Parental Kidnapping Prevention Act and, F-52
 - when previous custody order or proceedings commenced in another state, F-51
 - termination and, H-117, H-118–119, F-81
 - Uniform Child Custody Jurisdiction and Enforcement Act governing, F-49–52
 - “lawful,” surrendering child under safe-haven/safe-surrender program and, F-77
 - presumed father's right to, F-58, S-23
 - by previously noncustodial, nonoffending parent, H-86–88
 - judicial review of placement and, H-115–116, H-118
 - status reviews and, H-137–139
 - termination of jurisdiction and, H-117, H-118–119, F-81
 - timing of initial/detention hearing and, H-9
- Custody Order—Final Judgment* (JV-200), F-81

D

- DAP (Documented Alternative Plan), F-71
- Death of another child
 - as basis for jurisdiction, H-64–65
 - as grounds for reunification services denial/bypass and, H-65, H-93
- Declaration, § 388 petition hearing conducted by, H-219
- Declaration of parentage, F-56
- De facto parent, F-3–5, S-17–18
 - case summaries and, S-17–18
 - criteria for status as, F-3, S-17–18

De facto parent, cont'd.

- fact sheet on, F-3–5
- notifying of selection and implementation hearing (§ 366.26/two-six hearing), H-153
- reunification services and, H-91, F-4
- rights and role of in dependency proceedings, F-4
- § 387 petition and, H-204–205, F-73, S-17
- § 388 petition filed by, H-214
 - right to full evidentiary hearing and, H-219–220
 - § 388 petition to terminate de facto status and, F-4–5
 - standing and appeals involving, F-4–5
- “Default,” parent’s failure to appear at jurisdictional hearing not treated as, H-47, H-53
- Default jurisdiction, F-50–51
- “Deferred action,” eligibility for permanent resident status under U Visa and VAWA, F-33, F-34
- Demurrer, initial/detention hearing and, H-28
- Department of Social Services. *See* Social services
- Dependency, declaration of, H-77, H-83–102
 - ancillary orders and, H-102–106
 - child remains in home of parent and (supervision with family maintenance services), H-84
 - child removed from home of parent and
 - grounds for, H-84–86
 - placement and, H-86–90. *See also* Placement
 - constitutional rights of children and, F-9
 - drug testing and, H-105
 - grandparent visits and, H-79, H-106, F-90
 - immigration status irrelevant to, F-31
 - joinder and, H-103
 - limits on parent’s educational rights and, H-104, F-15
 - minor parents and, H-104
 - orders involving child and, H-104–105
 - orders involving parent and, H-103–104
 - parental visits and, H-79, H-105
 - reunification services and, H-79, H-90–102. *See also* Reunification services
 - § 388 petition hearing filed after, H-211–212
 - sibling visits and, H-79, H-106, F-90–91
 - statutory rights of children and, F-9–10
 - visitation and, H-79, H-105–106
- Dependency case file, confidentiality of, dependent child’s right to, F-10
- Dependency mediation, H-29–30
 - uncontested jurisdiction hearing and, H-51
- Dependency restraining order, H-20. *See also* Restraining orders

Dependent minor parent, H-104
 infant child supplement for caregivers of, F-25
 Detention of child. *See* Child's detention; Detention hearing; Placement
 Detention hearing, H-3-31
 appointment of child's attorney for, H-10-11, S-3
 burdens of proof in, H-13-14
 CAPTA GAL and, H-12
 case summaries and, S-3
 checklists for attorney, H-5-6, H-7-8
 child's counsel for, H-5-6, H-10-12
 child's detention from custodial parent and, H-13, H-22-25
 child's release to parent and, H-13, H-21-22
 commissioner hearing, rehearing and, H-28
 contested adjudication and, H-30-31
 continuing, H-20-21
 court orders/inquiries/findings in, H-15-20
 demurrer and, H-28
 dismissal of petition and, H-26
 evidentiary nature of, H-14
 informal supervision and, H-26
 jurisdictional issues and, H-15, H-26
 mediation of, H-29-30
 notice of, H-9-10
 jurisdictional findings at resolution conference/PRC hearing and,
 H-29, H-47
 rehearing and, H-27
 one-day continuance of, H-20-21
 outcome possibilities for, H-20-26
 parent's attorney for, H-7-8
 prejurisdictional settlement conferences and, H-29
 prerelease investigation hearings after, H-27
 prima facie case definition for, H-14
 referee hearing, rehearing and, H-28
 rehearings and, H-27-28
 relative/nonrelative extended family member placement pending, F-66
 representing child's best interest and, H-11-12
 setting next hearing and, H-27-31
 social worker's report and, H-13, H-21
 statutory elements of, H-13-14
 timing of, H-9
 Title IV-E funding findings at, H-16-17, H-20, F-20
 Detriment
 finding of, visitation and, H-105, F-88, F-89

Detriment, cont'd.

- incarcerated parent and, H-87, F-61, S-9
 - denial of visitation and, H-105, F-88
 - interference with sibling relationship causing, S-8
 - exception to termination of parental rights and, H-168–169, S-16
 - Interstate Compact on the Placement of Children (ICPC) evaluation in assessment of, H-87
 - parental substance abuse and, H-61, S-4–5
 - parent's failure to participate in court-ordered programs and, H-133
 - placement with previously noncustodial, nonoffending parent and, H-23, H-80, H-86–87, S-8, S-9
 - reunification services and, H-90–91
 - sibling interaction causing, visitation and, F-90
 - substantial risk of, H-144–145, S-11–12, S-12–13
- Difficult-to-place child, continuing selection and implementation hearing and, H-174–175
- Dirty home, as basis for jurisdiction/grounds for removal, H-61, H-84
- Disabled child. *See also* Special-needs child
 - in residential treatment facility, exception to termination of parental rights and, H-166
 - special education for, F-17–18
 - SSI payments for, F-24
- Discovery, pretrial, H-43–45
- Disentitlement doctrine, reunification services denial/bypass and, H-93, H-135
- Dismissal
 - child's right to hearing and, H-26, H-36, H-52, H-57
 - at disposition hearing, H-82
 - at initial/detention hearing, H-26
 - at jurisdiction hearing, H-57–58, H-67–68
 - no basis for jurisdiction and, H-67
 - prior to hearing, H-57
 - on § 350(c) (non-suit motion), H-35, H-38, H-57–58
 - of § 300(g) allegations when parent is located, H-66
 - § 310, H-26
 - § 360(b), H-82
 - § 390, H-26, H-82
 - of subsequent and supplemental petitions, H-206
- Disposition hearing, H-71–106
 - burdens of proof in, H-80–81
 - case summaries and, S-7–9
 - checklists for attorney, H-73–74, H-75–76
 - continuance of, H-68–69, H-77–78, H-83
 - dependency declared at, H-83–102. *See also* Dependency, declaration of

Disposition hearing, cont'd.

- discretionary continuance of, H-68, H-77-78
 - dismissal of petition and, H-82
 - education rights addressed at, H-104, F-15
 - evidence admissibility at, H-81
 - immediate, H-68, H-77
 - joinder at, H-103
 - jurisdiction declined at, H-82
 - legal guardianship (with/without taking jurisdiction) established at, H-82-83
 - mandatory continuance of, H-69, H-77-78
 - notice of, H-78
 - orders at
 - ancillary, H-102-106
 - challenge to, H-104
 - involving child, H-104-105
 - involving parent, H-103-104
 - for placement/custody, H-86-90, F-67. *See also* Placement for reunification services, H-90-102. *See also* Reunification services § 388 petition to challenge, H-211-212
 - specific versus general placement, H-89, H-204, F-73, F-74
 - outcome possibilities for, H-82-106
 - procedural and evidentiary issues at, H-81
 - § 388 petition filed after, H-211-212
 - six-month review after, H-130
 - social worker's report and, H-79-80
 - timing of, H-68-69, H-77-78
 - visitation orders at, H-105-106
- Doctor-patient privilege, child's, H-12, H-56-57, F-9-10
- Documented Alternative Plan (DAP), F-71
- Domestic partners, presumed mother and, H-18, F-57
- Domestic violence, eligibility for permanent resident status under VAWA and, F-33
- Drug abuse, parental
 - failure to protect and, H-61, S-4-5
 - reunification services denial/bypass and, H-61, H-99-100
 - safe-haven baby and, F-78
- Drug rehabilitation programs, reunification services denial/bypass and, H-100
- Drug testing, court-ordered, of dependent child, H-105
- Due diligence
 - in parental notification of initial/detention hearing, H-9-10
 - in parental notification of selection and implementation hearing (§ 366.26/ two-six hearing), H-155-156
- Due process
 - availability of social worker's report at status reviews and, H-132

Due process, cont'd.

- compelling child's testimony and, H-48
- contested selection and implementation hearing (§ 366.26/two-six hearing) and, H-160, H-161
- cross-examination of social worker and, H-161, S-12. *See also* Social worker, right to cross-examination of
- for de facto parent, F-4
- full evidentiary hearing for § 388 petition and, H-219–220
- inadequate notice and, challenge by § 388 petition and, H-211
- modification of visitation orders and, F-87
- parent's right to appear at jurisdictional hearing/procedure in his or her absence and, H-47–48
- parent's rights regarding GAL appointment and, F-59
- scope of evidence presented at judicial review of placement and, H-117

E

- Educational liaison, for foster children, F-17
- Educational rights, F-13–18
 - addressing at disposition hearing, H-104, F-15
 - addressing at initial/detention hearing, H-19, F-15
 - court orders affecting, F-15
 - decisionmaking authority for, F-13–15
 - fact sheet on, F-13–18
 - group home placement and, F-17
 - holders of, F-13–14
 - immigration status and, F-35
 - information resources on, F-18
 - parent's limits on, H-104, H-145, F-13, F-14, F-15
 - for child in long-term foster care or other planned permanent living arrangement, H-177, H-190
 - social worker's report recommendations and, H-80, H-145
 - special education and, H-104, F-13, F-14, F-17–18
 - transfer and enrollment issues and, F-15–17
- 18-month review
 - when child placed with previously noncustodial parent, H-137–138
 - continuing, with reunification services, H-139–140
 - time limits for, H-130–131
- Emancipating youth, termination of jurisdiction and, H-195–196, F-82–84, S-18–19
- Emergency jurisdiction, H-15, F-51–52
 - for Indian child, F-42
 - Parental Kidnapping Prevention Act providing for, F-52
- Emotional harm, severe
 - as basis for jurisdiction, H-62, S-5–6

Emotional harm, severe, cont'd.

- as grounds for removal, H-85
- Enrichment activities, dependent child's right to participate in, F-10
- Enrollment, in school, F-15-17
- Estoppel, collateral, sibling abuse as basis for jurisdiction and, H-67
- Evidence. *See also* Burdens of proof
 - child's right to presentation of, H-26, H-36, H-52
 - clear and convincing
 - of adoptability, at selection and implementation hearing (§ 366.26/two-six hearing), H-158, H-163, H-174
 - for child's removal from home, H-80-81, H-84-85, S-7
 - at § 388 petition hearing, H-217-218
 - Indian Child Welfare Act (ICWA) and, F-40
 - for long-term foster care, H-140
 - for reinstatement of parental rights, at § 388 hearing, H-218
 - for reunification services denial/bypass, H-80-81
 - abuse and, H-93, H-95
 - as standard of proof of reunification services provision, H-133
 - for subsequent and supplemental petition for removal from parent, H-207
 - termination of legal guardianship under § 388 petition and, H-222
 - that reunification is in best interest of child, H-93, H-94, H-95, H-96, H-97, H-98, H-99, H-100
 - competency definition and, H-48
 - at contested hearing, exceptions for termination of parental rights and, H-160-161
 - preponderance of
 - for changes requested in § 388 petition, H-218-219
 - exceptions for termination of parental rights and, H-158-159
 - removal from home of relative or nonrelative extended family member and, H-206
 - resumption of reunification services at permanency review/hearing and, H-188-189, H-193
 - to sustain a petition at a jurisdictional hearing, H-45-46, H-52-57
 - termination of legal guardianship under § 388 petition and, H-222
 - presentation of at disposition hearing, H-80-81
 - presentation of at initial/detention hearing, H-14, H-27-28
 - presentation of at judicial review of placement with parent (§ 364), scope of, H-117
 - presentation of at jurisdiction hearing, H-45-46, H-52-57, S-3-4
 - presentation of at selection and implementation hearing (§ 366.26/two-six hearing), H-160-162, F-27-28, S-20
 - professional. *See* Expert testimony
- Evidentiary hearing, on § 388 petition, right to, H-219-220

- Exceptional circumstances
 - caregiver unwilling/unable to adopt and, exception to termination of parental rights and, H-167, S-15
 - continued provision of reunification services and, H-139–140, H-142–143, S-11
- Exclusive jurisdiction, for Indian child, F-42
- Exit orders, F-81. *See also* Custody; Placement
 - care in drafting, H-88, H-119, F-81
 - issuing at judicial review of placement
 - scope of evidence and, H-117
 - termination of jurisdiction and, H-117, F-81
 - modification of, changed circumstances/best interest of child and, H-88, H-117, H-119, F-81, F-87
- Expert testimony
 - at disposition hearing, H-81
 - Indian Child Welfare Act (ICWA) and, F-40
 - on injuries not ordinarily sustained absent parental neglect, H-45, H-56
 - at jurisdiction hearing, H-56
 - on parent's mental illness/capacity to utilize reunification services and, H-92–93
- Exploitation, sexual, H-62, H-63. *See also* Sexual abuse
- Extended family member, nonrelative. *See* Nonrelative extended family member
- Extracurricular activities, dependent child's right to, F-10

F

- Fact sheets. *See also specific type of fact sheet*
 - on caregivers (de facto parent/prospective adoptive parent/reasonably prudent parent), F-3–7
 - on children's rights, F-9–11
 - on education rights/laws/issues, F-13–18
 - on funding and rate issues, F-19–26
 - on hearsay in dependency hearings, F-27–29
 - on immigration, F-31–36
 - on incarcerated parents, F-60–63
 - on Indian Child Welfare Act (ICWA), F-37–43
 - on Interstate Compact on the Placement of Children (ICPC), F-45–47
 - on jurisdictional issues, F-49–53
 - on parentage, F-55–58
 - on parent's rights regarding GAL appointments, F-59–60
 - on relative placements, F-65–75
 - on save-haven/safe-surrender law, F-77–79
 - on termination of jurisdiction, F-81–86
 - on visitation, F-87–91

Failure to protect

- as basis for jurisdiction, H-59–61, S-4–5
 - another child’s death and, H-64–65
 - cruelty and, H-66
 - incarcerated parent and, F-61
 - sexual abuse and, H-62–63
- as grounds for removal of child from parent, H-85–86
- as grounds for reunification services denial/bypass, H-93–94, H-94–95

Family-based visas, F-34

Family law orders. *See* Exit orders

Family maintenance review hearings. *See* Judicial review of placement with parent

Family maintenance services

- court-ordered. *See also* Case plan
 - at detention hearing, H-18–19
 - at judicial review of placement with parent (§ 364), continuing jurisdiction and, H-117–118, H-119
- dependent child’s release to parent and, H-84
- incarcerated parent and, H-90–91, F-61–63

Family relationships, child’s constitutional interests in, F-9

Family reunification. *See* Reunification services

Family services. *See* Child and family services

Family therapy, as prerequisite to visitation, provision of, H-134

Father. *See also* Parent

- alleged, H-160, F-55, F-57
- biological, F-55–56, F-57–58
- family reunification services ordered for, H-90
- inquiry as to identity/whereabouts of, H-17–18
- Kelsey S.*, F-56, F-58, S-22–23
- presumed, H-18, F-56–57, F-58, S-23
- rights of under safe-haven/safe-surrender law, F-79

FBI clearance, for detention/placement with relative, F-70

Federal criminal clearance, for detention/placement with relative, F-70

Federal funding eligibility. F-19–21. *See also* Funding

- findings necessary for, H-16–17, H-20, F-20
- placement without approval of social services and, F-72–73

Federal poverty guidelines, federal funding eligibility and, F-19

Felony convictions. *See also* Criminal conviction

- of intended witnesses, in pretrial discovery, H-44
- of parent
 - denial/bypass of reunification services and, H-99
 - termination of parental rights and, H-164
 - termination of reunification services and, H-142

Fingerprint clearance check, for criminal records check for detention/placement with relative, F-69–70

FLO's (family law orders). *See* Exit orders

Foster care, H-90

- adoptive preference and, H-171–172
- case plan with tailored services for child in, H-101–102
- children formerly in, vulnerability of, termination of jurisdiction and, F-83
- court-ordered programs for parents and, H-102
- date of child entering, H-130
- dependent child's "bill of rights" and, F-10
- educational decisions and, H-104, H-145, H-177, F-16–17
- funding for. F-19–26. *See also* Funding
 - Aid to Families With Dependent Children—Foster Care (AFDC-FC), F-21
 - county, F-21–22
 - placement without approval of social services and, F-72–73
 - state, F-21
 - Title IV-E, findings necessary for, H-16–17, H-20, F-20
- for Indian child, placement preferences and, F-41–42
- long-term, H-140, H-176–177
 - parent-child visitation and, H-177, F-89
 - permanency review/hearing and, H-187
 - order that child remain in, H-197
 - placement in another planned permanent living arrangement and, H-196–197
 - presumption that continued care is in child's best interest and, H-188–190
- notice of permanency review/hearing and, H-188
- notice of status reviews and, H-131
- placement of dependent minor parent with child and, H-104, F-25
- placement of siblings together and, H-25, H-89
- reasonable-and-prudent-parent standard and, F-6–7
- time limits on reunification services and, H-100–101, H-134–136
- unwillingness/inability to adopt and, exception to termination of parental rights and, H-167

Foster Care Education Fact Sheets, F-18

Foster care liaison, F-17

Foster children's "bill of rights," F-10

Full faith and credit

- Indian Child Welfare Act (ICWA) and, F-42
- Parental Kidnapping Prevention Act (PKPA) and, F-52

Funding, F-19–26

- Adoption Assistance Program (AAP), F-23

Funding, cont'd.

- Aid to Families With Dependent Children—Foster Care (AFDC-FC), F-21
 - at basic rate, F-24–25
 - CalWORKS, F-22
 - county foster care, F-21–22
 - disqualifying criteria or circumstances and, F-20–21
 - eligibility for, F-19–21
 - findings necessary for, H-16–17, H-20, F-20
 - fact sheet on, F-19–26
 - for immigrants, F-36
 - Cash Assistance Program for Immigrants (CAPI) and, F-24
 - infant child supplement and, F-25
 - Kinship Guardianship Assistance Payment (Kin-GAP and Kin-GAP Plus), F-22–23, F-85–86
 - disposition hearing continuance and, H-83
 - termination of dependency jurisdiction under legal guardianship and, H-177–178, H-194–195, F-85–86
 - placement without approval of social services and, F-72–73
 - rates of, F-24–26
 - requirements for, F-19–20
 - specialized-care increments and, F-25
 - state foster care, F-21
 - Supplemental Security Income (SSI), F-24
 - survivor's benefits, F-24
 - termination of jurisdiction and, H-196, F-20–21, S-18–19
 - Title IV-E, findings necessary for eligibility for, H-16–17, F-20
 - one-day continuance and, H-20
 - types of, F-21–24
 - Youakim*, H-17, F-21

G

- GAL. *See* Guardian ad litem
- “g” count, filing case under safe-haven/safe-surrender law and, F-78
- General order for placement, H-89, H-204, F-73, F-74
- “Go to jail, lose your child” rule, H-65, F-61
- Grandparents. *See also* Relative
 - detention/placement with, preferential consideration for, H-24, H-88–89, F-66, F-67, S-17
 - notifying of selection and implementation hearing (§ 366.26/two-six hearing), H-153, H-155
 - visitation with, H-79, H-106, F-90
- “Green card.” *See* Permanent resident status
- Group home, H-90

Group home, cont'd.

- educational rights/issues and, F-17
- out-of-state, H-90
- Guardian, H-82–83, H-175–176. *See also* Guardian ad litem; Guardianship
 - appointment of, H-175–176
 - child's return to, at status reviews, H-138
 - criminal history exemption and, F-72
 - educational rights of, F-13–14
 - judicial review of placement with (§ 364), H-107–119
 - notifying of hearing
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113–114, S-9
 - jurisdiction hearing, H-39–40, H-47
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153
 - status reviews, H-131
 - parent-child visitation and, H-177, F-89, S-15
 - probate, rights of, H-223
 - sexual abuse history and, H-46
- Termination of Dependency Jurisdiction—Child Attaining Age of Majority* (JV-365) form supplied to, H-195
- termination of guardianship and, H-91
 - order for long-term foster care and, H-176, H-197
 - parent's right to contest, H-87
 - reunification services and, H-91, H-96, H-100–101, H-134–136
 - § 388 petition and, H-212, H-218, H-222–223
- termination of jurisdiction under legal guardianship and, F-84–86
 - with nonrelative guardian, F-84–85
 - at permanency review/hearing (§ 366.3 review/hearing), H-194–195
 - with relative guardian (Kin-GAP and Kin-GAP Plus), H-177–178, H-194–195, F-85–86
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-177–178
- Guardian ad litem, F-59–60, S-19
 - for initial/detention hearing, H-12
 - for mentally incompetent parents, F-59–60, S-19
 - § 388 petition filed by, H-212
- Guardianship, H-175–176. *See also* Guardian
 - caregiver's preference for, exception to termination of parental rights and, H-167
 - change from to adoption, H-194
 - criminal history exemption and, F-72
 - entry of (with or without taking jurisdiction), H-82–83

Guardianship, cont'd.

- parent-child visitation and, H-177, F-89, S-15
- relative. *See* Relative, detention/placement with
- § 388 petition filed after entry of, H-211-212
- termination of jurisdiction under, F-84-86
 - with nonrelative guardian, F-84-85
 - at permanency review/hearing (§ 366.3 review/hearing), H-194-195, F-85-86
 - with relative guardian (Kin-GAP and Kin-GAP Plus), H-177-178, H-194-195, F-85-86
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-177-178
- termination of, H-91
 - order for long-term foster care and, H-176, H-197
 - parent's right to contest, H-87
 - reunification services and, H-91
 - § 388 petition and, H-212, H-218, H-222-223

H

- Hague Convention on International Child Abduction/Hague Service Convention, H-15, F-52-53
- Handwritten notes, social worker's, discoverability of, H-44-45
- Health care
 - decisions about, for child in long-term foster care or another planned permanent living arrangement, H-177
 - dependent child's rights regarding consent to, F-10-11
 - failure to provide, H-59-60, H-96
 - immigrant status affecting eligibility for, F-35
- Healthy Families Program, immigrant status affecting eligibility for, F-35
- Hearings. *See also specific type of hearing*
 - disposition, H-71-106
 - initial/detention, H-3-31
 - judicial review of placement with parent (§ 364), H-107-119
 - jurisdiction, H-33-69
 - motions for modification, H-209-223
 - review of permanent plan, H-179-197
 - selection and implementation (§ 366.26/two-six), H-147-178
 - status reviews, H-121-146
 - subsequent and supplemental petitions, H-199-207
- Hearsay in dependency hearings, F-27-29
 - case summaries and, S-20-21
 - "child hearsay" or "child dependency" exception and, H-54-55, F-28-29, S-20-21
 - fact sheet on, F-27-29

Hearsay, in dependency hearings, cont'd.

- jurisdiction hearing and, H-53-55, F-27-28, S-3-4
- selection and implementation hearing (§ 366.26/two-six hearing) and, H-161, F-27-28, S-20
- social study exception and, H-53, H-55, F-27-28, S-3-4, S-20
- in social worker's report, F-27-28, S-3-4, S-20
 - at disposition hearing, H-81, F-27-28
 - at jurisdiction hearing, H-42, H-52, H-53-54, H-55, F-27-28, S-3-4
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-161, F-27-28, S-20
- Home inspection, for detention/placement with relative, H-24-25, H-89, F-69, F-70-71
- Homelessness
 - failure to protect and, H-59
 - former foster children vulnerable to, termination of jurisdiction and, F-83
 - school transfer and enrollment issues and, F-15
- Home state jurisdiction, F-50
 - ceding jurisdiction before hearing and, F-52
 - temporary emergency jurisdiction and, F-51-52
- Household, member of
 - cruelty by, H-66
 - definition of, H-63, H-66
 - sexual abuse by, H-62, H-63

I

- I-360 (*Petition for Amerasian, Widow(er), or Special Immigrant*) form, F-33
- I-487 (*Application to Register Permanent Residence or Adjust Status*) form, F-33
- ICARA. *See* International Child Abduction Remedies Act
- ICPC. *See* Interstate Compact on the Placement of Children
- ICWA. *See* Indian Child Welfare Act
- IEP. *See* Individualized education program
- ILP. *See* Independent Living Program
- Immigration. F-31-36. *See also* Undocumented dependent children
 - access to public benefits and, F-34-36
 - Cash Assistance Program for Immigrants (CAPI) and, F-24
 - child's right to protection and, F-31
 - consulate assistance and, F-31
 - education rights and, F-35
 - fact sheet on, F-31-36
 - funding and income assistance and, F-24, F-36
 - health benefits and, F-35
 - out-of-country custody/jurisdiction determinations and, F-31
 - paths to documented status and, F-32-34

Immigration, cont'd.

- resources for information on, F-36
- Special Immigrant Juvenile Status (SIJS) program and, H-178, F-32–33.
 - See also* Special Immigrant Juvenile Status (SIJS) program
- U Visa program and, F-33–34
- Violence Against Women Act (VAWA) and, F-33
- Immunity, parent/witness, for dependency hearing, H-55–56
- Implementation and selection hearing. *See* Selection and implementation hearing
- Incarcerated parent, F-60–63
 - as basis for jurisdiction, H-65–66, F-61, S-7, S-9
 - custody and, F-61, S-7, S-9
 - fact sheet on, F-60–63
 - finding of detriment and, H-87, S-9
 - as grounds for removal, H-85, H-86, S-9
 - presence at hearing and, F-60–61, S-19–20
 - jurisdiction/disposition hearings, H-41, H-47–48, H-78, F-60–61, S-19–20
 - time limits and, H-41, H-47–48, H-78, F-60–61, S-20
 - selection and implementation hearing (§ 366.26/two-six hearing), H-159, F-60–61
 - reunification services for, H-90–91, H-134, F-61–63
 - visitation and, H-105, F-62–63, F-88
- Incest, child conceived as result of, reunification services denial/bypass and, H-97
- In-chambers testimony by child
 - at jurisdiction hearing, H-49–50
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-160
- Income assistance. *See also* Funding
 - for “not qualified” immigrants, F-36
- Inconvenient forum, jurisdiction and, F-50
- Independent living, transition to, services to assist in, H-190, F-82–83
- Independent Living Program (ILP), F-85
- Indian child. *See also* Indian Child Welfare Act (ICWA)
 - concurrent jurisdiction and, F-43
 - definition of, F-37
 - exclusive jurisdiction and, F-42
 - inquiry about status as, F-38
 - jurisdictional issues and, F-42–43
 - notice of hearing for, F-39
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113–114
 - jurisdiction hearing, H-39–40
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188

Indian child, notice of hearing for, cont'd.

- selection and implementation hearing (§ 366.26/two-six hearing),
H-153, H-156
- status reviews, H-131
- placement in another planned permanent living arrangement for, H-196
- placement preferences for, F-41-42
- right to access case information and, F-39
- right to intervene and, F-38
- temporary emergency jurisdiction and, F-42
- Indian child's tribe. *See* Tribe
- Indian Child Welfare Act (ICWA), H-18, F-37-43
 - access to case information and, F-39
 - active efforts to avoid breakup of family and, F-40-41
 - burden of proof and, F-39-40
 - burdens and standards and, F-39-41
 - concurrent jurisdiction and, F-43
 - court-appointed counsel and, F-39
 - definitions under, F-37
 - determination of status and, F-38
 - eligibility for, F-37-38
 - exclusive jurisdiction and, F-42
 - fact sheet on, F-37-43
 - full faith and credit and, F-42
 - inadequate notice under, reversals based on, H-154
 - inquiry about Indian status and, F-38
 - intervention rights and, F-38
 - jurisdictional issues and, F-42-43
 - notice of hearings and, F-39
 - placement preferences and, F-41-42
 - procedure and, F-38-43
 - qualified expert witness testimony and, F-40
 - rights and, F-38-39
 - special considerations and, F-41-43
 - temporary emergency jurisdiction and, F-42
- Indian custodian
 - court-appointed counsel for, F-39
 - definition of, F-37
 - notifying of hearing, F-39
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113-114
 - jurisdiction hearing, H-39-40
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188

Indian custodian, notifying of hearing, cont'd.

- selection and implementation hearing (§ 366.26/two-six hearing),
 - H-153, H-156
 - status reviews, H-131
 - right to access case information and, F-39
 - right to intervene and, F-38
- Individualized education program (IEP), F-14, F-17-18
- Infant child supplement, F-25
- Informal supervision
 - dismissal at detention hearing and, H-26
 - dismissal at disposition hearing and, H-82
 - dismissal at jurisdiction hearing and, H-67-68
- In-home inspection, for detention/placement with relative, H-24-25, H-27, H-89,
F-69, F-70-71
- Initial/detention hearing, H-3-31
 - appointment of child's attorney for, H-10-11, S-3
 - burdens of proof in, H-13-14
 - CAPTA GAL and, H-12
 - cases summaries and, S-3
 - checklists for attorney, H-5-6, H-7-8
 - child's counsel for, H-5-6, H-10-12
 - child's detention from custodial parent and, H-13, H-22-25
 - child's release to parent and, H-13, H-21-22
 - commissioner hearing, rehearing and, H-28
 - contested adjudication and, H-30-31
 - continuing, H-20-21
 - court orders/inquiries/findings in, H-15-20
 - demurrer and, H-28
 - dismissal of petition and, H-26
 - evidentiary nature of, H-14
 - informal supervision and, H-26
 - jurisdiction alternatives and, H-26
 - jurisdiction issues and, H-15
 - mediation of, H-29-30
 - notice of, H-9-10
 - jurisdictional findings at resolution conference/PRC hearing and, H-29,
H-47
 - rehearing and, H-27
 - one-day continuance of, H-20-21
 - outcome possibilities for, H-20-26
 - parent's attorney for, H-7-8
 - prejurisdictional settlement conferences and, H-29
 - prerelease investigation hearings after, H-27

Initial/detention hearing, cont'd.

- prima facie case definition for, H-14
- referee hearing, rehearing and, H-28
- rehearings and, H-27–28
- relative/nonrelative extended family member placement pending, F-66
- representing child's best interest and, H-11–12
- setting next hearing and, H-27–31
- social worker's report and, H-13, H-21
- statutory elements of, H-13–14
- timing of, H-9
- Title IV-E funding findings at, H-16–17, H-20, F-20
- "Initial removal." *See also* Child's removal
 - definition of, H-130, H-136
- Injuries not ordinarily sustained absent parental neglect, H-45, H-56
- Institutionalized child, exception to termination of parental rights and, H-166
- Institutionalized parent. F-60–63. *See also* Incarcerated parent
 - fact sheet on, F-60
 - reunification services ordered for, H-90–91, H-134
 - visitation and, H-105
- Interim relative placement hearings, H-27
- International Child Abduction Remedies Act (ICARA), F-52
- International custody disputes, Hague Convention on International Child Abduction governing jurisdiction in, F-52–53
- Interstate Compact on the Placement of Children (ICPC), H-25, F-45–47, F-73
 - applicability of, F-45–46
 - case summaries and, S-22
 - detention/placement with relative and, H-25
 - fact sheet on, F-45–47
 - priority placements and, F-47
 - procedure and, F-46–47
 - release to nonoffending/noncustodial parent and, H-23, H-87, F-46, S-22
 - requirements of, F-46–47
 - timing of disposition hearing and, H-69
 - visit differentiated from placement and, F-45, S-22
- Investigation hearings, prerelease, H-27

J

- Joinder, providing mandated services and, H-103
- JR's. *See* Judicial review of placement with parent
- JT. *See* Jurisdiction, termination of
- Judge. *See also under* Judicial review of placement with parent
 - rehearing ordered by, H-28
- Judicial Council forms. *See specific form under* JV

- Judicial review of placement with parent (§ 364), H-107–119
 - burdens of proof in, H-114–115
 - checklists for attorney, H-109–110, H-111–112
 - continuing jurisdiction at, H-117–118, H-119
 - custody transfer from one parent to another at, H-118
 - exit orders and, H-118–119, F-81
 - family law and, H-118–119
 - jurisdictional issues and
 - continuing, H-117–118, H-119
 - termination, H-117, F-81
 - notice of, H-113–114, S-9
 - of other parent receiving family reunification, H-115–116
 - child placed with previously noncustodial parent, H-115–116, H-118
 - child remained in home of one parent and, H-115
 - outcome possibilities for, H-117–118
 - restraining orders and, H-118–119, F-81
 - scope of evidence presented at, H-117
 - social worker's report for, H-114, S-9
 - statutory elements of, H-114–115
 - termination of jurisdiction at, H-117
 - timing of, H-113
 - transfer of custody from one parent to another and, H-118
- Jurisdiction, F-49–53. *See also* Jurisdiction hearing
 - bases for, H-58–67
 - cruelty, H-66
 - death of another child through abuse/neglect, H-64–65
 - failed adoption, H-66
 - failure to protect, H-59–61, H-62–63, S-4–5
 - lack of, dismissal and, H-67
 - parent's inability/unwillingness to care for child, H-65–66, F-61, S-7, S-9
 - serious physical injury to child under age five, H-63–64
 - severe emotional harm, H-62, S-5–6
 - severe physical harm, H-58–59, H-63–64, S-4, S-4–5
 - sexual abuse, H-62–63
 - sibling abuse/neglect, H-66–67, S-6
 - ceding, F-52
 - concurrent, for Indian child, F-43
 - continuing, at judicial review of placement with parent (§ 364), H-117–118, H-119
 - declined, H-67, H-82
 - default, F-50–51
 - due process challenge to, by § 388 petition, H-211–212
 - emergency, H-15, F-51–52
 - for Indian child, F-42

Jurisdiction, emergency, cont'd.

- Parental Kidnapping Prevention Act providing for, F-52
- exclusive, for Indian child, F-42
- fact sheet on, F-49–53
- Hague Convention on International Child Abduction and, F-52–53.
- See also* Immigration
- home state, F-50
- incarcerated parent and, H-65–66, F-61, S-7, S-9
- for Indian child, F-42–43
- for initial/detention hearing, H-15, H-26
- legal guardianship with or without, H-82–83, H-194–195
- no previous custody order and proceedings not commenced in state with jurisdiction, F-51–52
- Parental Kidnapping Prevention Act (PKPA) and, F-52
- previous custody order or proceedings commenced in another state, F-51
- requirements under Interstate Compact on the Placement of Children (ICPC) and, F-46–47
- temporary emergency, H-15, F-51–52
 - for Indian child, F-42
- Parental Kidnapping Prevention Act providing for, F-52
- termination of, H-194–196, F-81–86
 - adoption finalization and, H-194
 - custody (exit) orders and, H-117, F-81
 - emancipating youth and, H-195–196, F-82–84, S-18–19
 - fact sheet on, F-81–86
 - immigration status pending, H-196, F-32, F-84
 - at judicial review of placement with parent (§ 364), H-117
 - under legal guardianship, F-84–86
 - with nonrelative guardian, F-84–85
 - at permanency review/hearing (366.3 review/hearing), H-194–195, F-85–86
 - with relative guardian (Kin-GAP and Kin-GAP Plus), H-177–178, H-194–195, F-85–86
 - at selection and implementation hearing (§ 366.26/two-six hearing), H-177–178
 - loss of federal funding and, H-196, F-20–21
 - at permanency review/hearing, H-194–196
 - placement with previously noncustodial parent and, H-87–88, S-8
 - return to parent and, H-194
 - services and documents provided for, H-195, F-82–83
 - situations in which termination is improper and, F-82
 - at six-month hearing, H-138
 - standard for, F-83–84

Jurisdiction, cont'd.

- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and,
 - H-15, F-49-52
 - violation of time limits not affecting, H-30, H-40-41, H-77-78, S-18
- Jurisdiction hearing, H-33-69. *See also* Jurisdiction
 - appointment of counsel for, H-46-47
 - continuance and, H-43
 - bases for jurisdiction and, H-58-67. *See also* Jurisdiction, bases for
 - burden of proof in, H-45-46
 - case summaries and, S-3-7
 - checklists for
 - for child's attorney, H-35-36
 - for parent's attorney, H-37-38
 - "child hearsay"/"child dependency" exception and, H-54-55, F-28-29, S-20-21
 - child's competency and, H-48-49, F-28, F-29, S-20-21, S-21
 - right to confrontation and, H-54, F-29
 - child's presence at, H-48
 - child's privileges and, H-56-57
 - child's right to present evidence and, H-26, H-36, H-52
 - child's testimony at, H-48-50, F-28-29, S-20-21
 - compelling child's testimony at, H-48
 - contested, H-52-58
 - continuances of, H-41-43, S-18
 - denial of jurisdiction and
 - dismissal at disposition hearing and, H-82
 - dismissal of petition and, H-67
 - dismissal motions and, H-57-58
 - dismissal of petition and, H-67-68
 - disposition hearing following. *See also* Disposition hearing
 - continuing, H-68-69, H-77-78
 - immediate, H-68, H-77
 - evidence admissibility at, H-52-57, S-3-4
 - expert testimony/documentary evidence and, H-56
 - incarcerated parent and, H-47-48, F-60-61, S-19-20
 - time limits and, H-41, H-47-48, F-60-61, S-20
 - in-chambers testimony at, H-49-50
 - informal supervision and, H-67-68
 - missing child/parent and, H-46
 - notice of, H-39-40, H-47, H-48
 - outcome possibilities for, H-67-69
 - parent's right to appear and procedure in his or her absence and, H-47-48
 - pleas (admission or no contest) and, H-51
 - pretrial discovery for, H-43-45

Jurisdiction hearing, cont'd.

- with previous out-of-state custody order, F-52
 - presumptions, generally H-45
 - privilege exceptions and, H-56
 - procedure in, H-46–58
 - self-incrimination and, H-55–56
 - six-month review after, H-130
 - social worker's report and hearsay within it and, H-53–54, H-55, F-27–28,
S-3–4
 - submissions and, H-51–52
 - time limits on reunification services and, H-100
 - timing of, H-40–41
 - 12-month review after, H-130
 - uncontested, H-50–52
- Juvenile case files, confidentiality of, dependent child's right to, F-10
- JV-130 form (*Parental Notification of Indian Status*), F-38
- JV-180 form (*Request to Change Court Order*), H-216
- JV-190 form (*Waiver of Rights*), H-50
- JV-200 form (*Custody Order—Final Judgment*), F-81
- JV-365 form (*Termination of Dependency Jurisdiction—Child Attaining Age of Majority*), H-195
- JV-505 form (*Statement Regarding Parentage*), F-55

K

- Kelsey S.* father, F-56, S-22–23. *See also* Parent rights of, F-58, S-22–23
- Kidnapping, parental, prevention of (Parental Kidnapping Prevention Act/ PKPA), F-52
- Kinship/Foster Care Emergency Fund, F-71
- Kinship Guardianship Assistance Payment (Kin-GAP) program, F-22–23, F-85–86
- benefits of, F-85–86
 - disposition hearing continuance and, H-83
 - eligibility for, F-85
 - termination of dependency jurisdiction under legal guardianship and,
H-177–178, H-194–195, F-85–86
- Kinship Guardianship Assistance Payment Plus (Kin-GAP Plus) program, F-23, F-85–86

L

- “Lawful custody,” surrendering child under safe-haven/safe-surrender program and, F-77
- Legal guardianship. *See* Guardianship

Legal orphan
 child's opposition to adoption and, H-166
 reinstatement of parental rights and, H-171
 special needs/difficult-to-place child and, H-175

Limits. *See* Time limits

Long-term care, Medi-Cal, immigrant status not affecting eligibility for, F-35

Long-term foster care, H-140, H-176–177
 application for permanent resident status and, H-178
 efforts for relative placement before, F-67–68
 parent-child visitation and, H-177, F-89
 permanency review/hearing and, H-187
 order that child remain in, H-197
 placement in another planned permanent living arrangement and,
 H-196–197
 presumption that continued care is in child's best interest and,
 H-188–190
 termination of jurisdiction and, F-82

LTFC. *See* Long-term foster care

M

Majority, child at age of
 educational decisions and, F-14
 federal funding and, H-196, F-20
 termination of jurisdiction and, H-195–196, F-82–83, S-18–19

Marital privilege, H-52, H-56

Maternity, legal, determination of, H-18

McKinney-Vento Homeless Assistance Act, F-15

Mediation, dependency, H-29–30
 uncontested jurisdiction hearing and, H-51

Medi-Cal, immigrant status affecting eligibility for, F-35

Medical treatment
 decisions about, for child in long-term foster care or another planned
 permanent living arrangement, H-177
 dependent child's rights regarding consent to, F-10–11
 failure to provide, H-59–60, H-96
 immigrant status affecting eligibility for, F-35

Member of household
 cruelty by, H-66
 definition of, H-63, H-66
 sexual abuse by, H-62, H-63

Memorandum of understanding (MOU), issues relating to immigrant families
 and, F-31

Mental health treatment, dependent child's right to consent to, F-10

Mental illness

child, as basis for jurisdiction, H-62, S-5-6

parental

appointment of guardian ad litem and, F-59-60, S-19

failure to protect and, H-60, S-5

orders for psychological evaluation and, H-56, H-81

reunification services denial/bypass and, H-92-93

Messiness, chronic, as basis for jurisdiction/grounds for removal, H-61, H-84

Minor parent, dependent, H-104, F-25

Missing child

jurisdictional/dispositional findings and, H-46

termination of jurisdiction improper and, F-82

Missing parent

jurisdictional/dispositional findings and, H-46, H-65-66

notice of selection and implementation hearing (§ 366.26/two-six hearing)
and, H-155

reunification services denial/bypass and, H-92, H-141

termination of parental rights and, H-164

Modification, motions for/§ 388 petition, H-162, H-169, H-171, H-209-223, S-14

best interest and, H-220-221

burdens of proof and, H-217-219

changed circumstances and, H-215, H-216, H-218, H-220, H-222, S-14
visitation and, F-87

conduct of, H-217-221

court's options on receipt of, H-215-216

denial of, without hearing, H-215-216

granting of, without hearing, H-216

necessity for, H-211-213

notice of, H-217

with pending selection and implementation hearing (§ 366.26/two-six
hearing), H-162, H-221-222

for presumed father status, F-58

right to full evidentiary hearing and, H-219-220

setting hearing for, H-216

to terminate de facto status, F-4-5

termination of legal guardianship and, H-212, H-218, H-222-223

time limits on hearing of, H-217

uncontested, H-216

visitation and, F-87, F-91

who may file, H-212-215

Mother. *See also* Parent

family reunification services ordered for, H-90

legal maternity issues and, H-18

Mother, cont'd.

- presumed, H-18, F-57
- Motion to dismiss. *See also* Dismissal
 - jurisdiction hearing, H-57–58
- Motion for modification, H-209–223. *See also* Modification, motions for MOU. *See* Memorandum of understanding

N

Neglect

- another child's death caused by
 - as basis for jurisdiction, H-64–65
 - as grounds for reunification services denial/bypass and, H-65, H-93–94
- injuries not ordinarily sustained in absence of, H-45, H-56
- previous acts of, as basis for failure to protect, H-60
- safe-haven/safe-surrender program and, F-78
- of sibling, as basis of jurisdiction, H-66–67
- No-contest plea, at jurisdictional hearing, H-50, H-51
- Noncustodial/nonoffending parent
 - child's release to, H-22–23, H-83, H-85, H-86–88
 - court-ordered programs and, H-103
 - incarceration and, H-85, S-9
 - Interstate Compact on the Placement of Children (ICPC) and, H-23, H-87, F-46, F-73, S-22
 - judicial review of placement and, H-115–116, H-118
 - opposition to, H-23
 - parent-child visitation and, F-87
 - sexual abuse history and, H-46
 - sibling relationships and, S-8
 - status reviews and, H-137–139
 - termination of jurisdiction and, H-87–88, S-8
 - child's removal from
 - risk of future harm and, H-85
 - § 388 petition for, burden of proof and, H-217–218
- Nondetaining 387s, H-207
- Non-Needy Relative Caregiver grant, F-22
- Nonoffending parent. *See* Noncustodial/nonoffending parent
- Nonrelative extended family member (NREFM). *See also* Relative
 - definition of, H-24, F-65
 - detention/placement with, H-24–25, H-88–89, F-65–75
 - assessment/approval and, H-24–25, H-89, F-66, F-69–71
 - physical move to different home and, F-74–75
 - fact sheet on, F-65

Nonrelative extended family member (NREFM), detention/placement with, cont'd.

- Interstate Compact on Placement of Children and, H-25, F-73.
- See also* Interstate Compact on the Placement of Children
- pre-release investigation hearing and, H-27
- reasonable-and-prudent-parent standard and, F-6-7
- removal of child and, § 387 petition and, H-204-205, F-73-74
 - burden of proof and, H-206-207
 - termination of jurisdiction and, F-84-85

Non-suit/§ 350(c) motion, H-35, H-38, H-57-58

Notice

- of disposition hearing, H-78
- inadequate
 - challenge by § 388 petition and, H-211-212
 - reversal at initial/detention hearing and, H-10
 - reversal of selection and implementation hearing (§ 366.26/two-six hearing) findings and, H-154, H-156
- Indian Child Welfare Act (ICWA) requirements for, F-39
- of initial/detention hearing, H-9-10
 - jurisdictional findings at resolution conference/PRC hearing and, H-29, H-47
 - parents residing outside United States and, H-15
 - rehearing and, H-27
- of intent to terminate jurisdiction, F-81
- of judicial review of placement with parent (§ 364), H-113-114, S-9
- of jurisdiction hearing, H-39-40
 - to child, H-39-40, H-48
 - content of, H-39
 - to parent/guardian, H-39-40, H-47
 - parent's failure to appear and, H-29, H-47
 - persons/entities entitled to, H-39-40
 - service method for, H-40
- method of. *See* Service, method of
- of modification motion/§ 388 petition hearing, H-217
- of permanency planning review/hearing, H-69, H-78
- of permanency review/hearing, H-188
- of removal of child from prospective adoptive parent, H-173, F-5, F-75
- of selection and implementation hearing (§ 366.26/two-six hearing), H-153-157
 - to child, H-156, H-159
 - content of, H-153
 - continued hearings and, H-156-157
 - method of service of, H-154-156
 - to parent, H-153, H-154-156
 - persons/entities entitled to, H-153

Notice, of selection and implementation hearing, cont'd.

by publication, H-155

time for service of, H-156

of status reviews, H-131

for subsequent and supplemental petitions, H-201

No-time-waiver trials, H-30, H-40

NREFM. *See* Nonrelative extended family member

Nunc pro tunc order, Title IV-E findings and, F-20

O

One-day continuance, of detention hearing, H-20–21. *See also* Continuance

Orphan, legal

child's opposition to adoption and, H-166

reinstatement of parental rights and, H-171

special needs/difficult-to-place child and, H-175

Out-of-home placements. *See also* Foster care; Placement

funding for, H-16–17, H-20, F-19–26

Out-of-state custody, ceding jurisdiction before hearing and, F-52

Out-of-state facility, placement in, H-90

Out-of-state parent. *See also* Noncustodial/nonoffending parent

denial of placement with, H-23

P

Parent. *See also* Parentage

adoptive, prospective. *See* Prospective adoptive parent

changed circumstances of

§ 388 petition and, H-215, H-216, H-218, H-220, H-222, F-87, S-14

child's detention/removal from, H-22–25, H-86–90. *See also* Child's

removal; Placement

grounds for, H-84–86

not considered at § 364 review, H-118

placement after, H-86–90

subsequent and supplemental petitions seeking H-118, H-207, S-16–17

child's release/return to, H-21–22, H-83, H-84. *See also* Child's release;

Placement

burden of proof at detention hearing and, H-13, H-21

judicial review of (§ 364), H-107–119. *See also* Judicial review of

placement with parent

at permanency review/hearing, H-189, H-192–193, H-194

§ 388 motion for, H-162, H-169, H-171, H-213, H-221, S-14

§ 388 petition for termination of guardianship and, H-218, H-222

at status reviews, H-138

substantial probability of, H-139, H-144

Parent, cont'd.

- compelling testimony of, H-55
- contesting permanency review/hearing and, H-192, S-16
- continued relationship with, exception to termination of parental rights and, H-164-166, S-14-15, S-15
- court-ordered programs for, H-102, H-103-104. *See also* Case plan
 - failure to participate in, H-115, H-133, H-135, H-141
- deceased, termination of reunification services and, H-142
- de facto. *See* De facto parent
- dependent minor, H-104, F-25
- disclosure responsibilities of, H-44
- educational rights of, H-104, H-145, H-177, H-190, F-13-14, F-15
- failure to appear at jurisdictional hearing and, H-47-48
- failure of to protect child. *See* Failure to protect
- family reunification services ordered for, H-90-102. *See also* Reunification services
 - judicial review of placement under § 364 and, H-115
 - time limits on, H-19, H-69, H-100-101, H-134-136, H-202-203
- felony conviction of
 - denial/bypass of reunification services and, H-99
 - termination of parental rights and, H-164
 - termination of reunification services and, H-142
- immunity granted to for dependency hearing, H-55-56
- incarcerated. *See* Incarcerated parent
- Indian, F-39
- mentally ill
 - appointment of guardian ad litem and, F-59-60, S-19
 - failure to protect and, H-60, S-5
 - orders for psychological evaluation and, H-56, H-81
 - reunification services denial/bypass and, H-92-93
- missing/whereabouts unknown
 - jurisdictional/dispositional findings and, H-46, H-65-66
 - notice of selection and implementation hearing (§ 366.26/two-six hearing) and, H-155
 - reunification services denial/bypass and, H-92, H-141
 - termination of parental rights and, H-164
- noncustodial/nonoffending. *See* Noncustodial/nonoffending parent
- notifying of denial of reunification services, H-69, H-78
- notifying of hearing
 - disposition hearing, H-78
 - initial/detention hearing, H-9-10, H-27, H-29, H-47
 - judicial review of placement with parent (§ 364), H-113-114, S-9
 - jurisdiction hearing, H-29, H-39-40, H-47

Parent, notifying of hearing, cont'd.

- modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-69, H-78, H-188, H-192, S-16
 - selection and implementation hearing (§ 366.26/two-six hearing),
H-153, H-154-156
 - status reviews, H-131
 - orders involving, H-103-104
 - out-of-state parent, denial of placement with, H-23
 - plea made by, H-50, H-51
 - privilege against self-incrimination and, H-55-56
 - psychological evaluation of, orders for, H-56, H-81
 - reasonable services offered to, H-133-134
 - exception to termination of parental rights based on lack of, H-169-170, S-13
 - extension of reunification services based on lack of, H-136, H-139, S-12-13, S-13-14
 - guardianship order based on lack of, H-175
 - rights of
 - appearance at jurisdictional hearing and, H-47-48
 - case summaries and, S-19-20
 - contesting hearing and, H-52
 - educational, H-104, H-145, H-177, H-190, F-13-14, F-15
 - guardian ad litem appointments and, F-59-60, S-19
 - § 388 petition filed by, H-212, H-213, H-214
 - sexual abuse by. *See* Sexual abuse
 - special needs, continued provision of reunification services and, H-139-140, H-142-143, S-11
 - surrogate, for educational decisions, H-104, F-14
 - Termination of Dependency Jurisdiction—Child Attaining Age of Majority* (JV-365) form supplied to, H-195
 - undocumented, dependency law and, F-31
 - unwilling/unable to care for child
 - as basis for jurisdiction, H-65-66, F-61, S-7, S-9
 - as grounds for removal, H-85, H-86, S-7
 - as grounds for reunification services denial/bypass, H-66, H-97
 - visitation with. *See* Parent-child visitation
 - waivers by, at jurisdictional hearing, H-50-51
- Parentage, F-55-58
- alleged father, F-55, F-57
 - biological father, F-55-56, F-57-58
 - case summaries and, S-22-23
 - declaration of, F-56
 - fact sheet on, F-55-58

Parentage, cont'd.

- inquiry about, H-17–18, F-55
- Kelsey S.* father, F-56, F-58, S-22–23
- presumed father, H-18, F-56–57, F-58, S-23
- presumed mother, H-18, F-57
- rights based on, F-57–58
- statement regarding (JV-505), F-55
- types of, F-55–57
- Parental consent, dependent minor's right to health care and, F-10
- Parental Kidnapping Prevention Act (PKPA), F-52
- Parental neglect. *See* Neglect
- Parental Notification of Indian Status* (JV-130), F-38
- Parental rights
 - reinstating, H-171, H-213, H-218
 - termination of, H-170–174. *See also* Adoption; Selection and implementation hearing
 - additional findings and, H-164
 - adoptability finding and, H-163
 - adoptive preference and, H-171–172
 - for all parents, H-154, H-170
 - bonding/attachment studies and, H-162
 - burdens of proof and, H-158–159
 - contested selection and implementation hearing (§ 366.26/two-six hearing) and, H-160–161
 - continuance of disposition hearing and, H-69, H-77–78
 - exceptions (bars to), H-164–169
 - child bonded to caregiver unwilling/unable to adopt, H-167, S-15
 - child in residential treatment facility, H-166
 - child's objection, H-166
 - interference with sibling relationship, H-168–169, S-16
 - reasonable efforts/services and, H-169–170, S-13
 - regular visitation/benefit of continuing relationship, H-164–166, S-14–15, S-15
 - tribal connection, H-224, F-40
 - tribal interest in alternate permanent plan, H-224, F-40
 - failed adoption as basis for jurisdiction and, H-66
 - finality of, H-170–171
 - incarcerated parent's right to be present at hearing and, F-60–61, S-19–20
 - for Indian child, burden of proof under Indian Child Welfare Act (ICWA) and, F-39–40
 - notice of modification motion/§ 388 petition hearing not needed and, H-217
 - notice of permanency review/hearing not needed and, H-188

Parental rights, termination of, cont'd.

- notice of recommendation to deny reunification services/permanency hearing and, H-69, H-78
 - notice of selection and implementation hearing (§ 366.26/two-six hearing) and, H-154–156
 - placement changes after, H-172–174, F-6, F-75
 - referral for adoption and, H-170–174
 - relative placement and, F-75
 - for sibling, reunification services denial/bypass and, H-99
 - standing to file § 388 petition and, H-214
 - visitation and, F-89
- Parent-child relationship, continuing, benefit of, exception to termination of parental rights and, H-164–166, S-14–15, S-15
- Parent-child visitation, H-19–20, H-105, H-146, F-87–89
- for child placed with previously noncustodial parent, F-87
 - for child in plan of guardianship or long-term foster care, H-177, F-89, S-15
 - court's role and, F-88
 - exception to termination of parental rights and, H-164–166, S-15
 - failure of parent to visit
 - termination of parental rights and, H-164
 - termination of reunification services and, H-141–142, S-9–10
 - importance of, H-164–166, F-62, F-87
 - incarcerated parent and, H-105, F-62–63, F-88
 - modifications to, right to contest, H-192, S-16
 - when parental rights intact, F-89
 - when parental rights terminated, F-89
 - regular, exception to termination of parental rights and, H-164–166, S-15
 - when reunification services not offered, F-88
 - when reunification services offered, F-87–88, S-13–14
 - after § 366.26 hearing, F-89
 - when § 366.26 hearing is pending, F-88–89
 - social services agency's role and, F-88
 - social worker's report recommendations on, H-79
- Parenting classes, court-ordered, H-102, H-103. *See also* Case plan
- for dependent minor parent, H-104
 - failure to participate in, as prima facie evidence for continuing jurisdiction, H-115
- Parent's attorney. *See also* Attorneys
- advising parent on reunification services time limits and, H-101
 - for detention hearing, checklist for, H-7–8
 - for disposition hearing, checklist for, H-75–76
 - educational rights of parents and, F-13–14

Parent's attorney, cont'd.

- expert hired by, testimony about parent's ability to utilize reunification services and, H-93
 - GAL appointments and, F-59-60, S-19
 - for Indian parent, contacting tribal representative and, F-38
 - input into reunification services by, H-102
 - for judicial review of placement with parent (§ 364), checklist for, H-111-112
 - for jurisdiction hearing
 - access to social worker's report and, H-44-45
 - appointment of, H-46
 - checklist for, H-35-36, H-37-38
 - presence during in-chambers testimony by child and, H-49-50
 - for permanency review/hearing, checklist for, H-185-186
 - § 366.26(c)(1)(D) challenge to termination of parental rights and, H-167, S-15
 - for selection and implementation hearing (§ 366.26/two-six hearing)
 - appointment of, H-159
 - checklist for, H-151-152
 - presence during in-chambers testimony by child and, H-160
 - social service agency discovery requirements and, H-44
 - for status reviews, checklist for, H-127-128
 - visitation and importance of, H-164-165, H-165-166, F-62
- Paternity status, court's determinations of, H-17-18, F-55-56
- Paternity tests
 - determining biological father and, F-55-56
 - presumed father and, F-57
- Patient-doctor privilege. *See* Physician-patient privilege
- Patient-psychotherapist privilege. *See* Psychotherapist-client privilege
- Permanency/review hearing (§ 366.3 review/hearing), H-179-197
 - burden of proof in, H-188-191
 - case summaries and, S-16
 - checklists for
 - for child's attorney, H-181-183
 - for parent's attorney, H-185-186
 - frequency of hearings, H-189-190
 - long-term foster care order continued at, H-197
 - notice of, H-69, H-78, H-188
 - outcome possibilities for, H-192-197
 - placement in another planned permanent living arrangement ordered at,
H-189, H-196-197
 - reasonable efforts/services and, H-191
 - reinstating reunification services at, H-193
 - return of child to parent and, H-192-193, H-194
 - right to contest, H-192, S-16

Permanency/review hearing (§ 366.3 review/hearing), *cont'd.*

- selection and implementation hearing (§ 366.26/two-six hearing) set at,
 - H-189, H-192, H-193–194
- statutory elements of, H-188–191
- termination of jurisdiction at, H-194–196, F-85–86
- time limits for, H-130
- timing/setting of, H-187–188
- Permanent resident status, for undocumented dependent children, SIJS and,
 - H-178, F-32–33
 - preventing termination of jurisdiction until granted, H-196, F-32, F-84
- Personal Responsibility and Work Opportunity Reconciliation Act (PRA), F-35
- “Person with an interest,” § 388 petition filed by, H-212, H-214
- Petition for Amerasian, Widow(er), or Special Immigrant* (I-360) form, F-33
- Petitions
 - dismissal of
 - child’s objection to, H-52
 - at detention hearing, H-26
 - at disposition hearing, H-82
 - at jurisdiction hearing, H-67
 - for initial/detention hearing. *See also* Detention hearing
 - notice of, H-9–10, H-27, H-29
 - timing of filing of, H-9
 - § 342, H-203, H-219
 - § 387, H-201, H-204–205, H-219, F-73–74, S-16–17, S-17
 - nondetaining, H-207
 - § 388, H-162, H-169, H-171, H-211–223, S-14
 - best interest and, H-220–221
 - burdens of proof and, H-217–219
 - changed circumstances and, H-215, H-216, H-218, H-220, H-222, S-14
 - conduct of, H-217–221
 - court’s options on receipt of, H-215–216
 - denial of, without hearing, H-215–216
 - granting of, without hearing, H-216
 - necessity for, H-211–213
 - notice of, H-217
 - with pending selection and implementation hearing (§ 366.26/two-six hearing), H-162, H-221–222
 - for presumed father status, F-58
 - right to full evidentiary hearing and, H-219–220
 - setting hearing for, H-216
 - to terminate de facto status, F-4–5
 - termination of legal guardianship and, H-212, H-218, H-222–223
 - time limits for hearing on, H-217

Petitions, § 388, cont'd.

- uncontested, H-216
- visitation and, F-87, F-91
- who may file, H-212–215
- § 388(b), H-168, H-212, H-214–215
- subsequent and supplemental. *See* Subsequent and supplemental petitions
- Physical harm, severe. *See also* Child abuse
 - as basis for jurisdiction, H-58–59, S-4, S-4–5
 - child under age five and, H-63–64
 - definition of, H-58–59, H-64
 - forfeiture of opportunity to attain de facto status and, F-3
 - as grounds for reunification services denial/bypass, H-95–96
 - child under five and, H-64, H-94–95
 - sibling victim and, H-96–97
- Physician-patient privilege, child's, H-56–57, F-9–10
 - attorney as holder of, H-12, H-56, F-9–10
- PKPA. *See* Parental Kidnapping Prevention Act
- Placement, H-86–90
 - burdens of proof and, H-80–81
 - changing. *See also* Child's removal
 - agency's withdrawal of approval of caregiver or home and, F-74–75
 - burden of proof and, H-206–207
 - petition necessary for, H-204–205
 - preferential consideration to relatives and, H-88–89, F-67, S-17
 - social services use of § 388 petition and, H-214, H-219
 - after termination of parental rights, H-172–174, F-6, F-75
 - in foster care, H-90
 - of Indian child, placement preferences and, F-41–42
 - keeping siblings together and, H-25, H-89, S-8
 - with noncustodial/nonoffending parent. *See* Noncustodial/nonoffending parent, child's release to
 - out-of-home, clear and convincing needed evidence for, H-84–85, S-7–8
 - with parent, H-21–22, H-83, H-84
 - burden of proof at detention hearing and, H-13, H-21
 - judicial review of (§ 364), H-107–119. *See also* Judicial review of placement with parent
 - offending parent's return to familial home and, H-115
 - placement with previously noncustodial parent and, H-115–116, H-118
 - at permanency review/hearing, H-189, H-192–193
 - termination of jurisdiction and, H-194
 - § 388 motion for, H-162, H-169, H-171, H-213, H-221, S-14
 - § 388 petition for termination of guardianship and, H-218, H-222
 - at status reviews, H-138

Placement, with parent, at status reviews, cont'd.

- substantial probability of, H-139, H-144
 - posttermination changes of, H-172-174, F-6, F-75
 - priority, Interstate Compact on the Placement of Children (ICPC) and, F-47
 - with relative/nonrelative extended family member (NREFM). *See* Relative, detention/placement with
 - with sibling, H-24, H-25, H-88-89, F-66, F-67, S-8
 - with social services, H-83
 - specific rather than general order for, H-89, H-204, F-73, F-74
 - visit differentiated from, F-45, S-22
- Plea agreement, at jurisdictional hearing, H-50, H-51
- Postadoption contact agreements, F-89
- Postpermanency hearing. *See* Permanency/review hearing (§ 366.3 review/hearing)
- Posttermination placement changes, H-172-174, F-6, F-75
- Poverty
- federal funding eligibility and, F-19
 - former foster children vulnerable to, termination of jurisdiction and, F-83
- PRA. *See* Personal Responsibility and Work Opportunity Reconciliation Act
- Prayer, treatment through, as failure to protect, H-59-60
- PRC. *See* Pretrial resolution conference
- Preference (placement)
- adoptive/current-caregiver, H-171-172
 - under Indian Child Welfare Act (ICWA), F-41-42
 - relative, H-24, H-88-89, F-58, F-66-68, S-17
 - at disposition, H-88-89, F-67
 - after disposition, F-67-68
 - prior to disposition, F-66
- Pregnancy, prevention or treatment of, dependent child's right to consent to, F-10-11
- Prejurisdictional settlement conferences, H-29
- Prenatal care
- dependent child's right to consent to, F-10-11
 - immigrant status not affecting eligibility for, F-35
- Preponderance of evidence
- exceptions for termination of parental rights and, H-158-159
 - removal from home of relative or nonrelative extended family member and, H-206
 - resumption of reunification services at permanency review/hearing and, H-188-189, H-193
 - termination of legal guardianship under § 388 petition and, H-222
 - to sustain a petition at a jurisdictional hearing, H-45-46, H-52-57
- Pre-release investigation hearings, after initial/detention hearing, H-29
- Presumed father, H-18, F-56-57, F-58, S-23. *See also* Parent
- Presumed mother, H-18, F-57. *See also* Parent

Presumptions, rebuttable, H-45-46
 parentage and, F-57, S-23
 Pretrial discovery, H-43-45
 Pretrial resolution conference (PRC/pretrial readiness conference)
 after initial/detention hearing, H-29
 parent's failure to appear and, H-47
 Prima facie case/evidence
 for continuing need for jurisdiction, parent's failure to participate in court-ordered programs and, H-115
 definition of, H-14
 denial of § 388 petition without a hearing and, H-215
 for detriment, parent's failure to participate in court-ordered programs and, H-133
 for initial/detention hearing, H-14
 child's release/continued detention and, H-13, H-21
 rehearing on, H-27-28
 injuries not ordinarily sustained absent parental neglect as, H-45
 rebuttable presumptions and, H-45-46
 Priority placements, F-47
 PRI's (Prerelease investigation hearings), H-29
 Privacy, right to, court-ordered drug testing of dependent child and, H-105
 Privilege. *See also* Confidentiality
 against self-incrimination
 assertion of at initial/detention hearing, H-14
 assertion of jurisdiction hearing, H-55-56
 child's, F-9-10, H-56-57
 disclosure limitations and, H-44
 exceptions to, for jurisdiction hearing, H-56
 marital, H-52, H-56
 physician-patient and psychotherapist-client, H-56-57, F-9-10
 child's attorney as holder of, H-12, H-56, F-9-10
 Probable cause showing, for hearing on § 388 petition, H-216
 Probate guardians, rights of, H-223
 Proof. *See* Burdens of proof
 Prospective adoptive parent, F-5-6
 current caregiver as, H-172-174, H-178, F-5
 designation of, H-178, F-5
 fact sheet on, F-5-6
 funding for (Adoption Assistance Program [AAP]), F-23
 posttermination placement and, H-172-174, F-5-6, F-75
 removal of child from, H-173, H-205, F-5-6, F-75
 Protection, child's constitutional right to, F-9
 Protective orders, H-119, F-81. *See also* Restraining orders

“Prudent parent,” caregiver’s decisionmaking as, F-6–7
Psychiatrist, parental mental illness evaluated by, reunification services denial/
bypass and, H-92–93
Psychological examination
of child, privilege and, H-57
of parent
as intrusive discovery, H-56
reunification services denial/bypass and, H-92–93
Psychotherapist-client privilege
bonding/attachment studies and, H-162
child’s, H-56–57, F-9–10
attorney as holder of, H-12, H-56, F-9–10

Q

Qualified expert witness testimony. *See also* Expert testimony
Indian Child Welfare Act (ICWA) and, F-40

R

Rape victim, treatment of, dependent child’s right to consent to, F-11
Reasonable-and-prudent-parent standard, F-6–7
Reasonable efforts (to prevent/eliminate need for removal), H-15–16
active efforts under Indian Child Welfare Act (ICWA) and, F-40–41
assessment of at permanency review/hearing, H-191
exception to termination of parental rights and, H-169–170, S-13
Reasonable services
active efforts under Indian Child Welfare Act (ICWA) and, F-41
assessment of at permanency review/hearing, H-191
assessment of at status reviews, H-133–134
exception to termination of parental rights based on lack of, H-169–170,
S-13
extension of reunification services based on lack of, H-136, H-139, S-13–14
guardianship order based on lack of, H-175
Rebuttable presumptions, H-45–46
parentage and, F-57, S-23
Rebuttal evidence, presentation of at initial/detention hearing, H-14
Referee, matter heard by, rehearing and, H-28
Rehearings, H-27–28
on matter heard by referee or commissioner, H-28
no notice to parent and, H-27
on prima facie case, H-27–28
Reinstatement, petition for, H-171, H-213
Relative
of biological father, preferential consideration for placement and, F-58

Relative, cont'd.

- CalWORKS eligibility and, F-22
- definition of, H-24, F-65
- detention/placement with, H-24-25, H-88-89, H-145, F-65-75
 - agency approval lacking for, possible court orders and, F-72-73
 - appropriateness of, H-206-207, F-68-69
 - assessment/approval and, H-24-25, H-89, F-66, F-69-71, F-74-75
 - conditional, F-71
 - court-ordered programs for, H-102
 - court orders relating to, F-71-73
 - criminal history and, H-25, H-89, F-69-70, F-71-72, F-74-75
 - educational decisions and, H-145, H-177, F-14
 - fact sheet on, F-65-75
 - funding for
 - findings necessary for, H-16-17, F-20
 - one-day continuance and, H-20
 - Kin-GAP and Kin-GAP Plus, F-22-23, F-85-86.
 - termination of jurisdiction and, F-85-86
 - Youakim* funding and, F-21
 - under Indian Child Welfare Act (ICWA), F-41
- Interstate Compact on Placement of Children and, H-25, F-45-47, F-73. *See also* Interstate Compact on the Placement of Children
- as legal guardian, H-83
- preferential consideration and, H-24, H-88-89, F-58, F-66-68, S-17
 - for adoption, H-171-172
 - at disposition, H-88-89, F-67
 - after disposition, F-67-68
 - prior to disposition, F-66
- pre-release investigation hearing and, H-27
- reasonable-and-prudent-parent standard and, F-6-7
- removal of child and, F-73-75
 - parental rights intact and, F-73-75
 - parental rights terminated and, F-75
 - § 387 petition and, H-204-205, H-206-207, F-73-74
 - specific rather than general order and, H-89, H-204, F-73, F-74
 - withdrawal of approval from social services and, F-74-75
- social worker's report recommendations and, H-79
- as guardian, termination of jurisdiction and, H-177, H-194-195, F-85-86
- notifying of hearing
 - jurisdiction hearing, H-39-40, H-47
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153
- of presumed father, preferential consideration for placement and, F-58

Relative, cont'd.

- unwilling/unable to adopt, exception to termination of parental rights and, H-167, S-15
- Release of child. *See* Child's release
- Religious beliefs
 - failure to provide medical care and, jurisdiction and, H-59–60
 - failure to provide mental health treatment and, jurisdiction and, H-62
- Removal from home. *See* Child's removal
- Request to Change Court Order* (JV-180), H-216
- Residential community treatment program, for incarcerated parent, F-62–63
- Residential treatment facility, child placed in, exception to termination of parental rights and, H-166
- Res judicata, time limit for challenge to dispositional orders/judicial findings and, H-104
- Resolution conference
 - after initial/detention hearing, H-29
 - mediation on same day as, H-30
- Responsible adult, for educational decisions, F-14
- Restraining orders, H-20, H-119, F-81
 - against offending caregiver, child's release to parent and, H-22
 - visitation restrictions and, F-91
- Reunification services, H-19, H-90–102. *See also* Status reviews
 - as benefit rather than right, H-90
 - burden of showing provision of, H-133
 - bypass of. *See* Reunification services, denial/bypass of
 - continued provision of
 - disposition hearing and, H-68, H-69, H-77–78, H-202
 - exceptional circumstances/special-needs parent and, H-139–140, H-142–143, S-11
 - status reviews and, H-138–140, H-142–143
 - denial/bypass of, H-91–100
 - burden of proof and, H-80–81
 - child abandonment findings and, H-66, H-97, H-141
 - child abuse findings and, H-59, H-93, H-95–96
 - child under age five, H-64, H-94–95
 - sibling victim, H-96–97
 - child's abduction and, H-100
 - death of another child and, H-65, H-93
 - denial of reunification for sibling and, H-96–97
 - under disentitlement doctrine, H-93, H-135
 - failure to protect and, H-61, H-93–94, H-94–95
 - grounds for, H-91–100
 - notice of recommendation for, H-69, H-78

Reunification services, denial/bypass of, cont'd.

- parent missing/whereabouts unknown and, H-92, H-141
- parent's mental disability and, H-92-93
- permanency review/hearings after, H-187-188
- placement with previously noncustodial parent and, H-88
- safe-haven/safe-surrender program and, H-97, F-78
- sexual abuse findings and, H-63, H-93, H-95-96
- social worker's report detailing, H-79, H-80
- substance abuse and, H-61, H-99-100
- termination of parental rights and, H-164
- termination of parental rights for sibling and, H-99
- termination of services as to sibling and, H-98
- timing of selection and implementation hearing (§ 366.26/two-six hearing) and, H-157
- violent felony conviction of parent and, H-99
- visitation and, F-88, F-89
- eligibility for, H-90-91
- expert testimony on usefulness of, H-81
- felony conviction of parent and, H-142
- for incarcerated parent, H-90-91, F-61-63
- judicial review of placement with parent (§ 364) and, H-115-116
- Kelsey S.* father's rights to, F-58
- other parent receiving, judicial review under § 364 and, H-115-116
- parent waiving, H-100
- presumed father's right to, F-58
- for probate guardian, H-223
- providing, H-19, H-90-102
- reasonable. *See also* Status reviews
 - assessment of at status reviews, H-133-134
 - exception to termination of parental rights based on lack of, H-169-170, S-13
 - extension of reunification services based on lack of, H-136, H-139, S-12-13, S-13-14
 - guardianship order based on lack of, H-175
- resumption of
 - at permanency review/hearing, H-188-189, H-193
 - § 388 motion for, H-162, H-221, H-223
- social worker's report recommendations on, H-79
- status reviews of, H-121-146
- subsequent and supplemental petitions and, H-202-203
- tailored, in case plan, H-101-102
- termination of, H-101, H-140-142, S-9-10. *See also* Selection and implementation hearing

Reunification services, termination of, cont'd.

- child abandoned and parent's whereabouts unknown and, H-141
- death of parent and, H-142
- under disentitlement doctrine, H-93, H-135
- failure of parent to visit and, H-141-142, S-9-10
- noncompliance with case plan and, H-141
- permanency review/hearings after, H-187-188
- as to sibling, denial/bypass for dependent child and, H-98
- sibling group and, H-141, S-10
- at status reviews, H-140-142
- termination of parental rights and, H-164
- timing of selection and implementation hearing (§ 366.26/two-six hearing) and, H-157
- visitation and, F-89
- time limits on, H-19, H-69, H-100-101, H-134-136, H-202-203
- timing of disposition hearing and, H-69, H-78
- visitation and, H-105-106, H-141-142, F-87-88, S-13-14
- voluntary relinquishment of, entry of legal guardianship and, H-82-83

Reversal

- availability of social worker's report at status reviews and, H-132
 - failure to file § 388 petition and, H-212-213
 - inadequate notice and
 - under Indian Child Welfare Act (ICWA), F-39
 - of initial/detention hearing, H-10
 - of selection and implementation hearing (§ 366.26/two-six hearing), H-154, H-156
 - of jurisdictional findings, at disposition hearing, H-82
 - orders changed without § 388 petition and, H-212
 - of termination of parental rights, reasonable services and, H-170, S-13
- Review hearings. *See also* Judicial review of placement with parent (§ 364); Permanency review/hearing; Status reviews
- case summaries and, S-9-14
 - for child in long-term foster care, H-176
 - time limits for holding, H-129-131, S-10-11
- Review of permanent plan (RPP), H-179-197. *See also* Permanency/review hearing

S

- Safe-haven/safe-surrender program, H-65, F-77-79
 - confidentiality and anonymity and, F-77-78
 - procedure and, F-78
 - reunification services denial/bypass and, H-97, F-78
 - statutory requirements and, F-77
 - unresolved issues and, F-78-79

Safety/protection. *See* Child's safety/protection

School attendance. *See also* Educational rights

- child's rights and, F-15-17
- court orders regarding, H-103
- failure to ensure, H-61, S-5

School transfer and enrollment issues, F-15-17

Selection and implementation hearing (§ 366.26/two-six hearing), H-69, H-74, H-76, H-92, H-97, H-129, H-135, H-140-142, H-147-178

- adoptability and, H-158, H-163
- ancillary orders and, H-177-178
- assessment/social worker's report for, H-157-158, S-20
- bonding and attachment studies presented at, H-162
- burdens of proof in, H-158-159
- case summaries and, S-14-16
- checklists for attorney, H-149-150, H-151-152
- child's participation in, H-159-160
- child surrendered under safe-haven/safe-surrender program and, F-78
- concurrent 388 motion for return/resumption of reunification and, H-162, H-221-222, S-14
- contested, H-160-161
- continuances of, H-157
 - adoption as goal and, H-174-175
 - appointment of counsel and, H-159
 - notice of, H-156-157
- court-appointed counsel for, H-159
- evidence presented at, H-160-162
 - after hearing, F-89
- hearsay in assessments and court reports and, H-161, F-27-28, S-20
- incarcerated parent's right to appear and, H-159, F-60-61
- in-chambers testimony at, H-160
- notice of, H-153-157
 - to child, H-156, H-159
 - content of, H-153
 - continued hearings and, H-156-157
 - method of service of, H-154-156
 - to parent, H-153, H-154-155, H-155-156
 - persons/entities entitled to, H-153
 - time for service of, H-156
- notice of permanency review/hearing and, H-188
- outcome possibilities for, H-170-177
- procedure for, H-159-170
- prospective adoptive parent designation and, H-178, F-5

- Selection and implementation hearing, § 366.26/two-six hearing, cont'd.*
- setting
 - at permanency review/hearing, H-189, H-192, H-193–194, H-194–195, H-212
 - after termination of guardianship under § 388 petition, H-223
 - 388 petition granted, H-221–222
 - Special Immigrant Juvenile Status and, H-178
 - termination of jurisdiction under legal guardianship and, H-177–178
 - termination of parental rights and, H-170–177. *See also* Parental rights, termination of
 - bars to, H-164–169
 - basis for, H-164
 - burdens of proof and, H-158–159
 - reasonable efforts or services and, H-169–170, S-13
 - timing of, H-157
 - visitation orders and, H-177, F-88–89
 - Self-incrimination, privilege against
 - assertion of at initial/detention hearing, H-14
 - assertion of at jurisdiction hearing, H-55–56
 - Senate Bill 678 (Stats. 2006, ch. 838), F-37
 - Service
 - method of, for notice of hearing
 - for disposition hearing, H-78
 - under Indian Child Welfare Act (ICWA), F-39
 - for judicial review of placement with parent (§ 364), H-113
 - for jurisdiction hearing, H-40
 - for modification motion/§ 388 petition hearing, H-217
 - for selection and implementation hearing (§ 366.26/two-six hearing), H-154–156
 - for status reviews, H-131
 - time of, for selection and implementation hearing (§ 366.26/two-six hearing), H-156
 - Services. *See* Child and family services; Reunification services
 - Settlement and status conference
 - after initial/detention hearing, H-29
 - parent's failure to appear and, H-47
 - Severe emotional harm. *See also* Child abuse
 - as basis for jurisdiction, H-62, S-5–6
 - as grounds for removal, H-85
 - Severe physical harm. *See also* Child abuse
 - as basis for jurisdiction, H-58–59, S-4, S-4–5
 - child under age five and, H-63–64
 - definition of, H-58–59, H-64

Severe physical harm, cont'd.

- forfeiture of opportunity to attain de facto status and, F-3
- as grounds for reunification services denial/bypass, H-95–96
 - child under five and, H-64, H-94–95
 - sibling victim and, H-96–97
- Sex offender, in home
 - as prima facie evidence, H-46
 - visitation orders and, F-91
- Sexual abuse
 - as basis for jurisdiction, H-62–63
 - child conceived as result of, reunification services denial/bypass and, H-97
 - definition of, H-62
 - failure to protect child from, H-62–63
 - forfeiture of opportunity to attain de facto status and, F-3
 - as grounds for removal, H-86
 - as prima facie evidence, H-45–46
 - reunification services denial/bypass and, H-63, H-93, H-95–96
 - of siblings
 - as basis for jurisdiction, H-63, H-67, S-6
 - as grounds for removal, H-86
 - as grounds for reunification services denial/bypass, H-93, H-95–96, H-96–97
- Sexual assault, H-62. *See also* Sexual abuse
- Sexual exploitation, H-62, H-63. *See also* Sexual abuse
- Sexually transmitted diseases, treatment for, dependent child's right to consent to, F-11
- Sibling-child visitation, H-19–20, H-106, F-90–91
 - social worker's report recommendations on, H-79
- Sibling group, H-143–144. *See also* Siblings
 - caregiver unwilling/unable to adopt child part of, H-167, S-15
 - child's constitutional interests in family relationships and, F-9
 - continued provision of reunification services and, H-139
 - definition of, H-143
 - difficulty in placing child and, H-174, H-175
 - termination of reunification services and, H-141, S-10
- Sibling recognition, § 388(b) petition seeking, H-168, H-212, H-214–215, F-90
- Siblings. *See also* Sibling group
 - abduction of, reunification services denial/bypass and, H-100
 - conflict of interest at initial/detention hearing and, H-10–11, S-3
 - court-ordered termination of reunification services as to, denial/bypass for dependent child and, H-98
 - harm to
 - as basis of jurisdiction, H-66–67, S-6

Siblings, harm to, cont'd.

- as grounds for removal, H-86
- as grounds for reunification services denial/bypass, H-93, H-95-96, H-96-97
- interference with relationships among, exception to termination of parental rights and, H-168-169, S-16
- maintaining relationships among, H-145-146, S-8
 - permanency review/hearing and, H-190, H-214-215
 - § 388 petition and, H-168, H-212, H-214-215, F-90
- notifying of hearing
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-113-114
 - jurisdiction hearing, H-39-40
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153
 - status reviews, H-131
- placed apart
 - case plan for, H-102
 - visitation for. *See* Sibling-child visitation
- placed together, H-25, H-89, H-145-146, S-8
- preferential consideration for placement with, H-24, H-88-89, F-66, F-67
- § 388(b) petition filed by, H-168, H-212, H-214-215, F-90
- sexual abuse of
 - as basis for jurisdiction, H-63, H-67, S-6
 - as grounds for removal, H-86
 - as grounds for reunification services denial/bypass, H-93, H-95-96, H-96-97
- social worker's report on relationships among, H-79
- termination of parental rights as to, reunification services denial/bypass and, H-99
- visitation with, H-19-20, H-106, F-90-91
 - social worker's report recommendations on, H-79
- Significant connection, jurisdiction and, F-50
- SIJS program. *See* Special Immigrant Juvenile Status (SIJS) program
- six-month review
 - when child placed with previously noncustodial parent, H-137-138
 - continued provision of reunification services ordered at, H-139
 - proof of reunification services at, H-133
 - sibling group considered at, H-143-144, S-10
 - termination of reunification services at, H-141-142, S-10
 - time limits for, H-130
 - time limits for reunification and, H-134-135

SOC 369 (*Agency-Relative Guardianship Disclosure*) form, Kin-GAP funding and, F-23

Social activities, dependent child's right to participate in, F-10

Social Security Administration

- SSI program administered by, F-24
- survivor's benefits administered by, F-24

Social services. *See also* Social worker

- burden of proof borne by
 - for disposition hearing, H-80–81
 - for initial/detention hearing, H-13–14
 - for jurisdiction hearing, H-45
 - for subsequent and supplemental petitions, H-206–207
- child placed in care of, H-83
- consent to dismissal and, H-82
- disclosure responsibilities of, H-43–45
- dismissal of petition by, child's objection to, H-52
- failure to file dependency petition affecting funding and, F-19
- funding rate information available from, F-25
- Indian status inquiry by, F-38
- notifying caregiver of funding changes and, F-25
- placement changes made by, H-89, H-172–174, F-6, F-75
- placement orders over objection of, F-72–73
- placement of siblings together and, H-25, H-89
- posttermination placements and, H-172–174, F-6, F-75
- reunification services and. *See also* Reunification services
 - obligation to investigate and advise and, H-95
 - requirements for providing, H-90–91
- § 342 petition filed by, H-203, H-219
- § 388 petition filed by, challenge to, H-219
- supervision by, H-26, H-67–68, H-82, H-84
- visitation facilitated by, F-88

Social study. *See* Social worker's report

Social study exception, H-53, H-55, F-27–28, S-3–4, S-20

Social worker. *See also* Social services; Social worker's report

- disclosure responsibilities of, H-43–45
- informal supervision and, H-26, H-67–68, H-82
- reasonable efforts to prevent/eliminate need for removal and, H-16
- right to cross-examination of, H-53, H-81, H-161, F-27–28, S-3–4, S-12
 - full evidentiary hearing on 388 petition and, H-219–220
- § 388 petition filed by, H-214
 - challenge to, H-219

Social worker's report (social study), H-13, H-79–80. *See also* Social worker availability of/late

Social worker's report (social study), cont'd.

- disposition hearing continuance and, H-79
- judicial review of placement with parent (§ 364) continuance and,
H-114, S-9
- jurisdiction hearing continuance and, H-42
- status reviews and, H-132
- for disposition hearing, H-79–80, H-81
- hearsay within, F-27–28, S-3–4, S-20
 - at disposition hearing, H-81, F-27–28
 - at jurisdiction hearing, H-53–54, H-55, F-27–28, S-3–4
 - at selection and implementation hearing (§ 366.26/two-six hearing),
H-161, F-27–28, S-20
- for initial/detention hearing, H-13, H-21
 - preference for placement with relatives and, F-66
- for judicial review of placement with parent (§ 364), H-114, S-9
- for jurisdiction hearing, H-53–54, H-55, S-3–4
- pretrial discovery and, H-43–45, H-44–45
- as prima facie evidence, H-14, H-21
- for selection and implementation hearing (§ 366.26/two-six hearing),
H-157–158, S-20
- for status reviews, H-131–132
 - educational rights addressed in, H-145
 - sibling group addressed in, H-143–144, S-10
- submissions made on basis of, H-51, H-52
- Special education services, F-13, F-17–18
 - surrogate parent appointed for, H-104, F-14
- Special Immigrant Juvenile Status (SIJS) program, H-178, F-32–33
 - county foster care funds for child and, F-22
 - preventing termination of jurisdiction until legal permanent resident status
granted and, H-196, F-32, F-84
- Specialized-care increments, funding for special-needs children and, F-25
- Special-needs child
 - adoptability of, H-163, H-175
 - in residential treatment facility, exception to termination of parental rights
and, H-166
 - special education services for, F-13, F-17–18
 - surrogate parent appointed for, H-104, F-14
 - specialized-care increments in funding for, F-25
- Special-needs parent, continued provision of reunification services and, H-139–
140, H-142–143, S-11
- Specific order for placement, H-89, H-204, F-73, F-74
- SSI (Supplemental Security Income), F-24
- Stability, child's constitutional right to, F-9



Statement Regarding Parentage (JV-505), F-55

Status reviews, H-121-146

burdens of proof at, H-133

case summaries and, S-9-14

checklists for attorney, H-123-125, H-127-128

when child placed with previously noncustodial parent, H-137-138

continued provision of reunification services and, H-138-139

continued reunification services ordered at, H-136, H-138-140, H-142-143

educational rights addressed at, H-145

18-month, H-130-131

exceptional circumstances/special-needs parent and, H-139-140, H-142-143,
S-11

long-term foster care ordered at, H-140

notice of, H-131

ongoing concerns and, H-145-146

outcome possibilities of, H-138-142

preferential placement with relatives and, H-145

reasonable services and, H-133-134

extension of reunification services and, H-136, H-139, S-12-13, S-13-14

regular participation at six-month hearing, H-135

return of child to parent/guardian ordered at, H-138

reunification time limits and, H-134-137

sibling groups and, H-143-144, S-10

sibling relationships and, H-145-146

six-month, H-130

social worker's report for, H-131-132

statutory elements of, H-133

substantial probability of return and, H-139, H-144

substantial risk of detriment and, H-144-145, S-11-12

substantive progress at six-month hearing, H-135

termination of reunification and setting of 366.26 hearing and, H-140-142, S-10

time limits for, H-129-131, S-10-11

12-month, H-130

visitation and, H-146

Statutory elements. *See also Table of California Codes*

of initial/detention hearing, H-13-14

of judicial review of placement with parent (§ 364), H-114-115

of permanency review/hearing, H-188-191

of status reviews, H-133

of subsequent and supplemental petitions, H-203, H-206-207

Statutory rights, of dependent children, F-9-10

Submissions for court's determination, at jurisdiction hearing, H-51-52

on social worker's report, H-51, H-52

- Subsequent and supplemental petitions, H-199–207
 - burdens of proof and, H-206–207, S-16–17
 - case summaries and, S-16–17
 - dismissal of, H-206
 - necessity of, H-204–205
 - notice of, H-201
 - procedure for, H-201
 - for removal of child from parental home, H-118, H-207, S-16–17
 - reunification services provided on, H-101
 - reunification time limits and, H-202–203
 - for redetained child, H-136, H-203–204
 - § 342, H-203, H-219
 - § 387, H-201, H-204–205, H-219, F-73–74, S-16–17, S-17
 - nondetaining, H-207
 - standing to challenge removal and, H-204–205, S-17
 - statutory elements and, H-203, H-206–207
 - timing of hearing and, H-201
- Substance abuse, parental, failure to protect and, H-61, S-4–5
 - reunification services denial/bypass and, H-61, H-99–100
- Substantial danger, as grounds for removal, H-84–85, S-7–8
- Substantial probability of return, H-144
 - continued provision of reunification services and, H-139
- Substantial risk of detriment, H-144–145, S-11–12, S-12–13
- Supervision
 - dependent child’s release to custodial parent and, H-84
 - dependent child’s release to noncustodial parent and, H-87, H-88, S-8
 - informal
 - dismissal at detention hearing and, H-26
 - dismissal at disposition hearing and, H-82
 - dismissal at jurisdiction hearing and, H-67–68
- Supplemental petitions. *See* Subsequent and supplemental petitions
- Supplemental Security Income (SSI), F-24
- Surrogate parent, for educational decisions, H-104, F-14
- Survivor’s benefits, as funding source, F-24

T

- Telephone call, dependent child’s right to, F-9
- Temporary emergency jurisdiction, H-15, F-51–52
 - for Indian child, F-42
 - Parental Kidnapping Prevention Act providing for, F-52
- Temporary Protected Status, F-34
- Termination of Dependency Jurisdiction—Child Attaining Age of Majority* (JV-365), H-195

Termination of jurisdiction. *See* Jurisdiction, termination of

Termination of parental rights. *See* Parental rights, termination of

Testimony

- child's
 - in-chambers, at selection and implementation hearing (§ 366.26/two-six hearing), H-160
 - at jurisdiction hearing, H-48–50, F-28–29, S-20–21
 - compelling, H-48
 - competency and, H-48–49, H-54, F-28, F-29, S-20–21, S-21
- expert
 - at disposition hearing, H-81
 - Indian Child Welfare Act (ICWA) and, F-40
 - on injuries not ordinarily sustained absent parental neglect, H-45, H-56
 - at jurisdiction hearing, H-56
 - on parent's mental illness/capacity to utilize reunification services and, H-92–93
- parent's
 - at disposition hearing, right to, H-81
 - at jurisdiction hearing, compelling, H-55
- social worker's, at disposition hearing, H-81

Therapist-client privilege

- bonding/attachment studies and, H-162
- child's, H-56–57, F-9–10
 - attorney as holder of, H-12, H-56, F-9–10

310 dismissal, H-26

342 petition, H-203, H-219

350(c) motion. *See* Non-suit/§ 350(c) motion

352 continuance. *See* Continuance, § 352

360(b) dismissal, H-82

364 hearing. *See* Judicial review of placement with parent

366.3 hearing. *See* Permanency/review hearing

366.26 hearing. *See* Selection and implementation hearing

387 petition. *See* Petitions, § 387

388 petition. *See* Petitions, § 388

390 dismissal, H-26, H-82

Time limits

- for Interstate Compact on the Placement of Children (ICPC) compliance, F-47
- on jurisdictional/dispositional hearing, H-30, H-40–41, H-77–78, S-18
 - incarcerated parent and, H-41, H-47–48, H-78, F-60–61, S-20
- on reunification services, H-19, H-69, H-100–101, H-134–136
 - redetained child and, H-136, H-202–203

Time limits, on reunification services, cont'd.

- supplemental and subsequent petitions and, H-202–203
- on § 388 petition hearing, H-217
- Title IV-E funding eligibility, findings necessary for, H-16–17, F-20
- one-day continuance and, H-20
- “Title XX’s” (social worker’s notes), discoverability of, H-44–45
- Tribal contact list, F-38
- Tribe
 - Exception to termination of parental rights, H-224, F-40
 - Indian child status determination and, F-38
 - notifying of hearing, F-39
 - disposition hearing, H-78
 - judicial review of placement with parent (§ 364), H-114
 - jurisdiction hearing, H-39–40
 - modification motion/§ 388 petition hearing, H-217
 - permanency review/hearing, H-188
 - selection and implementation hearing (§ 366.26/two-six hearing), H-153, H-156
 - status reviews, H-131
 - right to access case information and, F-39
 - right to intervene and, F-38
- “Truth-incompetent” child, “child hearsay” or “child dependency” exception and, F-28, S-21
- 12-month review. *See also* Permanency review/hearing
 - for child in long-term foster care, H-193–194
 - when child placed with previously noncustodial parent, H-137–138
 - proof of reunification services at, H-133
 - time limits for, H-130
 - time limits for reunification and, H-134–135
- Two-six (.26) hearing. *See* Selection and implementation hearing

U

- UCCJEA. *See* Uniform Child Custody Jurisdiction and Enforcement Act
- Uncle. *See also* Relative
 - preferential consideration for placement with, H-24, H-88–89, F-66, F-67
- Uncontested jurisdiction hearings, H-50–52
 - pleas (admission or no-contest) and, H-51
 - submissions and, H-51–52
- Undocumented dependent children. *See also* Immigration
 - access of to public benefits, F-34–36
 - Cash Assistance Program for Immigrants (CAPI) and, F-24
 - education rights and, F-35
 - eligibility for permanent resident status under U Visa and VAWA, F-33–34

Undocumented dependent children, cont'd.

- funding and income assistance for, F-24, F-36
- health benefits for, F-35
- right to protection and, F-31
- Special Immigrant Juvenile Status (SIJS) program and, H-178, F-32–33
 - preventing termination of jurisdiction until legal permanent resident status granted and, H-196, F-32, F-84
- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), H-15,
F-49–52. *See also* Jurisdiction
 - applicability of, F-49–51
 - default and, F-50–51
 - home state and, F-50
 - purpose of, F-49
 - significant connection and, F-50
 - state with jurisdiction declined to exercise, F-50
 - temporary emergency jurisdiction and, H-15, F-51–52
- United States Code. *See Table of United States Codes*
- Unjustifiable conduct, jurisdiction and, F-50
- Unsanitary environment, failure to protect and, H-61
- U Visa program, permanent resident status and, F-33–34

V

- Violence Against Women Act (VAWA), eligibility for permanent resident status and, F-33
- Violent felony. *See* Felony convictions
- Visit, differentiation of from placement under ICPC, F-45, S-22
- Visitation, H-105–106, F-87–91
 - assessment of at status reviews, H-134
 - in case plan, H-102, H-134, F-62, F-87–88
 - child's safety and, F-91
 - court orders regarding, H-19–20, H-105–106, F-81
 - care in drafting, H-88, H-119, F-81
 - at judicial review of placement with parent (§ 364)
 - scope of evidence and, H-117
 - termination of jurisdiction and, H-117, H-118–119, F-81
 - fact sheet on, F-87–91
 - general constraints and, F-91
 - Kelsey S.* father's rights to, F-58
 - with parent, H-19–20, H-105, H-146, F-87–89
 - for child placed with previously noncustodial parent, F-87
 - for child in plan of guardianship or long-term foster care, H-177, F-89,
 S-15
 - court's role and, F-88

Visitation, with parent, cont'd.

- exception to termination of parental rights and, H-164–166, S-15
 - failure of
 - termination of parental rights and, H-164
 - termination of reunification services and, H-141–142, S-9–10
 - importance of, H-164–166, F-62, F-87
 - incarcerated parent and, H-105, F-62–63, F-88
 - modifications to, right to contest, H-192, S-16
 - when parental rights intact, F-89
 - when parental rights terminated, F-89
 - regular, exception to termination of parental rights and, H-164–166, S-15
 - when reunification services not offered, F-88
 - when reunification services offered, F-87–88, S-13–14
 - after § 366.26 hearing, F-89
 - when § 366.26 hearing is pending, F-88–89
 - social services agency's role and, F-88
 - social worker's report recommendations on, H-79
 - with siblings, H-19–20, H-79, H-106, F-90–91
 - social worker's report recommendations on, H-79
- Voluntary placement agreement (VPA), funding and, F-19

W

- Waiver of appearance, by incarcerated parent, H-47, H-159, F-60, S-19–20
- Waiver of Rights* (JV-190), H-50
- Welfare funding, CalWORKS, F-22
- Witness
 - child as, parent's right to call, H-48
 - unavailable, jurisdiction hearing continuance and, H-42
- Women, Infants and Children (WIC) program, immigrant status not affecting eligibility for, F-36

Y

- Youakim* funding, F-21
- findings necessary for, H-17
 - placement without approval of social services and, F-72–73

TABLE OF CASES

- Aaron B.* (1996) 46 Cal.App.4th 843, H-104
Abraham L. (2003) 112 Cal.App.4th 9, H-143, S-10
Aceves v. Superior Court (1996) 51 Cal.App.4th 584, H-11
Adoption of Hannab S. (2006) 142 Cal.App.4th 988, F-41
Adoption of Kelsey S. (1992) 1 Cal.4th 816, F-56, F-58, S-22-23
Alexis W. (1999) 71 Cal.App.4th 28, H-12
Alicia O. (1995) 33 Cal.App.4th 176, H-91, H-222, H-223
Aljamie D. (2000) 84 Cal.App.4th 424, H-216
Allen M. v. Superior Court (1992) 6 Cal.App.4th 1069, H-26, H-36, H-52, H-57
Alliance for Children's Rights v. DCFS (2001) 95 Cal.App.4th 1129, F-88
Alvin R. (2003) 108 Cal.App.4th 962, H-102, F-87, F-88, S-13-14
Alysha S. (1996) 51 Cal.App.4th 393, H-28, H-51, H-60
Alyssa F. (2003) 112 Cal.App.4th 846, H-15, F-57
Amber R. v. Superior Court (2006) 139 Cal.App.4th 897, H-214
Amber S. (1993) 15 Cal.App.4th 1260, H-49
American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, F-11
Amy M. (1991) 232 Cal.App.3d 849, H-48, H-49
Andrea L. v. Superior Court (1998) 64 Cal.App.4th 1377, H-142-143, F-27
Andrea R. (1999) 75 Cal.App.4th 1093, H-194, H-212
Andres G. (1998) 64 Cal.App.4th 476, H-84
Andrew L. (2004) 122 Cal.App.4th 178, F-56
Angelique C. (2003) 113 Cal.App.4th 509, H-99
Ansley v. Superior Court (1986) 185 Cal.App.3d 477, H-212
Anthony J. v. Superior Court (2005) 132 Cal.App.4th 419, H-96
Anthony W. (2001) 87 Cal.App.4th 246, H-214-215
A.O. (2004) 120 Cal.App.4th 1054, H-205
April C. (2005) 131 Cal.App.4th 599, H-54, F-29
Arlena M. v. Superior Court (2004) 121 Cal.App.4th 566, H-50
Arlyne A. (2000) 85 Cal.App.4th 591, H-10, H-39, H-47, H-156
Aryanna C. (2005) 132 Cal.App.4th 1234, H-101, H-135
Asia L. (2003), 107 Cal.App.4th 498, F-90
Austin P. (2004) 118 Cal.App.4th 1124, H-87, S-8
Autumn H. (1994) 27 Cal.App.4th 567, H-165, S-14-15
Baby Boy H. (1998) 63 Cal.App.4th 470, H-90, H-92
Baby Boy V. (2006) 140 Cal.App.4th 1108, F-55
Barbara P. (1994) 30 Cal.App.4th 926, H-202
Basilio T. (1992) 4 Cal.App.4th 155, H-80
Beatrice M. (1994) 29 Cal.App.4th 1411, H-165
B.G. (1974) 11 Cal.3d 679, F-3, F-4
Blanca P. v. Superior Court (1996) 45 Cal.App.4th 1738, H-144

Brandon C. (1993) 19 Cal.App.4th 1168, H-211
Brandon C. (1999) 71 Cal.App.4th 1530, H-165, S-15
Brian M. (2000) 82 Cal.App.4th 1398, H-100
Brian P. (2002) 99 Cal.App.4th 616, H-163
Brison C. (2000) 81 Cal.App.4th 1373, H-62, S-5-6
Brittany K. (2005) 127 Cal.App.4th 1497, F-5
Carlos E. (2005) 129 Cal.App.4th 1408, H-91, H-222, H-223
Carl R. (2005) 128 Cal.App.4th 1051, H-163, H-220
Carmen M. v. Superior Court (2006) 141 Cal.App.4th 478, H-105
Carolyn R. (1995) 41 Cal.App.4th 159, H-101
Carrie W. (2003) 110 Cal.App.4th 746, H-176, H-197, H-212
Carroll v. Superior Court (2002) 101 Cal.App.4th 1423, H-10
Casey D. (1999) 70 Cal.App.4th 38, H-220
Catherine H. (2002) 102 Cal.App.4th 1284, H-87
C.C. (2003) 111 Cal. App.4th 76, H-93
Celine R. (2003) 31 Cal.4th 45, H-10, H-169, S-3, S-16
Cesar V. v. Superior Court (2001) 91 Cal.App.4th 1023, H-89, H-145, F-67, F-72, S-17
C.G. (2005) 129 Cal.App.4th 27, F-59
Cheryl M. (Los Angeles County Dept. of Children and Family Services v. Superior Court) (2003) 112 Cal.App.4th 509, F-72, , F-74
Cheryl P. v. Superior Court (2006) 139 Cal.App.4th 87, H-98
Christina A. (1989) 213 Cal.App.3d 1073, H-81
Christina A. (2001) 91 Cal.App.4th 1153, H-130
Christina B. (1993) 19 Cal.App.4th 1441, F-59
Christina T. (1986) 184 Cal.App.3d 630, H-48
Christopher M. (2003) 113 Cal.App.4th 155, H-160
Cindy L. (1997) 17 Cal.4th 15, H-54, H-55, F-28, F-29, S-20-21
Claudia S. (2005) 131 Cal.App.4th 236, H-10, H-46
Clifton V. (2001) 93 Cal.App.4th 1400, H-220
Cody C. (2004) 121 Cal.App.4th 1297, H-175
Constance K. v. Superior Court (1998) 61 Cal.App.4th 689, H-145, S-11-12
Corey A. (1991) 227 Cal.App.3d 339, H-81, F-27
Crystal J. (1993) 12 Cal.App.4th 407, H-163
Crystal J. (2001) 92 Cal.App.4th 186, F-4
Curtis F. v. Superior Court (2000) 80 Cal.App.4th 470, H-93
Cynthia C. (1997) 58 Cal.App.4th 1479, H-74, H-76, H-89, H-204, F-73
Cynthia D. v. Superior Court (1993) 5 Cal.4th 242, H-158
Daijah T. (2000) 83 Cal.App.4th 666, H-220
Dakota H. (2005) 132 Cal.App.4th 212, H-188, H-189
David B. v. Superior Court (2004) 123 Cal.App.4th 768, H-133, H-144, S-12-13
David B. v. Superior Court (2006) 140 Cal.App.4th 772, S-12
David D. (1994) 28 Cal.App.4th 941, H-170

David M. (2005) 134 Cal.App.4th 822, H-60, H-67
David and Martha M. (marriage of) (2006) 140 Cal.App.4th 96, F-81
Denny H. v. Superior Court (2005) 131 Cal.App.4th 1501, H-129, S-10-11
Department of Social Services v. Superior Court (Theodore D.) (1997) 58 Cal.
 App.4th 721, H-173, H-174, H-205, F-6, F-75
D.E. v. Superior Court (2003) 111 Cal.App.4th 502, H-41, H-48, H-78, F-61, S-20
Dolly A. (1986) 177 Cal.App.3d 195, H-43
Dolly D. (1995) 41 Cal.App.4th 440, H-53
Dustin R. (1997) 54 Cal.App.4th 1131, H-145
Dylan T. (1998) 65 Cal.App.4th 765, H-105, F-62, F-88
Earl L. (2004) 121 Cal.App.4th 1050, H-161
Ebony W. (1996) 47 Cal.App.4th 1643, H-46
Edward H. (1996) 43 Cal.App.4th 584, H-215
E.H. (2003) 108 Cal.App.4th 659, H-45, H-64, S-6-7
Eileen A. (2000) 84 Cal.App.4th 1248, H-213
Elaine E. (1990) 221 Cal.App.3d 809, H-117, F-81
Elijah V. (2005) 127 Cal.App.4th 576, F-55-56
Elisa B. v. Superior Court (2005) 37 Cal.4th 108, F-57
Elizabeth M. (1991) 232 Cal.App.3d 553, H-81
Elizabeth R. (1995) 35 Cal.App.4th 1774, H-139, H-142, S-11
Emmanuel R. (2001) 94 Cal.App.4th 452, F-9, S-22
Eric E. (2006) 137 Cal.App.4th 252, F-57
Eric H. (1997) 54 Cal.App.4th 955, H-58
Erika W. (1994) 28 Cal.App.4th 470, H-88
Esmeralda B. (1992) 11 Cal.App.4th 1036, H-45, H-46
Ethan N. (2004) 122 Cal.App.4th 55, H-94
Fernando M. (2006) 138 Cal.App.4th 529, H-167, S-15
Francisco W. (2006) 139 Cal.App.4th 695, H-154
Fresno County Department of Children & Family Services v. Superior Court (2004)
 122 Cal.App.4th 626, F-75
Gabriel G. (2005) 134 Cal.App.4th 1428, H-175
Gaudin v. Remis (2005) 415 F.3d 1028, F-53
Gina S. v. Marin County Dept. of Social Services (2005) 133 Cal.App.4th 1074, F-10
Gladys L. (2006) 141 Cal.App.4th 845, H-158
Guadalupe A. v. Superior Court (1991) 234 Cal.App.3d 100, H-57-58
Hannah S. (2006) 142 Cal.App.4th 988, F-41
Harmony B. (2005) 125 Cal.App.4th 831, H-98
Hector A. (2005) 125 Cal.App.4th 783, H-168, H-169, H-215
Henry V. (2004) 119 Cal.App.4th 522, H-85, S-7-8
Hirenia C. (1993) 18 Cal.App.4th 504, H-214
Holly H. (2002) 104 Cal.App.4th 1324, H-195
Isayah C. (2004) 118 Cal.App.4th 684, H-80, H-85, H-87, F-61, S-9
Jacob S. (2002) 104 Cal.App.4th 1011, H-175

James C. (2002) 104 Cal.App.4th 470, H-28
James Q. (2000) 81 Cal.App.4th 255, H-161
Jamie G. (1987) 196 Cal.App.3d 675, H-91
Jamie R. (2001) 90 Cal.App.4th 766, H-50
Jane Doe v. Rita Saenz (2006) 140 Cal.App.4th 960, F-72
Janet T. (2001) 93 Cal.App.4th 377, H-60, H-61, S-5
Jasmine C. (2003) 106 Cal.App.4th 177, H-103
Jasmine D. (2000) 78 Cal.App.4th 1339, H-165
Jasmine G. (2000) 82 Cal.App.4th 282, H-84-85
Jasmine G. (2005) 127 Cal.App.4th 1109, H-154
Jasmon O. (1994) 8 Cal.4th 398, H-218, F-9
Jason E. (1997) 53 Cal.App.4th 1540, H-51
Jean B. (2000) 84 Cal.App.4th 1443, F-82
Jeanette V. (1998) 68 Cal.App.4th 811, H-161
Jeff M. v. Superior Court (1997) 56 Cal.App.4th 1238, H-41, H-78, S-18
Jennifer A. v. Superior Court (2005) 117 Cal.App.4th 1322, H-61
Jeremy S. (2001) 89 Cal.App.4th 514, H-166
Jerry P. (2002) 95 Cal.App.4th 793, F-58
Jesse C. (1999) 71 Cal.App.4th 1481, H-10
Jessica C. (2001) 93 Cal.App.4th 1027, H-36, H-38
Jessica F. (1991) 229 Cal.App.3d 769, H-64-65
Jesusa V. (2002) 97 Cal.App.4th 878, S-19-20
Jesusa V. (2004) 32 Cal.4th 588, F-58, F-60
Joel H. (1993) 19 Cal.App.4th 1185, H-205, F-73
Joel T. (1999) 70 Cal.App.4th 263, H-101, H-202
John M. (2006) 141 Cal.App.4th 1564, H-87, F-46, F-73
Johnny S. (1995) 40 Cal.App.4th 969, H-23, F-46, S-22
John S. (2001) 88 Cal.App.4th 1140, H-46
Jonique W. (1994) 26 Cal.App.4th 685, H-201, H-205, H-206, F-4, F-73, S-17
Joseph B. (1996) 42 Cal.App.4th 890, H-145
Joseph D. (1993) 19 Cal.App.4th 678, F-49
Joshua G. (2005) 129 Cal.App.4th 189, H-160
Joshua J. (1995) 39 Cal.App.4th 984, H-67
Josiah S. (2002) 102 Cal.App.4th 403, H-192
Josiah Z. (2005) 36 Cal.4th 664, H-12
Josue G. (2003) 106 Cal.App.4th 725, H-163, H-169
Joy M. (2002) 99 Cal.App.4th 11, H-93
Judith P. v. Superior Court (2002) 102 Cal.App.4th 535, H-114, H-132, S-9
Julian L. (1998) 67 Cal.App.4th 204, H-160
Julia U. (1988) 64 Cal.App.4th 532, F-58
Jullian B. (2000) 82 Cal.App.4th 1337, F-71
Karen R. (2001) 95 Cal.App.4th 84, H-63, H-67
Katie V. v. Superior Court (2005) 130 Cal.App.4th 586, H-133

Katrina C. (1988) 201 Cal.App.3d 540, H-80
Katrina L. (1988) 200 Cal.App.3d 1288, H-49
Kelly D. (2000) 82 Cal.App.4th 433, H-192, S-16
Kelly L. (1998) 64 Cal.App.4th 1279, F-81
Kelsey S. (1992) 1 Cal.4th 816, F-56, F-58, S-22-23
Kenneth M. (2004) 123 Cal.App.4th 16, H-95, H-96, H-97
Keyonie R. (1996) 42 Cal.App.4th 1569, H-81, H-161, F-28, S-20
Kiesha E. (1993) 6 Cal.4th 68, F-3, F-4
Kimberly F. (1997) 56 Cal.App.4th 519, H-220, H-221
Kimberly R. v. Superior Court (2002) 96 Cal.App.4th 1067, H-57, H-206
Kristina W. (2001) 94 Cal.App.4th 521, H-57
Lance V. (2001) 90 Cal.App.4th 668, H-212, F-87
La Shonda B. (1979) 95 Cal.App.3d 593, H-52
Laura H. (1992) 8 Cal.App.4th 1689, H-49
Laurie S. v. Superior Court (1994) 26 Cal.App.4th 195, H-43, H-56, H-81
League of United Latin American Citizens v. Wilson (C.D.Cal. 1995) 908 F.Supp.
 755, F-35
Leo M. (1993) 19 Cal.App.4th 1583, H-160
Los Angeles County Department of Children and Family Services v. Superior Court
 (Cheryl M.) (2003) 112 Cal.App.4th 509, F-72, F-74
Los Angeles County Department of Children and Family Services v. Superior Court
 (Richard A.) (2001) 87 Cal.App.4th 1161, F-71
Los Angeles County Dept. of Children and Family Services v. Superior Court
 (Sencere P.) (2005) 126 Cal.App.4th 144, F-75
Lucero L. (2000) 22 Cal.4th 1227, H-54, F-28, F-29, S-21
Luke L. (1996) 44 Cal.App.4th 670, H-105
Luke M. (2003) 107 Cal.App.4th 1412, H-23, H-80, H-87, S-8
L.Y.L. (2004) 101 Cal.App.4th 942, H-168
Malinda S. (1990) 51 Cal.3d 368, H-42, H-53, F-27, S-3-4
Manolito L. (2001) 90 Cal.App.4th 753, H-219, F-9
Maria S. (1998) 60 Cal.App.4th 1309, F-60
Maricela C. v. Superior Court (1998) 66 Cal.App.4th 1138, H-192, H-193
Marilyn H. (1993) 5 Cal.4th 295, H-162, H-215, H-221, S-14
Marina S. (2005) 132 Cal.App.4th 158, H-163
Mark L. (2001) 94 Cal.App.4th 573, H-57, H-105
Mark N. v. Superior Court (1998) 60 Cal.App.4th 996, H-91, H-140, F-62
Marquis D. (1995) 38 Cal.App.4th 1813, H-86
Marriage of David and Martha M. (2006) 140 Cal.App.4th 96, F-81
Mary M. (1999) 71 Cal.App.4th 483, H-91
Matthew C. (1993) 6 Cal.4th 386, H-104
Matthew P. (1999) 71 Cal.App.4th 841, H-219, F-4, F-28
Matthew S. (1996) 41 Cal.App.4th 1311, H-60
Megan P. (2002) 102 Cal.App.4th 480, H-156

Megan S. (2002) 104 Cal.App.4th 247, H-169
Merrick V. (2004) 122 Cal.App.4th 235, H-222, H-223
Michael D. (1996) 51 Cal.App.4th 1074, H-218, H-222
Michael G. (1998) 63 Cal.App.4th 700, F-41
Michael W. (1997) 54 Cal.App.4th 190, H-117, F-81
Miguel E. (2004) 120 Cal.App.4th 521, H-207, F-74
Miller v. California Dept. of Social Services (2004) 355 F.3d 1172, F-90
Misako R. (1991) 2 Cal.App.4th 538, H-134
Monique T. (1992) 2 Cal.App.4th 1372, H-50
M.R. (2005) 132 Cal.App.4th 269, H-177, F-89
Nada R. (2001) 89 Cal.App.4th 1166, F-51
Nahid H. v. Superior Court (1997) 53 Cal.App.4th 1051, H-189
Naomi P. (2005) 132 Cal.App.4th 808, H-169
Natasha H. (1996) 46 Cal.App.4th 1151, F-82
Nicholas B. (2001) 88 Cal.App.4th 1126, H-28, H-60, F-88, S-4-5
Nicholas H. (2002) 28 Cal.4th 56, S-23
Nicholas H. (2003) 112 Cal.App.4th 251, H-116, H-137
N.M. (2003) 108 Cal.App.4th 845, H-136, H-202, H-203
N.S. (2002) 97 Cal.App.4th 167, H-115
Pablo S. v. Superior Court (2002) 98 Cal.App.4th 292, H-96
Patricia L. (1992) 9 Cal.App.4th 61, F-3, S-17-18
Patricia O. v. Superior Court (1999) 69 Cal.App.4th 933, H-65, H-94
Paul E. (1995) 39 Cal.App.4th 996, H-61, H-84-85, H-204, H-207, S-16-17
P.C. (2006) 137 Cal.App.4th 279, H-167, H-172
P.L. (2005) 134 Cal.App.4th 1357, F-4
Plyer v. Doe (1982) 457 U.S. 202, F-35
Precious J. (1996) 42 Cal.App.4th 1463, H-165, H-170, F-62, F-88, S-13
Rachel M. (2003) 113 Cal.App.4th 1289, H-159, H-167
Ramone R. (2005) 132 Cal.App.4th 1339, H-166, H-174
Randi R. v. Superior Court (1998) 64 Cal.App.4th 76, H-100
Raphael P. (2002) 97 Cal.App.4th 716, F-58
Raymond C. v. Superior Court (1997) 55 Cal.App.4th 159, H-95
Rebecca H. (1991) 227 Cal.App.3d 825, H-93
Rebekah R. (1994) 27 Cal.App.4th 1638, H-95
Renee J. v. Superior Court (2002) 96 Cal.App.4th 1450, H-98
Renee S. v. Superior Court (1999) 76 Cal.App.4th 187, H-41, H-78
Ricardo L. (2003) 109 Cal.App.4th 552, H-60, H-67
Richard A. (Los Angeles County Department of Children and Family Services v. Superior Court) (2001) 87 Cal.App.4th 1161, F-71
Richard C. (1998) 68 Cal.App.4th 1191, H-162
Richard H. (1991) 234 Cal.App.3d 1351, H-30, H-41, H-77
Richard K. (1994) 25 Cal.App.4th 580, H-52
Rita L. v. Superior Court (2005) 128 Cal.App.4th 495, F-4

Robert A. (1992) 4 Cal.App.4th 174, H-74, H-76, H-89, H-205, F-74
Robert L. (1998) 68 Cal.App.4th 789, H-196, F-84
Rocco M. (1991) 1 Cal.App.4th 814, H-60, S-4
Roger S. (1992) 4 Cal.App.4th 25, H-117
Rosalinda C. (1993) 16 Cal.App.4th 273, F-82
Rosa S. v. Superior Court (2002) 100 Cal.App.4th 1181, H-51, H-101, H-203
Rubisela E. (2000) 85 Cal.App.4th 177, H-63, H-67, S-6
San Diego County Department of Social Services v. Superior Court (Sylvia A.)
 (1996) 13 Cal.4th 882, H-192, H-193, H-212
Sara D. (2001) 87 Cal.App.4th 661, F-60, S-19
Sarah S. (1996) 43 Cal.App.4th 274, H-172
Sara M. v. Superior Court (2005) 36 Cal.4th 998, H-142, S-9–10
Savannah B. v. Superior Court (2000) 81 Cal.App.4th 158, H-84
Savannah M. (2005) 131 Cal.App.4th 1387, H-60
S.B. (2004) 32 Cal.4th 1287, H-103
S.D. (2002) 99 Cal.App.4th 1068, H-65, F-61, S-7
S.D. (2002) 102 Cal.App.4th 560, H-10
Sean E. (1992) 3 Cal.App.4th 1594, H-162, H-221
Sencere P. (Los Angeles County Dept. of Children and Family Services v. Superior Court) (2005) 126 Cal.App.4th 144, F-75
Sergio C. (1999) 70 Cal.App.4th 957, H-61
Shelly J. (1998) 68 Cal.App.4th 322, H-51
Shirley K. (2006) 140 Cal.App.4th 65, H-205, F-75
S.M. (2004) 118 Cal.App.4th 1108, F-90
Stacy T. (1997) 52 Cal.App.4th 1415, H-47, H-53
Stephanie M. (1994) 7 Cal.4th 295, H-15, F-67
Stuart S. (2002) 104 Cal.App.4th 203, H-196, H-197
Summer H. (2006) 139 Cal.App.4th 1315, H-83, F-72
Sylvia A. (San Diego County Department of Social Services v. Superior Court)
 (1996) 13 Cal.4th 882, H-192, H-193, H-212
Tamika C. (2005) 131 Cal.App.4th 1153, H-196, F-21, F-84, S-18–19
Tamika T. (2002) 97 Cal.App.4th 1114, H-161
Tara S. v. Superior Court (1993) 13 Cal.App.4th 1834, F-46
Taryann W. (2002) 97 Cal.App.4th 675, H-96
Taylor M. v. Superior Court (2003) 106 Cal.App.4th 97, H-26, H-52
Theodore D. (Department of Social Services v. Superior Court) (1997) 58 Cal.
 App.4th 721, H-173, H-174, H-205, F-6, F-75
Thompson v. Thompson (1988) 484 U.S. 174, F-52
Tommy E. (1992) 7 Cal.App.4th 1234, H-51
Ulysses D. (2004) 121 Cal.App.4th 1092, H-63
Urayna L. (1999) 75 Cal.App.4th 883, H-163
Valerie A. (2006) 139 Cal.App.4th 1519, H-168, H-215
Vanessa M. (2006) 138 Cal.App.4th 1121, H-81

Victoria C. (2002) 100 Cal.App.4th 536, H-211, H-218
Vincent S. (2001) 92 Cal.App.4th 1090, H-170
Wilford J. (2005) 131 Cal.App.4th 742, H-29, H-47
Youakim v. Miller (1976) 425 U.S. 231, F-21
Zacharia D. (1993) 6 Cal.4th 435, F-55, F-57, F-58
Zachary G. (1999) 77 Cal.App.4th 799, H-215
Zeth S. (2003) 31 Cal.4th 396, H-166, H-167, H-213

TABLE OF CALIFORNIA CODES

Code of Civil Procedure, § 372, F-59

Code of Regulations, tit. 22

§§ 89317–89388, F-70

§ 89387, F-70

Education Code

§ 48645.5, F-16

§ 48853, F-16

§ 48853.5, F-16, F-17

§ 48854, F-17

§ 49069.5(h), F-16

§ 56029, F-18

§ 56031, F-17

§ 56041.5, F-14

§ 56055, F-13, F-15

§ 56346, F-17

§ 56366.9, F-17

Evidence Code

§ 240, H-48

§ 700, H-48, H-119

§ 701(a), H-48

§ 701(b), H-49

§ 710, H-49

§ 710(a), H-130

§ 710(g), H-141

§ 710(h), H-116

§ 715(c), H-116

§ 720(c), H-116

§ 730, H-56, H-81

§ 776, H-55

§ 801, H-56

§ 970, H-56

§ 972, H-56

§ 980, H-56

§ 986, H-56

§ 1017, H-56

§ 1200 et seq., H-55

Family Code

§ 3030, F-91
§ 3400 et seq., H-15
§ 3400–3465, F-49
§ 3402(g), H-15, F-50
§ 3421(a), H-15, F-50
§ 3421(c), F-50
§ 3422, H-15
§ 3424(a), H-15, F-51
§ 3424(b), F-52
§ 3424(c), F-51
§ 3424(d), F-51
§ 3425(b), F-51
§ 3427, F-50
§ 3428, F-50
§ 3443(a), F-51
§ 6323(c), F-91
§ 6323(d), F-91
§ 6924(b), F-10
§ 6925, F-10
§ 6926(a), F-11
§ 6927, F-11
§ 7540, F-56–57
§ 7541, F-56, F-57
§ 7570, F-56–57
§ 7576(d), F-57
§ 7611, H-18
§ 7611(c), F-56, F-57
§ 7611(d), F-56–57, S-23
§ 7612, F-57
§ 7824, H-92
§ 7826, H-92
§ 7827, H-92
§ 7900 et seq., H-25
§ 7901, F-45, F-73
§ 7950, H-24, F-66, F-67
§ 7950(a)(1), F-68
§ 8602, H-166
§ 8616.5, F-89

Government Code, § 75795.5, F-13, F-14, F-15



Health and Safety Code

- § 1255.7, H-65, F-77
- § 1255.7(b)(3), F-77
- § 1255.7(d)(2), F-77, F-78
- § 1255.7(e), F-77
- § 1255.7(k), F-77, F-78
- § 1501.1(b), F-17
- § 1522(f)(1), F-72
- § 1522(g), F-71, F-72
- § 123450, F-11

Penal Code

- § 1203.4, F-72
- § 1203.4(a), F-72
- § 1367, F-59
- § 2625, H-41, H-47, H-48, H-159, S-19–20, S-20
- § 2625(d), F-60
- § 2625(e), F-60
- § 3410 et seq., F-62
- § 6675, H-99
- § 11165.1, H-62
- § 11165.1(2), H-45

Welfare and Institutions Code

- § 61(a), H-73
- § 202(a), H-105
- § 213.5, H-6, H-8, H-20, H-119, F-81
- § 213.5(l), F-91
- § 281, H-81, S-20
- § 290.1, H-217
- § 290.1(b), H-217
- § 290.2, H-9, H-217
- § 290.2(b), H-217
- § 291, H-39, H-78, H-217
- § 291(a), H-40
- § 291(b), H-217
- § 291(c), H-40
- § 291(d), H-39
- § 291(e), H-40
- § 292, H-114
- § 293, H-131
- § 294, H-153, H-170
- § 294(c), H-156

§ 294(d), H-157
§ 294(e), H-153
§ 294(f), H-154, H-155
§ 294(g), H-155
§ 294(h), H-155
§ 294(i), H-155
§ 295, H-185, H-188
§ 295(f)(2)–(5), H-155
§ 297(a), H-201
§ 297(b), H-201
§ 297(c), H-217
§ 300, H-13, H-21, H-28, H-45, H-58–67, H-68–69
§ 300(a), H-39, H-45, H-46, H-59
§ 300(b), H-45, H-46, H-59, H-60, S-4, S-5
§ 300(c), H-46, H-62, S-5
§ 300(d), H-45, H-46, H-62, H-63, H-67
§ 300(e), H-64, H-94, S-6
§ 300(f), H-64, H-65
§ 300(g), H-65, H-66, H-97, F-60, F-61, F-78, S-7
§ 300(h), H-66
§ 300(i), H-66
§ 300(j), H-39, H-63, H-67, S-6
§ 300.2, F-87
§ 301, H-26, H-75
§ 302, H-52
§ 302(c), H-117
§ 302(d), H-88, H-117, H-119, F-81, F-87
§ 303, H-195
§ 304, H-20
§ 305, H-16
§ 306, H-19
§ 306(b), H-16, H-22
§ 306.5, H-13, H-25, H-89
§ 309, H-23
§ 309(b), H-131, H-136
§ 309(d), H-25, H-207, F-66, F-69
§ 309(d)(3), F-70, F-71
§ 311, H-14, H-48, F-58
§ 313, H-9
§ 315, H-9
§ 316.2, H-18
§ 317, H-46, F-58
§ 317(c), H-10, F-9



§ 317(e), H-11, H-12, H-73, F-34
§ 317(f), H-5, H-12, H-44, H-56, F-9
§ 317.5(b), H-48
§ 319, H-7, H-9, H-13, H-14, H-21, H-22, H-25, F-58
§ 319(a), H-21
§ 319(b), H-17, F-66
§ 319(c), H-17, H-20
§ 319(d), H-16, H-19, H-22
§ 319(e), H-17, H-19, H-22, F-66
§ 319(f), H-22, H-24, F-65, F-66, F-69
§ 319(g), H-19, F-13, F-15
§ 319.2, H-90
§ 321, H-27, H-28
§ 322, H-7, H-20
§ 326.5, H-12
§ 334, H-30, H-40
§ 335, F-58
§ 337, F-58
§ 341, H-48, H-81
§ 342, H-118, H-201, H-203, H-219
§ 349, H-48
§ 350(a), H-29, H-38, H-51
§ 350(b), H-35, H-37, H-49
§ 350(c), H-35, H-38, H-57-58
§ 351.5(d), H-92
§ 352, H-38, H-40, H-41, H-77-78, H-114, H-139, H-157, S-11, S-20
§ 352(a), H-31, H-38, H-41, H-42
§ 352(b), H-30, H-36, H-38, F-61
§ 353, H-43, H-46
§ 353.1, H-213
§ 354, H-42
§ 355, H-38, H-42, H-52, S-3, S-21
§ 355(a), H-45
§ 355(b), H-38, H-42, H-53, F-27
§ 355(c)(1), H-53, H-54, F-27, F-29
§ 355(d), F-28
§ 355.1, H-37, H-52, H-56
§ 355.1(a), H-37, H-45
§ 355.1(d), H-37, H-45, H-46, H-63
§ 356, H-67
§ 358, H-77, H-78, H-79
§ 358(a), H-68, H-69, H-75
§ 358(b), H-79, H-81

§ 358.1, H-79, H-80
§ 358.1(b), H-79
§ 358.1(g), H-79
§ 358.1(h), H-79
§ 358.1(i), H-79
§ 360, H-83
§ 360(a), H-82, H-83, F-72
§ 360(b), H-68, H-75, H-82
§ 360(c), H-68, H-82
§ 361, H-83, H-190, F-13, F-14, F-15, S-16
§ 361(a), H-104, F-14
§ 361(c), H-80, H-84, H-85, H-86, H-118
§ 361(d), H-80
§ 361.1(e), F-13
§ 361.2, H-23, H-83, H-86, H-87, H-116, H-137, F-58, F-87, S-8, S-9
§ 361.2(a), H-23, H-86, F-90
§ 361.2(b), H-87, H-88, H-116, H-137, H-139, F-57
§ 361.2(e), H-88, H-23
§ 361.2(f), H-90
§ 361.2(h), H-106, F-90
§ 361.2(i), H-89
§ 361.3, H-79, H-207, F-67, F-72, S-17
§ 361.3(a), H-24, H-89, F-67, F-68
§ 361.3(b)(2), F-58
§ 361.3(c), H-88, H-89, F-65, F-67
§ 361.3(d), H-145
§ 361.4, H-25, F-69, F-74
§ 361.4(b), F-69
§ 361.4(c), F-70
§ 361.4(d)(2), F-71
§ 361.5, H-136
§ 361.5(a), H-90, H-91, H-100, H-130, H-134, H-202
§ 361.5(a)(1), H-135
§ 361.5(a)(2), H-134
§ 361.5(a)(3), H-88, H-101, H-136, H-139, H-141, H-143, H-202
§ 361.5(b), H-75, H-81, H-90, H-92-100, H-164, H-203, F-88
§ 361.5(b)(1)-(15), H-92-100
§ 361.5(b)(2), H-81, H-93
§ 361.5(b)(3), H-59, H-63, H-96
§ 361.5(b)(4), H-65, H-94
§ 361.5(b)(5), H-96
§ 361.5(b)(6), H-59, H-63, H-95, H-96
§ 361.5(b)(7), H-59, H-63



§ 361.5(b)(9), H-66, F-78
 § 361.5(b)(13), H-61
 § 361.5(c), H-59, H-61, H-63, H-65, H-66, H-75, H-81, H-93, H-94, H-95,
 H-96, H-97, H-98, H-99, H-100, H-130
 § 361.5(c)(3), H-136
 § 361.5(e), H-75, H-91, H-134, F-61
 § 361.5(e)(1), H-105, H-164, F-62, F-88
 § 361.5(e)(3), F-63
 § 361.5(f), H-92, H-157, F-78, F-88, F-89
 § 361.5(g), H-83, H-158, H-175
 § 361.5(h), H-94, H-95, H-96, H-97
 § 362, H-83
 § 362(a), H-102, H-105
 § 362(b), H-103
 § 362(c), H-102, H-103
 § 362(d), H-103
 § 362.04, F-6
 § 362.05, F-7, F-10
 § 362.1, H-74, H-76, H-105
 § 362.1(a), H-106, F-88, F-91
 § 362.1(b), H-106
 § 362.2(h), H-74, H-76
 § 362.4, H-88, H-117, H-118, H-118–119, H-194, F-81
 § 362.5(c), H-92, H-83
 § 362.7, H-24, H-89, F-65
 § 364 (364/JR), H-74, H-76, H-89, H-107–119, H-138. *See also* Judicial
 review of placement with parent in topical index
 § 364(a), H-113
 § 364(b), H-109, H-111, H-114, H-118
 § 364(c), H-115, H-117
 § 364(d), H-118, H-119
 § 364.05, H-42, H-114
 § 365.1(b)(5), H-64
 § 365.1(c), H-64
 § 366, H-137
 § 366(a), H-129
 § 366.05, H-42, H-132
 § 366.1, H-131–132
 § 366.1(a), H-145
 § 366.1(e), H-145, F-15
 § 366.1(f), H-146
 § 366.3, H-150, H-152, H-176, H-212, F-22, F-58, F-85. *See also* Permanency
 review/hearing in topical index

§ 366.3(a), H-178, H-187, H-194, H-195, F-84, F-85
 § 366.3(b), H-91, H-222
 § 366.3(d), H-187, H-188, H-191, H-197
 § 366.3(e), H-185, H-190, H-191, H-193, H-197
 § 366.3(e)(1), H-192
 § 366.3(e)(3), H-182
 § 366.3(e)(4), H-191, H-192
 § 366.3(e)(6), H-191, H-195
 § 366.3(e)(7), H-192, H-193
 § 366.3(e)(10), H-182, H-191, H-192
 § 366.3(f), H-191, H-214
 § 366.3(g), H-187, H-188, H-189, H-192, H-193, H-194, H-196, H-197
 § 366.4, H-195, F-84
 § 366.21, H-90, F-58
 § 366.21(c), H-123, H-127
 § 366.21(e), H-74, H-76, H-116, H-129, H-130, H-133, H-134, H-135, H-137,
 H-138, H-139, H-141, H-142, H-157, H-161, H-164, S-9, S-10
 § 366.21(f), H-129, H-130, H-133, H-161, H-164
 § 366.21(g), H-127, H-140, H-157
 § 366.21(g)(1), H-136, H-139, H-144
 § 366.21(g)(3), H-140
 § 366.21(h), H-146, F-89
 § 366.21(i), H-158, H-175
 § 366.21(j), F-85
 § 366.22, H-29, H-61, H-129, H-130, H-133, H-136, H-139, H-140, H-161,
 F-58, S-10
 § 366.22(a), H-133, H-157
 § 366.22(b), H-175
 § 366.23, H-164
 § 366.26, H-69, H-74, H-76, H-92, H-97, H-129, H-135, H-140, F-58, S-13.
 See also Selection and implementation hearing in topical index
 § 366.26(b), H-175, H-176
 § 366.26(c)(1), H-150, H-151, H-152, H-158, H-159, H-163, H-164, S-15
 § 366.26(c)(1)(A), H-164, H-165, S-14, S-15
 § 366.26(c)(1)(B), H-160, H-166
 § 366.26(c)(1)(C), H-166
 § 366.26(c)(1)(D), H-24, H-167, S-15
 § 366.26(c)(1)(E), H-168, S-3, S-16
 § 366.26(c)(2), H-170
 § 366.26(c)(3), H-174, H-175
 § 366.26(c)(4)(A), H-175, H-176, H-177
 § 366.26(c)(4)(C), H-177, F-89
 § 366.26(d), H-175, H-176



§ 366.26(e), H-136
 § 366.26(f), H-159, S-11
 § 366.26(g), H-157, H-159
 § 366.26(h), H-149, H-150, H-159, H-160
 § 366.26(i), H-171, H-175, H-213, H-214, H-218
 § 366.26(j), H-176, F-75
 § 366.26(k), H-24, H-172
 § 366.26(n), H-150, H-172, H-173, H-178, H-205, F-6, F-75
 § 366.27(a), H-177
 § 366.27(b), H-177
 § 366.28(b), F-6
 § 366.29, H-149, H-151, H-191, F-90
 § 386, H-217
 § 387, H-89, H-118, H-204, H-219, S-16–17
 § 387(b), H-206
 § 387(d), H-201
 § 387(e), H-201
 § 388, H-118, H-162, H-169, H-171, H-211–223, S-14. *See also* Modification, motions for, in topical index
 § 388(a), H-211, H-212
 § 388(b), H-168, H-212, H-214, H-215, F-90
 § 388(c), H-216, H-217
 § 390, H-26, H-82
 § 391, H-195, F-82–83, S-18–19
 § 399, H-86
 § 728, H-222
 § 827, F-10, F-83
 § 16000(a), H-24, F-66
 § 16001.9(a), F-10
 § 16002, H-25, H-89, H-102, H-146, F-90
 § 16002(b), H-106, F-90
 § 16002(e), H-185
 § 16002.5, H-104
 § 16010(b), H-83
 § 16500 et seq., H-79
 § 16501.1, H-19, H-74, H-76, H-79, H-102
 § 16504.5(b), F-70

TABLE OF CALIFORNIA RULES OF COURT

Rule 5.501(a), H-66, H-136
Rule 5.502(a), H-24, H-63, H-131, H-143, F-3, F-65
Rule 5.502(b), H-135
Rule 5.518, H-29
Rule 5.524, H-217, H-131
Rule 5.534(b), H-29
Rule 5.534(c), H-49
Rule 5.534(d), H-45, H-57
Rule 5.534(e), F-4
Rule 5.534(g), H-10, H-46
Rule 5.534(h), H-46
Rule 5.534(j), H-48, H-81
Rule 5.534(n), H-48
Rule 5.535(i), F-38
Rule 5.546, H-35, H-43, H-44
Rule 5.548, H-55
Rule 5.550, H-40, H-41, H-42, H-77
Rule 5.560, H-201, H-203, H-212, H-214, H-216, H-219
Rule 5.565, H-118, H-201, H-202, H-203
Rule 5.570, H-118, H-215, H-216, H-217, H-218, H-219, H-222
Rule 5.616, H-23, H-25, H-87
Rule 5.620(b), H-20
Rule 5.630, H-20
Rule 5.630.5, H-20
Rule 5.635, H-18
Rule 5.660, H-10, H-11, H-12
Rule 5.662, H-12
Rule 5.664, H-18, H-78, H-156, F-37, F-38, F-39, F-41, F-43
Rule 5.670, H-9, H-19, H-40
Rule 5.672, H-20
Rule 5.674, H-14
Rule 5.676, H-13, H-21
Rule 5.678, H-13, H-19, H-21, H-22, F-66
Rule 5.680, H-27, H-28
Rule 5.682, H-48, H-50, H-51, H-55
Rule 5.684, H-45, H-52, H-53, H-56
Rule 5.686, H-77
Rule 5.690, H-79, H-81
Rule 5.695, H-80, H-81, H-82, H-83, H-86, H-91, H-92, H-95
Rule 5.700, H-117



Rule 5.710, H-131
Rule 5.710(a), H-113
Rule 5.710(b), H-131
Rule 5.710(e), H-115, H-118, H-119, H-133, H-138
Rule 5.710(f), H-134, H-135, H-139, H-141, H-142, H-144
Rule 5.710(h), H-137
Rule 5.710–5.720, H-129
Rule 5.715, H-130, H-131, H-133, H-137, H-139, H-140, H-146
Rule 5.720, H-130, H-133, H-137
Rule 5.725(a), H-170
Rule 5.725(b), H-153
Rule 5.725(c), H-149, H-151, H-158
Rule 5.725(e), H-158, H-159, H-163, H-164, H-168, H-170, H-175, H-177
Rule 5.725(f), H-170, H-171
Rule 5.725(h), H-154, H-170
Rule 5.727(c), H-42
Rule 5.730(g), H-194
Rule 5.740(a), H-187, H-188, H-192, H-194
Rule 5.740(b), H-187, H-188, H-189, H-192, H-193
Rule 5.740(c), H-91, H-223
Rule 5.740(d), H-195
Rule 1412(j), F-28
Rule 1413(h), F-55, F-57
Rule 1421(a), H-55
Rule 1428, F-73
Rule 1466(c), H-222
Rule 5616, F-45, F-46, F-47

CODE OF FEDERAL REGULATIONS

8 C.F.R. § 204.11, H-178, F-32
34 C.F.R. § 300.519, F-14
45 C.F.R. § 1356.21(b)(i), H-17
45 C.F.R. § 1356.21(h)(3), H-196

UNITED STATES CODE

8 U.S.C. § 1101(a)(15)(U), F-33
8 U.S.C. § 1154, F-33
8 U.S.C. § 1601 et seq., F-35
8 U.S.C. § 1611, F-35
8 U.S.C. § 1621, F-35
20 U.S.C. § 1415, F-14
25 U.S.C. § 1901 et seq., H-18
25 U.S.C. § 1901–1963, F-37
25 U.S.C. § 1911(d), F-38, F-42
25 U.S.C. § 1915, F-41
28 U.S.C. § 1738A(c), F-52
42 U.S.C. § 671(a), H-92
42 U.S.C. § 672, H-16
42 U.S.C. § 5101 et seq., H-12
42 U.S.C. § 11431 et seq., F-15
42 U.S.C. § 11434a, F-15
42 U.S.C. § 11601 et seq., F-52
42 U.S.C. § 11601(a)(4), F-53
42 U.S.C. § 11603(a), F-53
42 U.S.C. § 11603(e)(2), F-53

