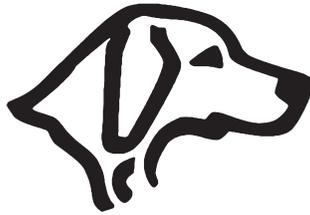




DEPENDENCY QUICK GUIDE



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

SECOND EDITION



**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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Judicial Council of California (2010–2011)

The Judicial Council is the policymaking body of the California courts, the largest court system in the nation. Under the leadership of the Chief Justice and in accordance with the California Constitution, the council is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice.

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SECOND EDITION

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The primary authors and editors of this edition were Martha Matthews, attorney, Children’s Law Center of Los Angeles, and, from the Administrative Office of the Courts (AOC), Center for Families, Children & the Courts (CFCC), David Meyers, senior attorney; Mara Bernstein, senior attorney; and Jenie Chang, attorney.

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was provided by California Office of Emergency Services.

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.

AN EXPLANATION OF THE TITLE

Courtroom binders containing case law and reference material have been a staple of civil and criminal litigators for generations. In California, several district attorney and public defender offices share the urban legend that one of their attorneys pasted a picture of his or her dog on the cover of the binder. For years, attorneys commonly referred to these binders as “dogbooks.”



HEARINGS

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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. (§ 317(f).)
- Interview client in private in age-appropriate manner regarding relevant issues (i.e., allegations, placement preferences, siblings, health issues, school of origin, early intervention services, special education services, pending exams, pending disciplinary actions, advanced placement status, extracurricular activities, graduation status, any pending delinquency matters, immigration status, treatment in current placement, access to phone calls, and visits with parents and other important people).
- Interview relatives and interested persons present re allegations, visitation, placement options, ASFA restrictions, willingness to make educational decisions. 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, whether parent's right to make education decisions should be limited, 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, nexus between allegations and risk to child, 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: parent's right to make education decisions, placement near school of origin (Ed. Code, § 48853.5(e)), transportation to school of origin, tutoring, extracurricular activities (*id.*, § 48850(a)(1)), 24-hour notice of placement change that affects school placement (Cal. Rules of Court, rule 5.651(e)), notice of disciplinary actions, and referral for assessments for early intervention and/or special education services. (Ed. Code, §§ 48850(a)(1), 48853.5(e); Cal. Rules of Court, rule 5.651(e))
- 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).
- Education rights. (§ 319(g); Cal. Rules of Court, rules 5.650–5.651.)
- 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 caregiver with contact information and summary of court orders.
- File necessary forms/motions if pursuing rehearing, demurrer, or writ of mandate.
- Follow up with caregiver to ensure child attending school of origin or enrolled in new school.

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.
- Anticipate whether education issues will be present and how to maximize your client's participation in the child's education.
- 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, nexus between allegations and risk to the child, 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.
 - Education decisions (i.e., court does not limit your client's rights). (Cal. Rules of Court, rule 5.651(b).)
 - 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 hearing 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).) Attorneys for children must comply with the education and experience requirements and standards of representation stated in rule 5.660(d) of the California Rules of Court. 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; *In re Charlisse C.* (2008) 45 Cal.4th 145; Cal. Rules of Court, rule 5.660(c.) Counsel for the child cannot accept the appointment if his or her firm previously represented a sibling and there is an actual conflict between the sibling and the new client. Counsel for the child also cannot accept appointment for two or more siblings if there is an actual or potential conflict between the siblings. After accepting appointment, counsel cannot continue to represent two or more siblings when an actual conflict arises between the siblings.

An actual conflict occurs when the lawyer would have to take directly adverse positions on a material factual and/or legal issue in order to advocate effectively for both clients. A potential conflict occurs when the specific circumstances of the case make it reasonably likely that an actual conflict will arise. 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. Potential conflicts that arise after appointment do not require withdrawal. 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). (*Ibid.*)

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 “mouth-piece” 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; *In re Kristen B.* (2008) 163 Cal.App.4th 1535.)

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).)



TIP The child may need legal representation in non-dependency proceedings—for example, when the child has been injured and has a cognizable tort claim or has been denied early intervention services, education rights, regional center services, or public benefits such as social security or state disability payments.

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 it is 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 identifying

- 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;
- Efforts that have been made and continue to be made to place the child with siblings or half-siblings who have also been detained;
- The person holding the education rights of the child and whether the court should temporarily limit the parent's or

guardian's right to make educational decisions (§ 319(g)(1)–(3); Cal. Rules of Court, rule 6.651(b)(1)(D));

- Whether the child is enrolled in and attending the child's school of origin as defined in Education Code section 48853.5(e) (Cal. Rules of Court, rule 6.651(b)); and
- If the child is no longer attending the school of origin, whether the education rights holder decided that it was not in the best interest of the child to attend his or her school of origin (*id.*, rule 6.651(b)(1)(C)(i)).

(§§ 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 contra-

dicted 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 un rebutted 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 Jennifer O.* (2010) 184 Cal.App.4th 539 [county agency must comply with the Hague Convention when serving parents in other countries with petition and notice of jurisdictional hearing]; *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.)

Also, if one or both parents are on active military duty, the Servicemembers Civil Relief Act (50 U.S.C. Appen. § 501 et seq.) applies. The parent is entitled to a 90-day stay of proceedings if military duty prevents his or her attendance at hearings, and special notice provisions apply. (See *In re Amber M.* (2010) 184 Cal.App.4th 1223; *In re A.R.* (2009) 170 Cal.App.4th 733.)



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 caregiver 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 are 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 its 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 5.481; 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 caregiver 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); assistance in obtaining the child's belongings from the parental home; and assistance in ensuring that the child remains in his or her school of origin. If the holder of education rights finds that remaining in the school of origin is not in the child's best interest, he or she should ensure that the child is immediately enrolled in the new school and that the child's education records are transferred within 48 hours. (§ 16501.1(c); Ed. Code, § 48853.5; Cal. Rules of Court, rule 5.651(e) & (f).)

d. Education Rights

Prior to disposition, the court may temporarily limit a parent's or guardian's right to make education decisions. (§ 319(g).) If the court limits the parent's right to make education decisions, the court order must specifically indicate that. The court at the same time must appoint a responsible adult to serve as the child's educational representative whether or not the child qualifies for special education or other educational services. All findings and orders relating to educational decisionmaking must be documented on Judicial Council form JV-535, *Findings and Orders Limiting Right to Make Educational Decisions for the Child, Appointing Educational Representative, and Determining Child's Educational Needs*. (§ 319; Cal. Rules of Court, rule 5.650.) The court should consider the following individuals as the child's educational representative: adult relative, nonrelative extended family member, foster parent, family friend, mentor, or CASA volunteer. The court may not appoint any individual who has a conflict of interest, including social workers, probation officers, group home staff, or an employee of the school district. (Ed. Code, § 56055.)

If the court is unable to locate a responsible adult to serve as educational representative for the child and the child either has been referred to the local educational agency (LEA) for special education services or has an individualized education plan (IEP), the court must refer the child to the LEA for appointment of a "surrogate parent" using form JV-535, and, within 30 days, the LEA must make reasonable efforts to appoint a surrogate parent and communicate the information to the court on form JV-536. The surrogate parent makes decisions related to special education evaluation, eligibility, planning, and services. (Cal. Rules of Court, rule 5.650(b)–(d).)

If the court cannot identify a responsible adult to make education decisions for the child and the child does not qualify for special education, the court may make education decisions for the child with the input of any interested person. (§ 319(g)(2); Cal. Rules of Court, rule 5.650(b).)

e. 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.

f. 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 investigate 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 with the child at the time of removal may come forward at detention to seek to care for the child. Section 319 does not specifically address release to the home of a previously non-custodial parent. Rather, the statute discusses “removal from,” “con-

tinuance 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 an 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(1).) 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 caregiver is addressed as early as possible, and that all efforts are made to place the child with appropriate relatives or NREFMs. 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 caregivers to whom he or she is attached. (See § 366.26(c)(1)(D) & (k).)

c. Notice to Relatives and Relative Information Form

When a child is removed from the home, within 30 days the child's social worker must conduct an investigation to identify and locate the child's grandparents and other adult relatives. Once a relative is located, the social worker is required to provide written notification and inform the relative, in person or by telephone, of the child's removal and the options available to participate in the child's care and placement. The social worker is also required to provide adult relatives with a relative information form to provide information to the social worker and the court regarding the child's needs. At the detention hearing, the juvenile court should inquire as to the efforts made by the social worker to identify and locate relatives and require the social worker to provide any completed relative information forms to the court and all parties. (§ 309.)



TIP When a child is removed from the parents' home, it is important that relatives are identified and assessed as soon as possible. The relative information form provides a process whereby able and willing relatives may seek placement of the child and/or become involved in the child's care. If relatives come forward but no relative information forms are completed by the time of the detention hearing, counsel should request that the forms be attached to the jurisdiction report.

(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, including 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 caregiver lives in a state other than California, placement can be made only 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.) Rules governing the ICPC do not apply to biological parents. (See generally *In re C.B.* (2010) 190 Cal.App.4th 102.)



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.

d. 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.)

But see *Los Angeles County Department of Children and Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408. In this case,

the court stated: “[I]n the ordinary course, section 390 is not an appropriate vehicle for summary dismissal at a detention hearing.”



TIP It will be the exceptional 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 (PRIs) 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. Also, counsel can use the hearing to challenge the basis for the agency’s refusal to place with a relative under sections 309 and 319. (See Relative Placements fact sheet.)

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

When a detention hearing is held and no parent or guardian of the minor is present and no parent or guardian has had actual notice of the hearing, the child, parent, or guardian may request that a further hearing be set for presentation of evidence of the prima facie case. 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, 252–254; 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 demur-

rer 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
 - 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 time-lines 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. (*Id.*, 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 handwritten 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; *In re Baby Boy M.* (2006) 141 Cal.App.4th 588.)

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 re-

quired 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.*, *supra*, 85 Cal.App.4th at p. 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*, *supra*, 111 Cal.App.4th at p. 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, rules 5.530(b), 5.534(p).)

If the child is present at the hearing, the court must allow the child, if the child so desires, to address the court and participate in the hearing. If the child is 10 years of age or older and not present at the hearing, the court must determine whether the child was properly notified of his or her right to attend the hearing. If the child was not properly notified or wants to be present and was not given the opportunity, the court must continue the hearing to allow the child to be present unless it finds that continuing the hearing is not in the child's best interest. (§ 349(c) & (d).)



TIP Dependency cases are about the child, and it is important that every child has the opportunity to actively participate in his or her court hearing.

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 5.526(d), 5.534(k), 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 testifying, 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.*, *supra*, 232 Cal.App.3d at p. 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.)



TIP Asking age-appropriate questions can substantially affect whether the child appears to be competent. Counsel should use simple words and short sentences and avoid questions using abstract concepts and questions about dates, times, distance, number

of times an event occurred, and so forth. Children’s attorneys should consider objecting to age-inappropriate questioning under Evidence Code section 765(b).

(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, submission on the report does waive appeal on the sufficiency of the petition itself. (See *In re Christopher C.* (2010) 182 Cal.App.4th 73; *In re David H.* (2008) 165 Cal.App.4th 1626; but see *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; 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 involve the conduct of only 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).)

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

- Either the child is 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, it did not hold that the section 355 “social study” exception supersedes the child hearsay dependency exception. In fact, the court spoke favorably of and relied heavily on the underlying rationale of the child hearsay dependency exception 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.



TIP In situations where there are multiple levels of hearsay, the multiple hearsay is admissible only if each hearsay layer separately meets the requirements of a hearsay exception. (*People v. Arias* (1996) 13 Cal.4th 92, 149; see also Evid. Code, § 1201.)

(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 5.548(a), 5.682(b); *In re Mark A.* (2007) 156 Cal.App.4th 1124; *In re Brenda M.* (2008) 160 Cal.App.4th 772.) 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. (Cal. Rules of Court, 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) Physician-Patient and Therapist-Patient Privilege

The physician-patient and psychotherapist-patient privileges defined in sections 994 and 1014 of the Evidence Code are applicable in dependency proceedings. However, parents cannot claim privilege as to relevant medical or mental health records if they have put their medical or psychological condition at issue in the dependency case. (*In re R.R.*

(2010) 187 Cal.App.4th 1264, 1278–1279.) 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 the child is over 12, there is a rebuttable presumption that the child is mature enough to decide whether to invoke or waive these privileges. (§ 317(f); see *In re S.A.* (2010) 182 Cal.App.4th 1128.)

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 Courts of Appeal have held that the therapist-patient privilege is not absolute in dependency cases; it does not preclude disclosure of information relating to a child’s participation and progress in therapy if disclosure is necessary for the court to make orders to ensure the child’s welfare. (See *In re S.A.*, *supra*, 182 Cal.App.4th at pp. 1138–1139; *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 a 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 J.N.* (2010) 181 Cal.App.4th 1010, 1023; see also *In re James R.* (2009) 176 Cal.App.4th 129; *In re Savannah M.* (2005) 131 Cal.App.4th 1387; *In re David M.* (2005) 134 Cal.App.4th 822; but see *In re J.K.* (2009) 174 Cal.App.4th 1426, 1434–1439 [evidence that child has suffered prior

serious harm or abuse is sufficient for jurisdiction under section 300(a), (b), and/or (d) without a showing of risk of future harm].)

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.)

A noncustodial parent’s past failure to take custody of his or her child or provide financial or other support does not give rise to jurisdiction under section 300(b) unless the child has been harmed or is at risk of harm by reason of the parent’s inaction. (*In re V.M.* (2010) 191 Cal.App.4th 245 [reversing jurisdictional findings as to father who allowed child to live with grandparents until age seven and then sought custody]; *In re X.S.* (2010) 190 Cal.App.4th 1154 [reversing jurisdictional findings as to father who did not seek custody or provide support until child was eight months old].) Also, jurisdiction under section 300(b) requires a showing of parental neglect or unfitness; a parent’s mere inability to supervise or control an incorrigible child is not sufficient. (*In re Precious D.* (2010) 189 Cal. App.4th 1251.)

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 that the child regularly attends school is not sufficient to sustain a petition without additional evidence of harm. In *In re Janet T.*, the trial court sustained a section 300(b) allegation based on the mother's failure to ensure regular school attendance and her numerous mental and emotional problems. However, the appellate court reversed the lower court's decision and found that before courts and agencies can exert jurisdiction under section 300(b), there must be evidence indicating that the child is exposed to substantial risk of serious physical harm or illness. (*In re Janet T.*, *supra*, 93 Cal.App.4th at p. 377.)

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.

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(19).)

The Courts of Appeal have held that siblings of a sexually abused child, even if they are younger and/or of the opposite sex, may be at risk of future sexual abuse within the meaning of section 300(d) and (j) owing to the parent’s “aberrant sexual behavior.” (See *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1414; *In re P.A.* (2006) 144 Cal.App.4th 1339; *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].)

Jurisdiction over a sibling of a sexually abused child under section 300(j) is not, however, limited to situations where the sibling is at risk of *sexual* abuse. Even if a sibling of a different age or gender is not at risk of sexual abuse, the sibling might be at risk of neglect or physical or emotional abuse as a result of one parent’s sexually aberrant behavior or the other parent’s nonprotective behavior. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 62–65.)

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 un-

der the Penal Code and case law definitions of sexual abuse. (*In re Maria R.*, *supra*, 185 Cal.App.4th at pp. 67–68 [“sexual abuse” for purposes of § 300(d) is defined by Pen. Code, § 11165.1 and does not include “collateral damage” caused by exposure to a sibling’s 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 against the parent who committed the act of sexual abuse.

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.*, *supra*, 108 Cal.App.4th at p. 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 evidence of neglect required to sustain a section 300(f) allegation need not meet the standard of proof for criminal negligence. (*In re Ethan C.* (2010) 188 Cal.App.4th 992, 1002.) Also, to sustain a section 300(f) allegation the court is not required to make a finding that the child is currently at risk of harm. (*In re A.M.* (2010) 187 Cal.App.4th 1380, 1389.)

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 any of 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.)

Jurisdiction over a sibling of a sexually abused child under section 300(j) is not limited to situations where the sibling is at risk of *sexual* abuse. Even if a sibling of a different age or gender is not at risk of sexual abuse, the sibling may be at risk of neglect or physical abuse as defined in section 300(a), (b), (e), or (i) as a result of one parent's sexually aberrant behavior or the other parent's nonprotective behavior. (*In re Maria R.*, *supra*, 185 Cal.App.4th at pp. 62–65.)

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 services. Whatever the ultimate time frame, counsel must remember that although the section 366.21(e) hearing must be scheduled 6 months after the dispositional hearing and the section 366.21(f) hearing must be scheduled 12 months from the date the child entered foster care, if the disposition is delayed so that the 366.21(e) hearing will occur after the date set for the 366.21(f) hearing, both hearings must occur concurrently or consecutively so that both are set on or before 12 months from the date the child entered foster care. (§ 361.5(a)(1).)

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 caregiver).
 - 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.
 - Education rights of the parents.
 - Whether child has full access to educational services, including any special education services.
 - 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 education rights and appointment of responsible adult to make education decisions. (§§ 361, 726; Ed. Code, § 56055; Cal. Rules of Court, rule 5.650.)
 - Case plan specific to the family and child. (§ 16501.1.)
 - Special services (e.g., regional center referral, necessary educational assessments or support to participate in extracurricular activities, 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 Cal.App.4th 1479.)
- Ensure that court addresses
 - Placement.
 - Education rights.
 - 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, 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 caregiver with contact information and summary of court orders.
- Follow up on assessments, special education services, enrollment in extracurricular activities.
- 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 caregiver).
 - Need for services, and whether they are reasonably tailored to client's needs.
 - Ability to substantially comply with case plan within allotted time.
 - Ability to participate in education decisions and needs.
 - 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.*, *supra*, 58 Cal.App.4th at p. 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.
 - Education rights.
 - Setting the next hearing. (§§ 364, 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 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.) 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 5.481(b).) 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);

- Identification of a responsible adult available to make educational decisions for the child, if recommending limitation of the parent’s educational rights (§358.1(e)); and
- Specific information regarding the child’s educational issues and needs, including, but not limited to, achievement levels; discrepancies in achievement; physical, developmental, and mental health needs; early intervention or special education needs/plans; extracurricular participation; and other such issues. If the child is five years old or younger, the report must identify whether the child may be eligible for or is already receiving early intervention services from either the regional center or the local education agency. Also, the report must identify whether the parent’s right to make education decisions is limited and, if it is limited, the person who holds the child’s education rights. (Cal. Rules of Court, rule 5.651(c).)



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 probabil-

ity, 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 5.526(d), 5.534(k), 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 section 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); *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1260–1261 [§ 360(b) order is not a dismissal but a type of disposition].) 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); see also *In re L.A.* (2009) 180 Cal.App.4th 413 [juvenile court may order § 360(a) guardianship where one parent consents and the other parent's whereabouts are unknown; agency's assessment report must include information on efforts to contact the absent parent].) 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 inves-

tigate 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)–(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 the child is 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*, *supra*, 118 Cal.App.4th at p. 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. (See *In re H.E.* (2008) 169 Cal.App.4th 710 [evidence sufficient to support removal under § 361(c)(3) when mother’s repeated false allegations of sexual abuse by father caused severe emotional harm to child].)

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 are 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.)

When a child's placement or change in placement affects the child's right to attend his or her school of origin, the social worker or probation officer must notify the court, the child's attorney, and the education representative/surrogate parent within 24 hours, excluding non-court days, of the determination. The child's attorney or the holder of education rights may request a hearing by filing Judicial Council form JV-539, *Request for Hearing Regarding Child's Education*, no later than two court days after receipt of notice of the decision. The court on its own motion may direct the clerk to set a hearing. The hearing must be held within seven calendar days and, pending the result, the child has a right to remain in his or her current school. At the hearing, the court must determine whether the proposed placement meets the school-of-origin provision required by the McKinney-Vento Act and Assembly Bill 490 (Stats. 2003, ch. 862) and whether it is based on the child's best interest. The court must make its findings and orders on form JV-538, *Findings and Orders Regarding Transfer From School of Origin* (Ed. Code, §§ 48853.5, 49069.5; Cal. Rules of Court, rule 6.651(e) & (f).)

(i) With a Previously Noncustodial 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 by clear and convincing evidence that placement would be detrimental to the child's safety or physical or emotional well-being. (§ 361.2(a); *In re John M.* (2006) 141 Cal.App.4th 1564, 1569–1570.) This is true regardless of whether the dependency petition contains any allegations concerning the noncustodial parent—i.e., whether the noncustodial parent is “offending” or “nonoffending.” (*In re V.F.* (2007) 157 Cal.App.4th 962, 969–970.) 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.*, *supra*, 107 Cal. App.4th at pp. 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; *In re V.F.*, *supra*, 157 Cal.App.4th at p. 971.)

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.*, *supra*, 141 Cal.App.4th at pp. 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(b)(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 noncusto-

dial parent. (See *In re Jane W.* (2006) 140 Cal.App.4th 1444, 1454–1455.)

(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 reunification services continue. (§§ 361.3(a) & (c); 366.26(k); see *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.)

Although they do not receive preference for placement, nonrelative extended family members are generally treated the same as relative caregivers under the statutes controlling placement. (§ 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.)

It is important to locate and assess relatives and resolve issues concerning relative placement as early as possible in the case. Cases in which a child is placed in foster care at disposition and a relative later requests placement often present complex legal and factual issues and tension between the goals of preserving extended family ties and of ensuring continuity of care. (See Relative Placement 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 pur-

sued 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 be placed in an out-of-state facility or group home only 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).)

If a child is returned to or allowed to remain with the formerly custodial parent at disposition, the court may, but is not required to, offer the other parent reunification services. (*In re Pedro Z.* (2010) 190 Cal.App.4th 12; *In re A.L.* (2010) 188 Cal.App.4th 138.) Likewise, if a child is placed with a formerly noncustodial parent under section 361.2, the court may, but is not required to, offer reunification services to the formerly custodial parent. (*In re Gabriel L.* (2009) 172 Cal.App.4th 644, 650.) However, if the noncustodial parent's request for custody is denied under section 361.2(a), then both the formerly custodial parent and the noncustodial parent are entitled to reunification services. (*In re Adrianna P.* (2008) 166 Cal. App.4th 44, 53–54.)

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 suc-

cessful reunification excuse 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. While the Court of Appeal has determined that guardians appointed by the juvenile court in conjunction with dependency proceedings have no such right, the juvenile court has the authority to order reunification services for a legal guardian if it determines that maintaining the legal guardianship is in the child's best interest. (*In re Z.C.* (2009) 178 Cal.App.4th 1271; § 366.3(b).) The social worker's report addressing potential termination of the legal guardianship must also identify recommended family maintenance or reunification services to maintain the legal guardianship and set forth a plan for providing those services. (*In re Jessica C.* (2007) 151 Cal.App.4th 474; § 366.3(b).)

 **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.* (2005) 129 Cal.App.4th 1408, 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.)

The petition to terminate the guardianship must be initiated under section 387, not section 388, when termination of the guardianship will result in foster care placement, a more restrictive placement

for the child. (*In re Carlos E.*, *supra*, 129 Cal.App.4th at p. 1418–1419; *In re Jessica C.*, *supra*, 151 Cal.App.4th at p. 477.)

(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); Welf. & Inst. Code, § 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 par-

ent 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 disentitlement 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 convinc-

ing 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). However, for a section 300(e) petition to be sustained against a parent who did not commit the abuse, there must be evidence that the parent “knew or reasonably should have known” of the abuse. (*L.Z. v. Superior Court* (2010) 188 Cal.App.4th 1285; *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.*, *supra*, 123 Cal.App.4th at p. 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.)

Section 361.5(b)(6) does not apply in cases where the parent was merely negligent, but it does apply in cases where the parent caused the harm by acts of omission rather than commission or where parental misconduct is the only

possible explanation for a child's injuries. (See *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839 [if parent was merely negligent, § 361.5(b)(6) does not apply]; *Amber K. v. Superior Court* (2006) 146 Cal.App.4th 553 [§ 361.5(b)(6) applies to mother's knowledge and "implicit consent" to sexual abuse by father]; *Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292 [§ 361.5(b)(6) applies to parent's failure to seek medical treatment for child's broken leg].)

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 un-

less 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. (*In re Albert T.* (2006) 144 Cal.App.4th 207 [parent's efforts to resolve problems that led to sibling's removal may be reasonable even if

unsuccessful; by making such efforts, parent has “earned the right to try” to reunify]; *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 about 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 about 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 as defined in Penal Code section 667.5(c). Once the court finds this 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

For parents whose child was three years of age or older when initially removed, the section 366.21(f) hearing must be scheduled 12 months from the date the child entered foster care, which is defined as the date of the jurisdictional hearing or 60 days after initial removal, whichever is earlier. (See § 361.49.) For parents whose child was under three when initially removed, the section 366.21(e) hearing must be scheduled six months from the date of the dispositional hearing. If the dispositional hearing is delayed so that the 366.21(e) hearing will occur after the date scheduled for the 366.21(f) hearing, the 366.21(f) hearing must be held either concurrently or consecutively with the 366.21(e) hearing, so that both hearings take place within 12 months from the date the child entered foster care. Services may be extended to 18 months from the date the child was initially removed from the parent, but only if the court finds that there is a substantial probability of return within the extended period of time or that the parent was not provided reasonable services. (§ 361.5(a)(3); see also Status Reviews black letter discussion.) Services may also be extended to 24 months from the date the child was initially removed from the parent, but only if the court finds that it is in the child's best interest and there is a substantial probability that the child will be returned to the parent, as described in section 366.22(b), within the extended period of time. (§ 361.5(a)(4); see also Status Reviews black letter discussion.)

These time limits do not 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. (See *In re Neil D.* (2007) 155 Cal.App.4th 219 [parent may be ordered into residential drug treatment program as part of case plan]; *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 (ILPs) 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)–(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; see *In re A.E.* (2008) 168 Cal.App.4th 1.)



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 the court limits the parent's right to make education decisions, it must specifically address that in the court order. The court at the same time must appoint a responsible adult as educational representative whether or not the child qualifies for special education or other educational services. All findings and orders about educational decisionmaking must be documented in Judicial Council form JV-535, *Findings and Orders Limiting Right to Make Educational Decisions for the Child, Appointing Educational Representative, and Determining Child's Educational Needs*. (§§ 361(a), 726(b); Cal. Rules of Court, rules 5.502, 5.650.) The court should consider the following individuals as the child's educational representative: adult relative, nonrelative extended family member, foster parent, family friend, mentor, or CASA volunteer. The court may not appoint any individual who would have a conflict of interest, including social workers, probation officers, group home staff, or an employee of the school district. (Ed. Code, § 56055.) The educational representative has all education rights normally held by the parent. See California Rules of Court, rule 5.650(f) for a list of the rights and responsibilities and rule 5.650(g) for the term of service.

If the court is unable to locate a responsible adult to serve as educational representative for the child and the child either has been referred to the local educational agency (LEA) for special education or has an individualized education plan (IEP), the court must refer the child to the LEA for appointment of a “surrogate parent” using form JV-535. Within 30 days the LEA must make reasonable efforts to appoint a surrogate parent and communicate the information to the court on form JV-536. The surrogate parent makes decisions related to special education evaluation, eligibility, planning, and services. (§§ 361(a), 726(b); Cal. Rules of Court, rule 5.650(b)–(d).)

If the court cannot identify a responsible adult to make education decisions for the child and the child does not qualify for special education, the court may make education decisions for the child with the input of any interested person. (§ 319(g)(2); Cal. Rules of Court, rule 5.650(b).)



TIP The issue of education rights must be addressed at detention and disposition, even if only to make clear that the parent retains the right to make education decisions. If the education rights were temporarily limited at detention, the court must make a permanent order at the disposition hearing if the limitation is still appropriate. Education rights should be addressed at each hearing and after each placement change if the foster parent is appointed the educational representative.

c. Orders Involving the Child

(i) Minor 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.)



TIP Where the minor parent is a dependent, an agreement pursuant to section 301 should not be undertaken until the parent has consulted with counsel. (§ 301(c).)

(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].)

iii. Education

At the disposition hearing and at all subsequent hearings, the juvenile court must address and determine the child's general and special education needs, identify a plan for meeting those needs, and provide a clear, written statement specifying the person who holds the education rights for the child. The court must make findings and orders regarding the child's needs and whether they are being met and identify services/assessments the child needs. (§ 362(a); Cal. Rules of Court, rule 5.651(b).) The court may restrict a parent from home schooling a child if the parent is judicially determined not to be fit and the restriction on home schooling is necessary to protect the safety of the child. (*Jonathan L. v. Superior Court* (2008) 165 Cal. App.4th 1074.)

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." (§ 362.1(a).) Although the frequency and duration of visits can be limited and other conditions imposed if necessary to protect the child's emotional well-being, parent-child visitation cannot be denied entirely unless it would "jeopardize the *safety* of the child." (*In re C.C.* (2009) 172 Cal.App.4th 1481 [emphasis added].) Disputes over visitation may arise when a child does not want to visit and/or the child's caregiver or therapist thinks visitation is harmful. (See Visitation fact sheet for detailed discussion.) 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.)

Incarcerated and institutionalized parents are entitled to reunification services, including visitation, unless there is clear and convincing evidence that such services would be detrimental to the child. (§ 361.5(e)(1); see also sections on incarcerated parents in Parents' Rights and Visitation fact sheets.)

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, unless the court finds by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of 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.
 - School progress and issues (grades, discipline, programs and activities).
 - 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.
 - Ensure needed educational supports and rights are in place.
 - 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 education rights need to be restored or otherwise addressed.
 - 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 (JRs), 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. If the child was removed from the custodial parent and placed with the formerly noncustodial parent, then the review hearings are conducted pursuant to section 361.2(a)(3), not section 364. (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451.) The court must determine, under section 361.2(b)(3), “which parent, if either, shall have custody of the child.” If the court determines at a review hearing that jurisdiction may be terminated with a family law order granting custody to the previously noncustodial parent, the court need not inquire whether the previously custodial parent received reasonable reunification services. (*Id.* at p. 1455.) Similarly, if a child is initially detained from both parents but later placed with one parent, the court may then terminate reunification services for the other parent. (*In re Gabriel L.* (2009) 172 Cal. App.4th 644; but see *In re Calvin P.* (2009) 178 Cal.App.4th 958, 964 [if the court does order reunification services for one parent after returning the child to the other parent, the agency must provide reasonable services].)

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 assume 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 by 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 (FLOs), 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. In cases involving ongoing conflict between parents, clear and specific visitation provisions in exit orders can be crucial in preventing future disputes and minimizing trauma to children.

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 parent's right to make education decisions should be restored or limited.
 - Whether child needs additional educational support.
 - 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.
 - Who is holding education rights.
 - Whether the child's educational needs are being met.
 - 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 caregiver (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).
 - If limited, whether education rights should be restored.
 - 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.
 - Education rights.
 - 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 5.710–5.722.) 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 5.710–5.722.)

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 does not take place until one year after the child is detained, the section 366.21(f) hearing must be set no more than two months after the disposition so that it occurs 12 months from the date the child entered foster care. (§ 361.5(a)(1)(A).) As a result, the section 366.21(e) hearing is held either between the disposition and section 366.21(f) hearing or concurrently with the sec-

tion 366.21(f) hearing. (§ 361.5(a)(1)(B).) If further reunification services are ordered, the section 366.22 hearing still takes place 18 months from the date of removal, and the section 366.25 hearing, if there is one, takes place 24 months from the date of removal. (§ 361.5(a)(3) & (4).)

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 hospital hold pursuant to section 309(b). (Cal. Rules of Court, rule 5.502(18).)

5. For the 24-Month Hearing

The section 366.25 hearing must be held within 24 months of the child's initial removal from the parent's or guardian's custody. (§§ 366.22(b), 366.25; Cal. Rules of Court, rule 5.722.) Section 366.22(b), which allows the court to continue services to the 24-month date, applies only to parents or guardians who either are in a substance abuse treatment program or were recently discharged from institutionalization or incarceration.

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), 5.710(b), 5.715(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.) A detailed status report on the child's behavioral, developmental, and educational needs, status, and plans must be included, as outlined in California Rules of Court, rule 5.651(c), even if the child is not of school age.

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).) However, a parent's poverty and/or lack of adequate housing has been found insufficient to meet the “substantial risk of harm” standard. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394; *In re P.C.* (2008) 165 Cal. App.4th 98; *In re G.S.R.* (2008) 159 Cal.App.4th 1202.)

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 others have held that a showing by 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 *In re Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1400.)

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; *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340 [caseworker must accurately inform parent of case plan requirements and maintain contact with service providers; agency cannot use its own failure to ensure that parent is enrolled in correct programs as reason to terminate reunification services]; *In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1202 [if a parent's inadequate housing is a barrier to reunification, agency must assist parent in finding housing].)

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.) For the court to determine what services are reasonable, the agency must document the services in the case plan that are available and the court must consider any barriers to the parent's access to services and his or her ability to maintain contact with the child. (§ 361.5(a)(2) & (3).)

However, the Legislature did not intend to automatically toll the timelines or extend reunification services to the 18- or 24-month date for incarcerated or institutionalized parents nor give these parents a free pass on compliance with their case plans. The barriers faced by these parents are just one of many factors the court must consider when deciding whether to continue services. (*A.H. v. Superior Court* (2010) 182 Cal.App.4th 1050.)



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 be provided for 6 months from the dispositional hearing but no more than 12 months from the date the child entered foster care. (§ 361.5(a)(1)(B).) How-

ever, 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)(3), 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 1.5(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.”

If the county agency wishes to terminate reunification services in less than six months, it must file a petition under section 388(c) and show either that there is a change of circumstances or new evidence justifying a bypass of reunification services under section 361.5(b) or (e) or that the parent’s actions or inactions (such as failing to visit the child or to make progress on the case plan) have created a substantial likelihood that reunification will not occur. The court must take into account any special circumstances such as a parent’s incarceration, institutionalization, or participation in residential drug treatment and must find that reasonable services have been offered prior to granting a petition for early termination of reunification services.

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(a)(3), 366.21(g)(1).)

3. 18- and 24-Month Outside Limits

In most cases, the maximum period for reunification 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(18).) This period may be exceeded only under “exceptional circumstances”; in such cases, the subsequent hearing is also conducted pursuant to section 366.22.

When a child is placed with a previously noncustodial parent, the 18-month time limit does not start running for the parent from whom the child was detained, unless the child is subsequently removed from both parents. (*In re A.C.* (2008) 169 Cal.App.4th 636.)

The 18-month reunification period may be extended for another six months, to a 24-month section 366.25 hearing, if the court finds by clear and convincing evidence that further reunification services are in the child’s best interest; the parent is making consistent progress in a substance abuse treatment program or was recently discharged from incarceration or institutionalization and is making significant and consistent progress in establishing a safe home for the child’s return; and there is a substantial probability that the

child will be safely returned within the extended period or that reasonable services were not provided. The section 366.25 hearing must be held within 24 months of the child's initial removal. (§§ 361.5(a)(4), 366.22(b).)

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

If the child was removed from the custodial parent and placed with the formerly noncustodial parent, then the review hearings are conducted pursuant to section 361.2(a)(3), not section 364. (*In re Jane W.* (2006) 140 Cal.App.4th 1444, 1451.) The court must determine, under section 361.2(b)(3), "which parent, if either, shall have custody of the child." If the court determines at a review hearing that jurisdiction may be terminated with a family law order granting custody to the previously noncustodial parent, the court need not inquire whether the previously custodial parent received reasonable reunification services. (*Id.* at p. 1455.) Similarly, if a child is initially detained from both parents but later placed with one parent, the court may then terminate reunification services for the other parent. (*In re Gabriel L.* (2009) 172 Cal. App.4th 644.) However, if the court does order reunification ser-

vices for the parent with whom the child is not placed, the services must be reasonable.

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.

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. Even

if the parent has already received the statutory maximum period of reunification services, the court may order family maintenance services after returning the child to the parent's home. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285.)



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 sec-

tion 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 within six months. (§ 366.21(e).) At the 12-month hearing, the standard for continuing services is more restrictive: the court must find a substantial probability that the child *will* be returned within six months and that the parent meets all three criteria listed in section 366.21(g)(1)(A)–(C). (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166.) Thus, “[t]he effect of these shifting standards is to make services during these three periods first presumed, then possible, then disfavored.” (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843.)

d. Exceptional Circumstances / Special-Needs Parent

Section 366.22 gives the court three options at the 18-month review hearing: return the child to the parent, continue reunification services for six months to the 24-month review hearing if the criteria under section 366.22(b) are met, or 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-, 18-, or 24-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).) When a child is placed in a planned permanent living arrangement under section 366.21, 366.22, or 366.26, the foster parent, relative caretaker, or nonrelative extended family member has the right to represent the child in educational matters if the court limited the right of the parent or guardian to make education decisions on behalf of the child. The foster parent may be excluded from making education decisions by court order. (§§ 361(a)(5), 366.27(b); Ed. Code, §§ 56028–56055.)



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.



TIP At or before the time of a court order placing a child in a planned permanent living arrangement, clarify who holds the right to make education decisions and ensure that the order assigning education rights (Judicial Council form JV-535) is executed. Some caregivers in planned permanent living arrangements are forbidden to hold education rights. For example, group home staff are prohibited from holding education rights by both federal and state law because of conflict of interest. Also, a foster parent may be specifically excluded from making education rights by court order.

To ensure that the child's education needs are met, ask the court to make an order giving the education rights to a foster parent, relative caregiver, nonrelated extended family member, or a CASA prior to making the order placing the child in a permanent planned living arrangement.

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, 366.25(a)(3); Cal. Rules of Court, rule 5.715(d)(3).) The court may also terminate reunification services for one parent and continue reunification services for the other parent. (*In re Jesse W.* (2007) 157 Cal.App.4th 49.)

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). However, at review hearings concerning youth over 18, the youth's legal status as an adult is in itself a compelling reason not to hold a section 366.26 hearing. (§ 366.21(g)(3).)

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 con-

sider 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 18-month limit if the court finds that “exceptional circumstances” so warrant. (*In re Elizabeth R.*, *supra*, 35 Cal.App.4th at p. 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.

EXTENDING REUNIFICATION FOR PARENTS RECENTLY RELEASED OR IN TREATMENT

Reunification services may be extended for another six months beyond the 18-month hearing if the court finds by clear and convincing evidence that further reunification services are in the child’s best interest; the parent is making consistent progress in a substance abuse

treatment program or was recently discharged from incarceration or institutionalization and is making significant and consistent progress in establishing a safe home for the child's return; and there is a substantial probability that the child will be safely returned within the extended period or that reasonable services were not provided. This hearing, held pursuant to section 366.25, is called a subsequent permanency review hearing. (§§ 361.5(4), 366.22(b), 366.25.)

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(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.*, *supra*, 123 Cal. App.4th at p. 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. Educational Rights and Needs

At each review hearing, the court must consider, and the social worker's report must address, whether the parent's right to make education decisions for the child should be limited. (§ 366.1(e); Ed. Code, § 56055; Cal. Rules of Court, rule 5.650.) 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 education rights. (See fact sheet on education rights.)

The court must consider, and the social worker's report must address, the child's general and special education needs at every hearing. The social worker and the probation officer must provide, to the extent available, an in-depth report on the child's educational needs, services, and achievements, even if the child is not of school age. (Cal. Rules of Court, rule 5.651.)

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.)

When a relative voluntarily comes forward at a time when a new placement is not required, the relative is entitled to the preference

and the court and the social worker are obligated to evaluate that relative. (*In re Joseph T.* (2008) 163 Cal.App.4th 787.)

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.)

5. Transition to Independence

If the review hearing is the last review before the child turns 18 or if the hearing concerns a nonminor dependent, the court must also address the goals and services described in the transitional independent living plan (TILP) and ensure that the youth is informed of the right either to seek termination of dependency under section 391 or to become or remain a nonminor dependent. (§ 366(a)(1)(F) & (f).)

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)(1).)
- 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 court to make appropriate findings and orders for referrals (i.e., Special Immigrant Juvenile Status (SIJS) visa, regional center, IEP, etc.).
- Where appropriate, request that caregivers be designated as "prospective adoptive parents." (§ 366.26(n).)
- If parental rights terminated and not previously ordered, request court to place education rights with caregivers or prospective adoptive parents.
- 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 caregiver 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 caregiver.
 - 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 within 60 days after rendition of the judgment.
- 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 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. (§§ 224.2(a)(1), 294(h)(1); Cal. Rules of Court, rule 5.481(b).)

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].)

One Court of Appeal decision held that the rights of a noncustodial parent against whom no allegations were ever filed cannot be terminated without a judicial finding of unfitness. (*In re Gladys L.*

(2006) 141 Cal.App.4th 845, 848.) Nevertheless, several later cases have held that a noncustodial parent's rights can be terminated even if the dependency petition did not contain, and/or the court did not sustain, any allegations against that parent, as long as the court has made findings by clear and convincing evidence at the dispositional and review hearings that placing the child with that parent would be detrimental. (*In re A.S.* (2009) 180 Cal.App.4th 351, 360–361; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1212; but see *In re G.S.R.* (2008) 159 Cal.App.4th 1202 [reversing termination of noncustodial parent's rights because he had visited regularly and maintained contact with agency and the only reason children were not placed with him was his poverty and lack of housing].) So, by the time of the section 366.26 hearing, the court should have already made the required findings that it would be detrimental to return the child to *either* parent.

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; *In re Thomas R.* (2006) 145 Cal.App.4th 726.)

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. (§§ 349, 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.)

Because the county agency has the burden of proof regarding adoptability, parents have a due process right to a contested hearing in which they can conduct cross-examination and challenge the sufficiency of the evidence. The court cannot require parents to make an offer of proof in order to contest this issue. (*In re Thomas R., supra*, 145 Cal.App.4th at p. 726.)

However, parents do not have 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.)

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.* (1998) 68 Cal.App.4th 811, 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 nor 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 permanency decisions are made 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; *In re Lesly G.* (2008) 162 Cal.App.4th 904.)

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. A child need not already be placed with a caregiver who is willing to adopt or who has an approved adoption home study for the court to make this finding, which is instead based on the age, health, and other characteristics of the child. (*In re I.I.* (2008) 168 Cal.App.4th 857; *In re R.C.* (2009) 169 Cal.App.4th 486; *In re Marina S.* (2005) 132 Cal.App.4th 158.) The fact that a caregiver is willing to adopt, however, may be considered as evidence of the child's general adoptability. (*In re I.I.*, *supra*, 168 Cal.App.4th at p. 870; *In re R.C.*, *supra*, 169 Cal.App.4th at p. 491; *In re Helen W.* (2007) 150 Cal.App.4th 71.) The adoptability determination focuses on the child as an individual; any issues regarding the child's attachment to siblings should be addressed under section 366.26(c)(1)(B)(v). (*In re I.I.*, *supra*, 168 Cal.App.4th at p. 872.)

In "specific adoptability" cases where a special-needs child is considered adoptable only because a specific person is willing to adopt him or her, the court must find that there is no legal impediment to adoption by that person. (*In re Valerie W.* (2008) 162 Cal.App.4th 1; *In re B.D.* (2008) 159 Cal.App.4th 1218.) The inquiry in such cases should be carefully limited, however, to prevent a section 366.26 adoptability inquiry from turning into an attack on the child's caregiver. (*In re Carl R.* (2005) 128 Cal.App.4th 1051.)

Many cases, however, fall somewhere on a continuum that ranges between instances where the availability of a prospective adoptive parent is not at all a factor in the adoptability assessment and instances where the child is found adoptable solely because the caregiver is willing to adopt. (*In re G.M.* (2010) 181 Cal.App.4th 552, 562.) Thus, evidence regarding any legal impediment to adoption by the current caregiver may be relevant even when the child's adoptability is not based solely on the caregiver's willingness to adopt. (*Ibid.*)

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 circumstances listed in section 7, above, applies, the court must terminate parental rights unless the court finds that one of the exceptions provided in section 366.26(c)(1)(A) and (B) applies. The exceptions are separated into two subdivisions; the rigorous “compelling reason” standard does not apply to the relative guardianship exception (§ 366.26(c)(1)(A)), but only to the exceptions that fall under (c)(1)(B)(i)–(vi), such as parent-child relationship and sibling relationship.

The order of preference in selecting a permanent plan for a child (§ 366.26(b)(1)–(6)) parallels the requirement that the court terminate parental rights unless one of the exceptions of section 366.(c)(1)(A) or (B) applies. The order of preference ranks adoption by a current caretaker first; followed by legal guardianship with a relative caretaker under the conditions specified in section 366.26(c)(1)(A); followed by identification of adoption as the goal and an order that the agency make efforts to find an adoptive home; followed by nonrelative guardianship; and last, long-term foster care.

a. Relative Preference for Legal Guardianship

This exception applies when a child is living with a relative who is unable or unwilling to adopt, for reasons that do not include unwillingness to accept legal or financial responsibility for the child, but who is willing to provide permanency through legal guardianship. (§ 366.26(c)(1)(A).)



TIP Children’s attorneys should carefully distinguish between relative caregivers who are genuinely committed to providing permanency for the child but who are unable or unwilling to adopt for reasons such as inability to obtain the consent of an absent

spouse or respect for an older child's wish to maintain legal ties to birth parents, versus relatives who are unwilling to adopt because they hope the parents will eventually reunify or they are not sure they can care for the child permanently.

b. 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)(B)(i); Cal Rules of Court, rule 5.725(e)(1)(B)(i).)



TIP To meet this requirement, counsel must 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*

Scott B. (2010) 188 Cal.App.4th 452 [court abused its discretion in denying exception because 11-year-old autistic child was strongly bonded to mother and would suffer emotional harm from loss of regular contact with her]; *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; the exception should not be denied merely because of a prospective adoptive parent’s unenforceable promise to allow parent-child visitation. (*In re S.B.* (2008) 164 Cal. App.4th 289.)



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)(B)(i) 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.

c. 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)(ii).) 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.

d. 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 children with severe disabilities 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)(B)(iii); *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.)

e. Child Bonded to Nonrelative Caregiver Who Is Unwilling or Unable to Adopt

This exception applies to a child living with a foster parent or Indian custodian 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 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; or
- The child is under age six.

(§ 366.26(c)(1)(B)(iv).)

f. 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)(B)(v).) 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 Valerie A.* (2007) 152 Cal. App.4th 987, 999; *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 juvenile court may find the exception applicable when a child *either* has shared significant

experiences with a sibling in the past *or* currently has a strong bond with a sibling. (*In re Valerie A. supra*, 152 Cal.App.4th at pp. 1008–1009.)

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 Valerie A., supra*, 152 Cal.App.4th at p. 1014; *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].)

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

Section 366.26(c)(1)(B)(vi) permits the court not to terminate the parental rights of an Indian child if there is a compelling reason that termination of parental rights would not be in the child’s best interest, including, but not limited to, the following: (1) termination of parental rights would substantially interfere with the child’s connection to the tribal community or tribal membership rights; or (2) the child’s tribe has identified guardianship, long-term foster care with a relative, tribal customary adoption, or another permanency plan for the child. Also, under section 366.26(c)(2)(B), a court may not terminate parental rights if the court has ordered tribal customary adoption pursuant to section 366.24.



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.* (2003) 106 Cal.App.4th 725, 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); *In re Lauren R.* (2007) 148 Cal. App.4th 841.)

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 subdivision 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)(A)

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 caregiver 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.*, *supra*, 132 Cal.App.4th at p. 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 be designated as “difficult to place” only 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 section 366.26(c)(1)(A) or (c)(1)(B)(i)–(vi) applies, it may appoint the current caregiver or another appropriate person as the child's legal guardian. 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 child with disabilities 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. (§§ 361(a)(5), 366.27(b); Ed. Code, § 56055; Cal. Rules of Court, rule 5.651.)

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 six 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. (See *De Facto Parent*, Prospec-

tive Adoptive Parent, and the Reasonably Prudent Parent fact sheet for detailed discussion.)

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 for an immigrant child to apply, the court must find that “reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law.” (8 C.F.R. § 204.11.)



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.
 - Ensuring educational needs are being addressed and met (placement, achievement, etc.).
- 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 education rights).
- Consider asking for hearing if it appears agency arbitrarily moved child.
- Ensure court addresses
 - Whether reasonable efforts were made to finalize permanent plan.
 - Child's particular educational, developmental, and mental health needs.
 - 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(e)(10).)
 - Whether to limit the parent's right to make education 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 caregiver 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 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 391 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 (RPPs) (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, including return to the home of the parent, must be considered. (§ 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 in 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.*, *supra*, 132 Cal. App.4th at p. 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, the child 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;
 - Whether the child’s educational, developmental, and mental health needs are being met;
 - 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 and nonminor dependents, 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;
- 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).)

After parental rights are terminated and adoption is selected as the child's permanent plan, the county agency has "exclusive care and control" of the child until adoption is finalized (§ 366.26(j)), so the court may not second-guess the agency's placement decisions. However, the court can still review adoptive placement decisions for abuse of discretion. (*In re Shirley K.* (2006) 140 Cal. App.4th 65.)

At the last review hearing before a foster youth turns 18 and at all review hearings concerning a nonminor dependent the agency's report must also address

- The youth's plans either to request that dependency be terminated or to remain a nonminor dependent;
- Efforts made to comply with the requirements of section 391; and
- The goals and services described in the transitional independent living plan (TILP).

(§ 366.3(l)–(n).)

For nonminor dependents, the review hearing must be conducted in a way that respects the youth's status as a legal adult. (§ 366.3(m).)¹

¹ These provisions take effect on January 1, 2012, but even prior to that date, attorneys for older foster youth should request that review hearings be conducted in accord with the policies expressed in section 366.3(l)–(n).

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) & (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 section 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 the setting of 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. (*Sylvia A.*, *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 usually the court will 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 Before the court terminates jurisdiction for a child in a legal guardianship, it is important for everyone involved to determine whether and how closing the case will affect the child's eligibility for funding and supportive services, especially if the child is receiving a special rate because of medical, emotional or behavioral problems and/or a child-care subsidy. (See discussion of Kin-GAP,

Kin-GAP Plus, and federal subsidized guardianship program in fact sheets on funding and termination of jurisdiction.)

d. Foster Youth Ages 18–21

Once a dependent youth reaches age 18, the youth may either request termination of dependency or remain in foster care as a non-minor dependent up to age 21. If the youth requests termination of jurisdiction, the court may order a trial period of independence of up to six months, during which the youth's foster care benefits and services can be reinstated if necessary. (§§ 366.31, 391.)²

Before terminating jurisdiction for a foster youth 18 or older, the court must conduct a hearing and ensure that the county agency has fulfilled all the requirements of section 391, including providing the youth with essential documents; assisting the youth in obtaining housing, employment and/or college or vocational education, and medical insurance and other benefits; and assisting the youth in maintaining relationships with relatives and other important persons in the youth's life. 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).)



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.)

² These provisions go into effect on January 1, 2012. Even prior to that time, however, attorneys for transition-age foster youth should counsel their clients on the potential benefits of remaining in the foster care system and should ensure that the county agency complies with all the requirements of section 391 before terminating jurisdiction.

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, nor 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 foster child or nonminor dependent pursuing independent living as a goal under section 366.31; (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.)

For nonminor dependents in long-term foster care or transitional housing, every six months the court must conduct review hearings focusing on the goals and services of the youth's TILP. (§ 366.3(m).)³



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.

³ This provision goes into effect on January 1, 2012.

**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. (See also *In re A.C.* (2008) 169 Cal.App.4th 636, which states that the timelines do not start running when a previously noncustodial parent receives custody and family maintenance services pursuant to section 361.2, unless the child is later removed from the previously noncustodial parent.)

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.) Similarly, a petition to terminate a guardianship must be initiated under section 387, not section 388, when termination of the guardianship will result in removal from a relative's home to foster care, regardless of whether the court made a general or a specific placement order. (*In re Jessica C.* (2007) 151 Cal. App.4th 474.)

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 contin-

ued 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.*, *supra*, 26 Cal.App.4th at p. 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). As rule 5.565(e) of the California Rules of Court requires the court to bifurcate the jurisdiction and disposition hearings generated as a result of the 387 petition, the court must conduct a full disposition hearing once a 387 petition is sustained. (*In re H.G.* (2006) 146 Cal.App.4th 1.)

 **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 *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 caregivers 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.*, *supra*, 26 Cal. App.4th at p. 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., supra*, 39 Cal.App.4th at pp. 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.) However, in cases where the child was

removed from the parents at the original dispositional hearing and then was returned to a parent's home, and then was again removed pursuant to a section 387 petition, the removal standard of section 361(c)(1) does not apply; the court need only find that the home-of-parent order was not effective in protecting the child. (*In re A.O.* (2010) 185 Cal.App.4th 103, 111–112.)



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 juris-

diction 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].) A 388 petition is not required to terminate a parent’s right to make educational decisions because, under California Rules of Court, rule 5.651(b), the court must address at detention, disposition, and all subsequent hearings the question of who should hold education rights for the child. If a hearing is not imminent, however, a 388 petition may be used to request that education rights be restored to the parent.

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.) Petitions under section 388 are also the proper vehicle for a party to request that the court terminate reunification services before the statutorily mandated time frame has expired. (§ 388(c).) 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 counsel 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.)

6. Former Foster Youth

Starting in January 2012, former foster youth for whom the court has ordered a trial period of independence under section 391 may

petition the court to resume dependency jurisdiction if the youth is in a college, vocational, or job training program, is employed, or is disabled. (§§ 388(e), 11403.)

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.*, *supra*, 100 Cal.App.4th at p. 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)(3).)

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 Cali-

ifornia 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 or New Evidence

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.* (2005) 128 Cal. App.4th 1051, 1072.)

A 388 petition may also be based on new evidence rather than changed circumstances. However, because of the importance of finality in dependency cases, courts are likely to construe the term “new evidence” narrowly, excluding any evidence that a party could have obtained at the time of trial. (*In re H.S.* (2010) 188 Cal.App.4th 103, 109–110 [“new” expert opinion based on evidence available at time of trial is not “new evidence” within the meaning of § 388].)

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.*, *supra*, 5 Cal.4th at p. 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 5.740(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.*, *supra*, 51 Cal.App.4th at pp. 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).) However, the juvenile court has the authority to order reunification services for a legal guardian if it determines that maintaining the legal guardianship is in the child's best interest. (*In re Z.C.* (2009) 178 Cal.App.4th 1271; § 366.3(b).) The social worker's report must, in addition to ad-

addressing potential termination of the legal guardianship, identify any recommended family maintenance or reunification services to maintain the legal guardianship and set forth a plan for providing those services. (*In re Jessica C.* (2007) 151 Cal.App.4th 474; § 366.3(b).)

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.



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Unless otherwise indicated, all citations are to
the California Welfare and Institutions Code.

ADOPTION

PARENTAL RIGHTS

1. Relinquishment by Parents

Either or both birth parents may relinquish a child for adoption at any time during dependency proceedings. (Fam. Code, § 8700(i).) Relinquishment requires a signed statement before two witnesses and an official of the adoption agency. (*Id.*, § 8700(a).) Both parents must consent to the adoption unless there is no presumed father or one or both parents have failed to support or communicate with the child for a year or more. (*Id.*, §§ 8604, 8605.)

Relinquishment becomes final 10 days after the documents are filed by the agency and can be rescinded only if one or both birth parents and the agency agree. (*Id.*, § 8700(e).) However, if the birth parents made a “designated relinquishment” naming specific adoptive parents and the agency does not place the child with those parents, the birth parents must be notified and have 30 days to rescind the relinquishment. (*Id.*, § 8700(g); see *In re R.S.* (2009) 179 Cal.App.4th 1137.)

2. Termination of Parental Rights

In California, termination of parental rights occurs at the conclusion of a selection and implementation hearing held pursuant to section 366.26. (See Selection and Implementation hearing chapter.)

If, following termination of parental rights, a child is not adopted within three years from the date parental rights were terminated (or sooner, if the social services agency stipulates that the child is no longer likely to be adopted), the child may petition for reinstatement of parental rights. (§ 366.26(i).) 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 reinstatement is in the child’s best interest.

PLACEMENT FOR ADOPTION

1. Placement With Agency; Court's Jurisdiction

After the birth parents have relinquished the child or parental rights have been terminated, the court places the child for adoption with the agency (this can be either the state adoption agency or the county social services agency, depending on whether the particular county has an adoption unit). The court retains jurisdiction until the adoption petition is granted and reviews the status of the child every six months “to ensure that the adoption . . . is completed as expeditiously as possible.” (§ 366.3.)

The agency has “exclusive custody and control of the child” until adoption is granted, and the court’s role is limited to reviewing adoptive placement decisions for abuse of discretion. (§ 366.26(j); Fam. Code, § 8704(a); see *In re Shirley K.* (2006) 140 Cal.App.4th 65.) No one other than the prospective adoptive parents with whom the agency has placed the child can file a petition to adopt the child. (Fam. Code, § 8704(b).) However, there are some limits on the agency’s discretion:

Caregiver preference (§ 366.26(k))—Adoption by a relative or nonrelative who has cared for the child is the preferred placement if the agency “determines that the child has substantial emotional ties to the relative caregiver or foster parent and removal from the relative caregiver or foster parent would be seriously detrimental to the child’s emotional well-being.” This preference means that the caregiver’s application for adoption and home study must be processed before anyone else’s. As soon as the child is placed for adoption, the caregiver preference applies. (*In re Lauren R.* (2007) 148 Cal.App.4th 841.)

Prospective adoptive parents (§ 366.26(n))—The court, at or after the section 366.26 hearing, is allowed to designate the child’s current caregivers as “prospective adoptive parents” if they have cared for the child at least six months and have taken at least “one step to facilitate the adoption process” (e.g., applying for a home

study, signing an adoptive placement agreement, working to overcome impediments to adoption).

Prospective adoptive parents have a right to a hearing if the county agency seeks to remove the child, at which hearing the court determines whether removal is in the child's best interest.



TIP The “best-interest” standard for removal from a prospective adoptive parent is much less deferential than the abuse-of-discretion standard that otherwise applies to court review of an agency’s adoptive placement decision. Attorneys should consider requesting designation of caregivers as prospective adoptive parents.

Removal after adoption petition is filed (Fam. Code, § 8704(b))—After an adoption petition has been filed, the agency may remove the child from the prospective adoptive parents only with court approval and must submit an affidavit explaining the reasons for its refusal to consent to the adoption. The court may still order the adoption if it finds that the agency’s refusal to consent is not in the child’s best interest.

2. Requirements for Adoption

The adoptive parent must be at least 10 years older than the child, unless the adoptive parent is a stepparent, a sibling, an aunt or uncle, or a first cousin (or a spouse of one of these relatives), *Id.*, § 8601.) A prospective adoptive parent who is married must obtain his or her spouse’s consent to adoption. (*Id.*, § 8603.)

Race, color, national origin, or the fact that the prospective adoptive parent lives in another county or another state may not be a basis for delay or denial of adoptive placement. (*Id.*, § 8708.) However, the child’s religious background may be considered in the adoptive placement decision. (*Id.*, § 8709.)

Prospective adoptive parents must be fingerprinted and have a criminal background check. Having a criminal record does not automatically disqualify a person from becoming an adoptive parent. However, the agency cannot place a dependent child with anyone

who has a criminal conviction unless a waiver is obtained as required by section 361.4. But even if a waiver is obtained, the agency may still consider the criminal record in deciding whether to approve the adoption home study. (*Id.*, § 8712.)

The agency must inform prospective adoptive parents of the family background, medical history, and any known special needs of the child. (*Id.*, §§ 8706, 8733.)

3. Adoption Assessment/Home Study

The agency must prepare, and the court must read and consider, a report meeting the requirements of Family Code section 8715. If the prospective adoptive parent is a foster parent or relative caregiver with whom the child has lived for at least six months, a simplified home study process under Family Code section 8730 may be used instead.

The home study process is governed by state regulations set forth in the *Adoptions Users Manual* (Cal. Dept. of Social Services, 2001), section 35180 et seq., and includes interviews; review of criminal and child abuse/neglect records, medical exams, and references; employment/income verification; review of school and health records of the adoptive parents' other children; and assessment of parenting abilities and the physical safety of the home.



TIP If the adoption agency denies approval of a home study and the child's attorney believes the adoptive placement is in the child's best interest, the child's attorney should consider the following strategies:

- Encourage the caregiver to request an administrative grievance hearing.
- If the caregiver qualifies as a prospective adoptive parent under section 366.26(n), request a hearing if the agency plans to remove the child.

- If an adoption petition has already been filed, set a hearing under Family Code section 8704(b) and ask the court to order the adoption over the agency's objection.
- Ask the court not to terminate parental rights until the issue of home study approval is resolved.

4. Adoption Procedure

After a petition for adoption is filed, the court sets a hearing and proceeds with the adoption after the birth parents' appeal rights are exhausted. (§ 366.26(b)(1).)

Adoption proceedings for dependent children may be held in juvenile court, or the prospective adoptive parents may file a petition for adoption in another court. (§ 366.26(e).) Adoption proceedings are private. (Fam. Code, § 8611.) The standard for granting an adoption petition is whether "the interest of the child will be promoted by the adoption." (*Id.*, § 8612.)

Before the adoption finalization hearing, the prospective adoptive parents must sign an adoptive placement agreement, execute a postadoption contact agreement if applicable, and have an attorney prepare and file an adoption petition.

POSTADOPTION AGREEMENTS AND FINANCIAL SUPPORT

1. Postadoption Contact Agreements

Pursuant to a postadoption contact agreement, the court may include provisions for postadoptive contact with siblings, birth parents, and/or other relatives in the final adoption order. (§§ 366.29, 16002; Fam. Code, § 8616.5.) Postadoption contact agreements can be negotiated either before or after the section 366.26 hearing.

Postadoption contact is voluntary, and prospective adoptive parents cannot be compelled to agree to it. However, with regard to siblings, agencies must "encourage prospective adoptive parents to make a plan for facilitating post-adoptive contact." (§ 16002(e)(3).)

Children 12 and older must agree to any postadoption contact agreement, or the court must find that the agreement is in the child's best interest. Dependent children have the right to be represented by an attorney for purposes of consent to postadoption contact agreements. (Fam. Code, § 8616.5(d).)

Postadoption contact agreements must be filed with the adoption petition, and the agency's report must address whether the agreement was entered into voluntarily and whether it is in the child's best interest. (*Id.*, § 8715.)

Enforcement of postadoption contact agreements is limited. Noncompliance does not invalidate the adoption or provide a basis for orders changing custody of the child. (§ 366.29; Fam. Code, § 8616.5(e).) Sibling contact agreements do not limit the adoptive parents' right to move, and adoptive parents can terminate sibling contact if they determine that it poses a threat to the health, safety, or well-being of the adopted child. (§ 366.29(a) & (b).) Postadoption contact agreements may be modified or terminated if all parties agree or if the court finds a substantial change of circumstances that necessitates a modification or termination to serve the child's best interest. (Fam. Code, § 8616.5(h).)

The court that grants an adoption retains jurisdiction to enforce postadoption contact agreements. Parties must participate in mediation before seeking enforcement. The court may order compliance only if it finds that enforcing the agreement is in the child's best interest. (§ 366.29(c); Fam. Code, § 8616.5(f).)

2. Postadoption Benefits and Support

Adoptive parents of dependent children are eligible for the Adoption Assistance Program (AAP). (See §§ 16115–16125.) The payment rate is determined on a case-by-case basis but generally is equivalent to the foster care rate. Adopted dependent children remain eligible for Medi-Cal regardless of the adoptive parents' income. Adoptive parents remain eligible for AAP benefits even if they move out of county or out of state.

Adoptive parents are also eligible for postadoption support services such as respite care, counseling/therapy, and facilitation of postadoption contact. (§ 16124.)

ADOPTION OF INDIAN CHILD

Adoption of an Indian child involves additional requirements and special procedures. (Fam. Code, § 8606.5 [consent]; *id.*, § 8616.5 [postadoption contact agreements]; *id.*, § 8619 [information about child's Indian ancestry]; *id.*, § 8619.5 [reinstatement of parental rights]; *id.*, § 8620 [relinquishment, procedures, notices].)

Also, section 366.26 provides an additional permanency planning option for Indian children: tribal or customary adoption. "Tribal customary adoption" means "adoption by and through the tribal custom, traditions or law of an Indian child's tribe. Termination of parental rights is not required to effect the tribal customary adoption." (§ 366.24(a).) See ICWA fact sheet for additional details.

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(10); *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.) However, where de facto status is already established, an isolated incident of misconduct by the de facto parent does not require the court

to terminate this status. (*In re D.R.* (2010) 185 Cal.App.4th 852, 861–862.)

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; see also *In re D.R.*, *supra*, 185 Cal.App.4th at p. 852.)

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 caregiver 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).)

Caregivers have the right to a hearing at which they can present evidence and argument on whether they should be granted prospective adoptive parent status. (*In re Wayne F.* (2006) 145 Cal.App.4th 1331.)



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 (NREFMs). (§ 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 and group home staff must 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

Independent of the constitutional interests of their parents, children have constitutional interests in dependency proceedings.

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; confidentiality of health and mental health information (§ 317(f))—A dependent child or the child's attorney may invoke the doctor-patient, therapist-client, and clergy-penitent privileges. If the child is over 12, there is a rebuttable presumption that

the child is mature enough to decide whether to invoke or waive these privileges. (See *In re S.A.* (2010) 182 Cal.App.4th 1128.)

Children’s health and mental health records are also protected by federal and state confidentiality laws; however, these laws do allow health and mental health providers to share information with county agency caseworkers and caregivers for purposes of coordinating care. (§ 5328; Civ. Code, § 56.103.)

Right to participate in hearings—Dependent children have the right to be present at all hearings and to address the court and otherwise participate. If a child 10 or older is not present, the court must inquire as to whether the child had notice of the hearing and why the child is not present, and it must continue the hearing if the child wishes to be present but was not given the opportunity to attend. (§ 349.)

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.) Under rule 5.651 of the California Rules of Court, the court must address, starting at detention and at every subsequent hearing, whether the parent's or guardian's education rights should be limited and given to another person. If the court gives the right to make education decisions to someone other than the parent, the court must provide a clear statement of the order on Judicial Council form JV-535. The court should consider appointing a relative, nonrelated extended family member, mentor, CASA, or community volunteer as the responsible adult. (*Note:* Under rule 5.502(13), this person is also referred to as an educational representative.) However, an individual with a conflict of interest, such as a social worker, group home staff member, probation officer, or therapist, may not be appointed. (20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. § 300.519(d)(2)(i); Cal. Rules of Court, rule 5.650(c).)

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; Cal. Rules of Court, rule 5.651.)



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; Cal. Rules of Court, rules 5.650, 5.651.) Judges should consider appointing relatives, nonrelated extended family members, caregivers, mentors, CASAs, and community volunteers as educational representatives. (*Id.*, rule 5.650(c).) The representative holds all the education rights normally held by parents. (See *id.*, rule 5.650(e) & (f), for a list of rights.) The person holds this responsibility until the court restores the parent's or guardian's education rights, a guardian/conservator is appointed, the child turns 18 years old, another person is appointed,

or the child is placed in a planned permanent living arrangement and the court appoints the caregiver as the educational representative. (§§ 361(a), 726(b); Ed. Code, § 56055; Cal. Rules of Court, rule 5.650(e)(2) & (g).)

c. Surrogate Parents

If the court is unable to identify an educational representative and the child is eligible for (or needs to be assessed for) special education services, the court must use Judicial Council form JV-535 to request that the school district in which the child resides appoint a surrogate parent within 30 days. (Cal. Rules of Court, rule 5.650(d).) The role of the surrogate parent is to represent the student with exceptional needs in all matters relating to identification, assessment, instructional planning and development, educational placement, and reviews and revisions of the individualized education program (IEP) and in all matters relating to the provision of a free, appropriate education for the child. The surrogate parent may not be an employee of the California Department of Education, the school district, or any other agency involved in educating or caring for the child. He or she must have knowledge and skills to ensure adequate representation. The school district must provide training before appointment, and the surrogate parent must meet with the child at least once. (34 C.F.R. § 300.519; 20 U.S.C. § 1415; Gov. Code, § 7579.5.) 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 IEPs. (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 a Child's Education

a. General

Under California Rules of Court, rule 5.651(c), the court has broad responsibility for the education of dependent children, and the social study report must include information on a broad range of educational issues. At every hearing, the child's attorney should review the educational information and identify a plan for meeting the child's needs, including, but not limited to, whether the parent or guardian should be the holder of education rights; whether the child is attending his or her school of origin and, if not, whether the school placement is in compliance with the McKinney-Vento Act and state law (see "Transfer and Enrollment Issues," following); whether the child is attending a comprehensive, regular public school or private school; whether the child was immediately enrolled and the education records transferred promptly to the new school; whether the child's educational, physical, mental health, or developmental needs are being met; whether the child has the opportunity to participate in developmentally appropriate extracurricular and social activities; whether the child needs to be assessed for early intervention or special education services; and so forth. (§§ 361, 726; Ed. Code, §§ 46069, 48850, 48853, 48853.5, 49076; Cal. Rules of Court, rules 5.650, 5.651.)

b. Detention

At the initial hearing, the court must consider whether the parent's or guardian's education rights should be limited. If the court limits these rights, even temporarily, it must identify the educational representative on Judicial Council form JV-535. (§§ 319, 726(b); Cal. Rules of Court, rules 5.650(b), 5.651(b).) This order expires at disposition or dismissal of the petition. Any right to limit education rights must therefore be readdressed at disposition. (§ 319(g)(3).)

c. Disposition and Beyond

At the disposition hearing and all subsequent hearings, the court must address the educational rights of the child and determine who will hold those rights. If the court limits the parent's right to make education decisions for the child, it must document the order on Judicial Council form JV-535. (§§ 361(a), 726(b); Cal. Rules of Court, rule 5.651(b).) If the court cannot identify an educational representative and the child does not qualify for special education, the court may make education decisions for the child with the input of any interested person. (§§ 319(g)(2), 361(a); Cal. Rules of Court, rule 5.650(b).)

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.)

Charter schools may be exempt from most laws governing school districts; however, if a charter school is a participating member of a special education local plan area (SELPA), it must comply with foster children’s education rights and must provide special education services. (*Wells v. One2One Learning Foundation* (2006) 141 P.3d 225, 249.)

3. Change of School and Residency

If a proposed change in placement would cause a foster child to be removed from his or her school of origin, the social worker must notify the court, the child's attorney, the educational representative, or the surrogate parent within 24 hours, excluding nonjudicial days. If the child has a disability and an active IEP, then at least 10 days' notice is required before change in placement. After receipt of the notice, the child's attorney must discuss the proposed move with the child and the education rights holder. The child's attorney or the educational representative may request a hearing, using Judicial Council form JV-539, no later than 2 court days after receipt of the notice. A hearing must be scheduled within 7 calendar days after the notice is filed. The court must determine whether the placement change affecting the school of origin is in the child's best interest. (Cal. Rules of Court, rule 5.651(e) & (f).)

Under federal and state law, a foster child has a right to a meaningful education, including access to the academic resources, services, and extracurricular and enrichment activities available to all students. A foster child who changes residences pursuant to a court order or decision of a child welfare worker must be immediately deemed to meet all residency requirements for participation in interscholastic sports or other extracurricular activities. (42 U.S.C. § 11301; Ed. Code, § 48850.)



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. Another option to support the educational stability of foster children is to request that reasonable transportation costs to a child's school of origin be included in the caregiver's foster care maintenance payment. Under the federal Fostering Con-

nections to Success and Increasing Adoptions Act of 2008, the local child welfare agency may apply federal funds to cover education-related transportation costs for children in foster care. It expands the definition of “foster care maintenance payments” to include reasonable transportation to a child’s school of origin. (Pub.L. No. 10-351, § 204.)



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.

4. High School Graduation

Students who are in foster care are exempt from local school district graduation requirements that exceed state graduation requirements if they transfer to a district or school in the 11th or 12th grade and would not be reasonably able to complete the additional district requirements prior to graduation. (Ed. Code, § 51225.3.)

Several programs are available to assist foster youth with college applications, housing during college, and financial support. For example, California Community College Tuition Assistance provides virtually free tuition for foster youth. Chafee Education and Training Vouchers offers up to \$5,000 per year to foster youth if they were in the foster care system on or after their 16th birthdays.

Some California state college campuses have designed local programs for former foster youth, including year-round housing during school breaks and summer sessions. A variety of scholarship programs specific to foster youth are available at California State University and University of California campuses throughout California. These programs go by different names—e.g., Guardian Scholars, Renaissance Scholars, CME Society, and Promise Scholars.

Many private, nonprofit organizations, such as United Friends of Children, provide scholarships and postsecondary support to foster youth. Other grants for low-income students, including foster youth, include Cal Grants and the Board of Governors Grant.

 **TIP** To be eligible for the variety of financial assistance programs available for college, a foster youth must apply for Free Application for Federal Student Aid (FAFSA) through the U.S. Department of Education at www.fafsa.ed.gov. Encourage a foster youth to apply early, before the March deadline, to meet early admissions deadlines and ensure funds are available. With proof that the youth is or was a dependent or ward of the juvenile court system, the fee to apply for federal student aid will be waived. A letter of eligibility should be available from the youth's social worker, minor's counsel, or probation officer. Prior to closing the case, advise the youth to ask for this letter documenting his or her status as a foster youth and the dates the case was opened and closed.

 **TIP** More information on specific financial aid, on-campus support programs, and participating campuses can be found at www.ilponline.org and www.cacollegepathways.org. For scholarship opportunities, direct the youth to www.fastweb.com.

5. Nonpublic School Enrollment

There is a presumption that a foster youth will be placed in a mainstream public school unless the youth has an IEP requiring placement outside the public school or the person who holds education rights determines that placement in another educational program is in the child's best interest. (*Id.*, § 48853.) If the educational representative makes a unilateral decision to place a foster youth in a nonpublic school (NPS), the school district may not be obligated to fund the placement. A student must not be placed in a special class or an NPS unless the severity of the disability is such that education in a regular class with the use of supplementary aids and services cannot be achieved satisfactorily. (*Id.*, § 56040.1.) The youth must have an

IEP and be assessed for special education services prior to placement in a nonpublic school. (*Id.*, §§ 56342.1, 56320.)

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.)

6. School Discipline

Foster youth are disproportionately subjected to school disciplinary actions, specifically suspensions and expulsions regulated by Education Code section 48900 et seq. Grounds for suspension or expulsion must be based on an act prohibited by the Education Code and a connection to the school. Generally, a student cannot be suspended for more than 5 consecutive school days or 20 nonsequential school days within a school year. (*Id.*, §§ 48911(a), 48903(a).) Students have a right to notice and a hearing prior to an expulsion, a right to be educated while expelled, a right to appeal an expulsion, and a right to a reinstatement hearing when the expulsion period is over. (*Id.*, §§ 48918, 48919, 48922.)

Students with IEPs have different rights regarding school discipline. (*Id.*, § 48915.5.)



TIP If the foster youth has a history of behavioral problems that are leading to disciplinary actions at school, the parent, educational representative, social worker, probation officer, or child's attorney should request a Student Success Team meeting to put positive interventions in place before the behavior results in multiple suspensions and/or expulsion.

SPECIAL EDUCATION

Under both federal and state law, school districts and special education local plans (SELPA) have a duty to “child find”—i.e., actively and systematically identify, locate, and assess children with exceptional needs who may be entitled to special education services. Failure to do so may entitle the child to compensatory education. (20 U.S.C. § 1412; Ed. Code, § 56301.)

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) provides services to students who have a physical or mental disability that substantially impairs a major life activity. Examples of qualifying disabilities are asthma, allergies, diabetes, attention deficit disorder (ADD), and attention deficit hyperactivity disorder (ADHD). If the child qualifies, the school district must prepare a plan that outlines special services, accommodations, and modifications that will be implemented to assist the child. (34 C.F.R. § 104.3(j).) Each district will have its own section 504 policy. Generally, a district may develop and implement a 504 plan with or without a parent’s consent, and there are few procedural safeguards.

Special education under the Individuals With Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) is a system of services and supports designed to meet the specific learning needs of a child with a disability who is between the ages of 3 and 22 years. (Ed. Code, § 56031.) If a parent, educational representative, or other provider believes a child has a disability, he or she may request in writing that the school district conduct an assessment. (*Id.*, § 56029; Cal. Code Regs., tit. 5, § 3021.) The school district must submit a proposed assessment plan to the holder of education rights within 15 calendar days of receipt of the written request. (Ed. Code, § 56321(a).) The education rights holder has 15 calendar days to provide written consent to the proposed assessment plan. (*Id.*, §§ 56321, 56381(f).) The school district has 60 calendar days (not including summer vacation or school breaks of more than 5 days) from receipt

of the written consent to the assessment to complete the assessment and hold the initial IEP team meeting. (*Id.*, §§ 56344(a), 56043(c).)

Convening a Student Success Team may be a step toward determining whether a student needs special education services, but it is not mandatory to convene one prior to formally assessing the child for special education. After a special education assessment, if the child is found eligible for special education services, the school district is required to provide a free, appropriate public education (FAPE) in the least restrictive environment, in the form of an IEP and related services that the child needs in order to access education. (20 U.S.C. § 1401; 34 C.F.R. § 300.17; Ed. Code, § 56000; Cal. Code Regs., tit. 5, § 3001.) Related services can include, but are not limited to, transportation; psychological services; physical, speech, and occupational therapy; and assistive technology. (Ed. Code, § 56363.)

If a child is found eligible for special education at the initial IEP team meeting, then an IEP document and plan are developed. The written IEP should include long- and short-term goals and objectives, accommodations and modifications, related services, behavioral plans, and transition plans for a youth 16 years old. (20 U.S.C. § 1414(d); Ed. Code, §§ 56345.1, 56043(g)(1); Cal. Code Regs. tit. 5, § 3042(b).) When a school district makes an offer of FAPE, the holder of education rights may consent in whole or in part or dissent. Any parts of the IEP to which the education rights holder has not consented may become the basis for a due process fair hearing. (20 U.S.C. § 1415; Ed. Code, § 56346.) Once the holder of education rights consents to the offer of FAPE, the child's progress in meeting goals and service needs will be reviewed annually, or more frequently upon request, by the IEP team. Every three years, the child will be reassessed to determine whether he or she continues to qualify for special education services. (Ed. Code, §§ 56343, 56043, 56381.)

If the child needs mental health services to benefit from special education services, he or she may be eligible for AB 3632 mental health services. These school-based services include individual,

group, or family psychotherapy; assessment of psychotropic medications; day treatment services; and residential placement. The AB 3632 referral must be made by the school, but a holder of education rights may request the referral as part of an assessment or an IEP. (Gov. Code, §§ 7572, 7576; Cal. Code Regs., tit. 2, § 60100.)

If a child under age 5 has a disability or is suspected of having a disability, he or she may qualify for early intervention services. For a child under age 3, assessment and services are provided through regional centers. For a child between the ages of 3 and 5 years, early intervention services are provided by the school district in which the child resides. (Ed. Code, § 56001.)



TIP Advise the holder of education rights to insist that all promises made by the school district are recorded in the IEP document. This document is a contract between the school district and the holder of educational rights, and a promise not in writing may not be enforceable. If the holder of education rights disagrees with the services offered by the school district or thinks the offer is not FAPE, he or she should not sign the document at the meeting but instead take the document home to review it, consult with an education advocate, and consider a response, which may include a request for a different school placement, more or different services, modifications, and/or accommodations. The holder of education rights may file for a due process fair hearing if he or she does not consent to all or part of the IEP.



TIP Under section 317(e), the child's attorney has a duty to investigate legal interests that the child may have outside the scope of the dependency proceedings and to report to the court any interests that may need to be protected in other administrative or judicial proceedings. This duty applies to special education rights as well as tort claims and other causes of action. A child client may need education advocacy or legal representation in IEP meetings, due process hearings, and/or disciplinary hearings. The child's attorney must take steps to secure education support. Possible options

may be direct representation on an education matter or a referral to a community education advocacy group, a nonprofit law firm focusing on low-income families, or a pro bono education attorney for the child.



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.

FOSTER YOUTH LIAISON

Every county has a Foster Youth Services (FYS) Liaison. FYS programs ensure that health and school records are obtained and that students receive appropriate school placements and education-based services (such as tutoring, counseling, and supplementary vocational and independent living services). For more information, visit www.cde.ca.gov/ls/pf/fy/ab490contacts.asp.

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. Another useful resource covering education rights of foster youth is www.fosteredconnect.org.

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 to secure 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 are 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 is 18 or older and the court has terminated jurisdiction. Federal funding can be extended to age 19 if the youth is still in high school and is expected to graduate before his or her 19th birthday, or, starting in January 2012, funding can continue until age 21 if the youth meets the criteria to be considered a nonminor dependent under section 11403.



TIP Loss of federal funding is not a legitimate basis for terminating jurisdiction. The juvenile court can maintain juris-

diction until a youth reaches age 21, and, if the court 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 nonrelative. 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 may 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)

The Kin-GAP program provides ongoing funding and Medi-Cal coverage to children in relative guardianships after dependency jurisdiction is terminated. Funding continues until the child turns 18, or, if the youth is on track to graduate from high school

by age 19, until age 19. Also, starting in January 2012, Kin-GAP funding will be available for nonminor dependents ages 18–21. (§ 11386(h).) Starting in 2010, a federal kinship guardianship assistance program replaced the state Kin-GAP program for federally eligible children. (§ 11385 et seq.) Funding rates under the federal program are to be negotiated in each case in light of the individual child’s needs, rather than limited to the basic foster care rate. (§ 11387(a).)

To be eligible,

- A child must have lived with the caregiver for at least the six 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 caregivers 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. (§ 11401.6.) County agencies are also required to screen foster youth who are nearing emancipation for SSI eligibility. (§ 13757). Children's attorneys should ensure that this screening is completed and an SSI application is processed, if appropriate, before jurisdiction is terminated. SSI benefits can provide a crucial source of income and Medi-Cal coverage for young adults with disabilities.



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 and updated periodically at www.childsworld.ca.gov/res/FactSheets/FosterCareRates.pdf.

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. For foster children with developmental disabilities who qualify for regional center services, a special "dual-agency rate" may be available. 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 websites, 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 another 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); 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.)

 **TIP** In situations where there are multiple levels of hearsay, the multiple hearsay is admissible only if each hearsay layer separately meets the requirements of a hearsay exception. (*People v.*

Arias (1996) 13 Cal.4th 92, 149.) However, a statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay, if the hearsay evidence consists of one or more statements that each meet the requirements of an exception to the hearsay rule. (Evid. Code, § 1201.)

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 country, 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 the subject of a finding by the juvenile court that “reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law”;
- 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 website. 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;
- Other: T visas for victims of international trafficking, for children who have been brought to the United States for purposes of prostitution, child labor, or other forms of unlawful exploitation.



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. (*Id.*, §§ 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. (Assem. Bill 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 94103
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
www.publiccounsel.org/practice_areas/immigrant_rights

INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) was passed by the United States Congress to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” (25 U.S.C. § 1902.) The ICWA recognizes that “the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.” (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52.) The ICWA presumes it is in the child’s best interest to retain tribal ties and cultural heritage and in the tribe’s interest to preserve future generations, a most important resource. Congress has concluded that the state courts have not protected these interests and drafted a statutory scheme intended to afford needed protection. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

ICWA requires that in all dependency cases the court and the child welfare agency inquire about the possible Indian status of the child and, where evidence suggests that the child is an “Indian child” within the meaning of ICWA, requires that notice of the proceedings be sent to the child’s tribe or tribes so they may participate in the proceedings. ICWA confers on tribes the right to intervene at any point in state court dependency proceedings. (25 U.S.C. § 1911(c).) California’s case law is replete with cases requiring proper notice. “Of course, the tribe’s right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.” (*In re Junious M.* (1983) 144 Cal. App.3d 786, 790–791.) “Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)

Failure to inquire about Indian status and give appropriate notice to the child’s tribe or tribes of child welfare proceedings can result in invalidation of the proceedings. (25 U.S.C. § 1914; § 224 (e); Cal. Rules of Court, rule 5.486.) Further, when a case is subject

to ICWA, both the child and the parents are entitled to different, culturally appropriate services that may be available only to Native Americans, so it is incumbent on both minor's and parent's attorneys to ensure that ICWA inquiry occurs at the outset of a case and ICWA notice is given where required.

When a dependency case involves an Indian child, ICWA also imposes substantive requirements that are different from those imposed under the Welfare and Institutions Code for non-Indian children. (See, generally, 25 U.S.C. §§ 1901–1963; Welf. & Inst. Code, §§ 224–224.6, 305.5, 306.6, 361(c)(6), 361.7, 361.31, 366.24, 366.26(a)(2), 366.26(c)(1)(A), 366.26(c)(1)(B)(iv) & (vi), 366.26(c)(2)(B); Cal. Rules of Court, rules 5.480–5.487.)



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, all counsel, and particularly minor's counsel, 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. (25 U.S.C. § 1903(4) & (6); Welf. & Inst. Code, § 224.1.) Assembly Bill 2418 (Stats. 2010, ch. 468) amends the definition of “Indian child” in sec-

tion 224.1(b) to include a youth up to the age of 21 who remains a dependent of the court unless the youth elects otherwise.

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 an ICWA webpage that can be accessed at www.childsworld.ca.gov/PG1322.htm. You can also find tribal contact information at www.bia.gov/idc/groups/xois/documents/text/idc002652.pdf and information on tracing Indian ancestry at www.bia.gov/idc/groups/public/documents/text/idc-002619.pdf.

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 ICWA-020 (*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 5.481(a).)

2. Rights

a. To Intervene

An Indian custodian and the Indian child's tribe have the right to intervene at any point in the dependency proceeding. (*Id.*, rules 5.534(i), 5.482(e).)

b. To Counsel

Indigent parents and Indian custodians have the right to court-appointed counsel in a "removal, placement or termination proceeding." (25 U.S.C. § 1912(b); see Welf. & Inst. Code, § 224.2(a)(5)(G)(v).)

c. To Access Case Information

If an Indian child's tribe has intervened in the child's case, the child's tribal representative may inspect the court file without a court order and receive a copy of the file pursuant to court order. (Cal. Rules of Court, rule 5.552(b)(2)(B).)

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 in which he or she 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 §§ 361.31, 361.7, 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.485.*)



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 are 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. (§ 224(c).) An expert witness cannot be a member of the child welfare agency recommending foster care placement. (§ 224.6(a).)

The court may accept a declaration or affidavit from a qualified expert witness (QEW) in lieu of live testimony only if the parties have stipulated in writing and the court is satisfied that the stipulation has been made knowingly, intelligently, and voluntarily. (§ 224.6.) The central question that QEW testimony must address is whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e) & (f).) The Bureau of Indian Affairs' Guidelines for State Courts, Indian Child Custody Proceedings, published in the Federal Register (44 Fed. Reg. 67584 (Nov. 26, 1979)) further clarify that part of the determination regarding whether the conduct of the parents will result in serious physical or emotional harm to the children includes the issue of whether the parents can be persuaded to modify their conduct. (*Id.* at D.4; see also www.cdss.ca.gov/lettersnotices/entres/getinfo/acin/2010/I-40_10.pdf). The expert witness is not required to interview the parents or otherwise conduct an independent investigation but may rely on a review of case records, unless interviews or other investigation are necessary to fulfill the expert testimony's purpose. (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1505.)



TIP Attorneys should ensure that QEW testimony is presented and that the experts understand why they are being asked to give their opinion. It is also critical for attorneys to ensure that experts base their opinions on all of the relevant information and that the person called to testify as an expert has the necessary understanding of the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices as required by section 224.6. Failure to object may waive these objections for purposes of an appeal.

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 re-

habilitative 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 individual 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 5.484(c).)

Although the term “active efforts” is not defined in the ICWA, section 361.7 requires that those efforts be made “in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe” and that they “utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.” Cases prior to the enactment of section 361.7 had concluded 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.) Those cases should be viewed with caution in light of the requirements of section 361.7. (See also Cal. Rules of Court, rule 5.484(c).) Cases decided since the enactment of these provisions suggest that there is a difference between “active” and “reasonable” efforts. (See *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 997; *In re K.B.* (2009) 173 Cal.App.4th 1275, 1286–1287.)



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 § 361.31; Cal. Rules of Court, rule 5.484(b)(1).)

In addition, rule 5.482 of the California Rules of Court requires that “any person or court involved in the placement of an Indian child must use the services of the Indian child’s tribe, whenever available through the tribe in seeking to secure placement within the order of placement preference specified in rule 5.484.” Counsel should be aware of the statutory placement preferences, take steps to ensure that an Indian child’s tribe is consulted, and that the placement accords with the statutory preferences.



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, or the child is already the ward of a tribal court, the dependent petition must be dismissed. (§ 305.5; Cal. Rules of Court, rule 5.483.).

(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 5.483.)

c. Tribal Customary Adoption

Effective July 1, 2010, AB 1325 (Stats. 2009, ch. 287) established a new permanency option for Indian children who are dependents of the California courts. Dependent Indian children who are unable to reunify with their parents may now, at the option of their tribe, be eligible for adoption by and through the tribe's laws, traditions, and customs without the parental rights of the child's biological parents having to be terminated. This option, known as tribal customary adoption, is mainly implemented through sections 366.24 and 366.26. Both the minor's and parents' attorneys should ensure that the child's tribe is aware of and is consulted about tribal customary adoption. For additional information, please review available materials on the California Dependency Online Guide, at www.courts.ca.gov/dependencyonlineguide or see the CDSS All County Letter at <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2010/10-47.pdf>.

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

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 5.616(a).) It applies to placement with relatives, nonrelatives, nonagency guardians, residential institutions, group homes, and treatment facilities. (*Id.*, rule 5.616(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. (*Ibid.*)



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 C.B.* (2010) 188 Cal.App.4th 1024 [noting disagreement among state courts and reaffirming that ICPC does not apply to placement with parents]; *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 5.616(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 5.616(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 of one or more of the following:

- The proposed caregiver is a relative; and
 - The child is under two 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
- 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 5.616(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 forms and a detailed timeline of the process) can be found in rule 5.616(f).



TIP Counsel must keep close watch on the time limits for ICPC compliance and approach the court for assistance if the re-

ceiving 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

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 *id.*, § 3402(g) for definition of “home state.”) Home state jurisdiction may be found where a parent is present in the state for several months, even if the parent is homeless. (*In re S.W.* (2007) 148 Cal.App.4th 1501.) 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 (Fam. Code, § 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. (See *In re Baby Boy M.* (2006) 141 Cal.App.4th 588 [juvenile court did not have jurisdiction where mother gave baby to father shortly after birth and father said he was leaving California, and there was no evidence available in California as to child’s current circumstances].)
- (Fam. Code., § 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 enforce 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); see *In re Jaheim B.* (2006) 169 Cal.App.4th 1343 [court may exercise temporary emergency jurisdiction where child is present and needs protection from abuse or neglect; such jurisdiction continues as long as reasons for dependency exist].)

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. (Fam. Code., § 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); see *In re Aaron D.* (2008) 165 Cal.App.4th 1546 [dependency court should have contacted out-of-state court in which custody case was pending].)

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

The federal Parental Kidnapping Prevention Act (PKPA) requires states to give full faith and credit to another state's custody determi-

nation 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).)

Under section 361.2, California dependency courts have the authority to place a child with a parent in another country but first must consider whether any orders necessary to ensure the child’s safety and well-being will be enforceable in that country. (*In re Karla C.* (2010) 186 Cal.App.4th 1236.)



TIP Complex jurisdictional and practical issues may arise when one or both parents reside outside the United States. Par-

ents should not be denied the opportunity to reunify with their children simply because they reside outside the United States; however, even if the children are placed in another country, the court has a duty to ensure their safety and well-being. Children's and parents' attorneys should explicitly address jurisdictional and enforcement issues and consider contacting the consulate and/or child welfare agency of the parent's home country for assistance. 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.

INTERCOUNTY TRANSFERS

Rule 5.612 of the California Rules of Court provides guidelines for when a case is transferred from one county to another. On receipt and filing of a certified copy of a transfer order, the receiving court must accept jurisdiction of the case. The clerk of the receiving court must immediately place the transferred case on the court calendar for a transfer-in hearing. (Cal. Rules of Court, rule 5.612(a).)

If the receiving court disagrees with the findings underlying the transfer order, its remedy is to accept transfer and either appeal the transfer order or order a transfer-out hearing, which must be a separate hearing from the transfer-in hearing and must consider the best interest of the child. (*In re R.D.* (2008) 163 Cal. App.4th 679.)



TIP It is important that the receiving court consider whether the child's best interest will be served by transfer of the case back to the sending court. If a transfer-out hearing is ordered, the transferring court is required to make findings not only as to the child's county of residence as defined by section 17.1 but also as to whether the transfer is in the child's best interest. (*In re R.D.*, *supra*, 163 Cal.

App.4th at p. 679.) To determine what is in the child's best interest, the receiving court should consider which county can best monitor the child's well-being and placement and provide appropriate services. If the receiving court believes that a later change of circumstances or additional facts indicate that the child does not reside in the receiving county, a transfer-out hearing must be held under rules 5.610 and 5.570. The court may direct the department of social services or the probation department to seek a modification of orders under section 388 or 778 and under rule 5.570. (Cal. Rules of Court, rule 5.612(f).)

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. (*In re E.O.* (2010) 182 Cal.App.4th 722, 727–728 [paternity judgment establishes biological paternity only, not presumed father status].) 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 5.635(e); 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 Fam. Code, § 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 either is 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 may be rebutted by "clear and convincing evidence" that the facts giving rise to the presumption are untrue. (*Id.*, § 7612(a).)

Number 4 can be rebutted only if blood tests show that the person who signed the declaration is not the biological father. (*Id.*, § 7576(d).) A man who believes he is the biological father has standing in dependency proceedings to seek a paternity test and move to set aside another man's voluntary declaration of paternity. (*In re J.L.* (2008) 159 Cal.App.4th 1010.)

If two or more persons claim presumed parent status under Family Code section 7610 and/or section 7611, the court must decide which claim "is founded on the weightier considerations of policy and logic." (Fam. Code, § 7612(b).)

 **TIP** Presumed father status under section 7611(d) can be established only if a man has held himself out to the community as the child's natural father; it does not apply to stepfathers, uncles, grandparents, or other persons who may have functioned in a parental role but have not claimed to be the child's father. (*In re Jose C.* (2010) 188 Cal.App.4th 147, 162–163.) Attorneys may want to seek de facto parent status for such persons instead.

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; *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361.)

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 5.635(e); *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. Minor parents are not required to have GALs in dependency proceedings solely because they are minors; their competency is determined by the same standard applicable to adult parents. (Code Civ. Proc., § 372(c)(1)(B).)



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 compe-

tenacy 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;
- Views of the child, if 10 or older; and
- The likelihood of the parent’s discharge from incarceration or institutionalization within the reunification time limitations.

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.) In determining the content of reasonable services, the court must consider the particular barriers to an incarcerated or institutionalized parent’s access to court-mandated services and ability to maintain contact with his or her child, and must document this information in the child’s case plan. (§§ 361.5(e), 366.21(e) & (f), 366.22.) A parent’s case plan must also include information about the parent’s incarceration throughout the dependency proceeding to determine what reasonable services should be offered to the parent. (§ 16501.1.)

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.” (§ 361.5(a)(4).) 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 suffi-

cient basis for such a finding absent a further showing of detriment. (See *In re Dylan T.* (1998) 65 Cal.App.4th 765.)

Reunification services may be extended for 6 months beyond the 18-month hearing if the court finds by clear and convincing evidence that further reunification services are in the child's best interest; the parent is making consistent progress in a substance abuse treatment program or was recently discharged from incarceration or institutionalization and is making significant and consistent progress in establishing a safe home for the child's return; and there is a substantial probability that the child will be safely returned within the extended period or that reasonable services were not provided. (§§ 361.5(a)(4), 366.22(b), 366.25.)



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 *In re 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).)

PREGNANT AND PARENTING TEENS

Children's attorneys must protect dependent teens' statutory and constitutional rights to sexual and reproductive health care and information as well as teen parents' dual rights as dependents and parents.

SEXUAL AND REPRODUCTIVE HEALTH CARE FOR FOSTER YOUTH

All minors, including dependents, may obtain confidential medical care related to the prevention or treatment of pregnancy, including contraception and prenatal care (but not sterilization), without a parent's or other adult's consent or notification. (Fam. Code, § 6925.) Children age 12 or older can consent to confidential medical care related to diagnosis and treatment of sexually transmitted diseases. (*Id.*, § 6926(a).)



TIP Children's attorneys should become familiar with the county agency's policies regarding reproductive health care and referrals to health clinics and should consider discussing with all clients aged 12 and older whether they need information or access to sexual and reproductive health care. Whether or not a client is currently sexually active, by asking these questions and providing information children's attorneys can help ensure that dependent youth take appropriate health and safety precautions if and when they do become sexually active.

If an attorney's personal beliefs regarding sexual activity, contraception, and/or abortion would prevent the attorney from discussing these issues with a teen client or from zealously advocating for the client's rights regarding sexual and reproductive health care, the attorney should consider withdrawing from representation.

PREGNANT FOSTER YOUTH

1. Options for Pregnant Foster Youth

A dependent youth who becomes pregnant has the same options as all other pregnant women: she may carry the child to term and raise the child, arrange for the child to be adopted after birth, or have an abortion. The pregnant youth has the sole right to make decisions regarding her pregnancy, and if she is capable of informed consent, has a constitutional right to obtain an abortion without parental or court approval or notice. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.) If a pregnant teen wants to carry the pregnancy to term but have the child raised by someone else, the attorney should assist in making a plan for guardianship or adoption early in the pregnancy.

2. Pregnancy and Postbirth Plan

If a teen client decides to carry a pregnancy to term, her attorney can assist with the various issues implicated by the pregnancy, such as

- Prenatal care;
- Delivery/birth plan;
- Postbirth placement for the parent and child;
- Visiting nurse program;
- Health care for the baby;
- Child care to enable the teen parent to attend school and/or work;
- Funding for the baby, including child support; and
- Custodial and visitation arrangements with the other parent.



TIP Attorneys who represent fathers of teen mothers need to make themselves aware of potential criminal and civil consequences for their clients and advise accordingly.

3. Education Rights

Schools cannot discriminate against any student or exclude any student from educational programs or activities on the basis of a student's

pregnancy, childbirth, or recovery from these conditions. (20 U.S.C. § 1681; 34 C.F.R. § 106.40; Ed. Code, § 230; 5 Cal. Code Regs., tit. 22, § 4950.) Pregnant and parenting students have the right to remain in their regular or current school programs, including honors and magnet programs, special education placements, and extracurricular and athletic activities. (34 C.F.R. § 106.4(a)(2); Ed. Code, § 230.) Students cannot be expelled, suspended, or otherwise excluded from programs or current school placement based on pregnancy, childbirth, or parental status. (34 C.F.R. § 106.4(a)(2); Ed. Code, § 230.)

PARENTING FOSTER YOUTH

1. Rights as a Foster Child; Rights as a Parent

A child whose parent is a dependent shall not be found to be at risk of abuse or neglect solely because of the parent's age, dependent status, or foster care status. (§ 300(j).) The county agency must place dependent teen parents and their children together in as familylike a setting as possible, unless the court determines that placement together poses a risk to the children. (§ 16002.5.)

The county agency must facilitate contact between the teen parent and child and the child's other parent if such contact is in the child's best interest. (§ 16002.5(d).) Also, the court must make orders regarding visitation between the teen's child, the teen parent, the child's other parent, and appropriate family members unless the court finds by clear and convincing evidence that such visitation would be detrimental to the teen parent. (§ 362.1(a)(3).)

2. Placement and Funding

The Welfare and Institutions Code includes special provisions intended to allow dependent teens and their children to live together in foster homes and to support the development of teen parents' ability to care for their children independently.

a. Infant/Child Supplement

This monthly payment to caregivers (relatives, foster parents, and group homes) of a dependent teen parent whose child resides in the same placement is intended to offset the extra costs of the child's care. The supplement remains available even if the teen parent's case is closed under Kin-GAP. (§ 11465.)

b. Whole Family Foster Home (WFFH)

In these specialized foster homes, the teen parent and child live together with a caregiver who has special training and is expected to assist the teen parent in developing the skills necessary to provide a safe, stable, and permanent home for his or her child. In a WFFH the caregiver receives the basic Aid to Families With Dependent Children–Foster Care (AFDC–FC) rate for the teen parent's child. The AFDC–FC rate is greater than the infant/child supplement. (§§ 11400(t), 11465, 16004.5.) Any foster parent or relative caregiver can obtain WFFH certification and qualify for the higher rate. The supplement remains available to relative caregivers who were receiving the higher rate at the time the teen parent's case was closed under Kin-GAP. Beginning in January 2012, nonminor dependents will be able to remain in a WFFH until age 21. (§ 11465(d)(6).)

There is also a financial incentive for caregivers of teens and their nondependent babies placed in WFFHs who together develop a Shared Responsibility Plan (see below). (§ 16501.25.)

c. Shared Responsibility Plan (SRP)

The SRP is an agreement between the dependent teen parent and his or her caregiver detailing the duties, rights, and responsibilities each has with regard to the teen parent's nondependent child. The agreement covers responsibilities such as feeding, clothing, hygiene, purchases of supplies, health care, and transportation. (*Ibid.*)

3. Mental Health Care and Parenting Support

If a teen parent experiences serious changes in mood, emotional affect, or behavior during pregnancy or after birth, the attorney

should request an evaluation for perinatal or postpartum depression. Prompt and appropriate care is essential to diagnose and treat these common disorders and prevent the teen's condition from being misinterpreted as an inability to parent.

Children's attorneys should also consider helping teen parents enroll in age-appropriate parenting classes or referring them to the Adolescent Family Life Program (AFLP), a state program providing social services and support for pregnant and parenting teens. (See www.cdph.ca.gov/programs/aflp/Pages/default.aspx.)

4. Social Services Intervention

If the county social services agency becomes concerned about the care that a dependent teen parent is providing to his or her child, the agency may want the teen to agree to voluntary family maintenance or voluntary family reunification services under section 301. The agency may not ask a teen parent to sign a voluntary services contract without first allowing the teen to consult with his or her attorney. (§ 301(c).)

If the county agency files a dependency petition regarding the teen parent's child, the teen parent has the same rights to family preservation and reunification services that adult parents have. (§ 16002.5.) The teen parent has the same right to counsel and to participate in the dependency proceedings that an adult parent has. The court cannot appoint a guardian ad litem (GAL) for a teen parent unless the court makes the same findings necessary to appoint a GAL for an adult parent: that the parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case. (§ 326.7.)

When representing a teen client who is both a dependent and a parent, the attorney must ensure that the client's rights as both a foster child and as a parent are protected and must monitor the teen client's development as a parent to reduce the risk that a dependency petition is filed regarding the teen parent's child.



TIP In situations where an attorney is representing a minor parent, California's hybrid model of child representation can occasionally conflict with the duty to zealously advocate for a client's stated interest. Such conflicts must resolve on a case-by-case basis, and attorneys are encouraged to seek consultation.

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(1).) Affinity exists between a person and the blood or adoptive kin of that person’s spouse. (Cal. Rules of Court, rule 5.502(1).)

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

When a child is removed from the home, the child’s social worker, within 30 days, must conduct an investigation to identify and locate the child’s grandparents and other adult relatives. Once a relative is located, the social worker is required to provide written notice and explain in person or by telephone that the child has been removed and the options available to participate in the child’s care and placement. The social worker is also required to give adult relatives a relative information form that they can use to provide information to the social worker and the court regarding the child’s needs. At the detention hearing, the juvenile court should inquire as to the efforts made by the social worker to identify and locate relatives. The social worker is required to provide any completed relative information forms to the court and all parties. (§ 309.)



TIP 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.



TIP When a child is removed from the parents’ home, it is important that relatives are identified and assessed for placement as soon as possible. The relative information form provides a

process whereby able and willing relatives may seek placement of the child or become involved in the child's care. If relatives come forward but no relative information form is completed by the time of the detention hearing, counsel should request that any forms that are subsequently received be attached to the jurisdiction report. Also, counsel should encourage appropriate relatives and NREFMs to visit the child as frequently as possible.

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, at any time when a child needs a change in placement, the county agency must again comply with section 361.3(a) by locating and assessing any and all available relatives. (*In re Joseph T.* (2008) 163 Cal.App.4th 787.) A relative should not be excluded from consideration because the child had previously been removed from his or her care or because the relative was involved in a prior dependency case. (*In re Antonio G.* (2007) 159 Cal.App.4th 369; *Cesar V. v. Superior Court, supra*, 91 Cal. App.4th at p. 1032.)

If a relative comes forward at a time when the child does not need a new placement, the preference still applies and the county agency must still evaluate that relative for placement, but the preference may be overridden if moving the child to the relative's home would not be in the child's best interest. (*In re Joseph T., supra*, 163 Cal.App.4th at p. 814.)

However, when reunification services are terminated and a selection and implementation hearing is set, the relative preference no longer applies. Instead, the child's current caretaker is entitled to preferential consideration under section 366.26(k), whether or not the caretaker is a relative. (*In re Lauren R.* (2007) 148 Cal.App.4th 841.)

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 Esperanza C.* (2008) 165 Cal.App.4th 1042; *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 serious felonies are nonexemptible, such as felony domestic violence; rape and other sex offenses; crimes of violence such as murder, manslaughter, and robbery; and crimes against children. (Health & Saf. Code, § 1522(g)(1)(C).) Felony convictions for assault, battery, or drug-related offenses are nonexemptible for five years after the date of conviction. (*Ibid.*) Most nonviolent felony offenses and almost all misdemeanor offenses are exemptible.

The criminal history restrictions apply only to actual convictions, not arrests, and only to adult criminal convictions, not juvenile delinquency adjudications. Also, the prohibition against placing a child with a person who has 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.)



TIP The statutes and regulations governing criminal history restrictions and exemptions are extremely complex, and county agency caseworkers may be mistaken in believing that an offense is nonexemptible or may deny an exemption request without engaging in a thorough, individualized assessment of the relative's character and the child's best interest. Children's attorneys should make an independent assessment of whether an exemption can and should be granted and should consider setting an abuse-of-discretion hearing to challenge the agency's denial of, or refusal to seek, an exemption for an otherwise appropriate relative.

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. (*In re N.V.* (2010) 189

Cal.App.4th 25, 30; *Cesar V.*, *supra*, 91 Cal.App.4th at p. 1023.) Relatives who are denied placement approval by the county agency may pursue an administrative grievance process. This remedy is separate from the dependency court's duty to make an independent placement decision in light of the child's best interest and need not be exhausted prior to a contested hearing on the placement issue. (*In re N.V.*, *supra*, 189 Cal.App.4th at pp. 9–10.)



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 or Country

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 5.616; 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.) The court may place a child with relatives outside the United States as long as there is substantial compliance with criminal background checks and other section 309 assessment requirements. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403.)



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.

SIBLINGS

NOTICE AND PROCEDURAL RIGHTS

The caregiver of a dependent child, the child’s attorney, and the child, if 10 or older, have the right to receive notice of any separate dependency proceedings regarding a sibling. (§§ 290.1–295.)

Any person, including a dependent child, can petition the court to assert a sibling relationship and request visitation, placement, or consideration of the sibling relationship when the court is determining the case plan or permanent plan. (§ 388(b).)

Children’s attorneys have the right to notice of any change in placement that would result in separation of siblings currently placed together. Notice must be given 10 days in advance unless exigent circumstances exist. (§ 16010.6(b).)

DEFINITION OF “SIBLING”

“Sibling” is defined as “a child related to another person by blood, adoption, or affinity through a common legal or biological parent” in sections 362.1(c), 388, and 16002(g). This definition includes half-siblings and adoptive siblings.



TIP Other provisions of the Welfare and Institutions Code simply refer to “siblings” without further explanation. There is a strong argument that, for consistency, all Welfare and Institution Code provisions concerning siblings should apply to all children who are described by the above definition.

REPRESENTATION OF A SIBLING GROUP

Prior to accepting appointment for a group of two or more siblings, attorneys must not only conduct routine conflict checks but also be mindful of potential conflicts before speaking with any potential clients. Upon appointment to represent a sibling set, attorneys should review the initial detention report and any other available

documents to identify potential conflicts. Common examples include situations where one sibling is alleged to have abused another sibling or one sibling has accused another of lying.

If a potential conflict is apparent, the attorney should carefully consider which sibling to interview first in order to preserve the ability to represent at least one of the siblings. In general, the attorney should start by interviewing any children whose statements are *not* included in the detention report, to determine whether these siblings' statements agree or conflict with those included in the detention report.



TIP Attorneys for other parties may file a motion to disqualify an attorney who represents multiple siblings on grounds of conflict of interest. Before taking this step, however, attorneys should attempt to resolve the issue in a less adversarial manner and also consider the drawbacks of a successful motion, including the delay caused when a new attorney needs to become familiar with the case.

SIBLING PLACEMENT

Whenever a child is detained, the child welfare agency “shall, to the extent that it is practical and appropriate, place the minor together with any siblings or half-siblings who are also detained” or explain in the detention report why the siblings are not placed together. (§ 306.5.)

County child welfare agencies must make “diligent efforts” to place siblings together and otherwise “develop and maintain sibling relationships” unless the court finds by clear and convincing evidence that sibling interaction is detrimental to the child or children. (§ 16002(a) & (b).)



TIP Counsel should independently investigate claims that placement of siblings together would be detrimental. The shortage of foster homes for large sibling sets may be a legitimate reason to

separate siblings temporarily, but this should not relieve an agency of its obligation to continue to search for an appropriate home, including consideration of noncustodial parents and relatives (both local and out-of-state) as well as foster homes. A detriment finding should always be revisited at subsequent hearings.

In deciding whether to place the dependent child with a relative, the court must consider whether placement of siblings and half-siblings in that same home is in the best interest of each of the children. (§ 361.3(a)(4).) Also, adult siblings are included in the relative placement preference. (§ 361.4(c)(2).)



TIP Sometimes the best advocacy one can do for a parent or child client is to work for safe placement with an appropriate caregiver. Independent, appropriate conversations are essential to ensure a caregiver’s understanding of the process as well as the other case-related issues.

If at least one child in a sibling group is under three years old at the time of removal, then “for purposes of placing and maintaining a sibling group together in a permanent home should reunification efforts fail,” reunification services as to all children in the sibling group may be limited to six months. (§ 361.5(a)(3).)



TIP Limiting reunification services under section 361.5(a)(3) is discretionary, not mandatory.

SIBLING VISITATION

When siblings are not placed together, any order placing a child in foster care must include provisions for sibling visitation unless the court finds by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of either child. (§ 362.1(a)(2).)

ONGOING CONSIDERATION OF SIBLING ISSUES

County child welfare agencies must address sibling issues in all court reports, and courts must consider sibling issues at all review hearings. These issues include:

- The nature of the sibling relationships (including whether the children were raised together, shared common experiences, or have a close bond; whether they express a desire to visit or live together; and whether ongoing sibling contact is in their best interest);
- The appropriateness of developing or maintaining these relationships;
- If siblings are not placed together, why not, and what efforts are being made to place siblings together or why such efforts would be contrary to the safety and well-being of any of the siblings;
- The nature and frequency of sibling visits, or if visits have been suspended, whether there is a continuing need to suspend sibling interaction; and
- The impact of sibling relationships on placement and permanency planning.

(§ 358.1(d) [social studies and evaluations]; § 361.2 [dispositional hearing]; § 366(a)(1)(D) [review hearings]; § 366.1(f) [supplemental court reports]; § 366.3(e)(9) [permanency review hearings]; § 16002(b) & (c) [review of sibling placement, visitation, and suspension of sibling visitation].)



TIP Ongoing contact with child clients and the agency will help ensure that these issues are addressed in reports and help avoid delays and continuances.

TERMINATION OF PARENTAL RIGHTS, ADOPTION AND POSTADOPTION CONTACT

At the selection and implementation (section 366.26) hearing, the court may find a “compelling reason” that termination of parental rights and adoption would be detrimental to the child if there would be “substantial interference with a child’s sibling relationship.” This determination must take into account whether the siblings were raised together, shared common experiences, or have close bonds, and whether ongoing sibling contact is in the child’s best interest as compared to the benefit of legal permanency through adoption. (§ 366.26(c)(1)(E).)

This exception applies even if the sibling has already been adopted. (*In re Valerie A.* (2006) 139 Cal.App.4th 1519.) The juvenile court may find the exception applicable when a child *either* has shared significant experiences with a sibling in the past *or* currently has a strong bond with a sibling. (*In re Valerie A.* (2007) 152 Cal. App.4th 987, 1008–1009.)

Membership in a sibling group is a basis for a finding that children are adoptable but “difficult to place” for adoption, which allows the court to identify adoption as the permanent plan but delay termination of parental rights for up to 180 days to allow the agency to find an adoptive home. (§ 366.26(c)(3).)

If the court terminates parental rights, the court must consider ordering sibling visitation pending finalization of adoption and termination of jurisdiction. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 427.)

County child welfare agencies 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 provisions for postadoption sibling contact in the adoption order. (§§ 366.29, 16002(e).) Such provisions have no effect on the continuing validity of the adoption and do not limit the adoptive parents’ right to move

away. Also, the adoptive parents may terminate the sibling contact if they determine that it poses a threat to the health, safety, or well-being of the adopted child. Subject to these limitations, the juvenile court has continuing jurisdiction to enforce postadoption sibling contact provisions under section 366.29(c).

When the court terminates jurisdiction over a foster youth who is 18 or older, the youth must be given information about the whereabouts of any dependent siblings unless sibling contact would jeopardize the safety or welfare of the dependent siblings. (§ 391(b)(1).) Family Code section 9205 also provides a process for siblings to locate each other after one or both has been adopted.



TIP Children’s attorneys have an ongoing duty to ensure that siblings have opportunities for meaningful contact, even if placed apart and even after one or more siblings reach adulthood. Many former foster youth report that their most harmful experience in the foster care system was being separated from and losing contact with their siblings.

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.) When making exit orders, the court must specify the amount of visitation granted to the noncustodial parent but may leave it up to the parents to arrange the time, place, and manner of visitation. (*In re T.H.* (2010) 190 Cal.App.4th 1119.)

Juvenile court custody orders (sometimes called exit orders, family law orders, or FLOs) 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

Once a dependent youth reaches age 18, the youth may either request that dependency be terminated or, in some circumstances, may remain in foster care as a nonminor dependent up to age 21. If the youth requests termination of jurisdiction, the court may order a trial period of independence of up to six months, during which the

youth's foster care benefits and services can be resumed if necessary. (§§ 366.31, 391.)¹

During the 90-day period before a foster youth turns 18, the county agency must work with the youth to prepare an individualized transitional independent living plan (TILP) addressing the youth's options for housing, health insurance, education, employment, support services, and mentoring. (§ 16501.1(f)(16)(B).) Children's attorneys should ensure that jurisdiction is not terminated until the TILP has been developed and should review the plan with their clients to ensure that it is adequate and realistic. Emancipating foster youth should be informed that they are eligible for food stamps under a special state program. (§ 18901.4.)

Also, county agencies are required to request credit checks for all foster youth between 16 and 18, and if a credit check indicates that a youth may have been a victim of identity theft, refer the youth for services to address the issue. (§ 10618.6.) Foster youth are especially vulnerable to identity theft because of their frequent moves, exposure to numerous related and unrelated adults, and lack of adult protection and support. Children's attorneys should ensure that the credit check is conducted and any identity theft issues are resolved before jurisdiction is terminated.

At the last review hearing before a foster youth turns 18, and at all review hearings concerning nonminor dependents, the agency's report must address

- The youth's plans either to request that dependency be terminated or to remain a nonminor dependent;
- Efforts made to comply with the requirements of section 391; and

¹ These provisions go into effect January 1, 2012. Even prior to that time, however, attorneys for transition-age foster youth should counsel their clients on the potential benefits of remaining in the foster care system and should ensure that the county agency complies with all the requirements of section 391 before the court terminates jurisdiction.

- The goals and services described in the TILP. (§ 366.3(l)–(n)).

For nonminor dependents, the review hearing must be conducted in a way that respects the youth’s status as a legal adult. (§ 366.3(m).)²

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;
 - Documents, including social security card, certified birth certificate, health and education passport, driver’s license or identification card, and, if applicable, death certificates of parents and/or 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 aid for college or vocational training and a letter verifying

² These provisions take effect January 1, 2012, but even before that date, attorneys for older foster youth should request that review hearings be conducted in accord with the policies expressed in section 366.3(l)– (n).

dependency status for purposes of federal and state financial aid eligibility; 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. 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).) If the child's needs change after jurisdiction is terminated, such that additional services and supports are needed to ensure the child's safety, well-being, and/

or successful transition to adulthood, a section 388 petition to reinstate dependency jurisdiction may be filed at any time before the child turns 18. (*In re D.R.* (2007) 155 Cal.App.4th 480.)

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 eighth birthday, the child will not be eligible for services from the California Department of Social Services' Independent Living Program (ILP). (§ 10609.45.)

 **TIP** There is talk of remedying this gap in services; practitioners can look for updates on the ILP website: 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).) Children whose cases are closed under the Kin-GAP program are eligible for ILP services.

A federal kinship guardianship assistance program replacing the state Kin-GAP program for federally eligible children was initiated in 2010. Funding rates under the federal program are to be negotiated in each case, in light of the individual child's needs, rather than limited to the foster care rate.

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

Under the Kin-GAP Plus program, caregivers are not limited to the basic foster care rate but can receive specialized-care increments for children who have medical, developmental, behavioral, or emotional problems as well as the same annual clothing allowance provided to foster children. (See Funding and Rate Issues fact sheet for more detailed information.)

Children in Kin-GAP care will continue to be provided with Medi-Cal health coverage and have access to the ILP program no matter what their age when jurisdiction terminates.

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).) Although the frequency and duration of visits can be limited and other conditions imposed if necessary to protect the child’s emotional well-being, parent-child visitation cannot be denied entirely unless it would “jeopardize the *safety* of the child.” (*In re C.C.* (2009) 172 Cal.App.4th 1481, emphasis added.) Disputes over visitation may arise when a child does not want to visit or the child’s caregiver, social worker, or therapist thinks visitation is harmful. The court may order visitation in a therapeutic setting, may condition visitation on the parent’s and/or child’s satisfactory progress in therapy, etc., but cannot delegate visitation decisions entirely to the child’s caregiver, group home, social worker, or therapist or to the children themselves. (*In re Kyle E.* (2010) 185 Cal.App.4th 1130, 1134–1135; *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505; *In re James R.* (2007) 153 Cal.App.4th 413, 436.)

a. 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.)

b. 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.)

It is the Legislature’s policy to encourage the reunification of families of incarcerated parents by easing the difficulties incarcerated parents encounter in maintaining contact with their children. Thus, when the court is exercising its discretion to continue or ter-

minate reunification services, the court should consider, among other factors, the parent's inability to have contact with the child because he or she is incarcerated. (*S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016–1017.) Specifically, section 361.5 requires the court to consider the special circumstances of an incarcerated parent when determining whether to extend reunification services, including the parent's ability and good faith efforts to maintain contact with the child. Sections 366.21(e) and (f) and 366.22 also require the court to take into account the incarcerated parent's ability to maintain contact with the child when considering the efforts or progress demonstrated by the parent in reunification and the extent to which the parent availed him- or herself of services provided when determining whether return would be detrimental.

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. (*Id.*, § 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; *In re Rebecca S.* (2010) 181 Cal.App.4th 1310.)

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 contrary to the safety or well-being of 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); see *Los Angeles County Department of Children and Family Services v. Superior Court (Ethan G.)* (2006) 145 Cal. App.4th 692 [order allowing parent in sex abuse case to live in home on condition that all contact with child would be monitored was abuse of discretion].)

- To protect the safety of the child, the court may craft visitation orders in a manner that keeps the child’s address confidential. (§ 362.1(a)(1)(B).)
- 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.



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Unless otherwise indicated, all citations are to
the California Welfare and Institutions Code.

SUMMARIES OF SEMINAL CASES

A case is designated as seminal on the basis of its impact on daily practice and the frequency of its citation in the appellate courts. To read the full opinions of the cases summarized here, and to access hundreds of additional dependency-related case summaries, please visit the California Case Law section of the California Dependency Online Guide website at www.courts.ca.gov/dependencyonlineguide.

DETENTION HEARINGS

Los Angeles County Department of Children and Family Services v. Superior Court (2008) 162 Cal.App.4th 1408

A juvenile court may not dismiss a dependency petition at the detention hearing.

At the detention hearing, the trial court sua sponte dismissed a petition alleging domestic violence. The agency filed a writ challenging the decision to dismiss the petition and return the minor to her mother. The court granted the writ petition and held that, barring exceptional circumstances not present here, the juvenile court had no authority to dismiss a dependency petition at the detention hearing. The statutory scheme envisions that the sufficiency of evidence will be addressed at the adjudication hearing, not at the detention hearing. Even if the petition had been insufficient on its face, there was no compelling reason that the issue demanded resolution without formal notice and a full opportunity to be heard.

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. (1991) 1 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 caregiver, 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 J.N. (2010) 181 Cal.App.4th 1010

A single episode of parental conduct is insufficient to bring children within the juvenile court's jurisdiction when there is no current risk of harm.

The children sustained injuries from a vehicle accident resulting from intoxicated father's driving. Trial court adjudged the children dependents of the court under section 300(b), ordered them returned home to the care and custody of mother on a case plan of family maintenance services, and removed them from the father's physical custody. Parents appealed, arguing lack of evidence at the time of the jurisdictional hearing that the children were at substantial risk of serious physical harm. The court agreed that in order for it to exercise jurisdiction, substantial evidence must show current risk of harm. If dependency jurisdiction were based on a single incident resulting in physical harm absent current risk, then a juvenile court could take jurisdiction but would be required to immediately terminate the dependency under the final sentence of section 300(b).

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 Andy G.* (2010) 183 Cal.App.4th 1405**

There was sufficient evidence of risk to a young male child where the father sexually abused the child's older female half-siblings.

The trial court adjudged a father's two-year-old son a dependent child, refused to release the child to the father, and ordered the father to attend sexual abuse counseling for perpetrators. Father challenged the jurisdictional and dispositional orders, asserting that the evidence was insufficient to support the court's jurisdictional findings as to the boy and that the boy should be released to his custody. The court rejected the father's sufficiency of evidence challenge, holding that there was sufficient evidence to support the trial court's finding that the child was at risk of sexual abuse based on the father's sexual abuse of the child's 12- and 14-year-old half-sisters.

***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 trial court determined 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 reversed, finding 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 caregiver 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.

***In re C.C.* (2009) 172 Cal.App.4th 1481**

If a parent is receiving family reunification services for a child, the court may terminate visitation between that parent and child only if the court finds that such visits would “pose a threat to the child’s safety.” A finding of detriment is an insufficient basis upon which to deny visits.

Supervised visits were unsuccessful because of child’s anger and unwillingness to visit his mother as well as confrontations between mother and child. At the dispositional hearing, based on a detriment finding, the trial court ordered all visits stopped. Mother appealed. The court held that the order denying visitation was not supported by the necessary finding that visitation would jeopardize the child’s safety; it was based on a finding that further visitation would be detrimental, which is not the correct standard. Visitation is a critical component of reunification; it may be denied during the reunification process based only on the safety of the child, not the best interest of or detriment to the child. No evidence in the record indicated that the mother posed a threat to the child’s physical safety during monitored visitation in a therapeutic setting. However, if the parent

is no longer in reunification, then the decision about whether to allow visits is based on whether such visits are detrimental to the child.

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.

Tonya M. v. Superior Court (2007) 42 Cal.4th 836

In determining whether to continue or terminate services at the 6-month review hearing, the court must consider the likelihood of reunification within the period of time that remains until the 12-month review hearing, even if it is less than 6 months.

After termination of her reunification services at the 6-month review hearing and the setting of a section 366.26 hearing, mother filed a writ petition. She challenged the period of time that the trial court considered in determining whether there was a substantial probability that the child could be returned. She argued that the court should have considered a full 6-month period from the conclusion of the 6-month review hearing. The Court of Appeal denied the writ petition, and mother petitioned for review. The Supreme Court affirmed the judgment of the Court of Appeal, holding that the trial court correctly considered the likelihood of reunification during the time that remained until a potential 12-month review hearing, not the next 6-month period.

M.V. v. Superior Court (2008) 167 Cal.App.4th 166

The 6-month review and 12-month permanency hearings present distinct inquiries; the standard at the 6-month hearing is whether there is a substantial probability that the child “may be returned,” which differs from the “will be returned” standard at the 12-month hearing. At the 6-month hearing the trial court is not required to make the findings specified in section 366.21(g)(1) and has discretion to consider other evidence.

At the 6-month review hearing regarding a two-year-old child, trial court terminated mother’s reunification services and set a section 366.26 hearing. Mother challenged the court’s finding of “substantial probability” and petitioned for a writ of mandate directing the trial court to vacate its order and issue a new and different order continuing reunification services. The writ was granted. The trial court erred in applying the 12-month hearing standard to a 6-month review. The factual findings necessary at a 12-month hear-

ing to support a substantial probability determination that child will be returned to parent are not required at a 6-month hearing. At the 6-month review, the trial court has discretion to continue the case and not set a 366.26 hearing. It also has discretion to consider other evidence beyond the three factors specified in section 366.21(g)(1), including extenuating circumstances. If, however, at the 6-month hearing the trial court finds a substantial probability that the child may be reunited with the parent, the trial court lacks discretion to schedule a 366.26 hearing and instead must continue reunification services until the 12-month review.

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 Alvin R. (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.

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 caregiver 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, the contested hearing 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, it 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.

**SELECTION AND IMPLEMENTATION
(SECTION 366.26) 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 P.C.* (2008) 165 Cal.App.4th 98**

Poverty alone—even when it results in homelessness or less-than-ideal housing arrangements—is not a sufficient ground to deprive a mother of parental rights.

Children were placed in a foster home based on allegations of abuse and domestic violence. Mother followed through with reunification services but remained homeless. Based on this instability, children were placed in the home of a prospective adoptive family. The trial court found the children to be adoptable and terminated parental rights. The Court of Appeal reversed the termination of parental rights. Inability to find housing because of poverty is not a valid basis for juvenile court jurisdiction. The mother did not receive adequate assistance from the social worker in obtaining low-income housing. Because the mother had complied with the entire reunification plan and there were no objections to returning the children to her other than her inability to obtain housing, the case was reversed and remanded for a determination of whether she could obtain housing and whether there were any remaining barriers, other than poverty, to reunification.

***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 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 relationship to Autumn was not 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 caregiver 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.

***In re R.N.* (2009) 178 Cal.App.4th 557**

When a successor guardian is to be appointed pursuant to section 366.3, the dependency court must provide notice to the parents, provide them with an opportunity to be considered as the child's

guardians, and consider whether reunification services should be offered to them, without requiring that they file a 388 petition.

Child's grandparents were appointed as guardians in 1996. The aunt filed a section 388 petition seeking to become the child's guardian after the grandparents' death. The aunt was appointed successor guardian, and a separate order summarily denied father's subsequent 388 petition challenging the appointment. The father appealed the order appointing the successor guardian, contending that under section 366.3, he was entitled to be considered as the child's guardian and to be provided reunification services. The court held that the father was entitled to be considered as the child's guardian and was eligible to receive services without a requirement that he file his own section 388 petition. The order appointing child's aunt as the successor guardian and the separate order denying father's 388 petition were reversed.

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. The court reversed the lower court's decision removing the children from the parents. When the child is being removed from the parent's home based on a section 387 petition, the court still has to have clear and convincing evidence of substantial risk of harm to the child to warrant removal.

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 ju-

venile 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 Joel H.* (1993) 19 Cal.App.4th 1185**

De facto parent has standing to appeal order granting agency's section 387 petition and removing children but is not entitled to appointed counsel on appeal.

The children were removed from their parents and placed with a great-aunt and -uncle. Reunification services were terminated, and the court chose adoption as the children's permanent plan. The county agency then received reports of abuse by the great-aunt and -uncle and filed a section 387 petition to remove the children and change the permanent plan. Trial court granted the section 387 petition, and the great-aunt appealed. The court reversed, holding that the appeal was not moot, even though while the appeal was pending the children were returned to mother and the dependency case was dismissed. The great-aunt's interests in future contact with the children and in being considered as a placement if they were ever detained again were adversely affected by the juvenile court's ruling. Great-aunt had standing as a de facto parent to appeal. She was an aggrieved party because the juvenile court's ruling adversely affected her interest in a relationship with the children. Great-aunt was not, however, entitled to appointed counsel on appeal.

CONTINUANCES

***Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238**

When a jurisdictional trial has been 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 child's dependency and does not comply with requirements of section 391.

The child 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.

COUNSEL FOR THE CHILD

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 in 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.

***In re Kristen B.* (2008) 163 Cal.App.4th 1535**

Child's attorney must advocate for the child's best interest, even if that goes against child's stated desires.

When interviewed, Kristen told social workers and family members that her mother's boyfriend had sexually abused her. All found the 14-year-old to be credible, and she was detained. Kristen then recanted the allegation of abuse. On direct examination, Kristen's attorney questioned her about her recantation. The trial court found Kristen's allegations of abuse, and not her recantation, to be credible. Mother appealed, citing ineffective assistance of minor's counsel. The court affirmed, holding that section 317 requires the child's attorney to advocate for the child's protection, safety, and physical and emotional well-being, even if it conflicts with child's stated desires. Kristen's attorney clearly informed the court of the conflict between Kristen's wishes and what the attorney believed was in Kristen's best interest. Mother's contention of ineffective assistance was unfounded.

PARENT'S RIGHTS

***In re James F.* (2008) 42 Cal.4th 901**

Before appointing a guardian ad litem (GAL) for a parent, the juvenile court must hold an informal hearing at which the parent has an opportunity to be heard and other procedural safeguards are in place. If the court appoints a GAL without the parent's consent, the record must contain substantial evidence of the parent's incompetence. However, an error in the court's procedure for appointing a GAL is subject to a harmless error analysis.

The trial court appointed a GAL for the father but failed to explain the role of a GAL adequately or to provide the father with a meaningful opportunity to be heard in opposition to the appointment. The California Supreme Court granted review to determine whether the juvenile court's error in the procedure used to appoint the GAL required automatic reversal of the order terminating the father's parental rights. The court concluded that such an error is a trial error subject to a harmless error analysis rather than a structural defect requiring reversal. Any errors in the GAL appointment process in this case caused father no actual prejudice. All the evidence pointed to the conclusion that the father was incompetent and in need of a GAL and would likely have consented to the appointment.

***In re Jesusa V.* (2004) 32 Cal.4th 588**

A biological tie does not trump a familial bond where juvenile court finds two presumed fathers. The juvenile court's error in proceeding at a jurisdictional hearing without having the incarcerated biological father present is subject to a harmless error analysis.

The Supreme Court held that a presumption of fatherhood under Family Code section 7611 is not necessarily rebutted by evidence of a biological tie, and the trial court must determine whether the case is an appropriate one in which to permit rebuttal. Furthermore, an incarcerated parent's presence in court is required only when that parent's parental rights will be terminated or the dependency of the prisoner's child will be adjudicated; a hearing to determine presumed father status did not require the parent's presence in court. A prisoner does not have a constitutional right to personally attend every dependency hearing. Violation of the Penal Code section requiring prisoners to be transported to court under certain circumstances is subject to the harmless error test.

***In re Nolan W.* (2009) 45 Cal.4th 1217**

Juvenile court may not use its contempt power to incarcerate a parent solely for the parent's failure to satisfy aspects of a voluntary reunification case plan.

Juvenile court terminated mother's reunification services, cited her for contempt, and ordered her to spend 300 days in custody for her failure to participate in an intensive substance abuse case management and treatment program. The Supreme Court held that while a juvenile court has the power to order a parent to participate in substance abuse treatment as part of a reunification plan, it may not issue contempt sanctions as punishment solely because the parent failed to satisfy a reunification condition.

HEARSAY IN DEPENDENCY PROCEEDINGS

***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 petition 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 petition 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 THE PLACEMENT OF CHILDREN**

***In re C.B.* (2010) 188 Cal.App.4th 1024**

The Interstate Compact on the Placement of Children (ICPC) does not apply to out-of-state placement with a parent.

Children were removed primarily because of mother's substance abuse and placed with father on the condition that he not live with their mother. The agency argued that the juvenile court could not place children out of state with father unless it complied with the ICPC. The court authorized father to leave California with his children. Agency appealed. The court held that the ICPC did not apply here regardless of whether father was the offending or nonoffending parent. California cases consistently hold that the ICPC does *not* apply to an out-of-state placement with a parent. The court made clear that statewide rules and regulations that purportedly make the ICPC apply to this situation are invalid. The court also asserted that

lack of uniformity with laws of other states creates dysfunction and that a multistate legislative response may be required.

***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.

INDIAN CHILD WELFARE ACT

***Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30**

Indian children born outside the reservation are considered to be domiciled on the reservation if their parents live there. Under the Indian Child Welfare Act (ICWA) a tribal court has exclusive jurisdiction over children domiciled on its reservation.

Twin babies, who were born off the reservation, were voluntarily relinquished for adoption by their Indian parents, who resided on the Choctaw reservation. The adoptive parents were non-Indians, and the adoption was finalized in a Mississippi state court. The tribe moved to vacate the adoption on the grounds that ICWA provided the tribe with exclusive jurisdiction over the children. The Mississippi Supreme Court affirmed the state court adoption. The United States Supreme Court reversed, finding, first, that Congress did not intend for the word "domicile" in ICWA to be defined by each state court. Second, the court held that a child's domicile is that of his or her parent or parents. Where the child is found or relinquished does not play a role in determining domicile. The purposes of ICWA

would be undermined if parents could avoid the tribe's jurisdiction simply by temporarily leaving the reservation prior to giving birth.

Dwayne P. v. Superior Court (2002) 103 Cal.App.4th 247

When parents indicated that the children may have Indian heritage, the notice requirement under ICWA was triggered. The parents' failure to appeal the ICWA notice issue following the dispositional hearing did not constitute a waiver of their right to appeal later in the case.

Early in the case parents indicated that their children might be Indian, but, because of lack of specific information, the trial court found at the time of the jurisdictional and dispositional hearing that ICWA did not apply. Parents did not appeal. At the 12-month hearing, after reunification services were terminated and a section 366.26 hearing was set, parents filed a writ petition asserting improper notice under ICWA. The court held that ICWA notice requirements apply even when the children's Indian status is uncertain. The requirements are triggered when the court has "reason to believe" the children may be Indian. The trial court's failure to ensure compliance with those requirements was prejudicial error. Further, the parents' failure to raise the issue at the time of jurisdiction and disposition did not constitute waiver of their right to appeal. The court's duty to ensure proper notice is an ongoing duty that continues until proper notice is given. An error in not giving notice is of a continuing nature and may be challenged at any time during the dependency proceedings.

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 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.



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