2013
Montana Dependency and Neglect Best Practice Manual

Developed in Cooperation with the
Montana Uniform Dependency and
Neglect Workgroup

Please note that page 41, GAL/CASA: role and responsibility is incorrect. There is a new grant funding the update of this practice and hopefully will be completed by mid- 2017

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Introduction

INTRODUCTION

Establishing the Need for a Best Practice Manual

In 2009, the Montana Supreme Court, through its Court Assessment Program, provided funding to establish a Uniform Dependency and Neglect Workgroup (DN Workgroup). The DN Workgroup is a multi-disciplinary team established for the express purpose of increasing collaboration among stakeholders in DN cases, improving the quality of professional practice statewide, and conserving limited judicial resources. Since its inception, one of the primary goals of the DN Workgroup was to develop and distribute a DN Best Practice Manual designed specifically for Montana.

At around the same time the DN Workgroup was established, the American Bar Association released a publication entitled, *Child Safety, a Guide for Judges and Attorneys* (*Child Safety Guide*), co-authored by Therese Roe Lund, MSSW, and Jennifer Renne, JD. The *Child Safety Guide* drew on nationally accepted best practice standards to develop a framework within which judges and attorneys could make informed decisions regarding child safety. This framework can be especially helpful in determining when it is appropriate to remove children from their home, and when it is safe to return them. The *Child Safety Guide* has been widely distributed and utilized in training sessions and conferences throughout Montana since its release.

In early 2012, the Montana Division of Child and Family Services (CFS) implemented the Safety Assessment and Management System (SAMS). The SAMS model essentially provides a vehicle by which the decision making process identified in the *Child Safety Guide* can be implemented in the field. SAMS accomplishes this feat by employing both a short-term present danger assessment, as well as a subsequent, more comprehensive family functioning assessment designed to give CFS workers the tools necessary to make objective, timely, and informed decisions regarding child safety.

Purpose of the Best Practice Manual

This manual is intended to provide much needed relief to judges, attorneys, CFS workers, GALs and CASA volunteers who are struggling with the challenge of incorporating an improved framework for making child safety decisions into a judicial process guided and directed by a cumbersome – and at times disjointed – set of Montana statutes. In addition, this manual seeks to eliminate much of the confusion surrounding the competing functions of child attorney and GAL/CASA volunteer by clearly defining their respective roles and responsibilities.

It should be noted, however, that this manual is NOT intended to establish or identify minimum practice standards for judges, attorneys, CFS workers, GALs/CASA volunteers, or any other participant. Such standards, to the extent they exist, are better left to those agencies or entities responsible for overseeing individual participants. Rather, this manual is designed to readily identify best practices and to encourage

participants to utilize them whenever possible. It should be noted that recognized best practice standards are meant to supplement – and not supplant – existing Montana law. As a practical matter, any decision made by a judge in a DN case will be guided and directed by the best interest of the child. Because best practice standards and stated Montana law and policy both seek to advance the best interest of children, the two should seldom, if ever, conflict.

In addition to identifying best practices, this manual was also designed to bring much needed simplicity and clarity to a cumbersome and complex process. It seeks to accomplish this by first dividing the "average" DN case into logical and digestible "critical stages," then, with respect to each stage, by succinctly describing the purpose, process to be followed, and respective roles of the relevant parties. The author was careful to provide extensive footnotes to enable the reader to determine the source of each provision (i.e., whether the provision is related to a statute or a standard). Furthermore, in order to allow the reader to easily differentiate between provisions which are required by Montana law and those which are recognized and encouraged best practice standards, the author employs mandatory language (i.e., must) with regard to the former and precatory language (i.e., should) with regard to the latter.

Development of the Best Practice Manual

Prior to developing this manual, the author travelled throughout Montana and conducted structured interviews with over 20 district court judges in order to determine current practice standards. Attorneys, CPS workers, GALs and CASA volunteers were likewise interviewed. It became apparent during the interview process that many courts had already implemented some of the practices suggested by the *Child Safety Guide*. Furthermore, additional practices were identified which helped inform and shape some of the recommendations contained in this manual.[1]

Prior to finalizing this manual, draft copies were shared with the DN Workgroup as well as stakeholders throughout Montana. The author owes a debt of gratitude to those who sacrificed their time and energy to carefully review this manual and provide much needed feedback. This manual has been greatly improved as a result of their efforts.

[1] As indicated above, extensive footnotes have been included to identify the source of recommendations contained in this manual.

1) Initial Petition[2] by CFS Seeking Emergency Protective Services[3]

Purpose: The court must determine whether sufficient facts are contained in the supporting affidavit to justify the grant of emergency protective services pending a show cause hearing.[4]

Key Issue: ***Legal Standard*** – An order granting emergency protective services must issue if the supporting affidavit demonstrates **probable cause[5] that the child was at imminent risk of harm.[6] The affidavit should further establish that the action taken by CFS was reasonably necessary to avert the specific injury, as required by applicable federal law.**[7]

Timeline: 1) The CFS worker must submit an affidavit to the attorney for the State within two working days of removal.[8]

2) The State attorney must file the initial petition within 5 working days of receiving the affidavit from the CFS worker.[9]

3) If the court grants emergency protective services, the court must schedule a show cause hearing within 20 days from the date on which the initial petition was **filed**.[10]

Imminent or Apparent Risk of Harm?

The identification and application of a consistent standard governing the forced removal of children in Montana proved troublesome due to the cumbersome and disjointed nature of the statutes governing DN cases in Montana. This issue provides perhaps the best example of the difficulties inherent in deciphering Montana's abuse and neglect statutes.

The problem is best illustrated as follows: On one hand, Montana statutory policy unequivocally provides that there can be no forced removal unless CFS has "reasonable

[2] A request for emergency protective services typically accompanies an initial petition filed by CFS. However, it is possible for CFS to file an initial petition which does not seek emergency protective services. See MCA § 41-3-422(1)(a) for other available options.
[3] Pursuant to MCA § 41-3-301, CFS is required to seek emergency protective services whenever it removes a child from the custody of a parent. If CFS has removed a child and the petition does not request emergency protective services, the petition is defective.
[4] MCA § 41-3-301.
[5] MCA § 41-3-422(5)(a)(i).
[6] MCA §§ 41-3-101(1)(c) and 301(1).
[7] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).
[8] MCA § 41-3-301(6).
[9] *Ibid.*
[10] MCA § 41-3-432(1).

Appointments: Immediately upon granting emergency protective services, the court should order the following appointments:

1) *Attorney for Each Child* – One attorney may be appointed to represent siblings if no conflict of interest is indicated.[11]

2) *Attorney for Each Parent.*[12]

3) *Guardian Ad Litem for Children*.[13] Where CASA volunteers are available, a CASA volunteer should be appointed as the GAL. Appointing a CASA as a GAL is important because Montana does not have a statute authorizing CASAs to serve as an agent of the court.

ICWA: ***Emergency Removal*** – ICWA allows the emergency removal of an Indian child in accordance with applicable State law provided that 1) such removal is **necessary to prevent imminent physical damage or harm** to the child; 2) the emergency **placement terminates** immediately **when such removal is no longer necessary to prevent imminent physical damage or harm** to the child, and 3) the **State expeditiously initiates a child custody proceeding**, transfers the Indian child to the jurisdiction of his tribe, or restores the child to his parent or Indian custodian.[14]

Elevated Legal Standard – If the case is subject to ICWA,[15] the supporting affidavit must satisfy the elevated standard of

cause to suspect that the child is at imminent risk of harm."[1] On the other hand, the statute governing emergency removal ostensibly allows CFS to remove a child if it has "reason to believe any child is in … apparent danger of harm."[2] Another factor that invites confusion is Montana's definition of child abuse which includes the relatively low standard of failing "to provide cleanliness and general supervision."[3] This is significant because, as a practical matter, a finding of abuse often results in the court granting CFS authority to place the child where it sees fit.[4]

Many pages could be written attempting to interpret these competing statutes *in pari materia*, but the Fourteenth Amendment to the United States Constitution renders such an exercise meaningless. Under the Fourteenth Amendment, a forced removal cannot occur absent "reasonable

[11] MCA §§ 41-3-425(2)(b) & (3)(b) and the 2011 American Bar Association Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (ABA Model Act) § 3.
[12] MCA § 41-3-425(2)(a).
[13] MCA § 41-3-112(1).
[14] 25 USC § 1922.
[15] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).

establishing **clear and convincing evidence** of immediate danger.[16]

Appointment of Counsel – Montana expressly authorizes payment for representation required by ICWA. In addition to the appointments above, ICWA requires **legal representation for the "Indian custodian."** The Indian custodian is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[17]

Caution: ***Imminent Risk of Harm*** – It is the stated policy of Montana to ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless CFS has reasonable cause to suspect that the child is at imminent risk of harm.[18]

Next: ***Show Cause Hearing*** – The show cause hearing must be scheduled within 20 days from the date on which the initial petition was **filed**.[19]

ROLES AND RESPONSIBILITIES

Judge: ***Mediation*** – Consider setting a court-ordered mediation prior to the show cause hearing. This may not be necessary in areas where parties routinely communicate and negotiate appropriate resolutions prior to the hearing. However, in areas where communication is problematic, mediation can prevent the prospect of often cumbersome and unnecessary "initial negotiations" occurring in open court at the initial hearing. The mediation can be

cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."[5] Furthermore, under the federal standard, the "mere 'possibility' of danger is not enough. If it were, officers would always be justified in seizing a child without a court order whenever there was suspicion that the child might have been abused."[6] Because federal law in this area is clearly established, any CFS worker who removes a child in Montana without reasonable cause to believe that the child is at imminent risk of serious harm will subject both himself and CFS to the possibility of civil damages under 42 USC § 1983.

It is worth noting that the *Child Safety Guide* is consistent with federal law and stated Montana policy in this area, in that it presupposes an "imminent harm" standard when addressing child safety decisions, such as removal and

[16] MCA § 41-3-427(1)(b).
[17] MCA § 41-3-425(2)(c) and 25 USC §§ 1903(6) & 1912(b).
[18] MCA § 41-3-101(1)(c).
[19] MCA § 41-3-432(1).

informal, without either the court or a facilitator present. There is tremendous value in bringing the parties together prior to the initial hearing to identify areas of agreement.[20]

CFS Worker: 1) ***Conditions for Return*** – Ensure that the supporting affidavit contains clear, specific and objective reasons an in-home safety plan is not feasible. This information is critical for assisting the court in developing meaningful conditions for return.

2) ***Family Identification Meeting*** – If the child has not been placed with a relative, schedule a meeting with known family members in order to locate a suitable family placement. This meeting should occur within 48 hours of removal.

3) ***CFS Assessments in Lieu of Traditional Affidavit*** – Current CFS policy requires completion of a present danger assessment/plan prior to removal, followed by a comprehensive family functioning assessment within 60 days of removal.[21] To avoid duplication of efforts on the part of the CFS worker, and to ensure that all parties receive the full benefit of the investigation, the CFS worker should consider filing the present danger assessment/plan with the initial petition, in lieu of the traditional affidavit. Once the family functioning assessment has been completed, this document should be filed as a supplemental report. Whenever the above referenced documents are filed with the court, they should be attached to an affidavit which incorporates the documents by reference and attests to the accuracy of the facts contained in them.

reunification.[7] Because Montana statutory policy, established federal law, and the *Child Safety Guide* all adhere to the "imminent harm" standard, this standard is assumed and asserted throughout this manual.

To be clear, this is not to say that CFS can only intervene in cases where imminent harm is present. To the contrary, CFS can and should intervene in cases where child abuse and neglect is present, even in the absence of imminent harm. However, in accordance with clearly established federal law and nationally recognized best practices, CFS should not forcefully remove a child, nor should a court endorse a forced removal, absent reasonable cause to believe imminent harm is present.

For those cases where imminent harm is not present, CFS has other alternatives available, including voluntary service agreements and temporary investigative authority. In addition, it may be possible for

[20] MCA § 41-3-422(12).
[21] CFS Policy Manual § 202-3.

State Attorney: ***Consultation*** – Be available to the CFS worker for consultation prior to filing the petition. Ensure that the affidavit contains sufficient facts to support the requested relief.

CFS to obtain a court-ordered treatment plan together with temporary investigative authority in cases where imminent harm is not present. To do so, CFS would need to request a treatment plan that does not include placement authority.

[1] MCA § 41-3-101(1)(c).
[2] MCA § 41-3-301(1).
[3] MCA § 41-3-102(20).
[4] MCA § 41-3-442(3).
[5] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009).
[6] *Tenenbaum v. Williams*, 193 F.3d 581, 593-594 (2d Cir. N.Y. 1999).
[7] *Child Safety Guide* at 2 ("For a child to be unsafe, the consequences must be severe and imminent.").

2) Show Cause Hearing

Purpose: To provide the parties an opportunity to challenge the court's initial probable cause finding, based on the supporting affidavit, **that the child was in imminent danger of harm.**[22] **The parties can further challenge whether the action taken by CFS was reasonably necessary to avert the specific injury, as required by applicable federal law.**[23] In addition, the court must determine 1) if the child should be returned home immediately, 2) why continuation of the child in the home would be contrary to the child's best interests, and 3) whether CFS has made reasonable efforts to avoid protective placement of the child.[24]

Key Issues: 1) ***Child Safety*** – Ensuring child safety is the court's primary goal. Objective, reliable, and timely information is necessary to enable the court to achieve this objective. At a minimum, the court **should have answers to the following six questions**[25] in order to make informed decisions regarding child safety:

a) What is the nature and extent of the maltreatment?
b) What circumstances accompany the maltreatment?
c) How does the child function day-to-day?
d) How does the parent discipline the child?
e) What are the overall parenting practices?
f) How does the parent manage his own life?

The child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats.[26]

2) ***Visitation*** – When removal occurs, an appropriate visitation schedule should be established. Furthermore, disputes involving visitation should be addressed at the show cause hearing. The following factors[27] should be considered when establishing a visitation schedule:

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[22] MCA §§ 41-3-101(1)(c) and 301(1).
[23] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).
[24] MCA § 41-3-432.
[25] 2009 American Bar Association *Child Safety Guide for Judges and Attorneys* (*Child Safety Guide*), 3.
[26] *Child Safety Guide* at 2.
[27] *Child Safety Guide* at 33-34.

a) Immediate and frequent contact between child and parent should be established to help maintain the child's identity and reduce trauma.
b) Cookie-cutter visitation plans (the same frequency, location, and level of supervision) should be avoided because they often place needless restrictions on parent-child contact, and miss opportunities to achieve safety expediently.
c) Where possible, visits should take place in the foster home providing a more natural setting and allowing the foster parent to model parenting techniques.
d) Frequency or length of visits should not be used as punishment or reward, but is a right of all family members unless child safety is jeopardized.
e) Other contacts should be authorized where appropriate, including phone calls, letters, email, text messaging, attending church, school and other appointments together.

The **visitation schedule should be established based on the best interests of the child and not resources available to CFS.** Although the court is required to consider CFS resources when ordering examinations, evaluations, or counseling during adjudication[28] and disposition[29] proceedings, there is no similar requirement regarding visitation, and, in any event, no such limitation exists at the show cause hearing.

3) ***Conditions for Return*** – If the child is not returned home, the court should establish minimum expectations or conditions for the child to return home. Clearly identifying conditions for return is important because parents being confused about what they must do or accomplish creates barriers to the child's safe and timely return and ultimately leads to lower rates of reunification.[30] The following factors[31] should be considered when establishing conditions for return:

a) Determine exactly why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.
b) Do not wait until the family is able to completely protect the child on its own before returning the child home. Threats do not have to be eradicated – they need to be

[28] MCA § 41-3-437(b)(ii).
[29] MCA § 41-3-438(g) & (h).
[30] *Child Safety Guide* at 33-34.
[31] *Child Safety Guide* at 34-38.

controlled – before children can be reunified with families.

c) Threats can be controlled by specifying people, behaviors, and circumstances (including alternatives and options) that, if in place and active would resolve why an in-home safety plan was insufficient.

d) Include as a condition for return that the family agree to a court-ordered in-home safety plan.

4) ***Continuances*** – Continuances may be granted only upon a **showing of substantial injustice**.[32] If continued, the court is required to issue an order with an appropriate remedy that considers the best interests of the child. Although parties may stipulate that grounds for a continuance exist,[33] the court is nonetheless **obligated to DENY a request** unless proceeding with the hearing would result in substantial injustice.

5) ***Stipulations*** – It is common for parties to stipulate to emergency protective services at the show cause hearing. In addition, parties often stipulate that 1) a child is a youth in need of care and 2) the disposition requested by CFS, usually Temporary Legal Custody or Temporary Investigative Authority, is appropriate.[34] The latter two stipulations negate the need for separate adjudication or disposition hearings. **If the parties stipulate to disposition, the court should set the matter for a review hearing within 30-60 days of the show cause hearing, depending upon the complexity of the case.**[35]

6) ***Child Hearsay*** – Hearsay evidence from children who are the subject of the petition may be presented at the show cause hearing.[36]

7) ***Show Cause and Adjudication: Bifurcation Required*** – Although it is typically not appropriate to conduct the show cause and adjudication hearings on the same day,[37] on those rare occasions when it is, the hearings must be bifurcated and the issue of probable cause addressed first. **If the court affirms probable cause, then adjudication can be considered by the court.**

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[32] MCA § 41-3-432(1)(c).
[33] MCA § 41-3-434(4).
[34] MCA § 41-3-434.
[35] Recommendation derived from judge interviews.
[36] MCA § 41-3-432(3).
[37] Conducting a contested adjudication hearing immediately after the show cause hearing is discouraged. See below, Section 4, *Timing of Adjudication Hearing*, p. 26.

Parties should be aware that the child hearsay exception does not apply to the adjudication proceeding.

8) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[38]

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

ICWA: ***Elevated Legal Standard*** – If the case is subject to ICWA,[39] CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[40]

Active Efforts – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[41] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[42]

Expert Testimony – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[43] Expert testimony should not be viewed as a mere "technical requirement" which can

[38] MCA § 41-3-437(5).
[39] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).
[40] 25 USC § 1912(e).
[41] ICWA does not designate a legal standard by which this evidence must be established.
[42] 25 USC § 1912(d).
[43] 25 USC § 1912(e).

be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[44] To this end, **CFS must always attempt to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[45] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

Placement Preference – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [46]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Timeline: 1) The court must schedule a show cause hearing within 20 days from the date on which the initial petition was **filed**.[47]

2) If the court has not addressed adjudication at the show cause hearing, either through a stipulation or a contested hearing, then the court must schedule an adjudication hearing within 90 days of the show cause hearing.[48]

Next: 1) ***Review Hearing*** – Review hearings should be scheduled every **30-60 days** in order to assess the current status of the child's vulnerability and the parent's protective capacities.[49]

[44] 2007 Native American Rights Fund, *A Guide to the Indian Child Welfare Act* (*ICWA Guide*), p. 47.
[45] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[46] 25 USC § 1915(b).
[47] MCA § 41-3-432(1).
[48] MCA § 41-3-437(1)
[49] Recommendation derived from judge interviews.

2) ***Adjudication Hearing*** – If the court has not addressed adjudication at the show cause hearing, either through a stipulation or a contested hearing, then the court must schedule an adjudication hearing within 90 days of the show cause hearing.[50]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Explain Purpose*** – Inform the parties that the purpose of the proceeding is to **ensure the safety**[51] of the child and

a) **preserve the unity and welfare of the family** whenever possible;[52]
b) protect the child's right to **a healthy and safe childhood** in a **permanent placement**;[53]
c) when removal occurs, protect the child's right to maintain **ethnic, cultural, and religious heritage** whenever appropriate;[54] and
d) when removal occurs**, place the child** with the **noncustodial parent or another relative**, provided the proposed custodian **has not been convicted of a crime involving serious harm to children**.[55]

2) ***ICWA Inquiry*** – Specifically ask the parties whether there is any indication that an Indian child is involved.[56] If so, ensure compliance with ICWA.

3) ***ICWA Notice*** – If the case is subject to ICWA, ensure that CFS has **notified the parent, Indian custodian, and Indian child's tribe** of the proceeding.[57] Pursuant to ICWA, the **hearing cannot be held until 10 days after receipt of the notice**.[58] Determine if the recipients have indicated any intent to intervene[59] or initiate transfer proceedings.[60]

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[50] MCA § 41-3-437(1)
[51] MCA § 41-3-101(1)(a) and 45 CFR § 1356.21(b).
[52] MCA § 41-3-101(1)(b) and 45 CFR § 1356.21(b).
[53] MCA § 41-3-101(1)(e).
[54] MCA § 41-3-101(1)(f).
[55] MCA § 41-3-101(3).
[56] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).
[57] MCA § 41-3-432(4).
[58] 25 USC § 1912(a).
[59] 25 USC § 1911(c).
[60] 25 USC § 1911(b).

4) ***Probable Cause Determination*** – Reconsider the court's initial probable cause determination in light of evidence presented.

5) ***Return of Child*** – Determine whether the child can be safely returned home using the questions and criteria outlined above.

6) ***Reasonable Efforts*** – Make an express finding of whether CFS made reasonable efforts to prevent removal of the child. The court should **postpone the hearing** if it cannot make an **informed** decision based on the information presented. It is critical that the court make a fully informed decision at this stage of the proceedings. A finding of "no reasonable efforts" at this stage will **permanently disqualify CFS from receiving federal funds for foster care throughout the life of the case**.[61] Conversely, a premature decision to uphold a removal **could unnecessarily disrupt the bond between parent and child for an extended period of time.** A postponed show cause hearing should be rescheduled as soon as possible, but a "judicial determination" on the issue of reasonable efforts must be made no later than 60 days from date of removal.[62]

7) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[63]

8) ***Review Hearing*** – Set a review hearing within 30-60 days of the show cause hearing, depending on the complexity of the case.[64] The Review Hearing can be combined with other hearings.

CFS Worker: ***Safety Plan*** – Provide the State attorney with a copy of the Safety Plan prior to the show cause hearing. Be prepared to clearly articulate why an in-home safety plan was not feasible and what must occur to ensure the safe return of the child.

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the show cause hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the show cause hearing. Advocate for the child's best interest, not necessarily his expressed interest.

[61] 45 CFR §§ 1356.21(b)(1)(ii) and (d)(2).
[62] 45 CFR § 1356.21(b)(1).
[63] ABA Model Act § 9(c).
[64] Recommendation derived from judge interviews.

Inform the court when taking a position contrary to the child's expressed interest.

2) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[65] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the show cause hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[66] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***File Timely Request for Contested Hearing*** – In order to preserve the child's right to a contested show cause hearing, the attorney **must file a request** for a contested hearing **within 10 days following service of the initial petition**.[67] This notice must be filed whenever the **child disputes** either the **veracity of the supporting affidavit** or the **material facts** contained within it.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a

[65] MCA § 47-1-104(4)(a)(iii).

[66] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[67] MCA § 41-3-427(1)(d).

minimum, seeking an order from the court appointing separate counsel.[68]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[69] then advocate for the child using the "substituted judgment" standard.[70]

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[71]

State Attorney: 1) ***Family Preservation*** – The State attorney needs to carefully balance his obligation to establish a basis for removal with the reality that parents and the State must work together to achieve family unity after the hearing is over. To this end, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[72] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

2) ***Safety Plan*** – Ensure that all of the parties have a copy of the Safety Plan prior to the show cause hearing. The safety plan will assist the court in making an informed decision regarding child safety. Furthermore, the safety plan will be reviewed at future hearings to monitor progress and assess whether the child can be safely returned.

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[68] ABA Model Act § 3(c).

[69] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[70] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[71] ABA Model Act §§ 9(d) and (e).

[72] Recommendation derived from judge interviews.

Parent Attorney: 1) ***Initial Meeting*** – The parent's attorney should meet with his client within 72 hours of the appointment.

2) ***File Timely Request for Contested Hearing*** – In order to preserve the parent's right to a contested show cause hearing, the attorney **must file a request** for a contested hearing **within 10 days following service of the initial petition**.[73] This notice must be filed whenever the **parent disputes** either the **veracity of the supporting affidavit** or the **material facts** contained within it.

3) ***Child Placement*** – The appropriateness of the child's current placement should be discussed at the initial meeting. The parent should be advised that, generally speaking, children placed with family members have a higher rate of reunification. It should also be noted that placement with a family member provides a per se exception to the requirement that CFS seek termination if the child has been in foster care for 15 of the most recent 22 months.[74] The latter point is especially important to parents who will likely require chemical dependency treatment. **Disputes regarding placement should be addressed at the show cause hearing.**

4) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[75] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

[73] MCA § 41-3-427(1)(d).
[74] MCA § 41-3-604(1)(a).
[75] Recommendation derived from judge interviews.

3) Temporary Investigative Authority

Purpose: A grant of authority from the court authorizing CFS to conduct an investigation into allegations of child abuse, neglect or abandonment. The grant of authority lasts no more than 90 days.[76]

Key Issues: 1) ***Filing Typically Includes Request for Emergency Protective Services*** – Although not required, a petition for temporary investigative authority will typically include a request for emergency protective services. This is because a grant of temporary investigative authority, standing alone, does not allow CFS to make decisions regarding the child's care and placement.

2) ***Treatment Plan*** – The court has the authority to order a treatment plan in cases where the parent has admitted the allegations contained in the petition.[77] Because the treatment plan statute grants CFS the authority to make placement decisions (i.e., remove the child),[78] unless placement authority is removed from the treatment plan, any admissions by the parent must necessarily involve imminent danger of harm to the child.[79]

3) ***Adjudicatory and Disposition Hearings NOT Authorized*** – A show cause hearing is the only hearing required for temporary investigative authority.[80] Adjudicatory and disposition hearings are neither required nor authorized.

Why TIA?

During the interview process, the judges were surprisingly consistent in identifying the importance of developing and nurturing a collaborative approach among the parties as a key to improving outcomes for both children and families. However, many cases are initiated in a way that makes collaboration between the parties difficult, if not impossible. This is because most cases are initiated by a request for adjudication rather than a request for temporary investigative authority. The difference between the two approaches, from the perspective of the parents, is massive.

In cases involving temporary investigative

[76] MCA § 41-3-433.
[77] MCA § 41-3-443(1)(a).
[78] MCA § 41-3-443(3)(f).
[79] MCA §§ 41-3-101(1)(c) and 301(1), *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009). This will not pose a problem in the vast majority of cases since petitions for temporary investigative authority are invariably combined with requests for emergency protective services, and because the latter request requires a finding that the child was in imminent danger of harm. As noted, however, even in cases where imminent harm is not present, CFS could very likely obtain a court-ordered treatment plan by expressly excluding placement authority from the terms of the requested plan.

4) ***Benefits of Temporary Investigative Authority*** – Though not appropriate for every case, seeking temporary investigative authority can be beneficial for a variety of reasons, including but not limited to the following:

a) ***Facilitates Cooperation*** – parents are less threatened by temporary investigative authority because a continuing investigation affords parents the opportunity to prove they can parent their children. As a result, it is easier and more natural for CFS to come alongside the parents and work with them to achieve its goal of protecting children while maintaining family unity. By contrast, when CFS immediately seeks adjudication, the parents are typically hurt, embarrassed and defensive. In many cases, parents are consumed with establishing their "innocence" and choose to spend their time and energy fighting CFS rather than cooperating.

b) ***Finish Investigation*** – because CFS has recently moved to a model that requires a more comprehensive initial investigation,[81] temporary investigative authority will allow CFS to complete its full investigation prior to deciding whether adjudication is warranted. As indicated above, this will also place CFS in a better

authority, CFS is essentially telling the parents that they are waiting to make a final decision on how to proceed until they are able to complete a comprehensive investigation. This provides an incredible incentive for the parents to work with CFS to "prove" that they can responsibly parent their children. It also provides incentive for the parties to stipulate at the initial hearing, if for no other reason than to possibly avoid the negative consequences, both legal and emotional, that can result from an adjudication hearing.

By contrast, an immediate request for an adjudication hearing has a tendency to place the parties in an adversarial position – one that many parents and CFS workers maintain throughout the life of the case. An additional advantage of initiating a case through a petition for investigative authority is that it virtually guarantees that the family functioning assessment will be

[80] MCA § 41-3-432(1)(a).

[81] Under its current policy, CFS is not required to complete its investigation until 60 days after the alleged abuse was reported. *See* CFS Policy Manual § 202-3. Since the show cause hearing must be held within 20 days of removal, CFS will not have time to complete its investigation and notify the parties of its results prior to the hearing.

posture to work with the parents immediately after the initial filing.

c) ***Smoother Transition to Temporary Legal Custody*** – in cases where temporary legal custody is indicated, parents should better understand the need for continued intervention. A relationship should be established with CFS and the parents cannot complain that they were not given an opportunity to prove themselves.

d) ***Alternative to Contested Adjudication*** – parents will often stipulate to temporary investigative authority in lieu of proceeding to a contested adjudication hearing. This result can expedite the transition to a more collaborative approach to parenting. Furthermore, amending the petition to allow for temporary investigative authority in lieu of adjudication can take place instantaneously in open court or at any time through a written amendment,[82] thus allowing tremendous flexibility in negotiating resolutions.

completed prior to adjudication, in the event an adjudication hearing is necessary. This will ensure that the judge has the benefit of a comprehensive investigation prior to making decisions that will profoundly affect both children and their families. Of course, not all cases are appropriate for temporary investigative authority. Depending on the circumstances of a given case, it may very well be appropriate for CFS to move directly to temporary legal custody or even termination.

One possible downside to temporary investigative authority is that, historically speaking, it has lacked formal oversight by either CFS or the court. In the past, this had led to a lack of accountability, and in many cases, a corresponding lack of progress. To guard against this dynamic, it is recommended that the court approve a treatment plan and conduct review hearings during the 90-day investigatory term.

ROLES AND RESPONSIBILITIES

Judge: 1) ***Treatment Plan*** – In cases where the parents have admitted the allegations, review and approve the treatment plan at the show cause hearing, if possible. If a treatment plan has not been prepared, require CFS to prepare a treatment plan within 10 days and set a review hearing 20 days from the show cause hearing for the purpose of approving the treatment plan.

[82] MCA § 41-3-422(1)(b).

2) ***Ensure Compliance with Show Cause Requirements*** – In all other respects, ensure compliance with the show cause requirements contained in this manual, Section 2, above.

CFS Worker: ***Treatment Plan*** – Prepare a treatment plan for presentation at the show cause hearing. If the parents do not admit the allegations, the document can nonetheless be used to communicate expectations and recommendations. Regardless, the parents will have incentive to adhere to the treatment plan to demonstrate competence and potentially avoid adjudication.

Parent Attorney: ***Explain Benefits*** – Counsel the parent regarding the benefits of temporary investigative authority, as indicated above. Note that temporary investigative authority gives the parent an opportunity to avoid the **negative consequences of an adjudication**, such as a) the corresponding **report of abuse** being deemed **"substantiated"** by CFS,[83] b) **inability to obtain a job** in a variety of **occupations involving children**,[84] and c) **disclosure of information** related to substantiated reports of abuse to certain **employers or volunteer organizations**.[85]

[83] If the court makes a finding that the child is a youth in need of care, whether based on a stipulation or a contested hearing, the underlying child abuse report is deemed substantiated pursuant to ARM § 37.47.615(1)(b). Even if the court makes no such finding, CFS can and often does send a "substantiation letter" to parents who are the subject of a child abuse investigation. The parents have 30 days after the date the letter was mailed by CFS to request a fair hearing. *See* ARM § 37.47.610.

[84] A substantiated report of child abuse or neglect will make it IMPOSSIBLE to operate or be employed by 1) a youth care facility, such as a group home or therapeutic foster home, as indicated by ARM §§ 37.97.115(1)(e) & 37.97.140(6); 2) an outdoor behavioral program, as indicated by §§ 37.98.304(2)(e) & 37.98.406(3)(a); and 3) an adoption agency, as indicated by ARM § 37.93.204(1)(c). Furthermore, a substantiated report will make it extremely difficult, though technically not impossible, to operate or be employed by 1) a day care facility, as indicated by ARM §§ 37.95.108(9)(d), 37.95.176(2)(e) & (3)(d) ; and 2) a foster care home, as indicated by ARM §§ 37.51.210(1) & 37.51.216(2)(f).

[85] MCA § 41-3-205(3)(o) and ARM § 37.47.608 authorize CFS to disclose "information that indicates a risk to children" to prospective employers or volunteer organizations who make a written request to CFS. CFS can only disclose information if the job or volunteer opportunity involves the possibility of unsupervised contact with children. Current CFS policy authorizes disclosure of substantiated reports of child abuse. *See* CFS Policy Manual § 506-1.

4) " Youth in Need o f Care" Adjudication Hearing

Purpose: To determine, by a preponderance of the evidence, whether a child meets the definition of a **"youth in need of care."**[86] A child is a "youth in need of care" if a court determines, **after a hearing**, that a child has been **abused, neglected or abandoned**.[87] A child has been abused, neglected or abandoned if any of the following apply:

a) ***Abandonment*** – the child has been abandoned as demonstrated by **1)** the child being left under circumstances that indicate the parent does not intend to resume care of the child; **2)** willful surrender of a child for 6 months without indicating a firm intention to resume custody or make permanent legal arrangements; **3)** the parent is unknown and has been unknown for at least 90 days despite reasonable efforts to locate; and **4)** the voluntary surrender of a child no more than 30 days old to an emergency services provider pursuant to MCA § 40-6-402. ***Caution:*** *abandonment is* ***not demonstrated*** *by voluntary surrender due solely to inability to access publicly funded services.*[88]

b) ***Physical Abuse*** – indicated when a person commits or allows another to commit[89] an intentional act, omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.[90] **Substantial risk** of physical abuse will support a "youth in need of care" finding.[91]

c) ***Physical Neglect*** – indicated when a person acts in a manner, or allows another to act in a manner[92] that results in a failure to provide basic necessities, including appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general

[86] MCA § 41-3-437(2).
[87] MCA § 41-3-102(34).
[88] MCA § 41-3-102(1).
[89] MCA § 41-3-102(21)(a)(i).
[90] MCA § 41-3-102(19).
[91] MCA §§ 41-3-102(7)(a)(ii) and 102(21)(a)(i).
[92] MCA § 41-3-102(21)(a)(i).

supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child.[93] ***Caution:*** *failure to provide food, clothing, shelter, education, or health care constitutes physical neglect* ***ONLY IF*** *the parent is financially able to provide these necessities or has been offered financial or other reasonable means to do so.*[94] ***Caution:*** *the term* ***does not*** *include a child not receiving* ***supervision solely because of parental inability to control the child's behavior****.*[95] **Substantial risk** of physical neglect will support a "youth in need of care" finding.[96]

d) ***Psychological Abuse or Neglect*** – indicated when a person acts in a manner, or allows another to act in a manner[97] that results in severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including the commission of acts of violence against another person residing in the child's home. However**, it is not psychological abuse or neglect** if an individual, who is himself a victim, fails to prevent abuse against another victim.[98] **Substantial risk** of psychological abuse or neglect will support a "youth in need of care" finding.[99]

e) ***Lack of Provision*** – indicated when a person causes **malnutrition** or a **failure to thrive** or otherwise fails to supply the child with adequate **food** or fails to supply **clothing, shelter, education**, or adequate **health care**, **though financially able to do so or offered financial or other reasonable means to do so**.[100] ***Caution:*** *failure to provide adequate health care solely on the basis of religious beliefs* ***DOES NOT*** *constitute child abuse or neglect.*[101]

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[93] MCA § 41-3-102(20).

[94] MCA § 41-3-102(21)(a)(iv) supplies this limitation for these specific necessities. See "Lack of Provision," below. Where two statutes deal with the same subject matter, the specific prevails over the general. *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, ¶ 21.

[95] MCA § 41-3-102(21)(b).

[96] MCA §§ 41-3-102(7)(a)(ii) and 102(21)(a)(i).

[97] MCA § 41-3-102(21)(a)(i).

[98] MCA § 41-3-102(23).

[99] MCA §§ 41-3-102(7)(a)(ii) & 102(21)(a)(i).

[100] MCA § 41-3-102(21)(a)(iv). *See also* MCA § 41-3-102(4) (defining "adequate health care") and § 102(33) (defining "withholding of medically indicated treatment").

[101] MCA § 41-3-102(4)(b).

f) ***Sexual Abuse*** – indicated when a person commits or allows another person to commit any of the following offenses against a child: **sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, sexual abuse, ritual abuse, or incest**, as described in Title 45, chapter 5.[102] ***Caution:*** *does not include necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler.*[103]

g) ***Sexual Exploitation*** – indicated when a person allows, permits or encourages a child to engage in a prostitution offense, as described in MCA §§ 45-5-601 through 45-5-603, or allows, permits, or encourages sexual abuse of children as described in MCA § 45-5-625.[104]

h) ***Inducing False Report*** – indicated when a person induces or attempts to induce a child to give a false report that he or another child has been abused by a parent or another person responsible for the child's welfare.[105]

i) ***Exposure to Unreasonable Risk*** – indicated when a person exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk.[106]

Key Issues: 1) ***Dismissal Required*** – If the court finds that the child is **NOT a youth in need of care**, the petition must be dismissed and any orders involving emergency protective services or the show cause hearing must be vacated.[107]

2) ***Required Determinations*** – At the conclusion of the hearing, if the court find that a child meets the definition of a youth in need of care, the court must **a) establish facts that resulted in CFS intervention**, and **b) determine the nature of abuse and/or neglect**.[108]

3) ***Required Evidence*** – The court is required to hear evidence on **a)** the **residence of the child**, **b) paternity**, if in question, **c)**

[102] MCA §§ 41-3-102(21)(a)(ii) and 102(27)(a).
[103] MCA § 41-3-102(27)(b).
[104] MCA §§ 41-3-102(21)(a)(ii) and 102(28).
[105] MCA § 41-3-102(21)(a)(iii).
[106] MCA § 41-3-102(21)(a)(v).
[107] MCA § 41-3-437(a).
[108] MCA § 41-3-437(2).

whereabouts of the parents, guardian, or nearest adult relative, and **d)** any other **evidence** the court considers **relevant in determining the status of the child**.[109]

4) ***Abandonment Evidence*** – In cases involving abandonment, the court is **required to consider evidence offered by any interested person with regard to any of the following**:[110]

a) the extent to which the child has been cared for by someone other than the child's parents;
b) whether the parents placed or allowed their child to stay with another person for the care of their child, and, if so, then:
    i) the intent of the parties with regard to the placement,
    ii) stability provided in residence, schooling, and activities outside of the home, and
    ii) the circumstances that led to the placement, including whether the placement occurred as the result of an order of protection or a conviction for partner or family member assault.

5) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[111]

6) ***Timing of Adjudication Hearing*** – The court is required to make an informed decision regarding the "nature of the abuse and neglect" at the adjudication hearing.[112] At a minimum, the court should receive the results of the initial investigation conducted by CFS prior to making this determination.[113] As a matter of policy, CFS will typically not complete its initial investigation until after the show cause hearing.[114] As a result, in the vast majority of cases, the **adjudication hearing should NOT be held immediately after the show cause hearing.**

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[109] MCA § 41-3-437(3).
[110] MCA § 41-3-437(4).
[111] MCA § 41-3-437(5).
[112] MCA § 41-3-437(2).
[113] The need and desire for this information was established during judge interviews. Furthermore, providing objective, relevant, and reliable information early in the process is important to allow all of the parties an opportunity to make informed decisions.
[114] Under its current policy, CFS is not required to complete its investigation until 60 days after the alleged abuse was reported. *See* CFS Policy Manual § 202-3. Since the show cause hearing must be held within 20 days of removal, CFS will not have time to complete its investigation and notify the parties of its results prior to the hearing.

7) ***Continuances*** – Continuances may be granted a) upon **stipulation** by the parties, b) to address **newly discovered evidence**, c) to manage **unavoidable delays** or d) as needed for **unforeseen personal emergencies**.[115]

8) ***Stipulations*** – Parties often stipulate to **a youth in need of care designation** at the adjudication hearing. If the parties stipulate, it is important for **the parties to identify which facts are uncontested** in order to provide a basis to support a youth in need of care designation. These facts will guide disposition, development of a treatment plan, periodic review and possible termination.[116] The parties may also **stipulate to disposition** at the adjudication hearing.

9) ***Temporary Dispositional Order Pending Hearing*** – If disposition is not determined at the adjudication hearing, the court should **enter a temporary dispositional order**.[117] In fashioning an appropriate order, the court should adhere to the following principles:

a) Because Montana policy and federal law[118] allow removal only if the child is at imminent risk of harm, the **child should be returned to his parents as soon as the threat of danger is controlled**.[119]
b) Refer to the sections above on **Child Safety, Visitation, and Conditions for Return,**[120] to guide the development of the temporary dispositional order.

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)

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[115] MCA § 41-3-437(1).
[116] MCA § 41-3-437(2).
[117] MCA §§ 41-3-437(6)(b) and (7)(b).
[118] MCA §§ 41-3-101(1)(c) and 301(1), *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).
[119] *Child Safety Guide* at 36.
[120] See above, pp. 9-11.

h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

Next: 1) ***Disposition Hearing*** – If the court **has not addressed disposition** at the adjudication hearing, either through a stipulation or a contested hearing, then the court must schedule a **disposition hearing within 20 days after an adjudication order** has been entered.[121] The court should advise the State to have the **treatment plan prepared and distributed 10 days prior to the disposition hearing.** The treatment plan should also be addressed at the disposition hearing.

2) ***Review Hearing*** – If **disposition has been addressed** at the adjudication hearing, the court should schedule a **review hearing within 30-60 days**, depending on the complexity of the case, in order to assess the current status of the child's vulnerability and the parent's protective capacities. The court should advise the State to have the **treatment plan prepared and distributed 10 days prior to the review hearing.** The treatment plan should also be addressed at the review hearing.[122]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Required Findings*** – The court **must** include in its order **a)** which **allegations** of the petition have been **proved or admitted**, **b)** whether there is a **legal basis** for continued **court and CFS intervention**, and **c)** whether CFS has **made reasonable efforts to avoid protective placement** of the child or to make it possible to safely return the child to the child's home.

2) ***Optional Findings*** – The court **may** include in its order **a)** terms for **visitation, support, and other intrafamily communication** pending disposition, **b)** completion of **examinations, evaluations, or counseling** of the child or parents in preparation for the disposition hearing, funds permitting, **c)** requirement that CFC **evaluate the noncustodial parent or relatives** as possible caretakers, **d)** requirement that **the perpetrator** of the alleged child abuse or neglect be **removed from the home**, and **e)** requirement that CFS continue efforts to **notify noncustodial parents**.

[121] MCA § 41-3-438(1). The 20 days begins running from the date of the oral pronouncement, typically given from the bench on the day of the adjudicatory hearing. See MCA § 41-3-438(2)(c). If there is no oral pronouncement, the 20 days begins running from the date of the written order.
[122] Recommendation derived from judge interviews.

3) ***Only Proven or Admitted Facts in Order*** – Ensure that only **facts** which have been **admitted or determined by the court** after a contested hearing are **included in the resulting order**. It is important that only those facts which have been verified are relied upon to guide disposition, development of a treatment plan, periodic review and possible termination.[123]

4) ***Investigations for Disposition Hearing*** – Determine if any investigations are needed in anticipation of the disposition hearing. **Order any necessary investigations** and require any resulting **reports to be provided** to the parties at least **5 working days prior to the disposition hearing**.[124]

5) ***Bifurcate Hearings*** – As indicated under *Timing of Adjudication Hearing*, above, it would be unusual to conduct an **adjudication** hearing immediately after a **show cause** hearing. Nonetheless, if these hearings are conducted one after another, the hearings **must be bifurcated** and the issue of probable cause addressed first.[125] Likewise, **when allowed**,[126] the **adjudication and disposition hearings must be bifurcated** because hearsay is allowed at the disposition hearing but not the adjudication hearing.[127]

6) ***Return of Child*** – Determine whether the child can be safely returned home using the criteria set forth in the **Child Safety and Conditions for Return** sections, above. **[128]**

7) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[129]

CFS Worker: ***Treatment Plan*** – If the court adjudicates the child as a youth in need of care, prepare an appropriate treatment plan and share it with the parties at least 10 days before the disposition hearing or the next review hearing, whichever occurs first. In either event, the treatment plan should be approved by the Court within 30 days of the adjudication hearing.[130]

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[123] MCA § 41-3-437(2).
[124] MCA §§ 41-3-437(6)(b) and 438(2)(b)(i).
[125] See above, *Show Cause and Adjudication: Bifurcation Required*, p. 11.
[126] The disposition hearing can be held immediately after the adjudication hearing only if 1) all required reports are available and have been provided to the parties at least 5 working days in advance of the hearing, and 2) the judge has an opportunity to review the reports after the adjudication hearing. MCA § 41-3-438(2)(b).
[127] MCA § 41-3-438(2)(a).
[128] See above, pp. 9-11.
[129] ABA Model Act § 9(c).
[130] Recommendation derived from judge interviews.

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the adjudicatory hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[131] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the adjudicatory hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[132] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a

[131] MCA § 47-1-104(4)(a)(iii).

[132] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

minimum, seeking an order from the court appointing separate counsel.[133]

4) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[134] then advocate for the child using the "substituted judgment" standard.[135]

5) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[136]

State Attorney: 1) ***Partial Admissions*** – If a parent makes partial admissions, ensure that the facts admitted are sufficient to enable CFS to address issues of concern. Since only admitted or proven facts can be used to guide disposition and development of a treatment plan,[137] it is important to elicit admissions relevant to areas of concern. If a parent is unwilling to admit facts deemed necessary by CFS, the State attorney may have to present testimony to establish the existence of additional facts.

2) ***Family Preservation*** – Because CFS and the State attorney need to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[138] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State

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[133] ABA Model Act § 3(c).

[134] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[135] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[136] ABA Model Act §§ 9(d) and (e).

[137] MCA § 41-3-437(2).

[138] Recommendation derived from judge interviews.

will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Consequences of Youth in Need of Care Determination*** – Explain the consequences of a determination by the court that the child is a youth in need of care. At a minimum, the parent should understand that a youth in need of care determination will result in a) the corresponding **report of abuse** being deemed **"substantiated"** by CFS,[139] b) **inability to obtain a job** in a variety of **occupations involving children**,[140] and c) **disclosure of information** related to substantiated reports of abuse to certain **employers or volunteer organizations**.[141]

2) ***Return of Child*** – Determine if the parent wants the child to return home. If the child's return is viable, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

3) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[142] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the

[139] If the court makes a finding that the child is a youth in need of care, whether based on a stipulation or a contested hearing, the underlying child abuse report is deemed substantiated pursuant to ARM § 37.47.615(1)(b). Even if the court makes no such finding, CFS can and often does send a "substantiation letter" to parents who are the subject of a child abuse investigation. The parents have 30 days after the date the letter was mailed by CFS to request a fair hearing. *See* ARM § 37.47.610.

[140] A substantiated report of child abuse or neglect will make it IMPOSSIBLE to operate or be employed by 1) a youth care facility, such as a group home or therapeutic foster home, as indicated by ARM §§ 37.97.115(1)(e) & 37.97.140(6); 2) an outdoor behavioral program, as indicated by §§ 37.98.304(2)(e) & 37.98.406(3)(a); and 3) an adoption agency, as indicated by ARM § 37.93.204(1)(c). Furthermore, a substantiated report will make it extremely difficult, though technically not impossible, to operate or be employed by 1) a day care facility, as indicated by ARM §§ 37.95.108(9)(d), 37.95.176(2)(e) & (3)(d) ; and 2) a foster care home, as indicated by ARM §§ 37.51.210(1) & 37.51.216(2)(f).

[141] MCA § 41-3-205(3)(o) and ARM § 37.47.608 authorize CFS to disclose "information that indicates a risk to children" to prospective employers or volunteer organizations who make a written request to CFS. CFS can only disclose information if the job or volunteer opportunity involves the possibility of unsupervised contact with children. Current CFS policy authorizes disclosure of substantiated reports of child abuse. *See* CFS Policy Manual § 506-1.

[142] Recommendation derived from judge interviews.

preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

5) Disposition Hearing

Purpose: In every case in which the **court enters an adjudicatory order**, the court must **protect the welfare of the child** by choosing an **appropriate disposition** for the child. Unless stipulated by the parties, the disposition hearing must be held **within 20 days after an adjudication order** has been entered.[143] The court is not required to grant CFS the specific disposition it is requesting (e.g., temporary legal custody). Instead, **the court must independently choose the best disposition** for the child from the following list of options:[144]

a) ***Parental Custody*** – allow the child to stay with his parents subject to conditions prescribed by the court.[145]
b) **Evaluate Noncustodial Parent** – require CFS to evaluate the noncustodial parent as a possible caretaker.[146] Reconvene the parties to conclude the disposition hearing as soon as possible, but no later than 20 days from the date of the request.
c) ***Noncustodial Parent*** – place the child with the noncustodial parent, superseding any existing custodial order, and do one of the following:
   i) **keep the proceeding open** pending completion of a **treatment plan** by the custodial parent;[147] or
   ii) **dismiss the proceeding** with no further obligation on the part of CFS to provide services.[148]
d) ***Emancipation*** – grant an order of limited emancipation to a child who is 16 years of age or older.[149]
e) ***Temporary Legal Custody*** – the court may transfer legal custody **only upon a finding**, by a preponderance of the evidence, that 1) **dismissing the petition** would create a **substantial risk of harm** to the child or would be a **detriment to the child's physical or psychological well-being**, and 2) **reasonable services** have been provided **to prevent the removal** of the child or to make it **possible for the child to safely return home**.[150] If both

[143] MCA § 41-3-438(1). The 20 days begins running from the date of the oral pronouncement, typically given from the bench on the day of the adjudicatory hearing. See MCA § 41-3-438(2)(c). If there is no oral pronouncement, the 20 days begins running from the date of the written order.
[144] MCA § 41-3-438(3).
[145] MCA § 41-3-438(3)(a).
[146] MCA § 41-3-438(3)(b).
[147] MCA § 41-3-438(3)(c).
[148] MCA § 41-3-438(3)(d).
[149] MCA § 41-3-438(3)(e).
[150] MCA § 41-3-442(1).

findings are present, the court may transfer temporary legal custody for up to 6 months[151] to any of the following:

i) CFS;
ii) a licensed child-placement agency; or
iii) a nonparent relative or other individual who has been evaluated and recommended by CFS.

Key Issues: 1) ***Child Safety*** – As always, the court should place primary focus on the child's safety. When determining whether the child can be returned home or placed with the noncustodial parent or relative, the court should look to **the following six questions:**[152]

a) What is the nature and extent of the maltreatment?
b) What circumstances accompany the maltreatment?
c) How does the child function day-to-day?
d) How does the parent discipline the child?
e) What are the overall parenting practices?
f) How does the parent manage his own life?

The child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats.[153]

2) ***Conditions for Return*** – If the child is not returned home, the court should establish minimum expectations or conditions. The following factors[154] should be considered when establishing conditions for return:

a) Determine exactly why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.
b) Do not wait until the family is able to completely protect the child on its own before returning the child home. Threats do not have to be eradicated – they need to be **controlled** – before children can be reunified with families.
c) Threats can be controlled by specifying people, behaviors, and circumstances (including alternatives and options) that, if in place and active would resolve why an in-home safety plan was insufficient.

[151] MCA § 41-3-442(2).
[152] *Child Safety Guide* at 3.
[153] *Child Safety Guide* at 2.
[154] *Child Safety Guide* at 34-38.

d) Include as a condition for return that the family agree to a court-ordered in-home safety plan.

3) ***Visitation*** – If the child cannot be returned home safely, then the court should fashion an appropriate visitation schedule. Furthermore, any disputes involving visitation should be addressed at the disposition hearing. The following factors[155] should be considered when establishing a visitation schedule:

a) Immediate and frequent contact between child and parent should be established to help maintain the child's identity and reduce trauma.
b) Cookie-cutter visitation plans (the same frequency, location, and level of supervision) should be avoided because they often place needless restrictions on parent-child contact, and miss opportunities to achieve safety expediently.
c) Where possible, visits should take place in the foster home providing a more natural setting and allowing the foster parent to model parenting techniques.
d) Frequency or length of visits should not be used as punishment or reward, but is a right of all family members unless child safety is jeopardized.
e) Other contacts should be authorized where appropriate, including phone calls, letters, email, text messaging, attending church, school and other appointments together.

The **visitation schedule should be established based on the best interests of the child and not resources available to CFS.** Although the court is required to consider CFS resources when ordering examinations, evaluations, or counseling during adjudication[156] and disposition[157] proceedings, there is no similar requirement regarding visitation.

4) ***Treatment Provisions*** – The court has broad authority to "do what is necessary to give effect to the final disposition."[158] This includes, but is not limited to, ordering medical and psychological evaluations, treatment and counseling. Treatment services, however, are subject to funding availability by CFS.[159]

[155] *Child Safety Guide* at 33-34.
[156] MCA § 41-3-437(b)(ii).
[157] MCA § 41-3-438(g) & (h).
[158] MCA § 41-3-438(3)(g).
[159] MCA §§ 41-3-438(g) and (h).

5) ***Abandonment*** – In cases involving an abandoned child, if the court considers ordering **temporary legal custody**, the court **must consider transferring legal custody of the child to a relative** unless the court transfers legal custody to CFS or a noncustodial parent.[160]

6) ***Hearsay*** – Hearsay evidence is admissible at the disposition hearing.[161]

7) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[162]

8) ***Continuances*** – Continuances may be granted a) upon **stipulation** by the parties, b) to address **newly discovered evidence**, c) to manage **unavoidable delays** or d) as needed for **unforeseen personal emergencies**.[163]

9) ***Stipulations*** – Parties may stipulate to disposition at or before the disposition hearing.

10) ***Treatment Plan*** – Whenever possible, the treatment plan should be reviewed and approved at or before the disposition hearing.

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

[160] MCA § 41-3-438(4).
[161] MCA § 41-3-438(2)(a).
[162] MCA § 41-3-437(5).
[163] MCA § 41-3-438(1).

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[164]

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[165] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[166]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[167] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[168] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[169] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to:[170]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

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[164] 25 USC § 1912(e).
[165] ICWA does not designate a legal standard by which this evidence must be established.
[166] 25 USC § 1912(d).
[167] 25 USC § 1912(e).
[168] *ICWA Guide* at 47.
[169] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[170] 25 USC § 1915(b).

d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – The court should schedule a **review hearing within 30-60 days**, depending on the complexity of the case, in order to assess the current status of the child's vulnerability and the parent's protective capacities. The treatment plan should have been submitted and approved by this time. If not, the court should advise the State to have the **treatment plan prepared and distributed to the parties with 10 days. The review hearing should then be scheduled within 15-20 days to expedite review, approval and implementation of the treatment plan.**[171]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Investigations for Disposition Hearing*** – Ensure that **any necessary investigations** have been completed and that any resulting **reports were provided** to the parties at least **5 working days prior to the disposition hearing**.[172]

2) ***Bifurcate Hearings*** – If allowed to occur on the same day,[173] the **adjudication and disposition hearings must be bifurcated** because hearsay is allowed at the disposition hearing but not the adjudication hearing.[174]

3) ***Return of Child*** – Determine whether the child can be safely returned home using the criteria contained in the sections above on **Child Safety and Conditions for Return.**

4) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[175]

CFS Worker: ***Treatment Plan*** – Prepare an appropriate treatment plan and share it with the parties at least 10 days before the disposition hearing.

[171] Recommendation derived from judge interviews.
[172] MCA §§ 41-3-437(6)(b) and 438(2)(b)(i).
[173] The disposition hearing can be held immediately after the adjudication hearing only if 1) all required reports are available and have been provided to the parties at least 5 working days in advance of the hearing, and 2) the judge has an opportunity to review the reports after the adjudication hearing. MCA § 41-3-438(2)(b).
[174] MCA § 41-3-438(2)(a).
[175] ABA Model Act § 9(c).

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the disposition hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Return of Child*** – Determine if it is in the child's best interest to return home. If so, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

4) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[176] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the disposition hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed

[176] MCA § 47-1-104(4)(a)(iii).

wishes.[177] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the child of the various options available to the court. If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Return of Child*** – Determine if the child wants to return home. If the child's return is viable, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

5) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[178]

6) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[179] then advocate for the child using the "substituted judgment" standard.[180]

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[177] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[178] ABA Model Act § 3(c).

[179] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[180] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the

7) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[181]

State Attorney: ***Family Preservation*** – Because CFS needs to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[182] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

2) ***Return of Child*** – Determine if the parent wants the child to return home. If the child's return is viable, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

3) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[183] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

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province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[181] ABA Model Act §§ 9(d) and (e).

[182] Recommendation derived from judge interviews.

[183] Recommendation derived from judge interviews.

6) Treatment Plan Approval

Purpose: The treatment plan should contain a **logical strategy for addressing the reasons the court became involved**: threats of danger to the child and parent's insufficient protective capacity. The treatment plan **outcome should be a home environment with no threats of danger or at least sufficient protective capacities to manage such threats**. [184]

Key Issues: 1) ***Court-Ordered Treatment Plan*** – The court may order a treatment plan if **a)** the parties **admit the allegations of an abuse and neglect petition** or **b)** if the parties have **stipulated** or the court has **adjudicated** the child as a **youth in need of care**.[185]

2) ***Mandatory Provisions*** – Each treatment plan is required to contain the following provisions:[186]

a) **identification** of the problems or conditions that resulted in **abuse or neglect**;
b) if the child has been removed**, conditions** or requirements that must be met for the **safe return of the child**;
c) **treatment goals** and objectives for each condition in the plan;
d) estimated **time necessary to complete treatment** objectives; and
e) **signature** of parent or guardian unless plan is ordered by the court.

3) ***Optional Provisions*** – A treatment plan may, but is not required to contain the following provisions:[187]

a) **right of entry** into the child's home to assess compliance;
b) requirement of the child or the child's parent or guardian to obtain **medical or psychiatric diagnosis and treatment**;
c) requirement of the child or the child's parent or guardian to obtain **psychological treatment or counseling**;
d) requirement of the child or the child's parent or guardian to obtain and follow through with **alcohol or substance abuse evaluation and counseling**, if necessary;

[184] *Child Safety Guide* at 39-40.
[185] MCA § 41-3-443(1).
[186] MCA § 41-3-443(2).
[187] MCA § 41-3-443(3).

e) requirement of the child or the child's parent or guardian to be **restricted from associating** with or contacting any **individual who may be the subject of a CFS investigation**;
f) requirement that the **child be placed in temporary medical or out-of-home care**; or
g) requirement that the parent, guardian, **furnish services that the court may designate**.

4) ***Modification Requires Court Order*** – The treatment plan cannot be modified or terminated without court approval.[188]

Bench Card: The following ABA *Child Safety Guide* Bench Card, located at the back of this manual, should be consulted:

a) Increasing the Treatment Plan's Likelihood for Success (p 87)

ROLES AND RESPONSIBILITIES

Judge: ***Evaluation Questions*** – The court should ask the following questions to determine the sufficiency of the treatment plan:[189]

a) Does the plan include goals or tasks **addressing changes in behaviors, commitments, and attitudes** related to safety?
b) Does the **plan follow logically from the threats** and gaps in protective capacities in the home?
c) Does the **treatment plan duplicate the safety plan**? If so, one or both is not fulfilling its purpose.
d) Does the plan **target issues that influence threats** of danger?
e) How do the **parents react to the plan**?
f) Does the plan focus on **reducing threats without also increasing protective capacities**?

Other Parties: Be prepared to **1)** address **disputed provisions**, **2)** respond to the **judge's questions**, and **3)** identify and **address deficiencies** that could not be resolved prior to the treatment plan hearing.

[188] MCA § 41-3-443(4).
[189] *Child Safety Guide* at 40.

7) Review Hearing

Purpose: Assess the current status of **the child's vulnerability** and the **parent's protective capacities**. Determine the continuing necessity for and **appropriateness of the placement**, the extent of compliance with the **treatment plan**, and the **extent of progress** which has been made toward alleviating or mitigating the causes necessitating the placement.[190]

Key Issues: ***Recurring Issues*** – The following issues[191] should be addressed at each review hearing:

a) Whether the safety plan and treatment plans are sufficient;[192]
b) Whether services, actions, tasks and responsibilities are being carried out according to plan;
c) Whether parents and others are participating according to commitments made in both plans;
d) Whether progress is occurring;
e) Whether conditions for return have been met; and
f) Whether the safety plan or treatment plan must be modified or revised.

Next: ***Review Hearing*** – The court should schedule the next **review hearing within 30-60 days.**[193]

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

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[190] 42 U.S.C. § 675(5)(B) and *Child Safety Guide* at 43-44.
[191] *Child Safety Guide* at 43.
[192] The safety and treatment plans differ in that the safety plan addresses what needs to happen immediately to control threats in order for the child to safely return home, while the treatment plan addresses what must change over time in order to enable the parents to provide a safe environment for their children without monitoring by CFS (i.e., dismissal of the case). See *Child Safety Guide* at 39.
[193] Recommendation derived from judge interviews.

j) Increasing Treatment Plan's Likelihood for Success (p 87)
k) Determining Whether to Reunify (p 88)

ROLES AND RESPONSIBILITIES

Judge: 1) ***Review Questions*** – The court should ask the following questions at each review hearing:[194]

a) **What do the parties know about child safety issues**, including progress under the treatment plan? Can the parties provide **current information**, free of bias, with regard to the following **six safety questions:**[195]
   i) What is the **nature and extent** of the **maltreatment**?
   ii) What **circumstances accompany the maltreatment**?
   iii) How does the **child function** day-to-day?
   iv) How does the **parent discipline** the child?
   v) What are the overall **parenting practices**?
   vi) How does the **parent manage his own life**?

   Recall that the child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats. [196]

b) What is the status of **threats of danger** and have **additional threats** emerged?

c) What is the status of **parent protective capacities**?
   i) Have the parents demonstrated **enhanced capacity**?
   ii) Will parents protect **without intervention**?
   iii) Has there been any change in **willingness, awareness, and ability** to protect the child from threats of danger?
   iv) The court should collect information regarding **each protective capacity** identified in the **treatment plan**.

d) Are there **differences of opinion** among the parties? **Resist** relying on the most **"credentialed" expert** – challenge **parties** to **reconcile differences** of opinion and **consider** their **rationales.**

e) Have **conditions for return** been met?

[194] *Child Safety Guide* at 43-44.
[195] *Child Safety Guide* at 3.
[196] *Child Safety Guide* at 2.

i) This questions **should be asked** regardless of how well treatment is progressing is or is not progressing.
ii) **Resist "raising the bar"** by having higher standards for returning the child than removing the child.
iii) Is an **in-home safety plan now sufficient**, feasible, and sustainable **until the parent is able to protect the child without help**?

f) Can the in-home safety **plan be revised to be less intrusive**?

g) If there has been **little progress**, consider the following:
i) Does the **treatment plan** contain the **right strategies**?
ii) Are the services and/or the **providers appropriate for the task**?
iii) Does the **parent want the same changes** as the other parties?
iv) Consider how long it will take for the conditions for return to be met – and **how long it is reasonable** to continue **working on the reunification** goal.

2) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[197]

Other Parties: Be prepared to **1)** respond to the **judge's questions,** and **2)** address **disputed issues**, including disputes over **visitation**.

[197] ABA Model Act § 9(c).

8) Extension of Temporary Legal Custody

Purpose: In cases where temporary legal custody has been ordered, the state attorney must **file a petition prior to the expiration of temporary legal custody** seeking one of the following:[198]

a) ***Extension of Temporary Legal Custody*** – an extension of temporary legal custody, **not to exceed 6 months**, upon a showing that:
   i) **additional time** is necessary for the parent or guardian to successfully **complete a treatment plan**; or
   ii) **continuation** of temporary legal custody is necessary because of the **child's individual circumstances**.

b) ***Placement with Noncustodial Parent*** – continued **placement with the noncustodial parent**, superseding any existing custodial order.

c) ***Termination of Parental Rights*** – termination of the parent-child relationship and:
   i) **permanent legal custody** with the **right of adoption**;
   ii) **permanent placement** with the **noncustodial parent**, superseding any existing custodial order;
   iii) appointment of a **guardian** pursuant to MCA § 41-3-607.

d) ***Long-Term Custody*** – long-term custody when the child is in a **planned permanent living arrangement** pursuant to MCA § 41-3-445.

e) ***Guardianship*** – appointment of a guardian pursuant to MCA § 41-3-444.

f) ***Dismissal***.

Key Issue: ***Adopt Review Hearing Protocol*** – The court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[199]

[198] MCA § 41-3-442(4).
[199] 25 USC § 1912(e).

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[200] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[201]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[202] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[203] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[204] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [205]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – The court should schedule a **review hearing within 30-60 days.**[206]

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[200] ICWA does not designate a legal standard by which this evidence must be established.
[201] 25 USC § 1912(d).
[202] 25 USC § 1912(e).
[203] *ICWA Guide* at 47.
[204] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[205] 25 USC § 1915(b).
[206] Recommendation derived from judge interviews.

Judge: 1) ***Review Hearing Questions*** – Utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Invite Amendment to Petition*** – If, based on the evidence presented, the court believes that the **child** would be **better served by a disposition different from the relief requested by the state** attorney, the court should **consider inviting the state attorney to amend the petition** to allow for a different outcome.[207]

3) ***Required Findings*** - If the court **grants an extension of temporary legal custody**, the court shall 1) indicate **why the child was not returned home**, 2) the **conditions** upon which the **child may be returned home**, 3) specifically find that an **extension of temporary legal custody is in the child's best interest**,[208] and 4) project a **likely date** by which the **child** may be **returned home or placed for adoption** or legal guardianship.[209]

4) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[210]

GAL/CASA: ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should**

[207] MCA § 41-3-422(1)(b).
[208] MCA § 41-3-442(6).
[209] 42 USC § 675(5)(B).
[210] ABA Model Act § 9(c).

not substitute his judgment in place of the child's. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[211] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the parent of the various options available under MCA § 41-3-442(4). If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[212]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[213] then advocate for the child using the "substituted judgment" standard.[214]

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[211] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[212] ABA Model Act § 3(c).

[213] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[214] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[215]

State Attorney: 1) ***Include Mandatory Language in Order*** – Ensure that the order prepared for the court includes the mandatory language referenced in "Required Findings", above.

2) ***File Petition Prior to Expiration*** – Ensure that the petition to extend or otherwise modify temporary legal custody is filed prior to expiration of the original order.[216] Ask the court to extend the terms of the original order until such time as the court rules on the petition.[217]

3) ***Family Preservation*** – Because CFS and the State attorney need to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[218] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Propose Alternate Disposition*** – Advise the parent of the various options available under MCA § 41-3-442(4). If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

2) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[219] One notable exception exists where a parent faces criminal prosecution for alleged abuse

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province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[215] ABA Model Act §§ 9(d) and (e).

[216] MCA § 41-3-442(4).

[217] MCA § 41-3-442(5).

[218] Recommendation derived from judge interviews.

[219] Recommendation derived from judge interviews.

or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

9) Petition to Terminate Parental Rights

Purpose: **Determine if termination** of parental rights is **warranted**. The court may terminate parental rights upon a finding established by **clear and convincing evidence** that:[220]

a) ***Relinquishment*** – the parent has **relinquished his rights** to the child pursuant to MCA §§ 42-2-402 and 412;
b) ***Abandonment*** – the parent has **abandoned the child**;
c) ***Rape*** – the parent **is convicted of sexual intercourse without consent** and a child was born as a result of his criminal conduct;
d) ***Serious Crimes and Abuse*** – the parent has **subjected the child** to any of the following:[221]
   i) **aggravated circumstances**, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;
   ii) committed, aided, abetted, attempted, conspired, or solicited **deliberate or mitigated deliberate homicide of a child**;
   iii) committed **aggravated assault against a child**;
   iv) committed **neglect of a child** that resulted in **serious bodily injury or death**; or
   v) had **parental rights to the child's sibling or other child of the parent involuntarily terminated** and the **circumstances** related to the termination of parental rights are **relevant to the parent's ability to adequately care for the child at issue**.
e) ***Neglect by Putative Father*** – the **putative father** has **failed** to do any of the following:[222]
   i) contribute to the **support of the child** for an aggregate **period of 1 year**, although able to do so; or
   ii) establish a **substantial relationship** with the child. A substantial relationship is demonstrated by:
      (1) either **visiting the child at least monthly** when physically and financially able to do so; or
      (2) having **regular contact with the child** or with the person or agency having the care and custody of the child when physically and financially able to do so; and
      (3) manifesting an ability and **willingness to assume legal and physical custody** of the child if the

[220] MCA § 41-3-609(1).
[221] MCA §§ 41-3-609(1)(d) and 423(2)(a)-(e).
[222] MCA §§ 41-3-609(1)(e) and 423(3)(a)-(c).

child was not in the physical custody of the other parent.

iii) **register with the putative father registry** pursuant to Title 42, chapter 2, part 2, and the person **has not been**
   (1) **adjudicated in Montana** to be the **father of the child** for the purposes of **child support**; or
   (2) recorded **on the child's birth certificate** as the child's father.

f) ***Failed Treatment Plan*** – the child is an **adjudicated youth in need of care** and both of the following exist:
   i) an **appropriate treatment plan** that has been approved by the court has **not been complied with** by the parents **or has not been successful**; **and**
   ii) the conduct **or condition of the parents rendering them unfit is unlikely to change within a reasonable time**.[223]

Key Issues: 1) ***Adopt Review Hearing Protocol*** – The court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

2) ***When Termination of Parental Rights Required*** – Except as provided in ¶ 3, below, a **petition to terminate** parental rights **must be filed:**

a) if the child has been in **foster care** under the physical custody of the state for **15 months of the most recent 22 months**; or
b) if the court has found **that reasonable efforts to reunify are not required** pursuant to MCA § 41-3-423.[224]

3) ***Exceptions to Requirement to Terminate Parental Rights*** – Even if the conditions referenced in ¶ 2, above, exist, CFS is NOT required to file a petition to terminate parental rights if:

a) the **child** is being **cared for by a relative**;
b) **CFS has not provided the services necessary** for the safe return of the child;

[223] See MCA §§ 41-3-609(2)-(3) for factors to consider when determining whether the parent's conduct or condition is unlikely to change within a reasonable time. These factors also address the corresponding needs of the child.
[224] MCA § 41-3-604(1).

c) CFS presents a **compelling reason for not filing** a petition to terminate. Compelling reasons not to file include, but are not limited to the following:
   i) there are **insufficient grounds** for filing a petition;
   ii) adequate documentation demonstrates that filing a petition is **not the appropriate plan** and not in the best interests of the child.[225]

4) ***Filing Required if Exception Applies*** – If CFS chooses NOT to file a petition to terminate in accordance with ¶ 3, above, then **CFS must instead file** either **a)** a petition for an **extension of temporary legal custody** pursuant to MCA § 41-3-438, **b)** a petition for **long-term custody** pursuant to MCA § 41-3-445, or **c)** a petition to **dismiss**.[226]

5) ***Options if Parental Rights Terminated*** – If termination of parental rights is ordered, the court may:

a) **Transfer Custody for Adoption** – transfer **permanent legal custody** of the child, with the **right to consent to adoption**, to i) **CFS**, ii) a **child-placing agency**, or iii) **another individual** approved by CFS; or
b) **Transfer Custody for Guardianship** – transfer permanent legal custody of the child **to CFS** with the right to **petition for appointment of a guardian** pursuant to MCA § 41-3-444.[227]

6) ***Guardian ad Litem Required*** – The court **must appoint a guardian ad litem** to advocate for the **child's best interest** prior to conducting a termination hearing. Likewise, if a **parent is a minor**, the **minor parent must have a guardian ad litem** appointed to advocate for the minor parent's best interest prior to a termination hearing.[228]

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing **beyond a reasonable doubt** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[229]

[225] MCA §§ 41-3-604(1) and (2).
[226] MCA § 41-3-604(5).
[227] MCA § 41-3-607(2).
[228] MCA § 41-3-607(4).
[229] 25 USC § 1912(f).

2) ***Active Efforts*** – Whenever **CFS seeks to effect termination of parental rights**, it must present evidence[230] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[231]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect termination** of parental rights. [232] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing a court to make a more informed decision and adhere to the spirit and intent of the act.[233] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[234] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [235]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – If the court **does not terminate parental rights**, the court should schedule a **review hearing within 30-60 days.**[236]

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[230] ICWA does not designate a legal standard by which this evidence must be established.
[231] 25 USC § 1912(d).
[232] 25 USC § 1912(f).
[233] *ICWA Guide* at 47.
[234] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(f) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[235] 25 USC § 1915(b).
[236] Recommendation derived from judge interviews.

Judge: 1) ***Review Hearing Questions*** – Utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[237]

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the termination hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[238] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the termination hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with

[237] ABA Model Act § 9(c).
[238] MCA § 47-1-104(4)(a)(iii).

national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[239] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the child of the various options available to the court. If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[240]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[241] then advocate for the child using the "substituted judgment" standard.[242]

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[239] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[240] ABA Model Act § 3(c).

[241] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[242] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[243]

Parent Attorney: ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

[243] ABA Model Act §§ 9(d) and (e).

10) Permanency Hearing

Purpose: To ensure**, at least annually**, that CFS is making **reasonable efforts to finalize a permanency plan** for the child.[244]

Key Issues: 1) ***Adopt Review Hearing Protocol*** – If the **parent's rights have not been terminated**, the court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

2) ***Permanency Options*** – Permanency options include, but are not necessarily limited to,[245] the following:[246]

a) **reunification** of the child with the child's parent or guardian;
b) permanent placement of the child with the **noncustodial parent**, superseding any existing custodial order;
c) adoption;
d) appointment of a **guardian** pursuant to MCA § 41-3-444; or
e) **long-term custody** if the child is in a **planned permanent living arrangement** and if it is established by a preponderance of the evidence, which is reflected in specific findings by the court, that:
   (i) the child is being cared for by a **fit and willing relative**;
   (ii) the child has an **emotional or mental handicap** that is so severe that the child cannot function in a family setting and the best interests of the child are served by placement in a residential or group setting;
   (iii) the child is **at least 16 years of age** and is participating in an independent living program and that termination of parental rights is not in the best interests of the child;
   (iv) the **child's parent is incarcerated** and circumstances, including placement of the child and continued, frequent contact with the parent, indicate that it **would not be in the best interests of the child to terminate parental rights of that parent**; or
   (v) the child meets the following criteria:
      (A) the child has been **adjudicated a youth in need of care**;

[244] MCA § 41-3-445(1)(a) and 45 CFR § 1356.21(b)(2).
[245] See MCA § 41-3-445(7).
[246] MCA § 41-3-445(8).

(B) **CFS has made reasonable efforts** to reunite the parent and child, **further efforts by CFS would likely be unproductive**, and **reunification** of the child with the parent or guardian would be **contrary to the best interests** of the child;
(C) there is a **judicial finding** that **other more permanent placement options** for the child have been **considered and found to be inappropriate** or not to be in the best interests of the child; and
(D) the child has been in a placement in which the **foster parent or relative** has **committed to the long-term care** and to a relationship with the child, and it is in the best interests of the child to remain in that placement.

3) ***Timing of Hearing*** – A permanency hearing must be held by the court[247] at the following intervals:[248]

a) within **30 days** of a determination that **reasonable efforts** to provide preservation or reunification services are **not necessary** under MCA §§ 41-3-423, 438(6), or 442(1); or
b) no later than **12 months** after the child was **adjudicated a youth in need of care** or **12 months after the child's first 60 days of removal**, whichever comes first, and **every 12 months thereafter.**

4) ***Hearing Not Required*** - A permanency hearing is not required if the proceeding has been **dismissed**, the child was **not removed from the home**, the child has been **returned to the child's parent or guardian**, or the child has **been legally adopted or appointed a legal guardian.**[249]

5) ***Combined with Other Hearings*** – The permanency hearing may be combined with other required hearings.[250]

6) ***Family Request for Custody*** – If a member of the child's **extended family requests custody** of the child, CFS must **determine if the placement is in the best interests of the child**. CFS shall indicate any reasons for denial to the court. In turn, if the

[247] Subject to the court's approval, and absent an objection from the parties, a foster care review committee is authorized to conduct this hearing on behalf of the court and submit a recommendation to the court for approval. MCA § 41-3-445.
[248] MCA § 41-3-445(1)(a).
[249] MCA § 41-3-445(1)(b).
[250] MCA § 41-3-445(1)(c).

court accepts CFS's recommendation for denial, the **court shall explain the reasons** for the denial to the denied family members, to the extent confidentiality laws allow. Furthermore, the court shall **include the reasons for denial in its court order if requested to do so by the denied family members**.[251]

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[252]

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[253] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[254]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[255] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[256] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[257] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [258]

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[251] MCA § 41-3-445(5)(a).
[252] 25 USC § 1912(e).
[253] ICWA does not designate a legal standard by which this evidence must be established.
[254] 25 USC § 1912(d).
[255] 25 USC § 1912(e).
[256] *ICWA Guide* at 47.
[257] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[258] 25 USC § 1915(b).

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – If the parent's rights have not been terminated, the court should schedule a **review hearing within 30-60 days.**[259]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Review Hearing Questions*** – If **parental rights have not been terminated**, utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Required Findings*** – The court shall approve a specific permanency plan and make written findings on:[260]

a) whether the **permanency plan** is in the **best interests of the child**;
b) whether CFS has made **reasonable efforts to finalize the plan**;
c) **other necessary steps** that CFS is required to take to effectuate the terms of the plan; and
d) In cases involving **multiple siblings**, specific **findings must issue for each child**.[261]

3) ***Timing of Order*** – The court's order must be issued **within 20 days** after the permanency hearing.[262]

4) ***Child Consultation*** – The court is **required to consult**, in an age-appropriate manner, **with the child** regarding the proposed permanency or transition plan for the child.[263]

[259] Recommendation derived from judge interviews.
[260] MCA § 41-3-445(6).
[261] MCA § 41-3-445(1)(d).
[262] MCA § 41-3-445(5)(a).
[263] MCA § 41-3-445(4).

CFS Worker: ***Required Report*** – At least **3 days prior to the hearing**, CFS must submit a report to the court indicating **efforts to effectuate the permanency plan** for the child, address the **options for the child's permanent placement**, examine the **reasons for excluding higher priority options**, and set forth the **proposed plan to carry out the placement decision**, including specific times for achieving the plan.[264]

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the permanency hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[265] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the permanency hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed

[264] MCA § 41-3-445(2).
[265] MCA § 47-1-104(4)(a)(iii).

wishes.[266] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the child of the various options available to the court. If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[267]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[268] then advocate for the child using the "substituted judgment" standard.[269]

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate

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[266] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[267] ABA Model Act § 3(c).

[268] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[269] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[270]

Parent Attorney: ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

[270] ABA Model Act §§ 9(d) and (e).

11) ABA *Child Safety Guide* Bench Cards

Bench Card A. Family Information – Six Safety Questions

A body of knowledge that is more comprehensive than the incident of maltreatment must be known about the family. This body of knowledge must include the extent of maltreatment, the surrounding circumstances, child functioning, adult functioning, parenting and discipline. The following are six background questions that should guide safety in each case. The answers will help the court assess threats of danger, child vulnerability, and protective capacities. The information will later help judges decide what to do about an unsafe child.

1 - What is the nature and extent of the maltreatment?

- Type of maltreatment
- Severity of the maltreatment, results, injuries
- Maltreatment history, similar incidents
- Describing events, what happened, hitting, pushing
- Describing emotional and physical symptoms
- Identifying child and maltreating parent

2 - What circumstances accompany the maltreatment?

- How long maltreatment has been occurring
- Parental intent concerning the maltreatment
- Whether parent was impaired by substance use, or was otherwise out-of-control when maltreatment occurred
- How parent explains maltreatment and family conditions
- Does parent acknowledge maltreatment, what is parent's attitude?
- Other problems connected with the maltreatment such as mental health problems

3 - How does the child function day-to-day?

- Capacity for attachment (close emotional relationships with parents and siblings)
- General mood and temperament
- Intellectual functioning
- Communication and social skills
- Expressions of emotions/feelings
- Behavior
- Peer relations
- School performance
- Independence
- Motor skills
- Physical and mental health

4 – How does the parent discipline the child?

- Disciplinary methods
- Concept and purpose of discipline

- Context in which discipline occurs, is the parent is impaired by drugs or alcohol when administering discipline
- Cultural practices

5 - What are overall parenting practices?

- Reasons for being a parent
- Satisfaction in being a parent
- Knowledge and skill in parenting and child development
- Parent expectations and empathy for child
- Decision-making in parenting practices
- Parenting style
- History of parenting behavior
- Protectiveness
- Cultural context for parenting approach

6 - How does the parent manage his own life?

- Communication and social skills
- Coping and stress management
- Self-control
- Problem-solving
- Judgment and decision-making
- Independence
- Home and financial management
- Employment
- Community involvement
- Rationality
- Self-care and self-preservation
- Substance use, abuse, addiction
- Mental health
- Physical health and capacity
- Functioning within cultural norms

Definitions

Safe child:

Vulnerable children are safe when there are no threats of danger within the family *or* when the parents possess sufficient protective capacity to manage any threats.

Unsafe child:

Children are unsafe when:
- threats of danger exist within the family *and*
- children are vulnerable to such threats, *and*
- parents have insufficient protective capacities to manage or control threats.

Bench Card B. Threats of Danger

A threat of danger is a specific family situation or behavior, emotion, motive, perception or capacity of a family member. The body of knowledge gained from Bench Card A is applied to specific criteria for what constitutes an impending threat of danger:

- Specific and observable;
- Out-of-control;
- Immediate
- Severe consequences

- No adult in the home is routinely performing basic and essential parenting duties and responsibilities.
- The family lacks sufficient resources, such as food and shelter, to meet the child's needs.
- One or both parents lack parenting knowledge, skills, and motivation necessary to assure a child's basic needs are met.
- One or both parents' behavior is violent and/or they are behaving dangerously.
- One or both parents' behavior is dangerously impulsive or they will not/cannot control their behavior.
- Parents' perceptions of a child are extremely negative.
- One or both parents' are threatening to severely harm a child, are fearful they will maltreat the child and/or request placement.
- One or both parents intend(ed) to seriously hurt the child.
- Parents largely reject CPS intervention; refuse access to a child; and/or the parents may flee.
- Parent refuses and/or fails to meet child's exceptional needs that do/can result in severe consequences to the child.
- The child's living arrangements seriously endanger the child's physical health.
- A child has serious physical injuries or serious physical symptoms from maltreatment and parents are unwilling or unable to arrange or provide care.
- A child shows serious emotional symptoms requiring immediate help and/or lacks behavioral control, or exhibits self-destructive behavior and parents are unwilling or unable to arrange or provide care.
- A child is profoundly fearful of the home situation or people within the home.
- Parents cannot, will not or do not explain a child's injuries or threatening family conditions.

Bench Card C. Child Vulnerability

A child is vulnerable when they lack the capacity to self-protect. This non-exhaustive list are issues that determine or increase a child's vulnerability:

- A child lacks capacity to self-protect
- A child is susceptible to harm based on size, mobility, social/emotional state
- Young children (generally 0-6 years of age)
- A child has physical or mental developmental disabilities
- A child is isolated from the community
- A child lacks the ability to anticipate and judge presence of danger
- A child consciously or unknowingly provokes or stimulates threats and reactions
- A child is in poor physical health, has limited physical capacity, is frail
- Physical frailty and potential physical harm from future maltreatment
- Emotional vulnerability of the child
- Impact of prior maltreatment
- Feelings toward the parent – attachment, fear, insecurity or security
- Ability to attach and vulnerability to future separations
- Ability to articulate problems and danger

Questions the judge can ask.

- Has the child demonstrated self-protection by responding to these threats? (Self-protection, means recognizing danger and acting to secure safety for one's self; it is not calling 911, CPS, or the school *after* an event.)
- Besides defending herself from threats, can the child care for her own basic needs?
- How does the judge find this child *not vulnerable* given the threats?
- Is vulnerability of all children, not just the victim, considered?
- Are there issues preventing this child from self-protecting?
- What plan would this child carry out to protect himself from threats?
- Can the child describe how she will know a threatening situation is developing, rather than recognizing it once it is happening?
- What has been learned about this child's functioning? How comprehensive is the information? How much time did the worker or other parties talk to the child about self-protecting? Is there information about this family and the way threats operate arguing against the child self-protecting?
- Are there ways the child behaves and responds, that escalate the threats to the child?

Bench Card D. Protective Capacities

Cognitive Protective Capacities

Cognitive protective capacity refers to knowledge, understanding, and perceptions contributing to protective vigilance. Although this aspect of protective capacities has some relationship to intellectual or cognitive functioning, parents with low intellectual functioning can still protect their children. This has to do with the parent recognizing she is responsible for her child, and recognizing clues or alerts that danger is pending.

Cognitive protective capacities can be demonstrated when the parent:

- articulates a plan to protect the child
- is aligned with the child
- has adequate knowledge to fulfill care-giving responsibilities and tasks
- is reality oriented; perceives reality accurately
- has accurate perceptions of the child
- understands his/her protective role
- is self-aware as a caregiver

Behavioral Protective Capacities

Behavioral protective capacity refers to *actions, activities, and performance* that result in protective vigilance. Behavioral aspects show it is not enough to know what must be done, or recognize what might be dangerous to a child; the parent must *act*.

Behavioral protective capacities can be demonstrated when the parent:

- is physically able
- has a history of protecting others
- acts to correct problems or challenges
- demonstrates impulse control
- demonstrates adequate skill to fulfill care-giving responsibilities
- possesses adequate energy
- sets aside her/his needs in favor of a child
- is adaptive and assertive
- uses resources necessary to meet the child's basic needs

Emotional Protective Capacities

Emotional protective capacity refers to *feelings, attitudes and identification* with the child and motivation resulting in protective vigilance. Two issues influence the strength of emotional protective capacity: the attachment between parent and child, and the parent's own emotional strength.

Emotional protective capacities can be demonstrated when the parent:

- is able to meet own emotional needs
- is emotionally able to intervene to protect the child
- realizes the child cannot produce gratification and self-esteem for the parent
- is tolerant as a parent
- displays concern for the child and the child's experience and is intent on emotionally protecting the child

- has a strong bond with the child, knows a parent's first priority is well-being of the child
- expresses love, empathy and sensitivity toward the child; experiences specific empathy with the child's perspective and feelings

Questions the judge can ask:

- Has the parent demonstrated the ability to protect the child in the past under similar circumstances and family conditions? ***(Behavioral Protective Capacity)***
- Has the parent arranged for the child to not be left alone with the adult/parent maltreater or source of danger? (This could include having another adult present aware of the protective concerns and able to protect the child). ***(Cognitive and Behavioral Protective Capacity)***
- Is the parent intellectually, emotionally and physically able to protect the child given the threats? ***(Cognitive, Behavioral and Emotional Protective Capacity)***
- Is the parent free from needs which might affect the child's safety such as severe depression, lack of impulse control, or medical needs? ***(Behavioral and Emotional Protective Capacity)***
- Does the parent have resources to meet the child's basic needs in light of the other changes the court is expecting from the family? ***(Behavioral Protective Capacity)***
- Is the parent cooperating with the caseworker's efforts to provide services and assess family needs? ***(Cognitive and Behavioral Protective Capacity)***
- Does the parent display concern for the child's experience? Is the parent intent on emotionally protecting the child? ***(Emotional Protective Capacity)***
- Can the caregiver specifically articulate a feasible, realistic plan to protect the child, such as the maltreating adult leaving when a situation escalates, calling the police in the event the restraining order is violated, etc.? ***(Cognitive Protective Capacity)***
- Does the caregiver believe the child's report of maltreatment and is he/she supportive of the child? ***(Emotional Protective Capacity)***
- Is the caregiver capable of understanding the specific threat to the child and the need to protect? ***(Cognitive Protective Capacity)***
- Has the caregiver asked the maltreating adult to leave the household (if applicable)? ***(Behavioral Protective Capacity)***
- Does the caregiver have adequate knowledge and skill to fulfill parenting responsibilities and tasks? (This may involve considering the caregiver's ability to meet any exceptional needs that the child might have). ***(Cognitive and Behavioral Protective Capacity)***

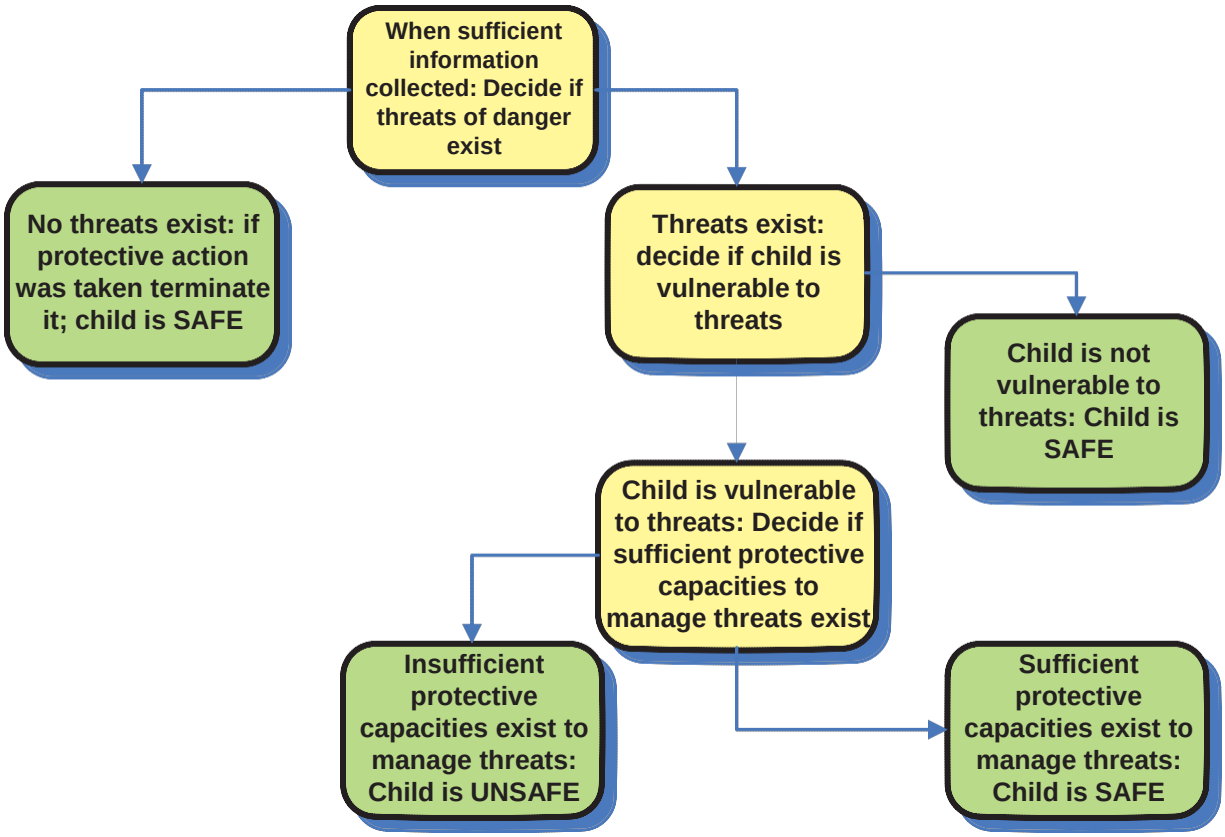
- Is the caregiver emotionally able to carry out a plan and/or to intervene to protect the child (caregiver is not incapacitated by fear of maltreating adult)? ***(Behavioral and Emotional Protective Capacity)***

- Do the caregiver and child have a strong bond and does the caregiver demonstrate clearly that the number one priority is the safety and well-being of the child? ***(Behavioral and Emotional Protective Capacity)***

- Even if the caregiver is having a difficult time believing the other adult would maltreat the child, does he or she describe the child as believable and trustworthy? ***(Emotional Protective Capacity)***

- Does the caregiver believe that the problems of the family (including current CPS and court involvement) are not the child's fault or responsibility? ***(Cognitive and Emotional Protective Capacity)***

Bench Card E. Child Safety Decision Tree



Bench Card F. Actions and Services to Control Threats of Danger

Actions or Services to Control or Manage Threatening Behavior
The purpose of a safety plan is *only to control* the behavior or the source of the threat. Understanding and correcting such behavior is a treatment plan goal, but not the goal of the safety plan. The court should consider including these actions and strategies in the court order.

- In-home health care
- Supervision and monitoring
- Stress reduction
- Out-patient or in-patient medical treatment
- Substance abuse intervention, detoxification
- Emergency medical care
- Emergency mental health care

Actions or Services that will Manage Crises
Crisis management aims to halt a crisis, return a family to a state of calm, and to solve problems that fuel threats of danger. Appropriate crisis management handles precipitating events or sudden conditions that immobilize parents' capacity to protect and care for children. Examples include:

- Crisis intervention
- Counseling
- Resource acquisition , obtaining financial help; help with basic parenting tasks

Actions or Services Providing Social Support
These services may be useful with young, inexperienced parents failing to meet basic protective responsibilities; anxious or emotionally immobilized parents; parents needing encouragement and support; parents overwhelmed with parenting responsibilities; and developmentally disabled parents. Services or actions include:

- Friendly visitor
- Basic parenting assistance and teaching
- Homemaker services
- Home management
- Supervision and monitoring
- Social support
- In-home babysitting

Actions or Services that Can Briefly Separate Parent and Child
Separation is a temporary action ranging from one hour to a weekend to several days. Separation may involve hourly babysitting, temporary out-of-home placement or both. Besides ensuring child safety, separation may provide respite for parents and children. Separating creates alternatives to family routine, scheduling, and daily pressures. Separation also can serve a supervisory or oversight function. Examples:

- Planned parental absence from home
- Respite care
- Day care
- After school care
- Planned activities for the children
- Short term out-of-home placement of child: weekends; several days; few weeks
- Extended foster care

Actions or Services to Provide Resources (Practical Benefits the Family Might Otherwise Be Unable to Afford)

These actions and services provide unaffordable practical help to the family, without it the child's safety is threatened.

- Resource acquisition ,obtaining financial help, help with basic parenting tasks
- Transportation services, might alleviate a threat
- Employment assistance
- Housing assistance

Bench Card G. Reasonable Efforts to Prevent Removal: In-home Safety Plans

Determining whether there were reasonable efforts to prevent placement goes beyond identifying relevant information (the 6 questions) and considering the types of information discussed above (i.e., threats of danger, vulnerability and protective capacities) to determine whether the child is safe.

Instead, the court now must focus on what should have been and actually was done to control those threats. The question becomes: *was the actual in-home or out-of-home safety plan (or some combination) the least intrusive approach that was needed to keep the child safe?* This analysis begins with the judge getting answers to the questions in this checklist, and determining whether the child can be kept safe with an in-home safety plan, and if so, some key components of the plan.

- Once threats are identified and the child is vulnerable, determine if the family can protect the child. Does the family possess sufficient protective capacity?

If the family's protective capacities are insufficient, determine what will protect the child by examining how and when threats emerge.

- Does each threat happen every day? Different times of day? Is there any pattern or are they unpredictable?
- How long have these threats been occurring? Will it be easier or harder to control or manage threatening behavior with a long family history?
- Does anything specific trigger the threat or accompany the threat, such as pay day, alcohol use, or migraine?

Is an in-home safety plan sufficient to control the threats, in view of when and how the threats of danger emerge?

- Are the parents living in the home, or do they disappear occasionally?
- Are the parents willing to cooperate with an in-home plan? How are we gauging "cooperation?"
- Is the household predictable enough that actions will eliminate or manage threat of danger?

(If the answer to any of these questions is "no," then an in-home safety plan may not be appropriate)

What actions or services are required for an in-home safety plan to control the threats of danger to the child?

- How often and long would services be needed (for example, separation: after-school daycare two times per week, from 3 pm to 6 pm)?
- Are providers available to carry out services at appropriate times, frequency and duration?
- Are the people carrying out the in-home the safety plan aware, committed, and reliable?
- Are safety plan providers able to sustain the intense effort until the parent can protect without support?

Bench Card H. Determining Visitation

- ☐ Organize visits to occasionally allow parents to learn or model the protective capacities they lack. Can visit length and location help make this happen?

- ☐ Arrange visits so CPS or another service provider can evaluate whether parents' protective capacities are improving. Can visit length and location help with this?

- ☐ Reasons visits may or may not be supervised are based on:

__ Threats of danger: some threats may be more difficult to manage without supervision than others. Unmanageable threats may include violence, child's intense fears, premeditated harm, extreme negative perception of the child, and likelihood of fleeing with the child.

__ The volatility of the threat and how difficult it would be to manage without supervision. Analyze volatility by considering when and how the threats emerge, parent's impulsivity, whether home environment is unpredictable, or safety could be maintained only through 24 hour in-home help.

__ Whether significant information is lacking about the parent, due to parent unwillingness or other obstacles.

__ Whether parents or children's functioning deteriorating during visits. If so, threats of danger must be reconsidered

- ☐ Is allowable contact spelled out, including email, text messages, and phone?

- ☐ Is there reason *not* to include parents at appointments, school, and church events?

- ☐ Are the requirements and logistics for visits and contacts provided in writing to parents and other visitation participants? Are they clear to *all,* not just legal parties?

- ☐ Are participants clear that visits will not be used as punishment or reward?

- ☐ Set dates when visitation terms and contacts will be reconsidered.

Bench Card I: Conditions for Returning Child

The judge should expect CPS and the legal parties to use the following process to identify the conditions for return to include in the court's order. (The following builds on the decision process needed to determine whether to remove a child from home, as discussed in Chapter 6.)

- Carefully review *exactly* why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.

- Ask the following questions regarding each threat of danger (including any new threats that may have emerged):
  - How does the threat emerge, including its intensity, frequency, duration, etc?
  - Can it be controlled with the children in the home and, if so, how?
  - Can anyone substitute for the parent within the home to provide sufficient protective capacity to assure control of the threat of danger?

- Based on the answers to the above questions, discuss what is needed to control threats of danger. Referring to the analysis that led to the original decision that an in-home safety plan would not work, identify what circumstances must be different. Answer the following questions (discussed more fully in Chapter 6):
  - Were the parents' capacity, attitude, awareness, etc factors in the original decision that an in-home safety plan would be insufficient?
  - Do any of these factors need to change before the child can return home with an effective in-home safety plan?
  - What is the potential for other threatening parents or persons leaving home?

- Specify the acceptable people, behaviors, situations, and circumstances (including alternatives and options) that, if in place and active, would resolve the reasons an in-home safety plan was originally determined to be insufficient.

- Always include as a condition for return that the family agree to a court-ordered in-home safety plan.

Bench Card J. Increasing the Treatment Plan's Likelihood for Success
(with focus on safety issues)

- **Does the treatment plan include goals or tasks addressing changes** in behaviors, commitments, and attitudes related to safety? Listing services people must attend, directing them to "follow all treatment recommendations," does not allow the court to measure progress, only to measure attendance or participation.

  An example: "Alan will demonstrate an ability and willingness to delay his own needs to provide food, supervision, and attention for his daughter Kayla."

- **Does the treatment plan follow logically from the threats** and gaps in protective capacities in the home? Be precise when detailing a treatment plan's strategy, and specify what must change.

- **Does the treatment plan duplicate the safety plan**? If yes, one plan (or both) is not fulfilling its purpose. A treatment plan does not replace the safety plan, nor is it a duplicate. These plans work concurrently. The treatment plan works on changing things so the parents, in time, can keep their child safe without the court intervening; while the safety plan, in or out-of-home, helps control things now so the child stays safe from threats.

- **Does the treatment plan target issues that influence threats of danger?** Does it target conditions interfering with parent protective capacity? Some parents must deal with their own experiences of being victimized to develop protective capacities. Some mental health issues make a parent so ill-prepared for being protective that those issues must be addressed first. A treatment plan calling for the parent to "learn about child development" will fail if it does not address these crucial problems.

- **How do parents react to the treatment plan?** An experienced judge knows how to gauge a parent's hope, fear, or remorse.

- **Does the treatment plan focus on reducing threats without also increasing protective capacities?** The family has the best chance for success if they reduce threats *and* increase protective capacity. Compare the benefits of a) having a single mother end her live-in relationship with her boyfriend who physically abused her and her child; and b) helping that mother develop her alertness to danger and willingness to put her child first. If the first succeeds, one threat is eliminated. If the second succeeds, future threats will be managed by the mother. Both strategies can be in the treatment plan. Focusing solely on reducing threats, while more obvious, will likely limit long-term success.

Bench Card K. Determining Whether to Reunify

While deciding whether to reunify, the judge requires the following information:

- The status of the original threats of danger and any newly emerged threats
- The nature, quality, and length of visits between child and parent. (By the time reunification is considered, visits should have been frequent, consistent, and unsupervised).
- Specific information about changes in parent behavior, attitudes, motivation, and interactions. (This has little to do with how many service sessions parents attended).
- Parental willingness and capacity to support reunification and an in-home safety plan. (Note this has *nothing* to do with gaining parental promises to control situations already determined out-of-control).
- Information and observations from the out-of-home care provider. (What are patterns of child or parent behavior before, during, and after visits, or changes in the child since placement that will influence reunification's success)?
- The preparation given the out-of home care provider to support reunification. (The natural loss experienced by the provider if reunification occurs does not rule out the value of their information; consider how their support or lack of it will influence reunification).
- Progress noted by providers; opinions of providers regarding reunification; recommendations from providers about what is needed for the in-home safety plan to be sufficient. (Scrutinize differences of opinion; resist relying on one party, or the person with the most credentials; sort through turf wars and personality conflicts).
- The recommendation and its justification from the CPS worker. (The worker should not be relying solely on "the recommendations of Dr. X"—demand that the worker make a recommendation and explain how he/she arrived at the recommendation).
- The specifics of a reunification plan, including: (A reunification *plan* means that even if the court orders reunification, it must happen with preparation, not at 6 pm tonight. Neither should it wait until the end of the school semester or some other lengthy timeframe.)
    - The changes to the visitation schedule, how will visits increase and still be used to keep measuring and building confidence in the reunification decision?
    - Involvement as appropriate of the extended family
    - Involvement of the out-of-home care provider, foster parent
    - Specific time frames
    - The plan to prepare the child; who will talk to the child? Who will a discuss emotions, such as what will be missed in the placement home and other important issues to the child?
    - The plan to prepare the family and the home for child's return. (There are unspoken issues the parent may feel guilty about raising, or worried that they may be misinterpreted as not being ready. There also must be a plan (who, when) for discussing and solving practical issues such as

school or transportation and emotional issues such as fear or anxiety. Do not assume the therapist will do this. Get specifics on how these important topics will be resolved).

- The specifics of the in-home safety plan: actions, frequency, providers, and roles. (Details are required: who will do what, when, and for how long).

- The role and responsibility for active safety plan management by the CPS worker; reunification is the most dangerous time for the child. (The court should be alert; often agency and service providers now see this family as successful so contact slows. Order specifics of how the safety plan will be aggressively supervised).