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

ADOPTION

Parental Rights

1. Relinquishment by Parents

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

Relinquishment becomes final 10 days after the documents are filed by the agency and can be rescinded only if one or both birth parents and the agency agree.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

2. Termination of Parental Rights

In California, termination of parental rights occurs at the conclusion of a selection and implementation hearing held pursuant to section 366.26. (See Selection and Implementation hearing chapter.) At the first review hearing following termination of parental rights, the court must inquire into the status of the development of a voluntary postadoption sibling contact agreement. (§ 366.3(e)(9)(B).

If, following termination of parental rights, a child is not adopted within three years from the date parental rights were terminated (or sooner, if the social services agency stipulates that the child is no longer likely to be adopted), the child may petition for reinstatement of parental rights. (§ 366.26(i).) The court must reinstate parental rights if it finds by clear and convincing evidence that the child is no longer likely to be adopted and reinstatement is in the child's best interest.

Placement for Adoption

1. Placement With Agency; Court's Jurisdiction

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

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

Indian Child Welfare Act placement preferences—In a case involving an Indian child, any adoptive placement must comply with the placement preferences found in 25 U.S.C. § 1915(a), which in order of preference are (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families.

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

Prospective adoptive parents (§ 366.26(n))—The court, at or after the section 366.26 hearing, is allowed to designate the child's

current caregivers as "prospective adoptive parents" if they have cared for the child at least six months and have taken at least "one step to facilitate the adoption process" (e.g., applying for a home study, signing an adoptive placement agreement, working to overcome impediments to adoption).

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

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

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

2. Requirements for Adoption

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

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

Prospective adoptive parents must be fingerprinted and have a criminal background check. Having a criminal record does not automatically disqualify a person from becoming an adoptive parent. However, the agency may not place a dependent child with anyone who has a criminal conviction unless a waiver is obtained as required by section 361.4. But even if a waiver is obtained, the agency may still consider the criminal record in deciding whether to approve the adoption home study. (*Id.*, § 8712.)

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

3. Adoption Assessment / Home Study

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

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

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

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

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

4. Adoption Procedure

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

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

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

Postadoption Agreements and Financial Support

1. Postadoption Contact Agreements

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

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

Children 12 and older must agree to any postadoption contact agreement, or the court must find that the agreement is in the child's best interest. Dependent children have the right to be represented by

an attorney for purposes of consent to postadoption contact agreements. (Fam. Code, § 8616.5(d).)

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

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

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

2. Postadoption Benefits and Support

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

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

Adoption of Indian Child

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

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

CAREGIVERS: DE FACTO PARENT, PROSPECTIVE ADOPTIVE PARENT, AND THE REASONABLY PRUDENT PARENT

Caregivers, including licensed foster parents, relatives, and nonrelative extended family members, are authorized to make certain decisions for the dependent children in their care under the "reasonable-and-prudent-parent" standard. Furthermore, caregivers who qualify as de facto or prospective adoptive parents are afforded specified rights and standing in dependency proceedings.

De Facto Parent

1. Criteria for De Facto Status

- A de facto parent is a person who, for a substantial period of time, has assumed the day-to-day role of parent by fulfilling the child's physical and psychological needs for care and affection. (Cal. Rules of Court, rule 5.502(10); *In re B.G.* (1974) 11 Cal.3d 679, 692.)
- Determination of de facto status is based on the above criteria and other relevant factors, such as whether the applicant (1) has "psychologically bonded" with the child and the child with applicant, (2) possesses unique information regarding the child, (3) has regularly attended court hearings, and (4) is subject to future proceedings that may permanently foreclose contact with the child. (*In re Patricia L.* (1992) 9 Cal.App.4th 61, 66–67.)
- Any adult who is found to have caused substantial physical or sexual harm to the child forfeits the opportunity to attain de facto status. (*In re Kiesha E.* (1993) 6 Cal.4th 68, 82.) However, where de facto status is already established, an isolated incident of misconduct by the de facto parent does not require the court to terminate this status. (*In re D.R.* (2010) 185 Cal.App.4th 852, 861–862.)

2. Rights and Role of a De Facto Parent in Dependency Proceedings

- Recognition by the court of de facto status gives a present or previous custodian standing to participate as a party at disposition and any hearings thereafter to "assert and protect their own interest in the companionship, care, custody and management of the child." (*In re B.G., supra,* 11 Cal.3d at p. 693; see Cal. Rules of Court, rule 5.534(e).)
- A de facto parent is entitled to procedural due process protections to protect his or her interests, including the right to be present, to be represented by counsel, and to present evidence. (Cal. Rules of Court, rule 5.534(e); *In re Matthew P.* (1999) 71 Cal.App.4th 841, 850; *In re Jonique W.* (1994) 26 Cal.App.4th 685, 693.)
- However, the role of de facto parents is limited in dependency, and they are not afforded the same substantive rights as parents or guardians. For example, they are not entitled to reunification efforts, custody, or visitation. (*In re Kiesha E., supra,* 6 Cal.4th at p. 82.)
- Furthermore, it is improper for the court to consider the closeness of the bond between the child and a de facto parent in determining whether the parent's reunification services should be terminated. (*Rita L. v. Superior Court* (2005) 128 Cal. App.4th 495, 508.)

3. Standing and Appeals Involving De Facto Status

- The individual seeking de facto parent status has the right to appeal denial of that status, but other parties, including the child, do not. (*In re Crystal J.* (2001) 92 Cal.App.4th 186, 192.)
- De facto parents have no standing to appeal removal of the child as they have no right to continued placement or custody. (*In re P.L.* (2005) 134 Cal.App.4th 1357, 1361.)
- In order to terminate de facto status, a 388 petition must be filed and show by a preponderance of the evidence that, as a result of changed circumstances, the conditions supporting the status no longer exist. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1514; see *In re D.R., supra,* 185 Cal.App.4th at p. 852.)

Prospective Adoptive Parent (§ 366.26(n))

- At the section .26 or any subsequent hearing, the court may designate the current caregiver as a prospective adoptive parent if
  - The child has lived with the caregiver for six months or more;
  - The caregiver expresses a commitment to adopt; and
  - The caregiver has taken at least one step to facilitate adoption, which can include, but is not limited to,
    - Applying for or cooperating with an adoption home study;
    - Being designated by the court or county social services agency as the adoptive family;
    - Requesting de facto parent status;
    - Signing an adoptive placement agreement;
    - Discussing a postadoption contact agreement;
    - Working to overcome identified impediments to adoption; or
    - Attending required classes for prospective adoptive parents;
- Except in emergency situations (immediate risk of physical or emotional harm), the child may not be removed from the prospective adoptive parent's home without prior notice;
- Notice of an anticipated move must be given to the court, the prospective adoptive parent (or caregiver who would qualify as such at the time of the proposed removal), the child's attorney, and the child if aged 10 or older;
- Any of the persons noticed may file a petition objecting to the removal, and the court must set a hearing within five court days, or the court may set the hearing on its own motion, at which it must determine the following:
  - Whether the caregiver meets the above criteria, if he or she has not previously been designated the prospective adoptive parent; and
  - Whether removal from the prospective caregiver would be in the child's best interest;

- Designation as a prospective adoptive parent does not confer party status or standing to object to any other of the social services agency's actions, unless the caregiver was also declared a de facto parent prior to the notice of removal; and
- Any order made following a noticed hearing is reviewable only by extraordinary writ. (§ 366.28(b).)

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

Prior to enactment of this statute (effective January 1, 2006), the social services agency had sole discretion over placements post-termination of parental rights, and removals could be challenged only as an abuse of discretion. (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721, 741.) Note that section 366.26(n) does not cover caregivers who do not meet the criteria as prospective adoptive parents; they will still be treated under the *Theodore D.* standard.

Caregiver's Decisionmaking as a "Prudent Parent"

- "Caregivers" is defined as licensed foster parents or approved relative and nonrelative extended family members (NREFMs). (§ 362.04(a)(1).)
- Caregivers may exercise their judgment as a reasonable and prudent parent—that is, they may make careful and sensible parental decisions that maintain the child's health, safety, and best interest. (§ 362.04(a)(2).)
- They may use this standard in selecting and utilizing babysitters for short-term needs (no more than 24 hours). Babysitters need not comply with social services agency regulations regarding health screening or CPR training. (§ 362.04(b), (c) & (e).)
- All dependent children are entitled to participate in age-appropriate social and extracurricular activities. Caregivers and group home staff must use the reasonable-and-prudent-parent standard in deciding whether to give permission for a child in

their care to participate in such activities, which (in keeping with the babysitting statute) can include short-term or overnight stays at another location. (§ 362.05.)

- It is the caregiver who is authorized to make these normal day-to-day decisions for the dependent child, and the social worker should not substitute his or her judgment for that of the caregiver.
- As of January 1, 2006, babysitters and other persons chosen by the caregiver to provide short-term supervision of the child are exempt from criminal records check requirements. (Health & Saf. Code, § 1522(b)(3).)

The stated intent of these "quality-of-life" statutes is to expand dependent children's access to age-appropriate activities so that they may have as normal a childhood as possible. Caregivers using the reasonable-and-prudent-parent standard now have the express statutory authority to consent to such activities as sleepovers, school field trips, and sports activities. Note, however, that the other side of the coin—responsibility for a foster child's actions while participating in an activity—is not addressed in the statutes and may be an additional factor for the caregiver to consider in making decisions as the reasonable and prudent parent.

CHILD ABUSE CENTRAL INDEX

The Department of Justice maintains the Child Abuse Central Index (CACI) under the Child Abuse and Neglect Reporting Act. (Pen. Code, § 11167 et seq.) Under the Act, all substantiated cases of abuse and neglect must be reported to the Department of Justice for inclusion in the CACI. A person listed on the CACI may be restricted from obtaining employment in certain fields, like health care and child care.

In 2011, the Legislature made changes to the CACI by revising the definition of substantiated case, revising the procedures for reporting abuse and neglect to the Department of Justice, and codifying a due process right to appeal any substantiating findings that lead to such a report. (*Humphries v. County of L.A.* (2009) 554 F.3d 1170, 1192 [the stigma of being listed in the CACI as substantiated child abusers, plus the accompanying various statutory consequences, constitutes a liberty interest, of which persons may not be deprived without process of law; Child Welfare Services Manual § 31-021 provides the due process requirements].)

The amendments to Penal Code section 11165.12 revise the definition of a substantiated report to exclude a report the investigator found to be false, be inherently improbable, involve an accidental injury, or not constitute child abuse or neglect, as specified. The agency must send only substantiated reports of known or suspected child abuse or severe neglect to the Department of Justice. (Pen. Code, § 11169.) All other determinations would be removed from the centralized list. This section also codifies the due process rights of a person listed on the CACI, who may challenge his or her listing by requesting a hearing. Penal Code section 11170 requires that the index be continually updated and not contain any reports that are determined to be unsubstantiated. The agency is responsible for ensuring that the CACI accurately reflects the report it receives from the submitting agency.

A person listed in the CACI may appeal the agency's decision by writ of mandate. Such hearings are heard de novo and are reviewed for substantial evidence. (*Gonzalez v. Santa Clara County Dept. of Social Service*s (2014) 223 Cal.App.4th 72, 96.) The court will consider whether the agency proceeded without or in excess of its jurisdiction, whether the trial was fair, and whether there was any prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5(b).)

In 2012, the Legislature made additional changes to the CACI rules. Specifically, Penal Code section 11169 now provides that "[a]ny person listed in the CACI as of January 1, 2013, who was listed prior to reaching 18 years of age, and who is listed once in CACI with no subsequent listings, shall be removed from the CACI 10 years from the date of the incident resulting in the CACI listing." (Pen. Code, §§ 11169(g), 11170(a)(1)–(3).) Penal Code section 11170 provides that any person, 18 years of age or older, listed in the CACI only as a victim of child abuse or neglect may have his or her name removed from the index by making a written request to the Department of Justice. The request must be notarized and include the person's name, address, social security number, and date of birth. (*Id.,* § 11170(g).)

CHILDREN'S RIGHTS

Constitutional Rights of Dependent Children

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

Family relationships—Children have fundamental and compelling constitutional interests in their family relationships. (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452.)

Protection and stability—Children have a fundamental constitutional interest in protection from abuse and neglect and in a stable and permanent placement. The turning point at which this interest may outweigh the interests of the parents is reached no later than 18 months after removal from the home. (*In re Manolito L.* (2001) 90 Cal.App.4th 753; *In re Jasmon O.* (1994) 8 Cal.4th 398.)

Statutory Rights of Dependent Children

California law also entitles children to the following:

Right to make telephone calls when detained (§ 308)—No more than one hour after a peace officer or social worker takes a minor into custody, except where physically impossible, a minor who is 10 or older must be allowed to make at least two telephone calls: one call completed to the minor's parent or guardian and one call completed to the minor's attorney.

Right to counsel (§ 317(c))—The dependency court must appoint counsel for the child unless the court finds that the child would not benefit from having counsel (and the court must state on the record the reasons for such a finding).

Privilege; confidentiality of health and mental health information (§ 317(f))—A dependent child or the child's attorney may invoke the doctor-patient, therapist-client, and clergy-penitent privileges. If the child is over 12, there is a rebuttable presumption that the child is mature enough to decide whether to invoke or waive these privileges. (See *In re S.A.* (2010) 182 Cal.App.4th 1128.)

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

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

Extracurricular activities (§ 362.05)—A dependent child is entitled to participate in age-appropriate extracurricular, enrichment, and social activities.

Confidentiality of juvenile case files (§ 827)—Only certain persons (including the child; the child's attorney, parents, or guardians; the county social services agency; court personnel; and other attorneys involved in the case) can inspect a child's dependency case file or otherwise obtain information about the contents of the file. (See § 827(a)(1)(A)–(P) for complete list of authorized persons.) Note that the right to access a file does not automatically entitle the viewer to copy or disseminate information from the file absent express court authorization to do so. (*Gina S. v. Marin County Dept. of Social Services* (2005) 133 Cal.App.4th 1074, 1078.) The notice sent to the superintendent of a school must be stamped with the instruction "Unlawful Dissemination Of This Information Is A Misdemeanor" and the information from the court kept in a separate confidential file until the child graduates from high school, is released from juvenile court jurisdiction, or reaches the age of 18 years, whichever occurs first, and ultimately destroyed as described in section 827(d)(1).

Foster children's "bill of rights"—The rights of children in foster care are enumerated in section 16001.9(a) and include those related to privacy, medical treatment, and visitation.

Rights Regarding Consent to Health Care

By statute, minors can access certain health and mental health care services without parental consent. Also, minors have the right under the California Constitution to consent to abortion. These rights apply to dependent children as well as to the general population.

Mental health treatment (Fam. Code, § 6924(b))—A minor who is 12 or older may consent to mental health treatment or counseling if

- The minor, in the opinion of the attending professional, is mature enough to participate in the services; and
- The minor would present a danger of serious harm to self or to others without the services or is an alleged victim of incest or child abuse.

Prevention or treatment of pregnancy (*id.,* § 6925)—A minor may consent to medical care related to the prevention or treatment of pregnancy (including contraception and prenatal care but not including sterilization).

Abortion—A minor who is capable of informed consent has a constitutional right to consent to an abortion without parental notice or approval. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 [striking down Health & Saf. Code, § 123450 as unconstitutional].)

Treatment for sexually transmitted diseases (Fam. Code, § 6926(a))—A minor who is 12 or older may consent to medical care related to the diagnosis or treatment of sexually transmitted diseases.

Treatment for victims of rape (*id.,* § 6927)—A minor who is 12 or older and who is alleged to have been raped may consent to medical care related to the diagnosis or treatment of the condition and the collection of medical evidence with regard to the alleged rape.

CONTINUUM OF CARE REFORM

The Continuum of Care Reform (CCR) addresses the placement and service needs of the significant number of children who continue to be cared for outside of their homes. CCR is a comprehensive effort to overhaul the foster care system, creating greater emphasis on permanence and placement with relatives and limiting the use of congregate care. (Assem. Bill 403 [Stats. 2015, ch. 773]; Sen. Bill 794 [Stats. 2015, ch. 425].)[2] CCR seeks to ensure that children are placed in permanent, supportive family home environments and limits congregate care to the minimum time required for a child's stabilization, if adequate services cannot safely be provided to the child while he or she is living with family.

Achieving Permanence

One of CCR's primary goals is to establish permanent families for children in out-of-home care. The following changes require the courts to play a greater role in ensuring that a child's permanency is planned for and established:

- The court's factual findings must identify any barriers to achieving the permanent plan (§ 366.21(g)(5)(A));
- When a child is under 16 years of age, the court must order a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative (*ibid.*);
- If a child is not a proper subject for adoption and no one is willing to accept legal guardianship, the court may order placement in foster care with a permanent plan of return home, adoption, tribal customary adoption, legal guardianship, or placement with a fit and willing relative (§ 366.22(a)(1) & (3));

[2] The CCR codifies a number of recommendations included in *California's Child Welfare Continuum of Care Reform,* available at *www.cdss.ca.gov /cdssweb/entres/pdf/CCR_LegislativeReport.pdf.*

- If a child is placed in a group home or a short-term residential therapeutic program (STRTP), the court must order that the child remain in foster care with a permanent plan of return home, adoption, tribal customary adoption, legal guardianship, or placement with a fit and willing relative (§ 366.26(c)(4)(B)(iii)); and
- When a child is 16 years of age or older, the court can order another planned permanent living arrangement (APPLA). If the court orders APPLA as the permanent plan, the court must ask the child about his or her desired permanency outcome, make a judicial determination as to why APPLA remains the best permanency option for the child, and state on the record the compelling reason why it is not in the child's best interest to return home or be placed for adoption, legal guardianship, or tribal customary adoption or with a fit and willing relative (§§ 366.3(h), 366.31(e)) and must also make a finding on the extent of compliance with the case plan in making ongoing and intensive efforts to return the child to a safe home and to complete whatever steps are necessary to finalize the permanent placement of the child (§ 366(a)(1)(B)).

Limiting Foster and Congregate Care as a Permanent Plan

Long-term foster care is no longer an acceptable permanent plan for children who must remain in foster care at or after the permanency hearing; references to "long-term foster care" have been removed from the Welfare and Institutions Code. Similarly, placement in a group home or a short-term residential therapeutic program (on or after January 1, 2017) cannot be a child's or nonminor dependent's permanent plan. (§ 16501(i)(2).)

APPLA is also no longer a legally permissible permanent plan except when the child is over the age of 16 and there is one or more compelling reason to determine that it is not in the best interest of the child or nonminor dependent to return home, be placed for adoption, be placed for tribal customary adoption in the case of an Indian child, or be placed with a fit and willing relative. (*Ibid.*) APPLA is a permanency option only in this limited circumstance, and changes in the law subject the plan to greater scrutiny and court oversight. (See Achieving Permanence, above.)

Primacy of Relative Placements

CCR also recognizes the primacy of placements with relatives by making relative placement a permanent plan option. The court may not remove a child from a relative's home if the court finds that the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative. If the child is living with an approved relative who is willing and capable of providing a stable and permanent environment but not willing to become a legal guardian as of the hearing date, the court must order a permanent plan of placement with a fit and willing relative. (§ 366.26(c)(4)(B)(i).)

Social Study and Case Plan

1. Service Needs

For all children who remain in out-of-home placement after reunification services have been terminated, the social study prepared for the hearing must note any identified barriers to achieving the permanent plan, as well as efforts made by the agency to address those barriers. For children in APPLA, the social study must (1) include a description of the intensive and ongoing efforts to return the child to the home of the parent, place the child for adoption, or establish a legal guardianship, as appropriate; (2) state whether the child has an opportunity to participate in developmentally appropriate activities; and (3) state whether the caretaker is following the "reasonable and prudent parent" standard (as defined in section 362.05(c)(1)). (§ 366.3(h)(2)–(4).)

2. Child and Family Team

For all children placed out of home, the CCR requires a child and family team (CFT) of various stakeholders to direct case plan services and planning based on the CFT model framed by the Katie A. settlement. (§ 16501; *Katie A. v. Bonta* (2006) 433 F.Supp.2d 1065.)

The placing agency convenes a CFT—a group of individuals engaged through a variety of team-based processes—to identify the strengths and needs of the child or youth and his or her family, and to help achieve positive outcomes for safety, permanency, and well-

being. (§ 16501(a)(4).) The case plan identifies the services to be provided for the child's care and treatment, and for the family's services. (§ 16501.1) The agency must consider the recommendations of the CFT and must document the reason for inconsistencies between the case plan and the CFT recommendations. (§ 16501.1(a)(3).)

The child has an expanded participatory role in the formation of the case plan. Children 12 years and older must be consulted on the development of their case plan. (§ 16501.1(g)(13.) Commencing with the first postpermanency hearing, the case plan for children 14 years old or older must describe the programs and services that will help the child prepare for the transition from foster care to successful adulthood. (§ 16501.1(g)(16)(A)(i).) If the CFT recommends that the child be placed in a short-term residential therapeutic program, the case plan must state the needs of the child that necessitate the placement, the plan for transitioning the child to a less restrictive environment, the projected timeline by which the child will be transitioned to a less restrictive environment, and the supports and services needed to achieve permanency and allow the child to be placed in the least restrictive family setting. (§ 16501.1(d)(2).)

Short-Term Residential Therapeutic Programs

A short-term residential therapeutic program is a residential facility, licensed by the California Department of Social Services (CDSS) and operated by a public agency or private organization, that provides short-term, specialized, and intensive nonmedical treatment and 24-hour care and supervision to children. (Health & Saf. Code, § 1502(a)(18).)

Traditional group homes will be phased out as foster care placements and will be replaced by the use of group care in STRTPs. A STRTP's short-term, specialized, intensive treatment is for a child or youth whose case plan specifies the need for, nature of, and anticipated duration of this specialized treatment. (§ 11400(ad).)

The case plan for children placed in a STRTP must also explain how the child will transition to a less restrictive environment and give the projected timeline for transition. The agency must consider

the recommendations of the child and family team and document the rationale for any inconsistencies between the case plan and the child and family team recommendations. If the placement is longer than six months, the deputy director or director of the county child welfare agency must approve the placement. (§§ 361.2(e)(9), 16501.1.)

For title IV-E–funded short-term residential therapeutic programs and FFAs that provide intensive treatment and therapeutic foster care programs, the CDSS must develop a new rate-setting system and payment structure that takes into consideration factors related to mental health, core services, transition services, permanency, and meeting of active-efforts requirements for Indian children, when appropriate. (§§ 11462, 11463, 11463.01.)

Resource Families

1. Requirements

Resource families must "parent and nurture vulnerable, traumatized children in emergencies, through transitions and crises, and sometimes make them a permanent part of their own families." (Assem. Bill 403 [Stats. 2015, ch. 773, § 1]; Sen. Bill 794 [Stats. 2015, ch. 425, § 1].) Among other requirements, these families must successfully meet the home environment assessment standards and the permanency assessment criteria and must demonstrate an understanding of child development and effective parenting skills; an understanding of the safety, permanence, and well-being needs of children who have been victims of child abuse and neglect and a capacity and willingness to meet those needs; and an ability and willingness to provide a family setting that promotes normal childhood experiences that serve the child's needs. (§ 16519.5.)

2. Resource Family Approval

As of January 1, 2017, all new caregivers will go through the resource family approval (RFA) process to become an approved placement for foster youth. (*Ibid.*) By December 31, 2019, all placements must be approved through the RFA process. (§ 16519.5(p)(3)(B).) The RFA approval process replaces the multiple processes for licensing foster,

relative, and NREFM homes by combining the approval standards for adoption, relative placement, and foster homes and requiring that an RFA home be approved only once. After approval, the home is eligible for placement of any foster child and for legal permanence, including adoption. Children and youth can still be placed with relatives in an emergency. The approval process is to be completed within 90 days of the child's placement in the home, unless good cause exists based on the needs of the child. (§ 16519.5(e)(2).)

A resource family applicant must complete a minimum of 12 hours of preapproval training and 8 hours of annual training. The training must include an overview of the child protective and probation system; the effects of trauma, including grief and loss and abuse and neglect, on child development and behavior; methods to behaviorally support children affected by trauma or abuse and neglect; positive discipline and the importance of self-esteem; the resource family's responsibility to act as a prudent parent, providing a family setting that "promotes normal childhood experiences and that serves the needs of the child"; and additional subject matters related to the rights of children in foster care, health, accessing services, and cultural competency. (§ 16519.5(g)(13).)

To increase support for families and reduce placement changes, FFAs may partner with counties to serve all types of placements, including relatives and NREFMs. FFAs must demonstrate their capacity to provide core support and services, including specialty mental health services under the Medi-Cal Early and Periodic Screening, Diagnosis, and Treatment program; initial-entry transition services; educational support; services for transition-age youth; and services to achieve permanency, including reunification and support for relationships with parents, siblings, extended family members, tribes, and other individuals important to the child or youth. (§§ 11400(af), 11462, 11463.)

DETERMINATION OF CHILD'S STATUS

Children Described Under Section 300 and Either Section 601 or 602

Welfare and Institutions Code section 241.1 establishes the process for handling cases in which the minor appears to be described by both section 300 and either section 601 or 602. Before the enactment of section 241.1, a minor could not simultaneously be a dependent and a ward of the court. Under section 241.1(e), counties may establish a dual-status protocol that enables a child to be simultaneously a dependent and a ward of the court. Counties that choose not to implement a dual-status model must still create a protocol, as described in subdivision (b) of that section, that establishes how to choose the status that serves the best interest of the minor.

Jointly Developed Written Protocol

When making their initial determination as to which status will serve the best interest of the minor and the protection of society under subdivision (a), the county probation department and the child welfare services agency must do so by following a jointly developed written protocol that ensures appropriate local coordination in the assessment of the minor and the development of recommendations by these organizations for consideration by the juvenile court. Under the protocol, the recommendations of both organizations must be presented to the juvenile court with the petition that is filed on behalf of the minor. The court must then determine which status is appropriate for the minor.

1. Protocol Requirements

a. Considerations

The protocols must require, but not be limited to, consideration of the following:

- Nature of the referral;
- Age of the minor;
- Prior record of the minor's parents for child abuse;

- Prior record of the minor for out-of-control or delinquent behavior;
- Parents' cooperation with the minor's school;
- The minor's functioning at school;
- The nature of the minor's home environment;
- The records of other agencies that have been involved with the minor and his or her family; and
- Provisions for resolution of disagreements between the probation department and child welfare services agency regarding the need for dependency or ward status and provisions for determining the circumstances under which filing a new petition is required to change the minor's status.

b. Processes

The protocols must

- Contain a process for determining which agency and court must supervise a child whose jurisdiction is modified from delinquency jurisdiction to dependency jurisdiction under section 607.2(b)(2) or 727.2(i);
- Contain a process for determining which agency and court must supervise a nonminor dependent under the transition jurisdiction of the juvenile court; and
- Specifically address the manner in which supervision responsibility is determined when a nonminor dependent becomes subject to adult probation supervision.

c. Joint Assessment

California Rules of Court, rule 5.512, provides the following procedures for the joint assessment and hearing:

- The assessment must be completed as soon as possible after the child comes to the attention of either probation or child welfare;
- Whenever possible, the determination of status must be made before any petition concerning the child is filed;
- The assessment report need not be prepared before the petition is filed but must be provided to the court for the hearing as stated in (e); and

- If a petition has been filed—on the request of the child, parent, guardian, or counsel, or on the court's own motion—the court may set a hearing for a determination under section 241.1 and order that the joint assessment report be made available as required in (f).

d. Joint Assessment Report

The joint assessment report must contain the joint recommendation of probation and child welfare, if they agree on the status that will serve the best interest of the child and the protection of society, or the separate recommendation of each, if they do not agree. The report must also include

- A description of the nature of the referral;
- The age of the child;
- The history of any physical, sexual, or emotional abuse of the child;
- The prior record of the child's parents for abuse of this or any other child;
- The prior record of the child for out-of-control or delinquent behavior;
- The parents' cooperation with the child's school;
- The child's functioning at school;
- The nature of the child's home environment;
- The history of involvement of any agencies or professionals with the child and his or her family;
- Any services or community agencies that are available to assist the child and his or her family;
- A statement by any counsel currently representing the child; and
- A statement by any CASA volunteer currently appointed for the child.

(Cal. Rules of Court, rule 5.512(d).)

A probation officer's report will not suffice if it does not include a joint recommendation or fully address these 12 statutory criteria. (*In re Joey G.* (2012) 206 Cal.App.4th 343.) However, a probation de-

partment's participation in creating a report with the social worker will suffice if both the social worker and the probation department agree on the recommendation. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117.)

2. Discretionary Procedures

Your county's protocols may also require procedures for the following:

- Release to, and placement by, the child welfare services agency pending resolution of the determination;
- Timelines for dependents in secure custody to ensure timely resolution of the determination for detained dependents;
- Nondiscrimination provisions to ensure that dependents are provided with any option that would otherwise be available to a nondependent minor; and
- Conduct in court-ordered placement: If the alleged conduct that appears to bring a dependent minor within the description of section 601 or 602 occurs in, or under the supervision of, a foster home, group home, or other licensed facility that provides residential care for minors, the county probation department and the child welfare services agency may consider whether the alleged conduct was within the scope of behaviors to be managed or treated by the foster home or facility, as identified in the minor's case plan, needs and services plan, placement agreement, facility plan of operation, or facility emergency intervention plan.

Hearing on Joint Assessment

If the child is detained, the hearing on the joint assessment report must occur as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and before the jurisdictional hearing. If the child is not detained, the hearing on the joint assessment must occur before the jurisdictional hearing and within 30 days of the date of the petition. The juvenile court must conduct the hearing and determine which type of jurisdiction over the child best meets the child's unique circumstances.

1. Conduct of Hearing

All parties and their attorneys must have an opportunity to be heard at the hearing. The court must make a determination regarding the appropriate status of the child and state its reasons for the determination on the record or in a written order.

2. Review

Section 241.1 hearings are reviewed for an abuse of discretion. (*In re M.V.* (2014) 225 Cal.App.4th 1495 [Holding a juvenile court's determination—in accordance with the recommendation of both the county probation department and the social services agency—that a minor should be adjudged a juvenile court ward and her dependency proceedings dismissed was not an abuse of discretion because the reasons for the decision were amply supported by the record, the juvenile court had a justifiable concern for her safety and the failure of all of her previous dependency placements, and it was clear that the court was aware of the minor's history of sexual exploitation and considered it when making its determination. Placement through probation would allow the minor to obtain some services and help in understanding the consequences of her actions.].)

The length of the 294-day detention did not violate due process based on a protocol drafted by the presiding judge of the juvenile court, which lacked the force of law and therefore did not define due process. (*In re Albert C.* (2015) 241 Cal.App.4th 1436.)

Notice

1. Notice and Participation in Hearing

At least five calendar days before the hearing, notice of the hearing and copies of the joint assessment report must be provided to the child, the child's parent or guardian, all attorneys of record, any CASA volunteer, and any other juvenile court having jurisdiction over the child. The notice must be directed to the judicial officer or department that will conduct the hearing.

2. Child Welfare Services Department and the Minor's Dependency Attorney

Your county's protocols may also require immediate notification of the child welfare services agency and the minor's dependency attorney upon referral of a dependent minor to probation.

3. ICWA

Section 224.3's references to section 602 and wardship proceedings address dual-status situations where foster care placement is intended to promote the best interest of the child or cases in which the delinquency proceedings are based on the minor's acts that would not be a crime if committed by an adult, so ICWA would apply. (*In re W.B.* (2010) 182 Cal.App.4th 126, aff'd. (2012) 55 Cal.4th 30.)

4. Notice of Decision After Hearing

Within five calendar days after the hearing, the clerk of the juvenile court must transmit the court's findings and orders to any other juvenile court with current jurisdiction over the child.

Proceedings in Different Counties

If the petition alleging jurisdiction is filed in one county and the child is already a dependent or ward in another county, a joint assessment must be conducted by the responsible departments of each county. If the departments cannot agree on which will prepare the joint assessment report, then the department in the county where the petition is to be filed must prepare the joint assessment report, as follows:

- The joint assessment report must contain the recommendations and reasoning of both child welfare and the probation department;
- The report must be filed at least five calendar days before the hearing on the joint assessment, in the county where the second petition alleging jurisdictional facts under section 300, 601, or 602 has been filed; and
- Any other juvenile court having jurisdiction over the minor must receive notice from the court in which the petition is filed within five calendar days of the presentation of the recommen-

dations of the departments. The notice must include the name of the judge to whom or the courtroom to which the recommendations were presented.

Court's Decision to Modify Jurisdiction

Whenever the court determines under section 241.1, 607.2, or 727.2 that it is necessary to modify its jurisdiction over a dependent or ward who was removed from his or her parent or guardian and placed in foster care, the court must ensure the following:

- The petition under which jurisdiction was taken at the time the dependent or ward was originally removed will not be dismissed until the new petition has been sustained; and
- The order modifying the court's jurisdiction contains all of the following provisions:
  - Reference to the original removal findings, and a statement that findings that continuation in the home is contrary to the child's welfare and reasonable efforts were made to prevent removal remain in effect;
  - A statement that the child continues to be removed from the parent or guardian from whom the child was removed under the original petition; and
  - Identification of the agency that is responsible for placement and care of the child based on the modification of jurisdiction.

Dual-Status Protocol

The probation department and the child welfare services agency in any county, in consultation with the presiding judge of the juvenile court, may create a jointly written protocol to allow the two to jointly assess and produce a recommendation that the child be designated as a dual-status child, allowing the child to be simultaneously a dependent child and a ward of the court. This protocol must be signed by the chief probation officer, the director of the county social services agency, and the presiding judge of the juvenile court before its implementation. A juvenile court may not order that a child is simultaneously a dependent child and a ward of the

court under section 241.1(e) unless and until the required protocol has been created and entered into. This protocol must include all of the following:

- A description of the process to be used to determine whether the child is eligible to be designated as a dual-status child.
- A description of the procedure by which the probation department and the child welfare services agency will assess the necessity for dual status for specified children and the process to make joint recommendations for the court's consideration before making a determination under section 241.1. These recommendations must ensure a seamless transition from wardship to dependency jurisdiction, as appropriate, so that services to the child are not disrupted on termination of the wardship.
- A provision for ensuring communication among the judges who hear petitions concerning children for whom dependency jurisdiction has been suspended while they are within the jurisdiction of the juvenile court under section 601 or 602. A judge may communicate by providing a copy of any reports filed under section 727.2 concerning a ward to a court that has jurisdiction over dependency proceedings concerning the child.
- A plan to collect data in order to evaluate the protocol under section 241.2.
- Identification of whether the county will adopt the "on-hold" system or a "lead court/lead agency" system, as described in subdivision (e)). There must not be any simultaneous or duplicative case management or services provided by both the county probation department and the child welfare services agency, and in cases in which more than one judge is involved, the judges must not issue conflicting orders.
  - In counties in which an on-hold system is adopted, the dependency jurisdiction must be suspended or put on hold while the child is subject to jurisdiction as a ward of the court. When it appears that termination of the court's jurisdiction, as established under section 601 or 602, is likely and that reunification of the child with his or her parent or guardian would be detrimental to the child, the county

probation department and the child welfare services agency must jointly assess and produce a recommendation for the court regarding whether the court's dependency jurisdiction may be resumed.

- In counties in which a lead court/lead agency system is adopted, the protocol must include a method for identifying which court or agency will be the lead court/lead agency. That court or agency must be responsible for managing the case, conducting statutorily mandated court hearings, and submitting court reports.

EDUCATION LAWS, RIGHTS, AND ISSUES

Ensuring that a dependent child's educational needs are met is an important factor in the child's overall well-being and is the responsibility of everyone involved in the dependency process, including attorneys, caregivers, parents, social workers, and the court.

Education Rights / Decisionmaking Authority

A child under the age of 18 years needs an adult to make education decisions. Knowing which adult has the legal authority to make these decisions is especially important for children who are eligible for (or need to be assessed for) special education services. (§§ 319(g), 361; Ed. Code, § 56055; Gov. Code, § 7579.5.) Under rule 5.651 of the California Rules of Court, the court must address, starting at detention and at every subsequent hearing, whether the parent's or guardian's education rights should be limited and given to another person. If the court gives the right to make education decisions to someone other than the parent, the court must provide a clear statement of the order on Judicial Council form JV-535. The court should consider appointing a relative, nonrelated extended family member, mentor, CASA, or community volunteer as the responsible adult. (*Note:* Under rule 5.502(13), this person is also referred to as an educational representative.) However, an individual with a conflict of interest, such as a social worker, group home staff member, probation officer, or therapist, may not be appointed. (20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. § 300.519(d)(2)(i); Cal. Rules of Court, rule 5.650(c).)

1. Who Holds Education Rights

a. Parents or Legal Guardians

Parents or legal guardians continue to have the right to make education decisions *unless* their education rights have been limited. However, the juvenile court has the discretion to limit a parent's education rights if that is necessary to meet the child's education needs. If they are limited, the court may reinstate the right to make education decisions at a later date. (See §§ 319(g), 361, 366.1(e); Ed. Code, § 56055; Gov. Code, § 7579.5; Cal. Rules of Court, rule 5.651.)

Ensuring that a parent's right to make education decisions remains intact can be an important part of the reunification process. Often the parent can use this as an opportunity to remain involved in important decisions and demonstrate to the court that he or she is committed to resolving the issues that resulted in the child's removal from his or her care and is actively working toward reunification.

If a parent's whereabouts are unknown, a restraining order has been issued against the parent, or the parent is unwilling or unable to make education decisions, child's counsel should consider asking the court to limit the parent's education rights. A request to limit education rights might also be appropriate when a parent's problems (such as mental health or substance abuse issues) are so severe that the parent is unable to make responsible decisions. Each situation should be evaluated on a case-by-case basis.

b. Responsible Adults

When the court limits a parent's right to make education decisions, it must appoint a responsible adult to make them. (§ 361; Cal. Rules of Court, rules 5.650, 5.651.) Judges should consider appointing relatives, nonrelated extended family members, caregivers, mentors, CASAs, and community volunteers as educational representatives. (*Id.,* rule 5.650(c).) The representative holds all the education rights normally held by parents. (See *id.,* rule 5.650(e) & (f), for a list of rights.) The person holds this responsibility until the court restores the parent's or guardian's education rights, a guardian/conservator is appointed, the child turns 18 years old, another person is appointed, or the child is placed in a planned permanent living arrangement and the court appoints the caregiver as the educational representative. (§§ 361(a), 726(b); Ed. Code, § 56055; Cal. Rules of Court, rule 5.650(e)(2) & (g).)

c. Surrogate Parents

If the court is unable to identify an educational representative and the child is eligible for (or needs to be assessed for) special education services, the court must use Judicial Council form JV-535 to request that the school district in which the child resides appoint a surrogate

parent within 30 days. (Cal. Rules of Court, rule 5.650(d).) The role of the surrogate parent is to represent the student with exceptional needs in all matters relating to identification, assessment, instructional planning and development, educational placement, and reviews and revisions of the individualized education program (IEP) and in all matters relating to the provision of a free, appropriate public education (FAPE) for the child. The surrogate parent may not be an employee of the California Department of Education, the school district, or any other agency involved in educating or caring for the child. He or she must have knowledge and skills to ensure adequate representation. The school district must provide training before appointment, and the surrogate parent must meet with the child at least once. (20 U.S.C. § 1415; 34 C.F.R. § 300.519; Gov. Code, § 7579.5.) County social workers, probation officers, or employees of a group home or any other agency that is responsible for the care or education of a child can never be appointed to serve as surrogate parents. These individuals may therefore not consent to services prescribed by IEPs. (20 U.S.C. § 1415; 34 C.F.R. § 300.519; Gov. Code, § 7579.5.)

d. Age of Majority

A student has the right to make his or her own education decisions once reaching the age of majority (18) unless deemed incompetent by the court under state law. (§ 361(a)(1); Ed. Code, § 56041.5.)

2. Court Orders Affecting a Child's Education

a. General

Under California Rules of Court, rule 5.651(c), the court has broad responsibility for the education of dependent children, and the social study report must include information on a broad range of educational issues. At every hearing, the child's attorney should review the educational information and identify a plan for meeting the child's needs, including, but not limited to, whether the parent or guardian should be the holder of education rights; whether the child is attending his or her school of origin and, if not, whether the school placement is in compliance with the McKinney-Vento Act and state law (see "Transfer and Enrollment Issues," following); whether the

child is attending a comprehensive, regular public school or private school; whether the child was immediately enrolled and the education records transferred promptly to the new school; whether the child's educational, physical, mental health, or developmental needs are being met; whether the child has the opportunity to participate in developmentally appropriate extracurricular and social activities; whether the child needs to be assessed for early intervention or special education services; and so forth. (§§ 361, 726; Ed. Code, §§ 46069, 48850, 48853, 48853.5, 49076; Cal. Rules of Court, rules 5.650, 5.651.)

b. Detention

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

c. Disposition and Beyond

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

Transfer and Enrollment Issues

1. McKinney-Vento

The McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.) allows homeless children to

- Remain in the school they attended prior to becoming homeless (their school of origin) until the end of the school year and for the duration of their homelessness; and
- Immediately enroll in school even if lacking the usual requirements.

Children covered by McKinney-Vento are entitled to transportation to and from school. The definition of "homeless" includes children "awaiting foster care placement." (*Id.,* § 11434a.)

2. Assembly Bill 490

California Assembly Bill 490 (Stats. 2003, ch. 862) provides foster youth with a series of rights related to education that are in keeping with and build on the federal McKinney-Vento legislation. Under AB 490,

- Foster youth are entitled to remain in their school of origin for the duration of the school year when their placement changes and when remaining in the same school is in the child's best interest (Ed. Code, § 48853.5(f)(1));
- If jurisdiction of the court is terminated before the end of an academic year, a child has a right to remain in the school of origin for the remainder of the school year, or if in high school, through graduation (*id.*, § 48853.5(f)(3)(A));
- When a foster child is subject to a change in school placement, the new school must immediately enroll the child even if the child has outstanding fees, fines, textbooks, or other items or money due to the school last attended or is unable to produce the records or clothing normally required for enrollment (*id.*, § 48853.5(f)(8)(B));
- Foster youth must be placed in the least restrictive academic placement and attend a mainstream public school unless the child has an IEP requiring placement outside the public school or the person who holds education rights determines it is in the child's best interest to be placed in another educational program (*id.,* § 48853);

- The new school and old school must ensure that school records are transferred within two days of the child's checking out of the old school and into the new school (*id.,* § 48853.5(f)(8)(C));
- Grades of a foster child may not be lowered because of absences from school owing to a change in placement, attendance at a court hearing, or other court-related activity (*id.,* § 49069.5(h));
- Local education agencies must calculate and award all full and partial course credit to pupils in foster care who transfer between schools (*id.,* §§ 49069.5, 51225.2);
- Each public school district and county office of education must accept, for credit, full or partial coursework satisfactorily completed by a student while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency (*id.,* § 48645.5); and
- Every local education agency must have an educational liaison for foster children (foster care liaison) (*id.,* § 48853.5.), and child's counsel must provide his or her contact information to the educational liaison at least once per year (Welf. & Inst. Code, § 317(e)(4)).

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

3. Change of School and Residency

If a proposed change in placement would cause a foster child to be removed from his or her school of origin, the social worker must notify the court, the child's attorney, the educational representative, or the surrogate parent within 24 hours, excluding nonjudicial days. If the child has a disability and an active IEP, then at least 10 days' notice is required before change in placement. After receipt of the notice, the child's attorney must discuss the proposed move with the child and the education rights holder. The child's attorney or the educational representative may request a hearing, using Judicial

Council form JV-539, no later than 2 court days after receipt of the notice. A hearing must be scheduled within 5 calendar days after the notice is filed. The court must determine whether the placement change affecting the school of origin is in the child's best interest. (Cal. Rules of Court, rule 5.651(e) & (f).)

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

Unlike McKinney-Vento, AB 490 does not contain a transportation mandate. The court and all parties should therefore determine whether the child is "awaiting foster care," living in emergency shelters, or otherwise "homeless" as defined in McKinney-Vento. If McKinney-Vento does not apply, parties should discuss alternative transportation options, including the possibility of bus passes for older students. Another option to support the educational stability of foster children is to request that reasonable transportation costs to a child's school of origin be included in the caregiver's foster care maintenance payment. Under the federal Fostering Connections to Success and Increasing Adoptions Act of 2008, the local child welfare agency may apply federal funds to cover education-related transportation costs for children in foster care. It expands the definition of "foster care maintenance payments" to include reasonable transportation to a child's school of origin. (Pub.L. No. 10-351, § 204.)

Counsel who believe that a school district is not complying with AB 490 provisions should begin by contacting the school district's foster care and/or homeless liaison. These liaisons are often very effective at resolving disagreements and educating school staff as to the legal mandates affecting foster youth. The contact information for state and county foster care liaisons is available at *www.cde.ca.gov/ls/pf/fy/ab490contacts.asp.*

4. High School Graduation

Students in foster care who transfer between schools any time after the completion of their second year of high school are exempt from local school district graduation requirements that exceed state graduation requirements, unless the school district finds that a student is reasonably able to complete the district's graduation requirements. in time to graduate from high school by the end of the student's fourth year of high school. The school district must determine if the student is reasonably able to complete the school district's graduation requirements within the pupil's fifth year of high school, and if so, the school district must take specified actions, including permitting the pupil to stay in school for a fifth year to complete the graduation requirements. The school district may use the student's credits earned to date or the length of the student's school enrollment to determine whether the student is in the third or fourth year of high school, whichever would qualify the student for the exemption. (Ed. Code, § 51225.1.)

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

Some California state college campuses have designed local programs for former foster youth, including year-round housing during school breaks and summer sessions. A variety of scholarship programs specific to foster youth are available at California State University and University of California campuses throughout California. These programs go by different names—e.g., Guardian Scholars, Renaissance Scholars, CME Society, and Promise Scholars. Many private, nonprofit organizations, such as United Friends of Children, provide scholarships and postsecondary support to foster youth. Other grants for low-income students, including foster youth, include Cal Grants and the Board of Governors Grant.

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

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

5. Nonpublic School Enrollment

There is a presumption that a foster youth will be placed in a mainstream public school unless the youth has an IEP requiring placement outside the public school or the person who holds education rights determines that placement in another educational program is in the child's best interest. (*Id.,* § 48853.) If the educational representative makes a unilateral decision to place a foster youth in a nonpublic school (NPS), the school district may not be obligated to fund the placement. A student must not be placed in a special class or an NPS unless the severity of the disability is such that education in a regular class with the use of supplementary aids and services cannot be achieved satisfactorily. (*Id.,* § 56040.1.) The youth must have an IEP and be assessed for special education services prior to placement in a nonpublic school. (*Id.,* §§ 56342.1, 56320.)

A group home may *not* condition residential placement on attendance at a nonpublic school or a school that is agency owned or operated or associated with the home. (*Id.,* § 56366.9; Health & Saf., Code,

§ 1501.1(b).) A licensed children's institution or nonpublic, nonsectarian school or agency may not require as a condition of placement that it have educational authority for a child. (Ed. Code, § 48854.)

6. School Discipline

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

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

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

The child's counsel and social worker must be notified of a recommendation for discretionary expulsion. (*Id.,* § 48853.5(d).) They must be invited to a meeting at which the school will consider and request to extend an expulsion or suspension because it determined that the child poses a danger and, for a child with exceptional needs, to participate in an IEP team meeting that will make a manifestation determination recommendation to change the child's placement due to an act warranting discretionary expulsion. (*Id.,* §§ 48911(g); 48915.5(d).)

7. Records

The social worker or tribal organization with legal responsibility for the care and protection of the child may disclose student records or personally identifiable information included in those records to those engaged in addressing the child's educational needs, if the recipient is authorized by the agency or organization to receive the disclosure and the information requested is directly related to the assistance provided by that individual or entity. (*Id.,* § 49076(a)(1)(N).)

Special Education

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

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

Special education under the Individuals With Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) is a system of services and supports designed to meet the specific learning needs of a child with a disability who is between the ages of 3 and 22 years. (Ed. Code, § 56031.) If a parent, educational representative, or other provider believes a child has a disability, he or she may request in writing that the school district conduct an assessment. (Cal. Code Regs., tit. 5, § 3021; Ed. Code, § 56029.) The school district must

submit a proposed assessment plan to the holder of education rights within 15 calendar days of receipt of the written request. (Ed. Code, § 56321(a).) The education rights holder has 15 calendar days to provide written consent to the proposed assessment plan. (*Id.,* §§ 56321, 56381(f).) The school district has 60 calendar days (not including summer vacation or school breaks of more than 5 days) from receipt of the written consent to the assessment to complete the assessment and hold the initial IEP team meeting. (*Id.,* §§ 56344(a), 56043(c).)

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

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

years, the child will be reassessed to determine whether he or she continues to qualify for special education services. (*Id.*, §§ 56343, 56043, 56381.)

School districts are solely responsible for ensuring that students with disabilities receive special education and related services. Assembly Bill 114 transferred responsibility and funding for educationally related mental health services—including residential services and wraparound services needed for the child to benefit from the FAPE—from county mental health and child welfare agencies to education. (Assem. Bill 114; Stats. 2011, ch. 43.) AB 114 eliminated all statutes and regulations related to Assembly Bill 3632 (Stats. 1984, ch. 1747).

The court found that a school district had noticed that a child may have a disorder on the autism spectrum and had an affirmative obligation to formally assess the child for autism and all areas of that disability, as required by the IDEA. The school psychologist's informal observations and subjective staff member opinions did not relieve the school district of this responsibility or satisfy the formal-assessment requirement. The school district's failure to assess the child for autism violated the IDEA's procedural requirements and deprived the child of FAPE. The court reversed and remanded for proper remedy. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (2016) 822 F.3d 1105.)

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

Advise the holder of education rights to insist that all promises made by the school district are recorded in the IEP document. This document is a contract between the school district and the holder of educational rights, and a promise not in writing may not be enforceable. If the holder of education rights disagrees with the services offered by the school district or thinks the offer is not FAPE, he or

she should not sign the document at the meeting but instead take the document home to review it, consult with an education advocate, and consider a response, which may include a request for a different school placement, more or different services, modifications, and/or accommodations. The holder of education rights may file for a due process fair hearing if he or she does not consent to all or part of the IEP.

Under section 317(e), the child's attorney has a duty to investigate legal interests that the child may have outside the scope of the dependency proceedings and to report to the court any interests that may need to be protected in other administrative or judicial proceedings. This duty applies to special education rights as well as tort claims and other causes of action. A child client may need education advocacy or legal representation in IEP meetings, due process hearings, and/or disciplinary hearings. The child's attorney must take steps to secure education support. Possible options may be direct representation on an education matter or a referral to a community education advocacy group, a nonprofit law firm focusing on low-income families, or a pro bono education attorney for the child.

If possible, attorneys should attend IEP meetings and/or assist the parents and caregivers with referrals to advocates or attorneys who specialize in special education law. Some counties have protocols for matching cases that require the assistance of an attorney with an attorney who specializes in education law.

Foster Youth Liaison

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

Additional Resources

For additional information regarding education-related legal issues and rights that affect foster youth—covering such topics as AB 490, education decisionmaking, special education, nonpublic schools, school discipline, and special education discipline—see the Judicial Council of California's *Special Education Rights for Children and Families* pamphlet, available at *www.courts.ca.gov/documents/SPED.pdf,* and the California Department of Education web page addressing AB 114 and the transition of special education and related services, available at *www.cde.ca.gov/sp/se/ac/ab114twg.asp.* Other useful resources covering education and educationally related mental health services rights of foster youth are available at *www.dhcs.ca.gov/services/MH/Pages/ProgramsforChildrenandYouth.aspx* and *www.dhcs.ca.gov/services/MH/Documents/CSI_2013_06_03c_AB_3632_AB_114b.pdf.*

EXTENDED FOSTER CARE: COURT PROCEDURES

The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub.L. No. 110-351 (Oct. 7, 2008) 122 Stat. 3949), which amended various sections of title IV-B and title IV-E of the Social Security Act, made extensive policy and program changes to improve the well-being of and outcomes for children involved with the foster care system. The changes included provisions for

- Federal funding of the Kinship Guardianship Assistance Payment (Kin-GAP) program; and
- Extension of eligibility of eligible nonminors up to 21 years of age in the following federally funded programs:
  - TAid to Families with Dependent Children–Foster Care (AFDC-FC) payments,
  - Title IV-E Adoption Assistance, and
  - Kin-GAP.

Participation by a state in these programs is optional and requires the alignment of state laws and regulations with the applicable provisions of the federal act.

California chose to participate, and Assembly Bill 12 (Beall; Stats. 2010, ch. 559), the California Fostering Connections to Success Act, enacted changes to California statutes to comply with the applicable provisions for these optional federal programs.

Extended Foster Care

The enactment of the Fostering Connections to Success Act makes extended foster care available to an eligible dependent or ward who is in a foster care placement on his or her 18th birthday because a plan of family reunification, adoption, or guardianship has not been achieved. This extension provides the additional time and support needed for these youth to become fully independent adults. Although extended foster care benefits are available to youth involved in juvenile justice as well as in child welfare, this reference guide focuses on their application in the child welfare context.

1. Nonminor Dependent Eligibility Criteria

Nonminor dependent (NMD), the term used for a dependent eligible for extended foster care (EFC), is defined as a nonminor, 18 to 20 years of age, who was under a foster care placement order on his or her 18th birthday and is currently under juvenile court jurisdiction with a foster care placement order and meeting at least one of the EFC participation conditions. (§ 11400(v).) A dependent who falls within the definition of an NMD on his or her 18th birthday is deemed an NMD. No formal action is required by the juvenile court.

a. Eligible Age Range

Young people who were subject to a foster care placement order on their 18th birthday are eligible to participate in extended foster care until they turn 21 years old.

b. Under a Foster Care Placement Order on 18th Birthday

A nonminor under a foster care placement order on his or her 18th birthday meets this requirement (§ 11400(v)(1).) California law does not require the nonminor to be physically in a foster care placement on the date of his or her 18th birthday. For example, a dependent under a foster care placement order meets this eligibility requirement under California law even though he or she is on runaway status or temporarily placed in a nontitle IV-E facility such as a locked psychiatric ward or a juvenile hall detention facility.

c. Under Juvenile Court Jurisdiction

The nonminor must be under the jurisdiction of the juvenile court. The nonminor can have either remained under the juvenile court's jurisdiction when he or she turned 18 years of age or reentered the court's jurisdiction following a termination of court jurisdiction, including dependency, delinquency, or transition jurisdiction.

d. In a Foster Care Placement

The nonminor must be in a foster care placement under the placement and care responsibility of a child welfare agency, probation department, or tribal agency.

The foster care placements for an NMD are those currently available, including licensed or certified foster homes, approved relative homes, and group homes or short-term residential therapeutic programs. However, a group home placement for an NMD may be considered only if the placement allows the NMD to finish high school or the NMD's medical condition requires it, and only if the NMD is under 19 years of age. (§ 16501.1(d)(3).)

Two additional NMD foster care placements were created by the Fostering Connections to Success Act:

- ***Transitional*** *Housing Program-Plus-Foster Care (THP-Plus-FC).* This foster care housing program is for NMDs who are not ready for a highly independent living situation and is similar to the housing models and supportive services available in the current THP-Plus program for former foster youth who are not currently under juvenile court jurisdiction.
- ***Supervised*** *Independent Living Placement (SILP).* This new and flexible placement type will provide NMDs who are developmentally ready with the opportunity to experience independent living while receiving financial support and continuing guidance from the placing agency. SILP placements include apartments (alone or with roommates), single-room occupancy hotels with shared bathrooms and/or kitchens, rooms for rent in a house or apartment, and college dormitories. There is no caregiver or provider, as other placement types provide, and the monthly AFDC-FC funds may be paid directly to the NMD.

An NMD may live in an out-of-state placement such as a college dormitory. The placing agency must comply with all monthly face-to-face visitation and services requirements. If the state in which the NMD is living does not accept an Interstate Compact on the Placement of Children request to provide courtesy supervision of the NMD, the placing agency must ensure that all visitation and services are provided by an employee of the placing agency or through a private agency located in the other state.

All County Letter (ACL) No. 11-77, issued by the California Department of Social Services (CDSS) on November 18, 2011, pro-

vides detailed information about the foster care placements available for the NMD. ACL No. 11-77 is available at *www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2011/11-77.pdf.*

e. EFC Participation Conditions

The nonminor must be participating in at least one of the five conditions described below:

- ***Completing*** *high school or an equivalency program.* To meet this condition, the NMD must be enrolled in a high school program such as a public high school, charter high school, alternative high school, continuation school, nonpublic school, adult education classes, or course of study leading to a high school diploma, GED test credential, California High School Proficiency Examination Certificate of Proficiency, or high school certification of completion. Participation in special education activities described in the NMD's individualized education program satisfies this condition. The NMD's enrollment is considered continuous during any summer or other scheduled break in the school program.
- ***Enrolled*** *in postsecondary education or vocational education.* To meet this condition, the NMD must be enrolled at least half time in an institution licensed to operate in California or at a comparable institution located or licensed to operate in another state. Formal admission to the educational institution is not required and includes situations where a student is enrolled in individual courses without being enrolled in the institution. Course work taken at more than one institution during a semester or quarter can be used to achieve half-time enrollment. The NMD remains in compliance with this participation condition during official school breaks such as a summer or semester break.
- ***Participating*** *in a program or activity that promotes or removes barriers to employment.* This participation condition can be met through a wide range of programs and activities, including job skills classes or training, career exploration classes or training, social skills classes or training, substance abuse treatment, mental health treatment, teen parenting classes or programs, unpaid employment, and volunteer activities. The NMD's indi-

vidualized programs or activities must be specific to his or her skills and needs, developed by the NMD with input from the social worker or probation officer and others providing support and guidance to the NMD, and designed to assist the NMD in his or her efforts to advance to participation in one of the education or employment conditions.

- ***Employed*** *for at least 80 hours per month.* To meet this condition, the NMD must be engaged in paid employment activities for a minimum of 80 hours per month. Paid employment by one or more employers during a month can be combined to reach the 80-hours-per-month minimum. The NMD remains in compliance with this participation condition as long as he or she is scheduled to work at least 80 hours per month, even if the NMD does not do so because of holidays, illness, authorized vacation, or circumstances beyond the NMD's control.
- *Incapable of doing any of the activities described above because of a documented medical condition.* The NMD must have a medical condition—a physical or mental state—and the medical condition must make the NMD incapable of participating in any of the participation conditions described above. Written verification is required by a health-care practitioner that one of the reasons an individual is unable to meet any of the other participation conditions is because of his or her medical condition.

Attachment A to ACL No. 11-61, issued by the California Department of Social Services on November 4, 2011, provides a detailed definition of each of the five participation conditions. ACL No. 11-61 is available at *www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2011/11-61.pdf*.

A nonminor may still continue under juvenile court jurisdiction as a dependent until his or her 21st birthday without meeting the requirements for status as an NMD. (§§ 303, 607.) However, the nonminor who remains under juvenile court jurisdiction without attaining the status as an NMD is ineligible to receive federal AFDC-FC funding.

2. Additional Requirement for Participation in EFC

Because remaining in foster care under juvenile court jurisdiction with the placing agency maintaining placement and care responsibility is voluntary after one turns 18 years old, the NMD and the plac-

ing agency must sign CDSS form SOC 162, *Mutual Agreement for Extended Foster Care* (mutual agreement), within six months of the NMD's 18th birthday. By signing the agreement, the NMD agrees to remain under juvenile court jurisdiction in a supervised foster care placement. This requirement is a condition for ongoing participation in EFC, and an NMD's failure to sign the mutual agreement could cause the placing agency to file a request with the court to terminate its jurisdiction over the NMD. However, the completion of the mutual agreement is not a condition for payment of foster care funds, and the NMD would remain eligible for funding until the court terminated its jurisdiction.

3. Nonminor Dependent as Legal Adult

As a person who has attained 18 years of age, the NMD is a legal adult and holds the rights and privileges of that status. (§ 303(d).) Protective custody warrants may not issue because the placing agency does not hold legal custody. Permission to access medical, dental, mental health, educational, and all other confidential information and records must be obtained from the NMD, as must consent for such [or the same] testing or treatment. The placing agency may provide that information to the NMD's foster care provider, as set forth in the CDSS placement agreement forms. But caregivers, including the NMD's Court Appointed Special Advocate, must keep all medical information confidential and not release information to another party without written consent from the NMD.

An NMD retains all the personal rights of a foster child enumerated in section 16001.9.

4. Responsibilities

The goal of extended foster care is to provide each NMD with the opportunity to make decisions regarding his or her housing, education, employment, and leisure activities while ensuring the availability of ongoing support and assistance when difficulties arise. Achieving this goal requires a change in the responsibilities of the NMD and the other participants in the juvenile court process.

As an adult, the NMD is voluntarily remaining in foster care and enters into a mutual agreement with the placing agency in which both parties agree to fulfill their respective responsibilities. The purpose of the mutual agreement is to ensure that the NMD's status as a legal adult is recognized and to provide clear expectations to both the NMD and the case manager of what the responsibilities are for each party. The mutual agreement further specifies what services and assistance the NMD will receive from the agency.

The NMD's responsibilities include participating in face-to-face monthly visits with the placing agency caseworker; reporting changes in income and placement and meeting eligibility conditions; working collaboratively with the caseworker to resolve any problems the NMD is experiencing with placement or in meeting eligibility conditions; demonstrating a gradual increase in his or her level of individual responsibility; and participating in the regularly scheduled six-month status review hearings either in person, telephonically, or through his or her attorney.

The caseworker's responsibilities include meeting with the NMD for face-to-face monthly visits; certifying the NMD's initial and ongoing eligibility for EFC; providing the NMD with contact information for his or her attorney and notification of the regular six-month status review hearings; preparing reports for those hearings; and providing the NMD with the services, guidance, and assistance necessary for the NMD's gradual increase in individual responsibility and successful transition to independence.

The NMD and the caseworker share responsibility for participating in ongoing collaborative case planning to develop, implement, and update the NMD's Transitional Independent Living Case Plan and Transitional Independent Living Plan (TILP).

The NMD who remains in foster care after his or her 18th birthday will continue to be represented by an attorney. In addition, an attorney will be appointed for a nonminor who files a request to return to the jurisdiction of the juvenile court and foster care when the court determines there is a prima facie showing of eligibility to

return and grants the request for a hearing. If the request is granted, the appointed attorney will continue to represent the NMD. However, the role of an attorney representing an NMD shifts from representing the child's best interest under section 317 to representing the stated interests of the adult client, the NMD. The NMD may designate the attorney to appear at the status review hearing on his or her behalf. Representation of an NMD by a court-appointed attorney is at no cost to the nonminor.

The child's caregiver and the caseworker have a responsibility to discuss with the child as part of the development of the child's TILP the extended foster care options available and the benefits of those options. The caregiver for an NMD must continue to support the NMD in his or her efforts to maintain a stable housing environment, to participate in the activities and achieve the goals of the TILP, and to demonstrate an incremental increase in the exercise of adult responsibility. The caregiver must recognize that the NMD is an adult and treat him or her as an adult by respecting the NMD's rights to privacy and autonomy.

5. Indian Child Welfare Act (ICWA)

Effective January 1, 2011, the definition of an Indian child was revised for the purposes of the application of ICWA to include an unmarried person who is 18 to 20 years old. All ICWA requirements apply to an Indian child who remains in or returns to a foster care placement on or after his or her 18th birthday unless the nonminor elects not to be considered an Indian child for the purposes of the application of ICWA. (§ 224.1.)

Court Procedures for Extended Foster Care

The Fostering Connections to Success Act created two new hearing types—one for a nonminor dependent status review and the other for a nonminor's request to return to foster care—and made extensive amendments to two existing dependency hearing types—the last status review hearing before a dependent in a foster care placement attains 18 years of age and the hearing to terminate jurisdiction over a nonminor.

The resulting rules and forms, effective January 1, 2012, provide a uniform procedural framework to support the extension of foster care services to NMDs and help ensure the consistent application of the Fostering Connections to Success Act to dependents throughout the state.

1. Planning for Transition From Foster Care to Successful Adulthood

Planning for a successful transition from foster care to successful adulthood is a difficult and complex process that must begin before a child's 14th birthday and continue throughout his or her stay in foster care. The services needed to help the child make the transition to successful adulthood must be included in the child's case plan beginning at 14 years of age.

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

Chart A, *Review Hearing Requirements for Child Approaching Majority,* provides detailed information about the report requirements and the appropriate findings and order for this hearing type. The chart is available at *www.courts.ca.gov/7988.htm*.

2. Termination of Juvenile Court Jurisdiction

Rule 5.555 provides the procedures for the hearing under section 391, which must be held to consider the termination of juvenile court jurisdiction over a nonminor who is a dependent or a nonminor

dependent subject to an order for a foster care placement. The rule addresses the procedures for calendaring a hearing, the information that the social worker must include in the report prepared for the hearing, and the related findings and orders.

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

The mandatory *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365) incorporates several requirements related to the documentation that must be provided to the nonminor.

Chart C, *Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Dependent or Ward Age 18 or Older in a Foster Care Placement or Over a Nonminor Dependent,* provides detailed information about report requirements and the appropriate findings and order for a rule 5.555 hearing. The chart is available at *www.courts.ca.gov/7988.htm.*

Rules of Court for Extended Foster Care

Chapter 14 of title 5 of the California Rules of Court includes three rules related to a nonminor in a foster care placement under juvenile court jurisdiction as a nonminor dependent and to the resumption of juvenile court jurisdiction over a nonminor.

1. General Provisions: Rule 5.900

This rule states the general provisions related to this group of nonminors, including a nonminor's status as an adult, the general conduct of hearings, and the nonminor's appearance at a court hearing by telephone. (§§ 303, 366(f), 366.3, 388(e)(3).)

2. Nonminor Dependent Status Review Hearing: Rule 5.903

This rule sets out the purpose of the hearing that must be held every six months to review the status of an NMD who has chosen to remain under juvenile court jurisdiction on reaching majority or to return to foster care and have juvenile court jurisdiction resumed.

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

Chart B, *Status Review Hearing for Nonminor Dependent,* provides detailed information about report requirements and the appropriate findings and order for a rule 5.903 hearing. The chart is available at *www.courts.ca.gov/7988.htm.*

3. Request to Return to Juvenile Court Jurisdiction: Rule 5.906

A nonminor who has not yet reached 21 years of age can return to foster care if he or she meets the eligibility requirements for status as a nonminor dependent. Under section 303, when the court terminates dependency, transition, or delinquency jurisdiction, the nonminor dependent automatically remains under the general jurisdiction of the court to allow the nonminor to petition under section 388(e) for a hearing to resume the dependency or transition jurisdiction of the court. The number of times a nonminor may exit and subsequently return to juvenile court jurisdiction and foster care has no limit. This flexibility is important because the NMD's circumstances and needs may change several times between the ages of 18 and 21 years.

Rule 5.906 states the procedures for the juvenile court to resume jurisdiction over a nonminor, including those related to the contents of the request; the filing and, if necessary when submitted to the court in the county where the nonminor resides, the forwarding of the request for filing to the juvenile court that retained general juris-

diction; provision of notice; appointment of an attorney for the nonminor; the contents of the report; and related findings and orders. The rule also includes provisions to provide additional information for the nonminor whose petition was denied.

The following are mandatory forms that will ensure that information needed for the juvenile court to resume jurisdiction is presented in a concise and simple fashion and that the nonminor's contact information will be able to remain confidential when desired: *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO), *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), and *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468).

Chart D, *Request by Nonminor for the Juvenile Court to Resume Jurisdiction,* provides detailed information about report requirements and the appropriate findings and order for a rule 5.906 hearing. The chart is available at *www.courts.ca.gov/7988.htm.*

EXTENDED FOSTER CARE: WRITTEN REPORT REQUIREMENTS FOR SOCIAL WORKERS

A social worker's written court report is integral to the court's oversight of a dependent child or a nonminor dependent (NMD). The report informs the court about a multitude of issues regarding the child or NMD and serves as the basis of the court's findings and orders, helping the court make informed decisions regarding a child's or NMD's safety, permanency, well-being, and successful transition to living independently as an adult.

The Judicial Council approved several new and revised rules of the California Rules of Court and Judicial Council forms to implement the statutory mandates of Assembly Bill 12 (Beall; Stats. 2010, ch. 559) (California Fostering Connections to Success Act).[3] The rules and forms also provide a uniform procedural framework to ensure compliance with the requirements for the federal funding needed to support the extension of foster care services to NMDs. The rules also outline the information, related to extended foster care, that must be discussed in court reports.

Child Approaching Majority (Rule 5.707)

At the last review hearing before a child turns 18 years of age, or at the dispositional hearing held under section 360, if no review hearing will be set before the child turns 18, in addition to complying with all other statutory and rule requirements applicable to the report prepared by the social worker for the hearing, the report must document the following:

[3] AB 12 was amended by Assembly Bills 212 (Beall; Stats. 2011, ch. 459), 1712 (Beall; Stats. 2012, ch. 846), 787 (Stone; Stats. 2013, ch. 487), and 2454 (Quirk-Silva; Stats. 2014, ch. 769). These bills are referred to as the California Fostering Connections to Success Act in this fact sheet.

- The child's plans to remain under juvenile court jurisdiction as an NMD, including the criteria in Welfare and Institutions Code section 11403(b) that he or she plans to meet; [4]
- The efforts made by the social worker to help the child meet one or more of the criteria in section 11403(b);
- For an Indian child to whom the Indian Child Welfare Act (ICWA) applies, his or her plans to continue to be considered an Indian child for the purposes of the ongoing application of ICWA to him or her as an NMD;
- Whether the child has applied for title XVI Supplemental Security Income (SSI) benefits and, if so, the status of any pending in-progress application, and if such an application is pending, whether it will be in the child's best interest to continue juvenile court jurisdiction until a final decision is issued to ensure that the child receives continued assistance with the application process;
- Whether the child has an in-progress application pending for Special Immigrant Juvenile Status (SIJS) or other application for legal residency, and whether an active dependency case is required for that application;
- The efforts made by the social worker toward providing the child with the written information, documents, and services described in section 391, and to the extent that the child has not yet been provided with the information, the barriers to providing that information and the steps that will be taken to overcome those barriers by the child's 18th birthday;
- When and how the child was informed of his or her right to have juvenile court jurisdiction terminated when he or she turns 18 years old;

[4] An otherwise eligible nonminor must meet one or more of the following conditions to receive extended foster care benefits: (1) complete secondary education or a program leading to an equivalent credential, (2) enroll in an institution that provides postsecondary or vocational education, (3) participate in a program or activity designed to promote or remove barriers to employment, (4) be employed for at least 80 hours per month, or (5) be incapable of doing any of the activities in (1)–(4) because of a medical condition.

- When and how the child was provided with information about the potential benefits of remaining under juvenile court jurisdiction as an NMD, and the social worker's assessment of the child's understanding of those benefits; and
- When and how the child was informed that if juvenile court jurisdiction is terminated, he or she has the right to file a request to return to foster care and have the juvenile court resume jurisdiction over him or her as an NMD.

The social worker must also submit the child's transitional independent living case plan (TILCP), which must include (1) the individualized plan for the child to satisfy one or more of the criteria in section 11403(b), and the child's anticipated placement as specified in section 11402; and (2) the child's alternate plan for his or her transition to independence, including housing, education, employment, and a support system in the event the child does not remain under juvenile court jurisdiction after reaching the age of 18.

NMD Status Review (Rule 5.903)

A status review hearing for an NMD must occur at least once every six months. The social worker must submit a report to the court that includes information regarding

- The continuing necessity for the NMD's placement, and the facts supporting the conclusion reached;
- The appropriateness of the NMD's current foster care placement;
- The NMD's plans to remain under juvenile court jurisdiction, including the section 11403(b) eligibility criteria that he or she meets for status as an NMD;
- The efforts made by the social worker to help the nonminor meet the section 11403(b) eligibility criteria for status as an NMD;
- Verification that the NMD was provided with the information, documents, and services required under section 391(e);
- How and when the TILCP was developed, including the nature and extent of the NMD's participation in its development, and for the NMD who has elected to have ICWA continue to apply, the extent of consultation with the tribal representative;

- The efforts made by the social worker to comply with the NMD's TILCP, including efforts to finalize the permanent plan and prepare the NMD for independence;
- Progress made toward meeting the TILCP goals, and the need for any modifications to help the NMD attain the goals;
- The efforts made by the social worker to establish and maintain relationships between the NMD and individuals who are important to the NMD, including caring and committed adults who can serve as lifelong connections; and
- The efforts made by the social worker, as required in section 366(a)(1)(D), to establish or maintain the NMD's relationship with his or her siblings who are under the juvenile court's jurisdiction.

The social worker must also submit with his or her report the TILCP. At least 10 calendar days before the hearing, the social worker must file with the court the report prepared for the hearing and the TILCP and provide copies of the report and other documents to the NMD, all attorneys of record, and, for the NMD who has elected to have ICWA apply, the tribal representative.

Termination of Jurisdiction (Rule 5.555)

At any hearing to terminate the jurisdiction of the juvenile court over an NMD or a dependent of the court who is a nonminor and subject to an order for a foster care placement, in addition to all other statutory and rule requirements applicable to the report prepared for any hearing during which the termination of the court's jurisdiction will be considered, the social worker must include the following:

- Whether remaining under juvenile court jurisdiction is in the nonminor's best interest, and the facts supporting that conclusion;
- The specific criteria in section 11403(b) met by the nonminor that make him or her eligible to remain under juvenile court jurisdiction as an NMD;
- For a nonminor to whom ICWA applies, when and how the nonminor was provided with information about the right to

continue to be considered an Indian child for the purposes of applying ICWA to him or her as a nonminor;

- Whether the nonminor has applied for SSI benefits and, if so, the status of any pending in-progress application, and whether remaining under juvenile court jurisdiction until a final decision has been issued is in the nonminor's best interests;
- Whether the nonminor has applied for SIJS or other application for legal residency and, if so, the status of any pending in-progress application, and whether an active juvenile court case is required for that application;
- When and how the nonminor was provided with information about the potential benefits of remaining under juvenile court jurisdiction as an NMD, and the social worker's assessment of the nonminor's understanding of those benefits;
- When and how the nonminor was informed that if juvenile court jurisdiction is terminated, the court maintains general jurisdiction over him or her for the purpose of resuming jurisdiction, and that the nonminor has the right to file a request to return to foster care and juvenile court jurisdiction as an NMD until the nonminor's 21st birthday;
- When and how the nonminor was informed that if juvenile court jurisdiction is continued, he or she has the right to have that jurisdiction terminated;
- For a nonminor who is not present at the hearing,
  - Documentation of the nonminor's statement that he or she did not wish to appear in court for the scheduled hearing; or
  - Documentation of the reasonable efforts made to locate the nonminor whose current location is unknown; and
- Verification that the nonminor was provided with the information, documents, and services required under section 391(e).

The social worker must file with the report a completed *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365), as well as the nonminor's TILCP (when recommending continuation of juvenile court jurisdiction), most recent Transitional Independent Living Plan (TILP), and completed 90-day transition plan.

At least 10 calendar days before the hearing, the social worker must file the report and all documents with the court and must provide copies of the report and other documents to the nonminor, the nonminor's parents, and all attorneys of record. If the nonminor is an NMD, the social worker is not required to provide copies of the report and other documents to the NMD's parents.

Resumption of Juvenile Court Jurisdiction (Rule 5.906)

At least two court days before the hearing on a nonminor's *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), the social worker or Indian tribal agency caseworker must file the report and any supporting documentation with the court and provide a copy to the nonminor and to his or her attorney of record. The social worker or tribal caseworker must submit a report to the court that includes

- Confirmation that the nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement when he or she turned 18 years old, and that he or she has not attained 21 years of age or is eligible to petition the court to resume jurisdiction under section 388.1;
- The condition or conditions under section 11403(b) that the nonminor intends to satisfy;
- The social worker's or tribal caseworker's opinion about whether continuing in a foster care placement is in the nonminor's best interest, and a recommendation about the assumption or resumption of juvenile court jurisdiction over the nonminor as an NMD;
- Whether the nonminor and the placing agency have entered into a reentry agreement for placement in a supervised setting under the placement and care responsibility of the placing agency;
- The type of placement recommended, if the request to return to juvenile court jurisdiction and foster care is granted; and
- If the type of placement recommended is a setting where minor dependents also reside, the results of the background check of the nonminor under section 16504.5.

- The background check is required only if a minor dependent resides in the placement under consideration for the nonminor.
- A criminal conviction is not a bar to a return to foster care and the resumption of juvenile court jurisdiction over the nonminor as an NMD.

Conclusion

The California Fostering Connections to Success Act made extensive policy and program changes to improve the well-being of and outcomes for children in the foster care system. The transition of a young person from foster care to successful adulthood is difficult and complex. It must be carefully planned and closely monitored. Thorough court reports are an essential component of this process and can help ensure that the nonminor dependent receives the array of services and support necessary for success.

FUNDING AND RATE ISSUES

The availability of funding is often a critical factor for relatives or other persons interested in providing care for a child who has been removed from the custody of his or her parent. All foster children should be eligible for some type of funding; however, the type of funding, amount, and source depend on a number of factors.

Eligibility for Federal Funding

1. Requirements

a. Generally

Several requirements must be met for a child to be considered eligible for federal funding. Generally a child is eligible if, during the month a voluntary placement agreement (VPA) was signed or the dependency petition was filed, the home of the parent, guardian, or relative from whose custody the child was removed met federal poverty guidelines (i.e., was eligible for federal assistance under the 1996 standards for Aid to Families with Dependent Children [AFDC], which continues to be used for qualification under CalWORKS).

b. Children in Voluntary Placements

Federal funding is available for children in out-of-home placements under a VPA if the above criteria are met. However, this funding is limited to six months; if the child is initially removed on a VPA, the county social services agency must file a dependency petition within 180 days of the date the VPA was signed to secure continued funding for children who are not returned to the parent's custody.

If funding is denied because the county social services agency failed to file a petition within the specified time limit, urge the caregiver to appeal through a request for an administrative fair hearing. The caregiver and, ultimately, the child should not suffer because the county did not follow the required protocol.

c. Title IV-E

In addition, in order for the caregiver to be federally eligible under Title IV-E of the Social Security Act, the court must make the following findings at the initial hearing on detention:

- Continuance in the home of the parent or legal guardian is contrary to the child's welfare;
- Temporary placement and care are vested with the social services agency pending disposition; and
- The social services agency has made reasonable efforts to prevent or eliminate the need for removal.

If the proper language does not appear in the minute order from *the first hearing,* federal funding will be denied. A deficiency may be corrected if the transcript shows the words were in fact stated on the record but inadvertently left out of the minute order. However, an attempt to add the language at a later time with a nunc pro tunc order will not fix the problem. Because the results of omitting the Title IV-E findings are so costly, it is best for all in the courtroom to ensure that the proper findings are made at the proper time.

2. Disqualifying Criteria or Circumstances

Federal funding is *not* available if

- The child is undocumented;
- The parent from whom the child was removed resides in the same home; or
- The child is 18 or older and the court has terminated jurisdiction. Federal funding can be extended to age 19 if the youth is still in high school and is expected to graduate before his or her 19th birthday, or, starting in January 2012, funding can continue until age 21 if the youth meets the criteria to be considered a nonminor dependent under section 11403.

Loss of federal funding is not a legitimate basis for terminating jurisdiction. The juvenile court can maintain jurisdiction until a youth reaches age 21, and, if the court does so, the county must provide funding after federal eligibility ends. Jurisdiction may be terminated only when it is in a dependent youth's best interest; the county's fiscal concerns do not take precedence. (See *In re Tamika C.* (2005) 131 Cal.App.4th 1153; see also Termination of Jurisdiction fact sheet.)

Types of Funding

1. Aid to Families with Dependent Children—Foster Care (AFDC-FC)

Although the AFDC program no longer exists as a general welfare program, federal foster care funds are referred to as AFDC-FC and are provided to children who are federally eligible and living with a nonrelative. The level of funding is at either the basic rate or a higher, specialized-care increment depending on the individual child's needs.

2. *Youakim*

The Supreme Court in *Youakim v. Miller* (1976) 425 U.S. 231 held that federal foster care funds could not be withheld from a federally eligible child simply because the child was placed with a relative. *"Youakim"* is now the shorthand term used for federal foster funds paid to a relative caregiver. Funding may be paid at either the basic rate or a specialized-care increment, depending on whether the child has special needs.

3. State Foster Care

These funds are paid for dependent children who are placed with nonrelatives and are not federally eligible. The funding rates, including specialized rates, are the same as those paid under AFDC-FC and *Youakim*.

4. County Foster Care

When federal, state, and other funds are not available, the county in whose care and custody a dependent child has been placed should be responsible for paying for the child's care. This situation may arise in several circumstances, such as when an undocumented foster youth is awaiting approval of his or her application for Special Immigrant Juvenile Status (SIJS) or when federal foster funds are terminated owing to the youth's age but the court determines that continued jurisdiction is in the dependent's best interest.

These situations are often covered under social services agency policy that will vary from county to county. Each case must therefore be individually assessed and arguments made to the court in terms of local policy and the child's particular circumstances.

5. CalWORKS

CalWORKS is the State of California's welfare program that took the place of, and is still sometimes referred to as, AFDC. Most dependent children who are not federally eligible should be eligible for CalWORKS. A relative who qualifies under the income guidelines may also receive assistance but will need to meet all the program's work requirements and be bound by its time limits. The income of the caregiver is irrelevant if the application is filed for the child only under a Non-Needy Relative Caregiver Grant. CalWORKS payment rates are significantly lower than those under *Youakim,* and funding is not determined on a per-child basis; instead a smaller increment is added for each additional child. For example, three children between birth and four years would receive $1,275 ($425 each) under AFDC-FC or *Youakim,* while the total payment under CalWORKS would be only $787.

6. Kinship Guardianship Assistance Payment (Kin-GAP)

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

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

To be eligible,

- A child must have lived with the caregiver for at least the six consecutive months immediately prior to termination of jurisdiction under the program;
- A legal guardianship must have been established by the juvenile court; and
- Dependency jurisdiction must have been terminated after the two prior conditions were met.

Previously, payments were capped at the basic foster care rate. However, the Kin-GAP Plus Program, effective October 1, 2006, extends eligibility for Kin-GAP to delinquent youth and provides a clothing allowance as well as continued payment of specialized-care increments to children who qualified for higher levels of funding before termination of jurisdiction.

Kin-GAP funding is available regardless of the prior source of funding and even if the caregiver previously received no funds at all. Children's counsel should make sure before jurisdiction is terminated that the required form (SOC 369, *Agency-Relative Guardianship Disclosure*) disclosing current and future funding rates has been filed with the court and reflects the correct amounts.

The six-month period of placement may not be required when a Kin-GAP guardianship is terminated and a successor guardian is appointed, if the successor guardian is also a kinship guardian who was named in the kinship guardianship assistance agreement or an amendment to the agreement, and the reason for appointment of a successor guardian is the death or incapacity of the kinship guardian. (§ 11386(i).)

7. Adoption Assistance Program (AAP)

The AAP is intended to encourage adoptions by providing a continuing funding stream to help families care for children they have adopted. It provides funding for all foster children, regardless of whether any funding was previously available, from the time the prospective adoptive parents sign the adoptive placement agreement until the child's 18th birthday. The rate will be determined prior to finalization and should be the basic rate at a minimum and equivalent to the appropriate specialized-care increment if the child is disabled.

AAP rates are negotiable, and caregivers should be encouraged to educate themselves about the program and seek the maximum available amounts.

8. Supplemental Security Income (SSI)

This is a federal program administered through the Social Security Administration designed to provide funding to low-income children (regardless of their dependency status) who suffer from strictly defined physical or mental disabilities. Although SSI payments are generally higher than basic rates, they are significantly lower than specialized-care increments. Counties are authorized to designate themselves as the payee for dependent children receiving SSI in order to recoup costs for the children's care. (§ 11401.6.) County agencies are also required to screen foster youth who are nearing emancipation for SSI eligibility. (§ 13757). Children's attorneys should ensure that this screening is completed and an SSI application is processed, if appropriate, before jurisdiction is terminated. SSI benefits can provide a crucial source of income and Medi-Cal coverage for young adults with disabilities.

For children with severe disabilities that are likely to persist into adulthood, it is very important to ensure that an SSI application and an evaluation have been completed before the child's 18th birthday, as lifelong eligibility is based on identification of the disability during childhood.

9. Survivor's Benefits

This program is also administered by the Social Security Administration and is available regardless of dependency status. It provides funds for the children of deceased parents who paid Social Security taxes while alive. The amount of payment is proportional to the deceased parent's earnings. The child's income from survivor benefits may impact federal or CalWORKS eligibility.

10. Cash Assistance Program for Immigrants

Children (regardless of dependency or foster care status) who are undocumented or have been legal residents of the United States for less than nine years are eligible for this federal program. The payments are significantly lower than those available through any of the foster care funding streams. (See Immigration fact sheet.)

Funding Rates

1. Basic Rates

The basic rate is the monthly amount paid under AFDC-FC, *Youakim,* and AAP for children who do not qualify for specialized-care increments. The payment increases as the child grows older. Note that some counties (e.g., Los Angeles, Marin, Orange, and Santa Clara) distribute funding at rates higher than the standard amounts. Detailed information on rates is available from the California Department of Social Services and updated periodically at *www.childsworld.ca.gov/res/FactSheets/FosterCareRates.pdf.*

2. Specialized-Care Increments

Higher amounts of funding are available for children with special medical needs or severe emotional/behavioral problems. The diagnosis and need for additional care must be documented, and the caregiver may need to fulfill certain training requirements in order to continue to provide for the child. For foster children with developmental disabilities who qualify for regional center services, a special "dual-agency rate" may be available. Currently, only 55 of the 58 counties have specialized-care systems, and each has its own procedures.

3. Infant Child Supplement

This funding is a statutorily authorized payment that is made on a monthly basis to the caregivers of a dependent parent whose non-dependent child resides in the same placement. The monies are intended to offset some of the extra costs of care for the infant. The supplement remains available even after the parent's dependency case has been terminated under Kin-GAP.

The county social services agency should promptly send the caregiver a notice of action describing any approval, denial, or change in eligibility or funding. If funding is denied (or decreased) and the caregiver wants to contest the action, it is critical that the caregiver be advised to file within 90 days a request for an administrative fair hearing. Caregivers may begin this process by calling the California Department of Child Support Services' State Hearing Support Section at 800-952-5253.

Funding is a very complex and constantly changing topic that is subject to federal, state, and county procedural requirements. This fact sheet is intended only as a general guide to alert dependency practitioners to issues that may become problematic. When problems do arise, current policy should be clarified utilizing state and county agency websites, and legal assistance should be sought from local experts in public assistance law.

HEARSAY IN DEPENDENCY HEARINGS

Social Study Exception—Section 355

All hearsay that is contained in the "social study" (any written report provided by the social worker to the court and all parties) is admissible at a jurisdictional hearing so long as the social worker/preparer is made available for cross-examination and parties have an opportunity to subpoena and cross-examine the witnesses whose statements are contained in the report. (§ 355(b); see *In re Malinda S.* (1990) 51 Cal.3d 368, 382–383.)

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

- It is otherwise admissible under another statutory or decisional exception;
- It was made by a child under 12 who is the subject of the hearing, and the statement is not shown to be unreliable because of fraud, deceit, or undue influence;
- It was made by a police officer, health practitioner, social worker, or teacher; or
- The declarant is available for cross-examination.

(§ 355(c)(1)(A)–(D).)

Remember that even a timely objection will not exclude hearsay. The statement will still be admitted under the social study exception, but the court may not exclusively rely on it to sustain any allegations unless one of the section 355(c)(1) criteria is established.

At all hearings after jurisdiction, the social study is admissible regardless of the availability of the preparer for cross-examination. (See *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387; *In re Corey A.* (1991) 227 Cal.App.3d 339, 346–347.)

However, the right to confront and cross-examine the preparer of any report admitted into evidence applies at all hearings, as does the right to subpoena the preparer or any witness whose statements are contained in a social study. (§ 355(d); see *In re Matthew P.* (1999) 71 Cal.App.4th 841, 849.)

Following jurisdiction, the social study is not only admissible but also any hearsay within it is considered evidence competent to solely support the court's determinations. (*In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1572–1573.)

The "social study exception" only covers hearsay statements contained in the county social services agency's reports. Other hearsay is still inadmissible unless an objection is countered with a valid exception. However, if no objection is made, the statement will come in as evidence and the issue is waived for appellate purposes.

"Child Hearsay," or "Child Dependency," Exception

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

- All parties are notified of the intent to use the statements;
- There are sufficient surrounding indicia of reliability; and
- Either the child is available for cross-examination or evidence corroborates the child's statements.

(*In re Cindy L.* (1997) 17 Cal.4th 15, 29.)

The statements of a child found incompetent to testify because he or she is unable to distinguish between truth and falsehood (i.e., "truth incompetent") are admissible under section 355 but may not be exclusively relied upon as a basis for jurisdiction unless the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1242–1243, 1247–1248.)

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

- Spontaneity and consistency of repetition;
- The mental state of the child;
- Use of unexpected terminology based on the child's age; and
- Child's lack of motive to fabricate.

(*In re Cindy L., supra,* 17 Cal.4th at pp. 30–31.)

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

The decisional "child hearsay/dependency" exception was created prior to the amendment of section 355 that created the "social study" exception. Although the *Lucero L.* court concluded that corroboration is no longer required for admissibility of statements within a social study, it did not reject the child dependency exception itself. In fact, the court spoke favorably of and relied heavily on the underlying rationale in reaching its conclusions. Therefore, if a party seeks to introduce hearsay from a source other than the social study, the *Cindy L.* criteria should be argued in determining admissibility.

The opponent of hearsay under section 355(c)(1)(B) has the burden to show that the statement is inadmissible as a product of fraud, deceit, or undue influence. But if the proponent (usually the petitioner) of a statement by a witness unavailable for cross-examination does not establish its reliability, the court may not exclusively rely on that information in making its jurisdictional findings. (*In re Lucero L., supra,* 22 Cal.4th at pp. 1248–1249.)

In situations where there are multiple levels of hearsay, the multiple hearsay is admissible only if each hearsay layer separately meets the requirements of a hearsay exception. (*People v. Arias* (1996)

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

IMMIGRATION

A child's immigration status is irrelevant to the applicability of dependency law; in other words, an undocumented child in California has the same right to protection from abuse or neglect as does an American citizen. However, whether the child and/or parent is legally present in the United States can have a significant impact on that individual's access to public services and therefore can have an ancillary effect on the ability to comply with the requirements of a reunification case plan or with a family's ability to provide a healthy, safe, and stable home environment. Additionally, persons who are undocumented live with the continuing possibility of deportation.

Immigration law is very complex and subject to frequent statutory and procedural changes. This fact sheet is intended as a general guideline only. The practitioner should contact an expert in immigration law for detailed assistance.

Counsel should also make sure to be aware of any custody and other prior judicial determinations made in countries or states outside California that may affect the dependency court's jurisdiction. (See the Uniform Child Custody Jurisdiction and Enforcement Act and the Hague Convention on International Child Abduction sections of the Jurisdictional Issues fact sheet, below.)

The court should inform noncitizen parents and children that they can seek the assistance of the consulate of their country of nationality.. In many cases, the consulate can be a tremendous resource—for example, by assisting with access to services, locating and evaluating relatives for potential placement, or providing document translation. Counsel should inquire into whether the client's country has a memorandum of understanding outlining the relationship between the court, the country, and the consulate on issues relating to immigrant families.

Paths to Documented Status

1. SIJ Status

Special Immigrant Juvenile Status (SIJS; 8 U.S.C. § 1101(a)(27)(J)) provides a mechanism for a dependent child to obtain permanent resident status (i.e., a "green card") under certain circumstances. In order to be eligible, the child must

- Be younger than 21 years old and unmarried;
- Have been declared a dependent or committed to or placed in the custody of a state agency or department or an individual or entity by the juvenile court (which may include delinquency, family, or probate court; see 8 C.F.R. § 204.11);
- Have been the subject of a finding by the juvenile court that "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law";
- Have been the subject of a finding by the juvenile court that it is not in the child's best interest to be returned to the country of origin; and
- Continue to be under the jurisdiction of the juvenile court unless that jurisdiction was terminated solely because of the child's age.

A federal petition for classification as a special immigrant juvenile (SIJ) may be filed by the child or anyone acting on the child's behalf (e.g., the social worker). Documentation of the child's dependency status and the court's relevant findings must be submitted in support of the petition.

It is critical that the juvenile court case remain open until the child has filed the federal petition for SIJS and, in many cases, until the SIJ petition and the green card application have been adjudicated. The process can take a long time to complete, so counsel should pursue this option as soon as the potential need arises and requisite findings have been made.

The appropriate documents for filing for SIJS are available at *www.uscis.gov*. Numerous documents must be submitted for a child who qualifies for SIJS, including, but not limited to, form I-360 *(Petition for Amerasian, Widow(er), or Special Immigrant*), I-485 *(Application to Register Permanent Residence or Adjust Status),* and supporting documents. Practitioners should seek help whenever possible, especially if the child has a criminal history, dependency is terminating soon, or the child is about to turn 21.

2. VAWA

Under the Violence Against Women Act (VAWA) (8 U.S.C. § 1154), the undocumented spouse or child of an abusive U.S. citizen or lawful permanent resident may apply for a green card with no need for cooperation from the abuser. If the application is approved, the applicant will first be given "deferred action" (see next section) and employment authorization until he or she can apply for a green card. "Abuse" is defined under VAWA as battery or "extreme cruelty" and need not be physical in nature but can also include psychological or emotional abuse. "Any credible evidence" is sufficient to demonstrate the abuse. (*Id.,* § 1154(a)(1)(J).) Thus, eligibility is likely to be supported by the sustained allegations of abuse or neglect or even police or hospital reports generated in connection with the dependency case. The sex of the applicant is irrelevant. Furthermore, the applicant need not personally have been the victim of the domestic violence so long as the applicant's parent or child qualifies under VAWA because of abuse. More information is available at *www.uscis.gov /humanitarian/battered-spouse-children-parents.*

3. U Visa

The U Visa program (*Id.,* § 1101(a)(15)(U)) allows a victim of specified serious crimes who has suffered substantial physical or mental abuse to obtain a nonimmigrant visa and ultimately to apply for a green card if he or she has been, is being, or is likely to be helpful in the investigation or prosecution of the crime (requires signed certification from a law enforcement official that the crime occurred in

the United States or violated U.S. laws). Given that regulations have not been issued yet, current applicants are given "deferred action" and employment authorization. "Deferred action" means that the applicant is permitted to remain lawfully in the United States. If the victim is under age 21, the parents, unmarried siblings under age 18, and a spouse and children of that person are also admissible under this program, as are the spouse and children of an applicant victim who is older than 21 years.

4. Other

Some additional programs may provide the means for a client (either child or adult) to obtain legal status; these include the following:

- Asylum for those who fear persecution in their native country based on their race, religion, nationality, political views, or membership in a disfavored social group (can include domestic violence);
- Temporary Protected Status (TPS), which provides temporary permission to stay and work in the United States for citizens from specified countries that have suffered devastating natural disasters, civil wars, or other nonpermanent disruptive situations (a list of countries designated for TPS is available at *www.uscis.gov/humanitarian/temporary-protected-status*);
- Family-based visas, which may be available based on a familial relationship to a U.S. citizen or lawful permanent resident;
- T visas (id., § 1101(a)(15)(T)) for victims of international trafficking, for children who have been brought to the United States for purposes of prostitution, child labor, or other forms of unlawful exploitation. Information on T visas is available at *www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status*.

Again, given the complexity of immigration law, it is highly recommended that dependency counsel consider referral to or consultation with outside counsel.

Access to Public Benefits

1. Generally

Dependent children who have been placed in foster care should be covered for all their needs (health, housing, education, etc.) regardless of their immigration status. The information below primarily becomes an issue of concern for both parents and children if the dependent child has been returned to or remains in the home of the parent.

In 1996 Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRA) (*id.*, § 1601 et seq.), which severely restricts access to public benefits for immigrants deemed "not qualified," which generally includes all undocumented persons. Under the PRA, any immigrant who is "not qualified" is ineligible for most federal, state, or local benefits, including welfare, health, postsecondary education, food assistance, or similar benefit. (*Id.,* §§ 1611 [federal], 1621 [state or local].) However, the PRA does include limited exceptions. (See *id.,* § 1621(b) & (c).) The PRA also permits a state to provide for the eligibility of otherwise ineligible immigrants for any state or local benefit by enactment of a state law after August 22, 1996. (*Id.,* § 1621(d).) California has enacted, and continues to enact, statutes conferring eligibility for specific state and local benefits on undocumented persons in the past 20 years. (See, e.g., Assem. Bill 540; Stats. 2001, ch. 814 [discussed below].)

2. Education

A state may not deny public elementary and secondary school education to a child on the basis of immigration status. (*Plyer v. Doe* (1982) 457 U.S. 202; *League of United Latin American Citizens v. Wilson* (C.D.Cal. 1995) 908 F.Supp. 755, 785.) However, as noted above, public benefits, such as financial aid relating to postsecondary education, are prohibited for immigrants who are "not qualified." Currently undocumented immigrants who sign an affidavit stating they are in the process of pursuing legalization or will do so as "soon as eligible" qualify for in-state tuition at California public colleges and universities. (Assem. Bill 540; Stats. 2001, ch. 814.)

3. Health Benefits

Undocumented adults are generally ineligible for full-scope Medi-Cal as well as for the Healthy Families program. They are eligible, however, for emergency Medi-Cal (which includes labor and delivery), Medi-Cal prenatal care, and Medi-Cal long-term (i.e., nursing home) care. Undocumented children are also generally ineligible for Medi-Cal, but they are eligible for the Child Health and Disability Program, which provides preventive health screenings, immunizations, and temporary (two-month maximum), full-scope Medi-Cal.

4. Funding and Income Assistance

Persons who are "not qualified" immigrants are generally ineligible for support from General Assistance, Supplemental Security Income, CalWORKS/CalLearn, or CalFRESH (food stamps). However, immigration status is irrelevant to eligibility for the Women, Infants and Children (WIC) program as well as for school lunch and breakfast programs.

Assistance in this complex, ever-changing area of law is available from several resources, including the following:

Immigrant Legal Resource Center
1663 Mission St., Ste. 602
San Francisco, CA 94103
www.ilrc.org

National Immigration Law Center
3450 Wilshire Blvd. #108-62
Los Angeles, CA 90010
www.nilc.org

Public Counsel
Immigrants' Rights Project
610 South Ardmore Ave.
Los Angeles, CA 90005
www.publiccounsel.org/practice_areas/immigrant_rights

INDIAN CHILD WELFARE ACT

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

ICWA requires that in all dependency cases (as well as some delinquency cases and cases involving removal from parental custody or termination of parental rights arising under the Probate and Family Codes) the court and the child welfare agency inquire about the possible Indian status of the child. Where evidence suggests that the child is an "Indian child" within the meaning of ICWA, in addition to the various substantive and procedural requirements discussed below, the agency is required to do further inquiry, and that notice of the proceedings must be sent to the child's tribe or tribes so they may participate in the proceedings. ICWA confers on tribes the right to intervene at any point in state court dependency proceedings. (25 U.S.C. § 1911(c).) California's case law is replete with cases requiring proper notice. "Of course, the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending." (*In re Junious M.* (1983) 144 Cal. App.3d 786, 790–791.) "Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)

Failure to inquire about Indian status and give appropriate notice to the child's tribe or tribes of child welfare proceedings can result in invalidation of the proceedings. (25 U.S.C. § 1914; § 224(e);

Cal. Rules of Court, rule 5.486.) Furthermore, when a case is subject to ICWA, both the child and the parents are entitled to different, culturally appropriate services that may be available only to Native Americans, so it is incumbent on both minor's and parent's attorneys to ensure that ICWA inquiry occurs at the outset of a case and ICWA notice is given where required.

When a dependency case involves an Indian child, ICWA also imposes substantive requirements that are different from those imposed under the Welfare and Institutions Code for non-Indian children. (See, generally, 25 U.S.C. §§ 1901–1963; 25 C.F.R. § 23; *Guidelines for Implementing the Indian Child Welfare Act*[5]; §§ 224–224.6, 305.5, 306.6, 361(c)(6), 361.7, 361.31, 366.24, 366.26(a)(2), 366.26(c)(1)(A), 366.26(c)(1)(B)(iv) & (vi), 366.26(c)(2)(B); Cal. Rules of Court, rules 5.480–5.487.)

In 2006, the Legislature passed Senate Bill 678 (Stats. 2006, ch. 838), which issued sweeping changes to the code by clarifying the role of ICWA in dependency, delinquency, and probate cases. This bill further differentiated the roles of the court and county social services agency in Indian cases at each stage of a dependency proceeding. As such, all counsel, and particularly minor's counsel, must consult the applicable statutes prior to hearings in order to review notice requirements and determine whether additional substantive provisions apply. In addition, in 2016 the federal government issued comprehensive ICWA regulations at 25 Code of Federal Regulations part 23 and updated the ICWA *Guidelines for Implementing the Indian Child Welfare Act.* Use caution when relying on California cases before 2006 and 2016, respectively, to the extent that they are inconsistent with either SB 678 or the new federal regulations and guidelines.

[5] Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (Dec. 2016), *www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.*

Eligibility

1. Definitions

An Indian child is an unmarried person under the age of 18 years who is a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a tribal member. An Indian custodian is any Indian person who has legal custody of an Indian child under tribal law or custom or state law or has temporary physical care, custody, and control of an Indian child whose parent(s) have transferred custody to that person. (25 U.S.C. § 1903(4) & (6); Welf. & Inst. Code, § 224.1.) Assembly Bill 2418 (Stats. 2010, ch. 468) amends the definition of "Indian child" in section 224.1(b) to include a youth up to the age of 21 who remains a dependent of the court unless the youth elects otherwise.

2. Determination of Status

A determination by a tribe, or by the Bureau of Indian Affairs (absent a determination by a tribe to the contrary), that a child is or is not a member of a tribe or that the child is eligible for membership in the tribe is conclusive. (25 U.S.C. § 1911(d).)

Attorneys for parents and children should, whenever appropriate, contact the tribal representative directly. Counsel can assist by providing the tribe with information necessary to establish eligibility, ensure that the parent and Indian child have access to proper services and funding, and relay the party's preferences as to placement. The California Department of Social Services maintains an ICWA webpage that can be accessed at *www.cdss.ca.gov/inforesources/Tribal-Affairs/ICWA.* You can also find tribal contact information at *www.bia.gov/regional-offices* and information on tracing Indian ancestry at *www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc-002619.pdf.*

Procedure

1. Definitions

The federal statute and regulations contain a number of definitions that are distinct from, but must be reconciled with, California law and practice in cases involving Indian children. (25 U.S.C § 1903; 25 C.F.R. § 23.2.)

ICWA defines the cases to which it applies as "child custody proceeding[s]," including four distinct categories: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. (25 U.S.C. § 1903.) The regulations make it clear that a "proceeding" is any action that may culminate in one of these four outcomes. Under California law, one child welfare case may produce several distinct child custody proceedings—and several hearings within each "proceeding." (25 C.F.R. § 23.2.) Furthermore, the federal regulations add a category of emergency proceeding. (*Ibid.*)

Whenever a child is involuntarily removed from parental custody and there is "reason to know" that the child is an Indian child, ICWA applies. (*Guidelines for Implementing the Indian Child Welfare Act,* B.2, at page 13.) Each phase of a California child welfare case involving an Indian child will be a different "child custody proceeding" subject to specific ICWA requirements as the case progresses.

For example, a detention hearing is likely an "emergency proceeding" if there is reason to know that the child is an Indian child and the child is removed from parental custody without prior judicial sanction and compliance with ICWA requirements, such as qualified expert witness testimony and finding of active efforts. Thus, all of the procedural requirements to support an emergency removal would have to be met. Generally, such emergency removal cannot last more than 30 days without a hearing with the "full suite" of ICWA protections. The jurisdiction hearing (or other hearing that must take place within 30 days of removal) through the termination of reunification services would be the foster care placement proceeding, and so on. Counsel should ensure that the appropriate ICWA requirements are met for each proceeding.

2. Inquiry

The court and the county social services agency have an affirmative, ongoing duty to inquire whether a child for whom a dependency petition has been filed may be an Indian child. Before or at a parent's first appearance before the court on a dependency matter, the parent must be ordered to complete form ICWA-020 (*Parental Notification of Indian Status*) as to possible Indian ancestry and the child's parents or any relative's membership in an Indian tribe. (Cal. Rules of Court, rule 5.481(a).) If this inquiry results in reason to know that the child is an Indian child, then the agency is required to conduct further inquiry as defined in Welfare and Institutions Code section 224.3(c), and complete and send ICWA notice using mandatory Judicial Council form ICWA-030, *Notice of Child Custody Proceeding for Indian Child,* in accordance with section 224.2. In addition, federal regulations require the agency to use "due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member . . .." (25 C.F.R. § 23.107.) Evidence of this due diligence must be presented to the court.

3.Jurisdiction and Transfer

a. Full Faith and Credit

Full faith and credit must be afforded to all public acts, records, and judicial proceedings of any Indian tribe. (25 U.S.C. § 1911(d).)

b. Exclusive Jurisdiction

If the Indian child resides or is domiciled on a reservation that exercises exclusive jurisdiction, or the child is already the ward of a tribal court, the dependency petition must be dismissed. (§ 305.5; Cal. Rules of Court, rule 5.483.)

c. Temporary Emergency Jurisdiction

The juvenile court may exercise temporary emergency jurisdiction even when a tribe has exclusive jurisdiction if the child is temporarily off the reservation and there is an immediate threat of serious physical harm to the child. Specific evidentiary and procedural requirements apply to such emergency removals. (25 C.F.R. § 23.113.)

Temporary emergency custody must terminate "immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child," and in any case within 30 days unless the court determines, based on clear and convincing evidence, including the testimony of a qualified expert witness, that restoring the child to the parent or Indian custodian is likely to cause serious physical damage to the child, the court has been unable to transfer the child to the jurisdiction of a tribal court, and initiating a nonemergency "child-custody proceeding" as defined in 25 C.F.R. § 23.2 has not been possible. (§ 305.5(f); 25 C.F.R. § 23.113.)

d. Concurrent Jurisdiction

If the Indian child is not residing or domiciled on a reservation that exercises exclusive jurisdiction, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribe. The juvenile court must transfer the case absent good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer; in the latter instance, the juvenile court retaining jurisdiction must continue to comply with ICWA requirements. (25 U.S.C. § 1911(b); 25 C.F.R. §§ 23.115–23.119; § 305.5(b).)

e. Transfer

At the request of the tribe, parent, or Indian custodian, the juvenile court must transfer the case to tribal court, absent good cause not to transfer. Federal regulations and California statutory law limit the basis for good cause not to transfer. Either parent objecting to the transfer or the tribe declining the transfer constitutes good cause. Other factors may provide the court with discretion to find good cause; however, federal regulations prohibit consideration of some factors. (25 C.F.R. §23.118(c)). The right to request a transfer to tribal court attaches to each ICWA "proceeding" before termination of parental rights. Therefore, transfer can be sought during the emergency proceeding, foster care, and termination of parental rights phases of the case. (25 U.S.C. § 1911; 25 C.F.R. §§ 23.115–23.119; § 305.5; Cal. Rules of Court, rule 5.483.)

Attorneys for parents should consult with their clients and the tribe to determine whether tribal court jurisdiction would be more beneficial to the clients. This consideration should be made at all stages, but particularly if the parent is facing termination of parental rights. Note that once parental rights have been terminated, the ICWA transfer provisions no longer apply.

4. Rights

a. To Intervene

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

b. To Counsel

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

c. To Access Case Information

If an Indian child's tribe has intervened in the child's case, the child's tribal representative may inspect the court file and receive a copy of the file without a court order. (§ 827(f).)

5. Notice

Whenever there is reason to know that an Indian child is involved in a dependency proceeding, the county social services agency must send notice on mandatory Judicial Council form ICWA-030, Notice of Child Custody Proceeding for Indian Child, of any upcoming proceedings to the parent; to the Indian custodian, all tribes of which the child may be a member or in which he or she may be eligible for membership; and, if no tribe can be identified, to the Bureau of Indian Affairs. Notice must be as complete and accurate as reasonably possible. The agency has an affirmative and continuing duty to interview available family members and others to obtain the information necessary to complete the notice. The obligation to send notice continues until, and if, it is determined that the child is not an Indian child. The juvenile court may determine that ICWA does

not apply if, 60 days after notice has been sent, no determinative response has been received from any of the parties notified. Notice must be sent by registered mail with a return receipt requested, and the return receipts must be lodged in the court file. The requirement to send notice, like the requirement to conduct inquiry, attaches to each distinct ICWA proceeding, of which there may be several as a case progresses. (25 C.F.R. § 23.2, definition of child custody proceeding (2); Guidelines for Implementing the Indian Child Welfare Act, D.10.)

Failure to send proper notice under ICWA is central to an inordinate number of appeals that have resulted in reversal. Counsel must always be mindful of the ICWA notice requirements.

6. Burdens and Standards

a. Burden of Proof

The burdens of proof required both to remove a child from a parent's custody and to terminate parental rights are higher than those required under the Welfare and Institutions Code for non-Indian children:

- Clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage, including the testimony of a qualified expert witness, is required to place a child in foster care and to order a guardianship.
- In order for the court to terminate parental rights, proof must be beyond a reasonable doubt and include testimony of a qualified expert witness that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage. *(Note:* See 25 U.S.C. § 1912(e) & (f); 25 C.F.R. § 23.121; §§ 361.31, 361.7, 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.485.)

It is almost always in a parent's best interest to make all efforts to establish the applicability of the ICWA so that proceedings are conducted under the heightened burdens described above.

b. Qualified Expert Witness Testimony

In order to place an Indian child into foster care, enter an order of guardianship, or terminate parental rights, the court must require and rule on the testimony from a qualified expert witness that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage. Persons most likely to be considered experts include members of the tribe, or lay or professional persons with substantial education and experience in Indian social and cultural standards. (§ 224(c).) An expert witness must not be a member of the child welfare agency recommending foster care placement. (25 U.S.C. § 1912(e) & (f); 25 C.F.R. § 23.122; § 224.6(a); *Guidelines for Implementing the Indian Child Welfare Act,* G.2.)

The court may accept a declaration or affidavit from a qualified expert witness (QEW) in lieu of live testimony only if the parties have stipulated in writing and the court is satisfied that the stipulation has been made knowingly, intelligently, and voluntarily. (§ 224.6.) The central question that QEW testimony must address is whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e) & (f).) In 2016, the federal government issued regulations and guidelines concerning ICWA. Regulation 23.122 and G.2 of the *Guidelines for Implementing the Indian Child Welfare Act* deal specifically with the requirements for QEWs. California case law before the issuance of the regulations and guidelines holds that the expert witness is not required to interview the parents or otherwise conduct an independent investigation but may rely on a review of case records, unless interviews or other investigation is necessary to fulfill the expert testimony's purpose. (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1505.) However, G.2 specifically states that the QEW should be someone familiar with the specific child and should make contact with parents and observe interactions between the parent(s) and child and meet with extended family members.

Attorneys should ensure that QEW testimony is presented and that the experts understand why they are being asked to give their opinion. It is also critical for attorneys to ensure that experts base their opinions on all of the relevant information and that the person called to testify as an expert has the necessary understanding of the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices as required by section 224.6. Look at G.2 of the federal guidelines for guidance on how the QEW should prepare. Failure to object may waive these objections for purposes of an appeal.

c. Active Efforts

In order to remove from the custody of or terminate the parental rights of a parent of an Indian child, the juvenile court must find that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful. Active efforts must include attempts to utilize available resources offered by the extended family, the tribe, Indian social services agencies, and individual Indian caregivers. The court must also take into account the prevailing social and cultural conditions of the Indian child's tribe. (§ 361.7; Cal. Rules of Court, rule 5.484(c).)

Although the term "active efforts" is not defined in the ICWA, federal regulations define "active efforts" as

> affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe

and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

(25 C.F.R. § 23.2)

The regulations also set out specific examples of what should be included as active efforts. Section 361.7 requires that active efforts be made "in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe" and that they "utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers." Cases prior to the enactment of the federal regulations and section 361.7 had concluded that active efforts are essentially equivalent to the reasonable-efforts standard required for provision of family reunification services in non-ICWA cases. (See *In re Michael G.* (1998) 63 Cal.App.4th 700, 713.) Those cases should be viewed with caution in light of the requirements of section 361.7. (See Cal. Rules of Court, rule 5.484(c).) Cases decided since the enactment of these provisions suggest that there is a difference between "active" and "reasonable" efforts. (See *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 997; *In re K.B.* (2009) 173 Cal.App.4th 1275, 1286–1287.)

Attorneys should remember that clients are entitled to culturally appropriate services and should advocate for these whenever possible.

7. Special Considerations

a. Placement Preferences—25 U.S.C. § 1915

If an Indian child is removed from parental custody for placement in foster care, placement preferences apply in the following order, absent good cause to the contrary:

- To a member of the Indian child's extended family;
- To a foster home licensed or approved by the Indian child's tribe;
- To a state- or county-licensed, certified Indian foster home; or

- To a children's institution approved by the tribe or operated by an Indian organization that offers a program designed to meet the Indian child's needs.

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

The federal regulations (25 C.F.R. §§ 23.129–23.132) and Guidelines (Guidelines for Implementing the Indian Child Welfare Act, H.2–H.5) address the requirements for an agency to actively seek out placements within the placement preferences and document these efforts, and for the court to make a finding if the placement does not conform to the placement preferences. The regulations also limit the factors that the court can consider in allowing a placement that deviates from the placement preferences. In addition, rule 5.482 of the California Rules of Court requires that "any person or court involved in the placement of an Indian child must use the services of the Indian child's tribe, whenever available through the tribe in seeking to secure placement within the order of placement preference specified in rule 5.484." Counsel should be aware of the statutory placement preferences, take steps to ensure that an Indian child's tribe is consulted, and that the placement accords with the statutory preferences.

Designation as a foster home "licensed or approved by the Indian child's tribe" does not necessarily require that the caregivers be members of the tribe. The tribe may alter these placement preferences, and approval of a home can be sought through a tribal representative at any time in the proceedings.

If the child is to be placed for adoption, preferences are as follows:

- To a member of the Indian child's extended family;
- To other members of the Indian child's tribe; or
- To other Indian families.

The court may deviate from the above preferences only on a showing of good cause, which may be based on

- Requests by the Indian child, parent, or Indian custodian;
- The Indian child's extraordinary physical or emotional needs as established by a qualified expert witness; or
- Lack of a suitable family after a diligent search has been made to identify families meeting the preference criteria.

Ensuring a placement within the placement preferences must be separately assessed at the foster care placement and permanency planning phases of a case.

b. Tribal Customary Adoption

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

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The Interstate Compact on the Placement of Children (ICPC) is an agreement among member territories and states, including California, that governs "sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption." (Fam. Code, § 7901, art. 3(b).) The purpose of the ICPC is to facilitate cooperation between jurisdictions for the placement and ongoing supervision of children who are dependents or wards of the court, and it details the procedures that must be followed in making out-of-state placements in such situations.

Applicability

1. Generally

The ICPC applies to the placement of any dependent child in any other state, the District of Columbia, or the U.S. Virgin Islands. (Cal. Rules of Court, rule 5.616(a).) It applies to placement with relatives, nonrelatives, nonagency guardians, residential institutions, group homes, and treatment facilities. (*Id.,* rule 5.616(b).) However, it does not apply when the court is transferring jurisdiction of a case to a tribal court. (Fam. Code, § 7907.3.)

2. Distinction Between Visit and Placement

An order authorizing a visit that is for a period longer than 30 days, that is indeterminate in length, or that extends beyond the end of a school vacation is considered a placement and therefore is subject to the ICPC. (Cal. Rules of Court, rule 5.616(b).)

Although true short-term visits are not controlled by the ICPC, assistance from the receiving state's ICPC unit may be helpful in facilitating visits—for example, by conducting background checks or courtesy visits.

3. Previously Noncustodial Parent

The ICPC does *not* apply to placement outside California with a previously noncustodial parent. (*Id.,* rule 5.616(b)(1)(A); see also Fam. Code, § 7901.)

Although compliance with the ICPC is not required for placement with an out-of-state parent, nothing in the ICPC prevents the use of an evaluation as a method of gathering information about a parent before the court makes a finding under section 361.2 regarding whether placement with the previously noncustodial parent would be detrimental to the child. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1572.) However, an unfavorable recommendation by the receiving jurisdiction may not be the sole basis for denial of placement, absent other evidence establishing detriment.

The attorney for a nonoffending parent from another state will want to gather as much evidence as possible (such as home photos, work history, letters from employers or clergy) to present to the child's attorney, social worker, and court so that the court can make informed decisions on the child's placement in the parent's custody and termination of jurisdiction.

Procedure

1. Requirements

Prior to placing a child in another state, the sending jurisdiction must notify the designated receiving jurisdiction of the intention to place the child out of state. A child may not be sent to the new caregivers until the receiving jurisdiction has responded in writing that it has determined that the placement is not contrary to the child's best interest. (Cal. Rules of Court, rule 5.616(d).)

It can be argued that because a child is merely "detained" and not "placed" prior to disposition, an ICPC may not be initiated until the court makes the dispositional orders removing the child from the custodial parent and placing the child in foster care. However, this is a subtle distinction, and especially given that ICPC

assessments can take months to complete, counsel may want to request an ICPC referral from the court as soon as the issue of out-of-state placement arises.

2. Priority Placements

Expedited procedures may be utilized if the placement request qualifies as a "priority." This requires express findings of one or more of the following:

- The proposed caregiver is a relative, and
  - The child is under two years of age;
  - The child is in an emergency shelter; or
  - The child has spent a substantial period of time in the proposed caregiver's home; or
- The receiving jurisdiction has been in possession of a properly completed ICPC request for more than 30 business days and has not sent notice of its determination as to whether the child may be placed.

(*Id.,* rule 5.616(b)(2).)

The procedure for submitting a priority placement request and for seeking assistance from the receiving jurisdiction in the case of a delayed response (including references to the required forms and a detailed timeline of the process) can be found in rule 5.616(f).

Counsel must keep close watch on the time limits for ICPC compliance and approach the court for assistance if the receiving state does not respond in a timely manner. A list of the compact administrators for each of the member jurisdictions and their contact information is available online at *http://ICPC.aphsa.org*.

JURISDICTIONAL ISSUES

Uniform Child Custody Jurisdiction and Enforcement Act

Apart from the Parental Kidnapping Prevention Act (discussed below), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) exclusively governs subject matter jurisdiction in child custody—including dependency—cases. (Fam. Code, §§ 3400–3465.)

1. Purpose

The purpose of the UCCJEA is to avoid jurisdictional competition between states, to promote interstate cooperation so that custody orders are made in the state that can best decide the issue in the child's interests, to discourage continuing custody conflicts, to deter child abductions, to avoid relitigation of another state's custody decisions, and to facilitate enforcement of custody decrees. (See *In re Joseph D.* (1993) 19 Cal.App.4th 678, 686–687 [discussing former UCCJA].)

2. Applicability

Generally speaking, California has jurisdiction over a child who is the subject of a dependency petition if the child has lived in California with a parent for the six consecutive months immediately before the petition was filed *and* there have not been any prior out-of-state custody proceedings involving the child. However, if another state or country has made a "child custody determination" prior to commencement of the California dependency proceedings, or if the child has lived in California for less than six months at the time dependency proceedings are initiated, the California court may be prohibited from exercising jurisdiction, except for temporary emergency jurisdiction. Note that tribes are treated as states for the purposes of the UCCJEA. (Fam. Code, § 3404.)

Under the UCCJEA, a California court has jurisdiction to make an *initial* child custody determination if any of the following are true:

a. Home State

California is the child's "home state" on the date that proceedings are commenced, or it was the child's home state within six months prior to commencement of the proceeding and the child is absent from California but a parent or person acting as a parent continues to live in California. (*Id.,* § 3421(a)(1); see *id.,* § 3402(g) for definition of "home state.") Home state jurisdiction may be found where a parent is present in the state for several months, even if the parent is homeless. (*In re S.W.* (2007) 148 Cal.App.4th 1501.) Home state jurisdiction has priority over all other bases for jurisdiction under the UCCJEA.

b. Significant Connection

No court of another state has home state jurisdiction as described above, or a court of the child's home state has declined to exercise jurisdiction because California is the more convenient forum (Fam. Code, § 3427), or a party has engaged in unjustifiable conduct (*id.,* § 3428), *and* both of the following are true:

- The child and at least one parent or person acting as a parent have a significant connection with California, other than mere physical presence; *and*
- Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships. (*See In re Baby Boy M.* (2006) 141 Cal.App.4th 588 [juvenile court did not have jurisdiction where mother gave baby to father shortly after birth and father said he was leaving California, and there was no evidence available in California as to child's current circumstances].)

(Fam. Code., § 3421(a)(2).)

c. State With Jurisdiction Has Declined to Exercise It Because of Inconvenient Forum or Unjustifiable Conduct

All courts having jurisdiction under a or b above have declined to exercise jurisdiction because California is the more appropriate forum under Family Code section 3427 or 3428. (*Id.,* § 3421(a)(3).)

d. Default

No court of any other state would have jurisdiction under a, b, or c above. (*Id.,* § 3421(a)(4).)

Physical presence of, or personal jurisdiction over, a parent or child is neither necessary nor sufficient to make a child custody determination. (*Id.,* § 3421(c); but see "Temporary Emergency Jurisdiction," below). Also, California does not have to enforce a custody order that was not made in substantial compliance with UCCJEA standards (i.e., without notice and an opportunity to be heard). (See Fam. Code, §§ 3425(b), 3443(a); *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1175–1176.)

3. Temporary Emergency Jurisdiction

Even if a California court does not have jurisdiction to make a child custody determination under the conditions described above, it does have temporary emergency jurisdiction if a child is present in California *and* has either been abandoned or it is necessary in an emergency to protect the child because the child, a sibling, or a parent has been subjected to or threatened with mistreatment or abuse. (Fam. Code, § 3424(a); see *In re Jaheim B.* (2006) 169 Cal.App.4th 1343 [court may exercise temporary emergency jurisdiction where child is present and needs protection from abuse or neglect; such jurisdiction continues as long as reasons for dependency exist].)

The status of any orders made under temporary emergency jurisdiction and the actions that the California juvenile court must subsequently take are determined by whether there are existing custody orders or proceedings in another jurisdiction.

a. Previous Custody Order or Proceedings Commenced in Another State

If another state previously made a child custody determination or if a child custody proceeding is commenced in a state having jurisdiction, any protective order issued by the California court is temporary and must specify an expiration date. The temporary order remains in effect only until an order is obtained from the state having jurisdiction or until the California order expires, whichever occurs first.

(Fam. Code., § 3424(c).) In addition, the California court must immediately communicate with the court having jurisdiction to determine how best to resolve the emergency. (*Id.,* § 3424(d).)

b. No Previous Custody Order and Proceedings Not Commenced in State With Jurisdiction

If there is no previous child custody determination and no child custody proceeding has been commenced in a state having jurisdiction, any custody order made by the California court remains in effect until an order is obtained from a state having jurisdiction. If a child custody proceeding is not commenced in a state having jurisdiction and California later becomes the child's home state, then the California custody order becomes a permanent child custody determination if the order so provides. (*Id.,* § 3424(b).)

If there is a previous out-of-state custody order, the court should not proceed with the jurisdictional hearing unless the court of the state with jurisdiction has agreed to cede jurisdiction to California. (See *In re C.T.* (2002) 100 Cal.App.4th 101, 109.)

Parental Kidnapping Prevention Act

The federal Parental Kidnapping Prevention Act (PKPA) requires states to give full faith and credit to another state's custody determination so long as it is consistent with the provisions of the PKPA—that is, the state that made the determination had jurisdiction over the custody matter under its own law and one of five specified conditions exists. (See 28 U.S.C. § 1738A(c).) While the PKPA preempts state law, it does not provide for federal court jurisdiction over custody disputes; thus, it is up to state courts to construe and apply the PKPA to decide which state has jurisdiction. (*Thompson v. Thompson* (1988) 484 U.S. 174, 187.) If a California court has jurisdiction under the UCCJEA, conflict with the PKPA is unlikely because the two acts are generally consistent. Like the UCCJEA, the PKPA contains an emergency jurisdiction provision. (28 U.S.C. § 1738A(c)(2)(C).)

Hague Convention on International Child Abduction

The Hague Convention on International Child Abduction, implemented in the United States by the International Child Abduction Remedies Act, governs jurisdiction in international custody disputes involving participating countries. (42 U.S.C. § 11601 et seq.) It provides procedures and remedies for return of a child wrongfully removed from, or retained in a country other than, the child's place of habitual residence. (See *id.,* § 11601(a)(4).) Several affirmative defenses are available to a parent who opposes return of a child, including "grave risk" of physical or psychological harm to the child if returned. (See *id.,* § 11603(e)(2); *Gaudin v. Remis* (2005) 415 F.3d 1028.) State courts and United States district courts have concurrent jurisdiction over Hague Convention actions. (42 U.S.C. § 11603(a).)

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

Complex jurisdictional and practical issues may arise when one or both parents reside outside the United States. Parents should not be denied the opportunity to reunify with their children simply because they reside outside the United States; however, even if the children are placed in another country, the court has a duty to ensure their safety and well-being. Children's and parents' attorneys should explicitly address jurisdictional and enforcement issues and consider contacting the consulate and/or child welfare agency of the parent's home country for assistance. For more information on the UCCJEA and PKPA, see 2 Kirkland et al., California Family Law Practice and Procedure (2d ed. 2005) *Jurisdiction to Determine Custody and Visitation*, section 32.20 et seq. For information on the Hague Convention, see *Special Remedies for Enforcement of Custody and Visitation Orders*, in volume 4 at section 142.50 et seq.

Intercounty Transfers

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

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

It is important that the receiving court consider whether the child's best interest will be served by transfer of the case back to the sending court. If a transfer-out hearing is ordered, the transferring court is required to make findings not only as to the child's county of residence as defined by section 17.1 but also as to whether the transfer is in the child's best interest. (*In re R.D., supra,* 163 Cal. App.4th at p. 679.) To determine what is in the child's best interest, the receiving court should consider which county can best monitor the child's well-being and placement and provide appropriate services. If the receiving court believes that a later change of circumstances or additional facts indicate that the child does not reside in the receiving county, a transfer-out hearing must be held under rules 5.610 and 5.570. The court may direct the child welfare agency or the probation department to seek a modification of orders under section 388 or 778 and under rule 5.570. (Cal. Rules of Court, rule 5.612(f).)

PARENTAGE

Types of Parentage

There are several different categories of parentage. The legal designation a person receives not only affects the rights afforded to that person but also can have an important impact on the procedural path of the entire dependency case.

Despite the complexities of the code and case law, parentage issues must be addressed and resolved as early as possible in a dependency action as these decisions can affect placement, access to family reunification services, and other critical issues. Counsel can request that the court make orders, after an evidentiary hearing if necessary, to clarify the status of any persons who claim parentage and to resolve any conflicting claims regarding parentage.

1. Alleged Father

A man is an alleged father if he appears at a dependency hearing and claims to be the child's father or if he is named by the child's mother as the father.

2. Biological Father

A man is a biological father if his paternity is proved by a blood test but he has not achieved presumed father status. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 499, fn. 15.) This category includes persons adjudicated to be fathers in a prior family law or child support case, either on the basis of blood tests or by default. (*In re E.O.* (2010) 182 Cal.App.4th 722, 727–728 [paternity judgment establishes biological paternity only, not presumed father status].) Additionally, if a man appears at a dependency hearing and requests a finding of paternity on form JV-505 *(Statement Regarding Parentage),* the court must determine whether he is the biological father by ordering a paternity test. (Cal. Rules of Court, rule 5.635(e); see *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108; but see *In re Elijah V.* (2005) 127 Cal. App.4th 576 [court may not order a blood test under Fam. Code, § 7541 to defeat a conclusive marital presumption of paternity].)

In addition, the court has the discretion to order blood tests if in the child's best interest—for example, to create a basis for placement with paternal relatives or to resolve competing claims to biological paternity. However, remember that biological paternity is neither necessary nor sufficient to establish presumed father status.

3. *Kelsey S.* Father

A man is a *Kelsey S.* father if he is a biological father and he promptly attempts to fulfill parental responsibilities, but he is unable to establish presumed father status through no fault of his own. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816 [child's mother would not let father have contact with the child]; *In re Andrew L.* (2004) 122 Cal.App.4th 178 [father's repeated efforts to establish paternity were thwarted by the county social worker].)

4. Presumed Father (Fam. Code, §§ 7540, 7570, 7611(d))

A man qualifies as a presumed father under any of the following circumstances:

1. He was married to the child's mother at the time of the child's birth (or the child was born within 300 days of separation) (Fam. Code, § 7540);
2. He married the child's mother after the child's birth and either is named on the child's birth certificate or has a voluntary or court-ordered child support obligation (*id.,* § 7611(c));
3. He has lived with the child and held himself out as the child's father (*id.,* § 7611(d)); or
4. He and the mother have signed a voluntary declaration of parentage under Family Code section 7570 et seq.

Each of these presumptions can be rebutted under certain circumstances:

Number 1 above can be rebutted only if the husband is proved not to be the biological father, by blood tests requested within two years of the child's birth. (*Id.,* § 7541.)

Numbers 2 and 3 may be rebutted by "clear and convincing evidence" that the facts giving rise to the presumption are untrue. (*Id.,* § 7612(a).)

Number 4 can be rebutted only if blood tests show that the person who signed the declaration is not the biological father. (*Id.,* § 7576(d).) A man who believes he is the biological father has standing in dependency proceedings to seek a paternity test and move to set aside another man's voluntary declaration of paternity. (*In re J.L.* (2008) 159 Cal.App.4th 1010 [superseded in part by statute as stated in *In re Alexander P.* (2016) 4 Cal.App.5th 475, 486].)

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

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

Family Code section 7613(b) precludes a sperm donor from establishing paternity based only on his biological connection to the child, unless there is a written agreement between the donor and the woman. A sperm donor who has established a familial relationship with the child and demonstrated a commitment to the child and the child's welfare can be found to be a presumed parent under section 7611(d), even though he could not establish paternity based on his biological connection to the child. (*Jason P. v. Danielle S.* (2014) 226 Cal.App.4th 167, 176; distinguished from *K.M. v. E.G.* (2005) 37 Cal.4th 130 and *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319.)

Family Code section 7611(d) seeks to further a two-parent familial arrangement that has already been developed. A parent's commitment to parenting as a single parent, in part established by mother conceiving through artificial insemination through an anonymous sperm donor, does not control a parentage determination. The question to be determined is whether a two-parent relationship has in fact been developed with the child. If it has, the interests of the child in maintaining the second parental relationship can take precedence over one parent's claimed desire to raise the child alone. (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 763–782; citing *Jason P., supra,* 226 Cal.App.4th at p. 178.) In this case, the court looked to petitioner's pre- and postnatal efforts and behavior, which included petitioner's attendance at prenatal appointments, presence at the birth and initial postnatal testing, regular cross-county visits mother arranged with petitioner during the first two years of the child's life, petitioner naming the child as the primary beneficiary on his life insurance policy, both mother and child referring to petitioner as "Daddy," and the fact that mother gave birth to petitioner's biological child when child was two years old.

5. Presumed Mother

Although paternity issues arise more frequently, issues of maternity may also arise in dependency cases. A woman other than the child's birth mother may be found to be a presumed mother if she is or was the birth mother's domestic partner or she has lived with the child and held herself out as the child's mother. (See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108; *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, partially overruled on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.)

Rights Based on Parentage

- **Alleged fathers** have the right to notice of dependency hearings and an opportunity to show that they should be granted presumed father status. (§ 361.2(b); Cal. Rules of Court, rule 5.635(e); *In re Alyssa F.* (2003) 112 Cal.App.4th 846, 855.) They have no right to custody or reunification services. (See *In re Zacharia D., supra,* 6 Cal.4th at p. 435.)

- **Biological fathers** have the right to notice of dependency hearings and must be afforded an opportunity to show that they should be granted presumed father status. The court has discretion to grant services if to do so is in the child's best interest. (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 726.)
- ***Kelsey S.* fathers** have the right to notice of dependency hearings and an opportunity to show that they should be granted presumed father status. (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 816.) The court must give a *Kelsey S.* father a fair opportunity to develop a relationship with the child and to fulfill parental responsibilities. Denying a *Kelsey S.* father visitation and other reunification services has been found to violate due process and the dependency statutory scheme. (See *In re Julia U.* (1988) 64 Cal.App.4th 532.)
- **Presumed fathers** are afforded full standing in dependency actions as well as all constitutional and statutory rights and protections provided to "parents" under the Welfare and Institutions Code. (See §§ 311, 317, 319, 335, 337, 361.2, 366.21, 366.22, 366.26, 366.3; *In re Jesusa V.* (2004) 32 Cal.4th 588, 610.) The primary purpose for seeking presumed status in dependency matters is that presumed fathers have the right to reunification services and to custody. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 804.) A request for recognition as a presumed father may be brought by filing a section 388 petition. (*In re Zacharia D., supra,* 6 Cal.4th at p. 442, fn. 5.)

Relatives of presumed fathers and biological fathers (but not alleged fathers) have the right to preferential consideration for placement of a child. (§ 361.3(b)(2); see Relative Placements fact sheet.)

PARENTS' RIGHTS REGARDING GAL APPOINTMENTS AND INCARCERATED PARENTS

GAL Appointments for Mentally Incompetent Parents

A guardian ad litem (GAL) is a person appointed by the court to protect the rights of an incompetent person. The GAL serves as the party's representative and controls the litigation but may not waive fundamental rights (such as the right to trial) unless there is a significant benefit to the party from doing so. (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454.) A GAL should be appointed for a parent in a dependency case if the parent cannot understand the nature or consequences of the proceedings and is unable to assist counsel in case preparation. (Code Civ. Proc., § 372; Pen. Code, § 1367; see *In re James F.* (2008) 42 Cal.4th 901.)

Due process requires either the parent's consent or a hearing to determine whether the parent is incompetent before the juvenile court can appoint a GAL, but a court's error in the procedure used to appoint a guardian ad litem does not always require reversal; rather, it is subject to harmless error analysis. (*In re James F., supra,* 42 Cal. 4th at p. 911.) At the hearing, the court should explain to the parent what a GAL is and give the parent an opportunity to be heard on the issue. The court should appoint a GAL only if the preponderance of the evidence shows that the parent has a mental impairment and that the parent does not understand the nature of the case or cannot meaningfully assist counsel. Minor parents are not required to have GALs in dependency proceedings solely because they are minors; their competency is determined by the same standard applicable to adult parents. (Code Civ. Proc., § 372(c)(1)(B).)

Counsel should carefully consider the extent to which the client's case will be compromised by the request for and appointment of a GAL, as the parent's mental health and competency may factor into the court's and other counsel's positions on the allegations, reunification services, and the safety of return.

If a parent's counsel thinks a GAL should be appointed, counsel may either ask the parent to consent (although it is unclear whether a parent who needs a GAL would be competent to give informed consent) or ask the court to set a hearing. (See *In re Sara D.* (2001) 87 Cal.App.4th 661.) Counsel may request that the court hold a closed hearing, that all documents related to the hearing be sealed, and/or that the hearing be conducted in front of another bench officer when the issues of competency coincide with the allegations to be adjudicated. The court may also raise the issue sua sponte, and any party (including minor's counsel) may bring the issue to the court's attention.

Incarcerated and Institutionalized Parents

1. Presence at Hearings

The Penal Code requires that incarcerated parents and their counsel be present for adjudications and hearings set under section 366.26 to terminate parental rights. The court must grant a continuance if the incarcerated parent is not brought to the hearing, unless he or she has waived the right to be present. (Pen. Code, § 2625(d); see *In re Jesusa V.* (2004) 32 Cal.4th 588.)

Penal Code section 2625(d) does not apply to

- Adjudication of a section 300(g) petition (Pen. Code, § 2625(d));
- A parent incarcerated out of state or in a federal prison (*In re Maria S.* (1998) 60 Cal.App.4th 1309, 1312–1313); and
- Hearings other than adjudication or termination of parental rights—these may be held in the absence of an incarcerated parent so long as the parent's counsel is present; however, the court has the discretion to order the incarcerated parent to be present under Penal Code section 2625(e).

If a continuance to allow the incarcerated parent to be present would cause the adjudication to occur more than six months after detention, then the child's right to prompt resolution of the case un-

der section 352(b) prevails over the parent's right to be present under Penal Code section 2625. (See *D.E. v. Superior Court* (2003) 111 Cal. App.4th 502.)

2. Jurisdictional Allegations

Under section 300(g), the court may declare a child a dependent if a parent is incarcerated or institutionalized and "cannot arrange for the care of the child." However, in order for the court to do so, the county social services agency must prove that the parent cannot make an appropriate plan for the child's care—not just that the parent has not yet done so. (See *In re S.D.* (2002) 99 Cal.App.4th 1068.)

3. Custody, Visitation, and Services

The Court of Appeal has stated that "[t]here is no 'Go to jail, lose your child' rule in California." Section 300(g) is applicable only if an incarcerated parent is unable to arrange for the child's care. (*In re S.D., supra,* 99 Cal.App.4th at p. 1077.) If a nonoffending parent is incarcerated, the court may not remove the child from that parent's custody unless (1) the parent is unable to arrange for the care of the child or (2) the parent would not be able to protect the child from future physical harm. (§ 361(c); *In re Isayah C.* (2004) 118 Cal.App.4th 684.)

Reunification services must be provided to an incarcerated parent unless the court finds by clear and convincing evidence that such services would be detrimental to the child. (§ 361.5(e).) In making this finding, the court must consider the

- Age of the child;
- Degree of parent-child bonding;
- Nature of the parent's crime or illness;
- Length of the sentence or the nature and duration of the parent's treatment;
- Potential detriment to the child if services are not offered;

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

The county social services agency must make a "good faith" effort to provide services unique to each family's needs and specially tailored to fit its circumstances. Neither difficulty in providing services nor low prospects of successful reunification excuses the duty to provide reasonable services. In light of this, the county social services agency must identify services available to an institutionalized parent and assist in facilitating them. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010, 1014–1015.) In determining the content of reasonable services, the court must consider the particular barriers to an incarcerated or institutionalized parent's access to court-mandated services and ability to maintain contact with his or her child, and must document this information in the child's case plan. (§§ 361.5(e), 366.21(e) & (f), 366.22.) A parent's case plan must also include information about the parent's incarceration throughout the dependency proceeding to determine what reasonable services should be offered to the parent. (§ 16501.1.)

Services to an incarcerated or institutionalized parent may include, for example,

- Providing services to relatives, extended family members, or foster caregivers;
- Counseling, parenting classes, or vocational training if available in the institution;
- Allowing the parent to call the child collect;
- Transporting the child for visits; and
- Arranging visitation.

(See § 361.5(e)(1).)

The Welfare and Institutions Code provides for visitation between an incarcerated parent and the child "where appropriate." (§ 361.5(a)(4).) The court must find clear and convincing evidence

of detriment in order to deny visitation under 361.5(e)(1), and neither the age of the child alone nor any other single factor forms a sufficient basis for such a finding absent a further showing of detriment. (See *In re Dylan T.* (1998) 65 Cal.App.4th 765.)

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

Visitation must always be a component of the case plan, as it is vital to the reunification process. In fact, reunification services may be deemed inadequate if there has been no visitation arranged by the social services agency for a parent incarcerated within a reasonable distance of the child's placement. (See *In re Precious J.* (1996) 42 Cal.App.4th 1463, 1477–1479.)

Penal Code sections 1174 et seq. and 3410 et seq. govern the community treatment program that allows some convicted parents to be released to a private treatment facility in which their children under the age of six can also reside. If the parent wants to participate in this program, the juvenile court must determine whether the parent's participation is in the child's best interest and will meet the needs of both the parent and the child. (§ 361.5(e)(3).)

PREGNANT AND PARENTING TEENS

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

Sexual and Reproductive Health Care for Foster Youth

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

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

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

Pregnant Foster Youth

1. Options for Pregnant Foster Youth

A dependent youth who becomes pregnant has the same options as all other pregnant women: she may carry the child to term and raise the child, arrange for the child to be adopted after birth, or have an

abortion. The pregnant youth has the sole right to make decisions regarding her pregnancy, and if she is capable of informed consent, has a constitutional right to obtain an abortion without parental or court approval or notice. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.) If a pregnant teen wants to carry the pregnancy to term but have the child raised by someone else, the attorney should assist in making a plan for guardianship or adoption early in the pregnancy.

2. Pregnancy and Postbirth Plan

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

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

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

3. Education Rights

Schools may not discriminate against or exclude any student from educational programs or activities on the basis of a student's pregnancy, childbirth, or recovery from these conditions. (20 U.S.C. § 1681; 34 C.F.R. § 106.40; 5 Cal. Code Regs., tit. 22, § 4950; Ed. Code, § 230.) Pregnant and parenting students have the right to remain in their regular or current school programs, including honors and magnet programs, special education placements, and extracurricular and athletic activities. (34 C.F.R. § 106.4(a)(2); Ed.

Code, § 230.) Students may not be expelled, suspended, or otherwise excluded from programs or current school placement based on pregnancy, childbirth, or parental status. (34 C.F.R. § 106.4(a)(2); Ed. Code, § 230.)

Parenting Foster Youth

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

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

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

2. Placement and Funding

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

a. Infant/Child Supplement

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

b. Whole Family Foster Home (WFFH)

In these specialized foster homes, the teen parent and child live together with a caregiver who has special training and is expected to

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

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

c. Shared Responsibility Plan

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

3. Mental Health Care and Parenting Support

If a teen parent experiences serious changes in mood, emotional affect, or behavior during pregnancy or after birth, the attorney should request an evaluation for perinatal or postpartum depression. Prompt and appropriate care is essential to diagnose and treat these common disorders and prevent the teen's condition from being misinterpreted as an inability to parent.

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

4. Social Services Intervention

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

If the county agency files a dependency petition regarding the teen parent's child, the teen parent has the same rights to family preservation and reunification services that adult parents have. (§ 16002.5.) When reunification services are offered, the court must consider, at the 18-month review hearing, the progress made and take into account the barriers faced by the parenting teen. If the teen parent is making significant and consistent progress in establishing a safe home for the child's return, the court may offer additional reunification services, not to exceed 24 months from the date the child was removed from the teen parent. (§ 366.22.) The teen parent has the same right to counsel and to participate in the dependency proceedings that an adult parent has. The court may not appoint a guardian ad litem (GAL) for a teen parent unless the court makes the same findings necessary to appoint a GAL for an adult parent: that the parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case. (§ 326.7.)

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

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

PSYCHOTROPIC MEDICATION ORDERS

Several Judicial Council forms are available to ask for an order to give (or continue giving) psychotropic medication to a child who is a ward or dependent of the juvenile court and living in an out-of-home placement or foster care, as defined in Welfare and Institutions Code section 727.4. Local forms may be used to provide additional information to the court.

Required Forms

1. JV-220, *Application for Psychotropic Medication*
2. JV-220(A), *Physician's Statement—Attachment*
3. JV-220(B), *Physician's Request to Continue Medication—Attachment*
4. JV-221, *Proof of Notice of Application*
5. JV-223, *Order on Application for Psychotropic Medication*
6. JV-224, *County Report on Psychotropic Medication*

Optional Forms

1. JV-218, *Child's Opinion About the Medicine*
2. JV-219, *Statement About Medicine Prescribed*
3. JV-222, *Input on Application for Psychotropic Medication*

Exception: These forms are not required if

- The child lives in an out-of-home facility not considered foster care, as defined by section 727.4, unless a local court rule requires it; or
- A previous court order gives the child's parent(s) the authority to approve or refuse the medication. (§ 369.5(a)(1); see Cal. Rules of Court, rule 5.640(e).)

Required Forms

1. Form JV-220, *Application for Psychotropic Medication*

This form, the *Application,* gives the court basic information about the child and his or her living situation. It also provides contact information for the child's social worker or probation officer.

- This form is usually completed by the social worker or probation officer, but is sometimes completed by the prescribing physician, his or her staff, or the child's caregiver.
- Whoever completes the form must identify himself or herself by name and by signing the form. If the prescribing physician completes this form, she or he must also complete and sign form JV-220(A) or form JV-220(B). (See below.)

2. Form JV-220(A), *Physician's Statement—Attachment*

This form is used to ask the court for a new order. The prescribing doctor fills out this form and gives it to the person who files the *Application* (form JV-220).

- This form provides a record of the child's medical history, diagnosis, and previous treatments, as well as information about the child's previous experience with psychotropic medications. The doctor will list his or her reasons for recommending the psychotropic medications.
- **Emergencies:** A child may *not* receive psychotropic medication without a court order except in an emergency.
  - A doctor may administer the medication on an emergency basis.
  - To qualify as an emergency, the doctor must find that the child's mental condition requires immediate medication to protect the child or others from serious harm or significant suffering, and that waiting for the court's authorization would put the child or others at risk.
  - After a doctor administers emergency medication, she or he has two days at most to ask for the court's authorization.

3. Form JV-220(B), *Physician's Request to Continue Medication—Attachment*

Form JV-220(B) is a shorter version of form JV-220(A). It may be used only by the same doctor who filled out the most recent form JV220(A) if the doctor is prescribing the same medication with the same maximum dosage.

- The prescribing doctor fills out this form and gives it to the person who is filing the *Application* (form JV-220).

4. Form JV-221, *Proof of Notice of Application*

This form shows the court that all parties with a right to receive notice were served a copy of the *Application* and attachments, according to rule 5.640 of the California Rules of Court.

- The person(s) in charge of notice must fill out and sign this form.
- Local county practice and local rules of court determine the procedures for the provision of notice, except as otherwise provided in rule 5.640.
- A separate signature line is provided on pages 2 and 3 of the form to accommodate those courts in which the provision of notice is shared between agencies. This sharing occurs when local practices or local court rules require the child welfare services agency to provide notice to the parent or legal guardian and caregiver, and the juvenile court clerk's office to provide notice to the attorneys and CASA volunteer.
- If one department does all the required noticing, only one signature is required, on page 3 of the form.
- The person(s) in charge of service should use the fastest method of service available so that people can be served on time. E-notice can be used only if the person or people to be e-served agree to it. (Code Civ. Proc., § 1010.6)

5. Form JV-223, *Order on Application for Psychotropic Medication*

This form lists the court's findings and orders about the child's psychotropic medications.

- The agency or person who filed the *Application* must provide to the child's caregiver a copy of the court order approving or denying the *Application.*
- The copy of the order must be provided (in person or by mail) within two days of when the order is made.
- If the court approves the *Application,* the copy of the order must include the last two pages of form JV-220(A) or form JV-220(B) and all of the medication information sheets (medication monographs) that were attached to form JV-220(A) or form JV-220(B).

- If the child's placement is changed, the social worker or probation officer must provide the new caregiver with a copy of the order, the last two pages of form JV-220(A) or form JV-220(B), and all of the medication information sheets (medication monographs) that were attached to form JV-220(A) or form JV-220(B).

6. Form JV-224, *County Report on Psychotropic Medication*

The social worker or probation officer must complete and file this form before each progress review.

- It has information that the court must review, including the caregiver's and child's observations about the medicine's effectiveness and side effects, information on medication management appointments and other follow-up appointments with medical practitioners, and information on the delivery of other mental health treatments.
- This form must be filed at least 10 calendar days before the progress review hearing. If the progress review is scheduled for the same time as a status review hearing, the form must be attached to and filed with the court report.

Optional Forms

1. Form JV-218, *Child's Opinion About the Medicine*

The child may use this form to tell the judge about himself or herself and his or her opinion about the medicine.

- The child may ask someone he or she trusts for help with the form.

The child does not have to use form JV-218. The child may tell the judge how he or she feels in person at the hearing; by letter; or through his or her social worker, probation officer, lawyer, or CASA.

2. Form JV-219, *Statement About Medicine Prescribed*

The parent, caregiver, CASA, or Indian tribe may use this form to tell the court how they feel about the *Application* and the effectiveness and side effects of the medicine.

- This form must be filed within four court days of receipt of the notice of an *Application*, or before any status review hearing or medication progress review hearing.
- This form is not the only way for the parent, caregiver, CASA, or tribe to provide information to the court. The parent, caregiver, CASA, or tribe can also provide input on the medication by letter; by talking to the judge at the court hearing; or through the social worker, probation officer, attorney of record, or CASA.
- A CASA can also file a report under local rule.

3. Form JV-222, *Input on Application for Psychotropic Medication*

This form may be used when the parent or guardian, attorney of record for a parent or guardian, child, child's attorney, child's Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem, or Indian child's tribe does not agree that the child should take the recommended psychotropic medication. This form may also be used to provide input to the court.

Setting of Hearing and Notice

- The court will decide about the child's psychotropic medication after reading the *Application,* its attachments, and all statements filed on time. The court is not required to set a hearing if a statement opposed to medication is filed.
- If the court does set the matter for a hearing, the juvenile court clerk must provide notice of the date, time, and location of the hearing to the parents or legal guardians and their attorneys; the child, if 12 years of age or older; the child's attorney, current caregiver, social worker, CAPTA guardian ad litem, and CASA, if any; the social worker's attorney; and the Indian child's tribe at least two court days before the hearing date.
- In delinquency matters, the clerk also must provide notice to the child, regardless of his or her age; the child's probation officer; and the district attorney.

RELATIVE PLACEMENTS

Whenever a child must be removed from the family home, placement should be sought with relatives or other persons whom the child knows and is comfortable with in order to minimize the trauma of removal, to maintain consistency and routine (such as attendance at the same school or church or with the same therapist), and to encourage visitation and strengthen ties with parents, siblings, and extended family members.

Definitions

1. Relative

In the context of serving as a placement resource for a dependent child, a "relative" is defined as an adult related by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all "great, great-great, or grand" relatives and the spouses of those persons, even if divorce or death ended the marriage. (§§ 319(f), 361.3(c)(2); Cal. Rules of Court, rule 5.502(1).) Affinity exists between a person and the blood or adoptive kin of that person's spouse. (Cal. Rules of Court, rule 5.502(1).) Note that if the case involves an Indian child, who counts as a relative may be defined by the law or custom of the child's tribe. (25 U.S.C. § 1903.)

2. Nonrelative Extended Family Members

A nonrelative extended family member (NREFM) is defined as "an adult caregiver who has an established familial relationship with a relative of the child, as defined in paragraph (2) of subdivision (c) of Section 361.3, or a familial or mentoring relationship with the child" that has been verified by the county social services agency. (§ 362.7.) A NREFM is treated as a relative in virtually all aspects of assessment and determination as to the appropriateness of placement.

Preference for Placement With Relatives

1. Generally

It is the stated intent of the California Legislature to "preserve and strengthen a child's family ties whenever possible." Furthermore, when "a child is removed from the physical custody of his or her parents, preferential consideration shall be given whenever possible to the placement of the child with the relative as required by Section 7950 of the Family Code." (§ 16000(a).) However, preferential consideration for placement is given only to the child's grandparents and adult aunts, uncles, and siblings. (§§ 319(f), 361.3.) (A county social services agency and a juvenile court erred when they disregarded the statutory mandate by not considering if relative placement was appropriate under the applicable statutory standards. [§ 361.3; *In re R.T.* (2015) 232 Cal.App.4th 1284, 1297, 1300–1301].) Remember that if the case involves an Indian child, specific placement preferences under ICWA must be followed.

2. Prior to Disposition

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

If an able and available relative, or nonrelative extended family member, is available and requests temporary placement of the child pending the detention hearing, or after the detention hearing and pending the disposition hearing, the child welfare agency is required

to initiate an assessment of the relative's or nonrelative extended family member's suitability. (*Ibid.*) When considering whether the placement with the relative is appropriate, the social worker must consider the placement of siblings and half-siblings in the same home, unless that placement would be contrary to the safety and well-being of any of the siblings. A social worker is not limited to placing a child in the home of an appropriate relative or a nonrelative extended family member pending the consideration of other relatives who have requested preferential consideration. (§ 361.3.)

Counsel should encourage appropriate relatives and NREFMs to visit the child as frequently as possible and to use the time from the earliest days of the case to build and strengthen the network of relationships with persons important to the child.

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

3. At Disposition

Once a child has been declared a dependent and it has been determined that out-of-home placement is necessary, placement should be with relatives if at all possible (taking into consideration the proximity of the parents and access to visitation) unless that is shown not to be in the child's best interest. The county social services agency has the duty to make diligent efforts to locate and place the child with an appropriate relative. (Fam. Code, § 7950.) Upon removal of a child from parental custody, preferential consideration must be given to relatives who request placement. (§ 361.3(a).) "Preferential

consideration" means that the relative seeking placement must be the first to be considered and investigated. However, as at the initial hearing, preferential consideration is given only to grandparents and adult aunts, uncles, and siblings. (§ 361.3(c).)

The court must exercise its independent judgment in determining whether a relative placement is appropriate; it may not merely defer to the recommendation of the social worker. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 [section 361.3 expressly requires the court to give favorable consideration to an assessed relative and to make its own determination based on the suitability of the home and the child's best interest]; see *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.)

4. After Disposition

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

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

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

Before any child can be ordered to remain in foster care with a permanent plan of adoption, tribal customary adoption, guardianship, or placement with a fit and willing relative, the court must find that the county social services agency has made diligent efforts to locate an appropriate relative placement and that each relative whose name has been submitted as a possible caregiver has been evaluated. (Fam. Code, § 7950(a)(1).)

Again, even in situations where placement with a relative or NREFM may not be appropriate, counsel should continue to encourage frequent contact and visitation with the child.

Placement

1. Appropriateness

Under section 361.3(a), the social worker must determine whether a relative being considered as a placement resource is appropriate based on (but not limited to) consideration of all of the following factors:

- Child's best interest, including individual physical, medical, educational, psychological, or emotional needs;
- Wishes of the parent, relative, and child;
- Placement of siblings in the same home;
- Good moral character (based on a review of prior history of violent criminal acts or child abuse) of the relative and all other adults in the home;
- Nature and duration of the relationship between the child and relative;
- Relative's desire to care for the child;
- Safety of the relative's home; and
- Ability of the relative to provide a safe, secure, and stable home and the necessities of life; to exercise proper care and control of the child; to arrange safe and appropriate child care if needed; to protect the child from the child's parents; to facilitate court-ordered reunification efforts, visitation with other relatives, and implementation of the case plan; and to provide legal permanence if reunification fails.

However, neither inability to facilitate implementation of the case plan nor inability to provide legal permanence may be the sole basis for denying placement with a relative. (§ 361.3(a).)

Counsel speaking to relatives seeking placement must keep in mind the possibility that reunification may not occur. Regardless of the stage of the proceedings or the legal permanent plan (if determined), relatives must consider providing emotional permanence and a stable home for the child. If a relative insists that placement in his or her home is only temporary, counsel must carefully weigh whether such a placement would be in the child's best interest.

2. Assessment

All potential caregivers must be assessed by the county social services agency before a child can be placed in the home. This is both a federal requirement under the Adoption and Safe Families Act (ASFA) and is mandated by state law. (See § 361.4.) Relatives are assessed for placement using the resource family approval process. See the RFA fact sheet for detailed information on the assessment process. (§ 309.)

3. Possible Court Orders

a. Conditional Placement

The court may conditionally place a child with a relative upon receiving criminal clearances from CLETS and the Department of Justice while awaiting receipt of the FBI federal records so long as all adults in the household sign statements that they have no criminal history. Placement may subsequently be terminated if results reveal undisclosed criminal convictions. (§ 309.)

b. When a Member of the Household Has a Criminal Record

If the results of the CLETS or LiveScan show a criminal conviction for anything other than a minor traffic violation, a child may not be placed in the home unless and until the county social services agency grants a criminal conviction exemption (sometimes called a waiver). (§ 361.4; Health & Saf. Code, § 1522(g); *Los Angeles County Department of Children and Family Services v. Superior Court (Rich-*

ard A.) (2001) 87 Cal.App.4th 1161 [the restrictions under section 361.4(d)(2) are mandatory, and the court may not place a child in a home in which a person has a conviction unless an exemption has been granted].) The juvenile court may, however, set a hearing to determine whether the agency has abused its discretion by failing to seek or by denying an exemption. (*In re Esperanza C.* (2008) 165 Cal. App.4th 1042; *In re Jullian B.* (2000) 82 Cal.App.4th 1337.)

An exemption is granted based on substantial and convincing evidence that the prospective caregiver (or other person in the home with a criminal record) is of such good character as to justify the exemption. An exemption is needed even if the conviction has been expunged or set aside pursuant to Penal Code section 1203.4 or 1203.4(a). (Health & Saf. Code, § 1522(f)(1); *Los Angeles County Dept. of Children & Family Services v. Superior Court (Cheryl M.)* (2003) 112 Cal.App.4th 509.) Some serious felonies are nonexemptible, such as felony domestic violence; rape and other sex offenses; crimes of violence such as murder, manslaughter, and robbery; and crimes against children. (Health & Saf. Code, § 1522(g)(1)(C).) Felony convictions for assault, battery, or drug-related offenses are nonexemptible for five years after the date of conviction. (*Ibid.*) Most nonviolent felony offenses and almost all misdemeanor offenses are exemptible.

The criminal history restrictions apply only to actual convictions, not arrests, and only to adult criminal convictions, not juvenile delinquency adjudications. Also, the prohibition against placing a child with a person who has a criminal history for which no exemption has been obtained is inapplicable to a guardianship granted at disposition under section 360(a). (*In re Summer H.* (2006) 139 Cal.App.4th 1315.)

The statutes and regulations governing criminal history restrictions and exemptions are extremely complex, and county agency caseworkers may be mistaken in believing that an offense is nonexemptible or may deny an exemption request without engaging in a thorough, individualized assessment of the relative's character and the child's best interest. Children's attorneys should make an independent assessment of whether an exemption can and should be

granted and should consider setting an abuse-of-discretion hearing to challenge the agency's denial of, or refusal to seek, an exemption for an otherwise appropriate relative.

c. In Other Situations Lacking Agency Approval

The court may order a child placed in a home despite lack of approval so long as the county social service agency's denial is not based on a criminal conviction. The juvenile court has a duty to make an independent placement decision under section 361.3; it cannot merely defer to the social worker's recommendation. (*In re N.V.* (2010) 189 Cal.App.4th 25, 30; *Cesar V., supra,* 91 Cal.App.4th at p. 1023.) Relatives who are denied placement approval by the county agency may pursue an administrative grievance process. This remedy is separate from the dependency court's duty to make an independent placement decision in light of the child's best interest and need not be exhausted prior to a contested hearing on the placement issue. (*In re N.V., supra,* 189 Cal.App.4th at pp. 30–31.)

Although the court clearly has the power to make a specific placement order over the objection of the county, counsel should be aware that placement without the approval of the county social services agency can negatively affect funding and render the family ineligible for federal relative foster care funds (otherwise known as *Youakim* or AFDC-FC).

d. When Relative Lives in Another State or Country

If the potential caregiver lives in a state other than California, the placement process must comply with the Interstate Compact on the Placement of Children (ICPC). (Fam. Code, § 7901; Cal. Rules of Court, rule 5.616; see fact sheet on the ICPC.) However, the ICPC does not apply to release to a previously noncustodial parent living in another state. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1574–1575; see fact sheet on the ICPC.)

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

Placement of a child outside the United States is further restricted by Assembly Bill 2209 (Stats. 2012, ch. 144). A child may not be placed outside the United States before the court finding that the placement is in the best interest of the child, except as required by federal law or treaty. The party or agency requesting this placement carries the burden of proof and must show, by clear and convincing evidence, that placement outside the United States is in the best interest of the child. When making this determination, the court must consider the following:

- Placement with a relative;
- Placement of siblings in the same home;
- Amount and nature of any contact between the child and the potential guardian or caretaker;
- Physical and medical needs of the child;
- Psychological and emotional needs of the child;
- Social, cultural, and educational needs of the child; and
- Specific desires of any dependent child who is 12 years of age or older.

If the court finds by clear and convincing evidence that placement outside the United States is in the child's best interest, the court may issue an order authorizing the social worker to make a placement outside the United States. The child may not leave the United States before the issuance of said order. (§§ 361.2(f), 366(d), 16010.6(b).)

The child may not be sent to a placement in another state unless and until the requirements of the ICPC have been met. This is often a cumbersome and time-consuming process, so a referral should be made as soon as an out-of-state placement resource is identified.

Removal From a Relative Placement

1. While Parental Rights Are Still Intact

a. Generally

Under certain circumstances the county social services agency must file a petition under section 387 when it removes a child from a relative's home, including when the child was specifically ordered by the court to be placed in that home. There is a split of authority as to whether removal from a general placement requires judicial review. (See *In re Cynthia C.* (1997) 58 Cal.App.4th 1479 [no 387 petition is needed]; but see *In re Jonique W.* (1994) 26 Cal.App.4th 685 [a petition is necessary especially where the custodial relative's conduct is at issue]; *In re Joel H.* (1993) 19 Cal.App.4th 1185 [relative de facto parent is entitled to challenge removal]; see also Subsequent and Supplemental Petitions black letter discussion.)

b. Special Versus General Placement Orders

An order at disposition simply placing the child in the care and custody of the county social services agency is deemed a general placement order that, in most circumstances, gives the agency the discretion to make placement changes without bringing the issue before the court. However, the court has the authority to order the agency to place a child in a specific home, thereby triggering procedural protections for the placement. (See *In re Robert A.* (1992) 4 Cal.App.4th 174, 189 ["Although the court does not make a direct placement order itself, it does have the power to instruct the (county social services agency) to make a particular out-of-home placement of a particular dependent child"].)

A "specific placement" order is far preferable to one generally placing the child in the custody of the county social services agency. Removal from the former requires that the county file a supplemental petition under section 387.

c. When Agency Withdraws Approval of Caregiver or Home

The prohibitions in section 361.4 involving a prospective caregiver's criminal history apply only to initial placement, *not* to removal from an existing placement. Neither a conviction after placement has been

made nor delayed recognition of an existing record requires removal from a caregiver; the court has the discretion to allow the child to remain in the home and a duty to make an independent decision. (*Cheryl M., supra,* 112 Cal.App.4th at p. 519.) Furthermore, removal is not mandated from a court-ordered placement merely because the county social services agency withdraws its approval of the relative's home. (*In re Miguel E.* (2004) 120 Cal.App.4th 521 [the agency does not have absolute authority to change placements, and its approval is only one of the factors that the court considers in reviewing the continuing appropriateness of a placement].)

However, a caregiver's physical move into a different house triggers a new assessment and approval process. Furthermore, the court does not have the discretion to allow a child to remain with a caregiver if anyone in the new home has a criminal conviction unless the county social services agency grants an exemption. *(Los Angeles County Dept. of Children and Family Services v. Superior Court (Sencere P.)* (2005) 126 Cal.App.4th 144.)

2. After Termination of Parental Rights

After parental rights have been terminated, the agency responsible for the child's adoption has exclusive care and custody of the child until the adoptive petition is granted. (§ 366.26(j).) This statutory language has been interpreted to give the agency the discretion to terminate or change placements as it sees fit until the adoption petition is granted. The court may not substitute its judgment for that of the agency; it can merely review whether the agency abused its discretion by acting in a capricious or arbitrary manner. (*Dept. of Social Services v. Superior Court (Theodore D.)* (1997) 58 Cal.App.4th 721.) However, the ultimate responsibility for the child's well-being remains with the court, which has the responsibility to ensure that posttermination placement decisions are appropriate and in the child's best interest. (See *In re Shirley K.* (2006) 140 Cal.App.4th 65; *Fresno County Department of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626.)

Furthermore, pursuant to section 366.26(n), a child may not be removed from a caregiver who qualifies as a prospective adoptive parent without notice and the opportunity for a hearing at which the court will determine whether removal is in the child's best interest. (§ 366.26(n); see Caregivers fact sheet.)

RESOURCE FAMILY APPROVAL

Resource family approval (RFA) is the new caregiver approval process that replaces the current foster family home licensing, relative approval, and adoption and guardianship approval processes by combining elements of each into one new procedure. (§ 16519.5.) This procedure is detailed in the RFA Written Directives (All County Letters [ACLs]), which have the same force and effect as regulations. (§ 16519.5(f).) The goal of RFA is to ensure that all children and nonminor dependents are placed with quality resource families that can effectively parent vulnerable children and youth and have the willingness and ability to either provide permanency for a child or nonminor dependent or help develop and support a plan for permanency. In addition, the new process seeks to improve the experience that children, youth, and nonminor dependents have in foster care by increasing the caregiver's ability to effectively meet the diverse needs of those in their care. To accomplish this goal, all resource families are assessed, supported, and trained up front under the same high-level standards.

Like Continuum of Care Reform, resource family approval is a very recent development in child welfare. The RFA process is evolving and still taking shape, which means that information in this fact sheet may quickly become out of date. For example, at the time of publication of this third edition of the guide, Assembly Bill 404, which would make significant changes to the RFA process, is pending. (Assem. Bill 404 [Stone; 2017–2018 Reg. Sess.].) Be sure to research the citations and look to the California Department of Social Services RFA Program information page, at *http://cdssdnn.dss.ca.gov/inforesources/Resource-Family-Approval-Program,* for updates.

Effective January 1, 2017, all counties and foster family agencies (FFAs) statewide must implement the RFA process for all new applicants, including relatives, interested in providing care to a child in the foster care and/or probation system/s. By December 31, 2019, all existing licensed foster family homes, certified family homes, and approved relatives and NREFMs who wish to continue to care for

foster children must be converted to resource family status because their license or relative approval status will be forfeited by operation of law (ACL 17-16). (§ 16519.5(p).)

The RFA process includes two primary components: the home environment assessment and the permanency assessment. The home environment assessment includes a home health and safety assessment and background checks. The permanency assessment includes a psychosocial assessment and a minimum of 12 hours of preapproval training for the applicants. Note that some counties may require more than 12 hours of training. Additional requirements include health screening for applicants, TB screenings for all adults living in the home, and first aid and CPR certification, among other things. (§ 16519.5(d)(2).) Counties and FFAs are required to update the resource family's approval at least annually. This update includes, among other requirements, a minimum of 8 hours of postapproval training. Again, as noted above, some counties may require more than 8 hours of postapproval training. Once all requirements for approval have been completed, a written report on the resource family must be completed, including a determination that the family, among other things, understands the safety, permanency, and well-being needs of children and NMDs who have been victims of child abuse and neglect and has the capacity and willingness to meet those needs. (§ 16519.5(c)(1)(A)–(E).)

In certain situations, a child can be placed before the caregiver is an authorized RFA placement. If there is a compelling reason, which is based on the needs of the child, and the home environment assessment has been completed, the child may be placed with the caregiver. (§ 16519.5(e).) If a child is placed before RFA authorization based on a compelling reason, the permanency assessment must be completed within 90 days, or good cause for the delay must be documented.

A child may also be placed before RFA authorization on an emergency basis. An emergency placement may only be with a relative or nonrelative extended family member, and the appropriate assessments must be completed within the statutorily established

timeline. If a child is placed before RFA authorization based on an emergency, the comprehensive assessment must be completed within 90 days, or good cause for the delay must be documented.

It is important to note that although a child may be placed before RFA authorization for a compelling reason or on an emergency basis, the caregiver will not receive AFDC-FC funding until full approval has been achieved. (*Ibid.*)

Although RFA represents a rigorous new assessment process,

- Emergency placement procedures are available to avoid delays in placement;
- Once a family, including relatives, is approved, the family will be approved for all children and will not have to complete additional assessments for guardianship or adoption; and
- Enhanced due process is available when approval is denied or rescinded.

Potential delays in funding that may occur as a result of the more rigorous process can be avoided or softened with

- An expedited CalWORKS process; and
- The provision of temporary funding through emergency money or recruitment and retention money.

SAFE HAVEN / SAFE SURRENDER

The purpose of the safe-haven/safe-surrender law is to save the lives of newborn infants who otherwise might be abandoned and left to die. It does so by (1) decriminalizing the voluntary "surrender" of such children and (2) guaranteeing parental anonymity. Although in effect since January 1, 2001, there are no appellate opinions interpreting the law, and therefore the only guidance in determining how it should be applied comes from legislative history and the language of the statute itself.

Statutory Requirements (Health & Saf. Code, § 1255.7)

The baby must be 72 hours old or younger and voluntarily surrendered to personnel on duty at a designated safe-surrender site (most often a hospital) by a parent or person having lawful custody.

"Lawful custody" means that physical custody is accepted from a person believed in good faith to be the infant's parent and to have the express intent of surrendering the child. (Health & Saf. Code, § 1255.7(j).)

Confidentiality and Anonymity Are Key

- The child is identified only by an ankle bracelet that bears a confidential code.
- Although site personnel attempt to provide a medical questionnaire, it may be declined, filled out at the site, or anonymously mailed in, and it must not require any identifying information about the child, parent, or surrendering party. (*Id.,* § 1255.7(b)(3).)
- Any identifying information received is confidential and must not be further disclosed by either site personnel or the county social services agency. (*Id.,* § 1255.7(d)(2) & (k).)
- Identifying information must be redacted from any medical information provided by site personnel to the social services agency. (*Id.,* § 1255.7(d)(2).)
- The agency must not reveal information identifying the parent or surrendering party to state and national abduction and

missing children agencies, although the child's identifying information (e.g., physical description) must be conveyed to those agencies. (*Id.,* § 1255.7(e).)

- All such information is exempt from disclosure under the California Public Records Act. (*Id.,* § 1255.7(d)(2) & (k).)

Procedure

- The case should be filed as a "g" count only, which specifically covers situations in which "the child has been … voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code." (§ 300(g).)
- The petition should preserve the anonymity of the child and parent(s), referencing the child only as "Baby Boy/Girl Doe" and the parents only as "John/Jane Doe."
- At disposition, no reunification should be provided and the court should set a 366.26 hearing within 120 days.

(§ 361.5(b)(9) & (f).)

Unresolved Issues

- Does the statute cover children who appear to be the victims of abuse or neglect? In other words, when abuse is suspected, should anonymity extend to the parents if they voluntarily surrender the child?
- Can a baby born with drugs in his or her system be considered a safe-haven baby?
- Can a baby not exposed to drugs and born in a hospital, whose mother's identity is documented on all the birth records, be "surrendered" to hospital staff as a safe-haven baby?

If identifying information is disclosed but all parties agree that the case should properly be handled under Health and Safety Code section 1255.7, ask the court to direct the social services agency to redact all identifying information from the petition and supporting documentation *or* to seal the file, and direct the agency to refile correctly. An amended birth certificate, with all names deleted pursuant to safe haven on the *Adjudication of Facts of Parentage* form, must be obtained from the California Department of Social Services.

- Does a safe-haven filing obviate the need for notice and the agency's duty to conduct a diligent search?
- What about the rights of the father of the newborn? Are they adequately protected?

Until the statutory law is clarified or the Court of Appeal weighs in, these and other questions about safe haven/safe surrender remain open for debate.

SIBLINGS

Notice and Procedural Rights

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

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

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

Definition of "Sibling"

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

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

Representation of a Sibling Group

Prior to accepting appointment for a group of two or more siblings, attorneys must not only conduct routine conflict checks but also be mindful of potential conflicts before speaking with any potential clients. Upon appointment to represent a sibling set, attorneys should review the initial detention report and any other available documents to identify potential conflicts. Common examples include situations where one sibling is alleged to have abused another sibling or one sibling has accused another of lying.

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

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

Sibling Placement

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

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

Counsel should independently investigate claims that placement of siblings together would be detrimental. The shortage of foster homes for large sibling sets may be a legitimate reason to separate siblings temporarily, but this should not relieve an agency of its obligation to continue to search for an appropriate home, including consideration of noncustodial parents and relatives (both local and out-of-state) as well as foster homes. A detriment finding should always be revisited at subsequent hearings.

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

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

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

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

Sibling Visitation

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

Ongoing Consideration of Sibling Issues

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

- The nature of the sibling relationships (including whether the children were raised together, shared common experiences, or have a close bond; whether they express a desire to visit or live together; and whether ongoing sibling contact is in their best interest);
- The appropriateness of developing or maintaining these relationships;

- If siblings are not placed together, why not, and what efforts are being made to place siblings together or why such efforts would be contrary to the safety and well-being of any of the siblings;
- The nature and frequency of sibling visits, or if visits have been suspended, whether there is a continuing need to suspend sibling interaction; and
- The impact of sibling relationships on placement and permanency planning.

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

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

Termination of Parental Rights, Adoption, and Postadoption Contact

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

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

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

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

County child welfare agencies must facilitate postadoption sibling contact by giving prospective adoptive parents information about the child's siblings and encouraging continued sibling contact. With the adoptive parents' consent, the court may include provisions for postadoption sibling contact in the adoption order. (§§ 366.29, 16002(e).) Such provisions have no effect on the continuing validity of the adoption and do not limit the adoptive parents' right to move away. Also, the adoptive parents may terminate the sibling contact if they determine that it poses a threat to the health, safety, or well-being of the adopted child. Subject to these limitations, the juvenile court has continuing jurisdiction to enforce postadoption sibling contact provisions under section 366.29(c).

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

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

TERMINATION OF JURISDICTION: COMMON ISSUES

The court may terminate jurisdiction at several different stages of the proceedings and under a number of varying scenarios. Some of the more common issues encountered (and pitfalls to be aware of) are covered below. Note that for cases involving an Indian child, jurisdiction can also be terminated when the case is determined to be under the exclusive jurisdiction of or transferred to a tribal court. (25 U.S.C. § 1911; 25 C.F.R. §§ 23.110, 23.115–23.119.)

Custody to One or Both Parents

Whenever the court terminates jurisdiction over a child younger than 18 years, the court may enter protective orders (as provided under section 213.5) and/or orders regarding custody and visitation. Orders issued upon termination must be made on Judicial Council form JV-200 *(Custody Order—Final Judgment)* and must be filed in any existing dissolution or paternity proceedings or may serve as the sole basis for opening a file for such a proceeding. (§ 362.4.) Each parent has a right to notice of the intent to terminate jurisdiction and a right to be heard as to the proposed custody and visitation orders. (*In re Kelly L.* (1998) 64 Cal.App.4th 1279; *In re Michael W.* (1997) 54 Cal.App.4th 190; but see *In re Elaine E.* (1990) 221 Cal. App.3d 809.) When making exit orders, the court must specify the amount of visitation granted to the noncustodial parent but may leave it up to the parents to arrange the time, place, and manner of visitation. (*In re T.H.* (2010) 190 Cal.App.4th 1119.)

Juvenile court custody orders (sometimes called exit orders, family law orders, or FLOs) are final orders and will continue until they are modified or terminated by a superior court. (§ 362.4.) Such visitation and custody orders may not be subsequently modified unless the court finds both that there is a significant change of circumstances and that the suggested modification is in the child's best interest. (§ 302(d); *In re Marriage of David and Martha M.* (2006) 140 Cal.App.4th 96.)

Given the difficulty of modifying juvenile court custody orders after the fact (and the reality that most clients will be attempting to do so pro per), attorneys should try to carefully craft the document with the client's long-range, as well as short-term, goals in mind.

Situations in Which Termination Is Improper

Jurisdiction must not be terminated for a minor under the age of 18 who is in foster care or APPLA, even if the child refuses services and is habitually absent from placement without permission (i.e., AWOL). (See *In re Natasha H.* (1996) 46 Cal.App.4th 1151; see also *In re Rosalinda C.* (1993) 16 Cal.App.4th 273 [termination of jurisdiction improper where minors were in long-term placement, not guardianship, with relative in a foreign country].) Additionally, the court must not terminate jurisdiction over a minor whose whereabouts are unknown. (*In re Jean B.* (2000) 84 Cal.App.4th 1443 [the proper procedure was to issue a protective custody warrant for the child and arrest warrants for the absconding parents, set the matter for periodic review, and take no further judicial action].)

Although the court should not enter dispositional or other orders, the county social services agency has an affirmative obligation to continue search efforts and counsel should be ready to address any new developments in the case.

Youth Who Age Out

Once a dependent child who is the subject of an out-of-home-placement order reaches age 18, he or she may either request that dependency be terminated or, in some circumstances, remain in foster care as a nonminor dependent up to age 21. If the youth requests termination of jurisdiction, the court must hold a hearing under section 391 and rule 5.555. If the court terminates jurisdiction, it retains general jurisdiction under section 303(b) to allow the youth to petition under section 388 to request to resume juvenile court jurisdiction and reenter foster care. (§§ 303, 391.)

During the 90-day period before a foster child turns 18, the county agency must work with the child to prepare an individualized 90-day transition plan addressing the child's options for housing, health insurance, education, employment, support services, and mentoring; a power of attorney for health care; and information regarding the advance health care directive form. (§ 16501.1(f)(16)(B).) Children's attorneys should ensure that jurisdiction is not terminated until the 90-day transition plans have been developed and should review the plans with their clients to ensure that they are adequate and realistic. Foster youth moving to independence should be informed that they are eligible for food stamps under a special state program. (§ 18901.4.)

Also, county agencies are required to request credit checks for all foster youth between 14 and 18, annually, and if a credit check indicates that a youth may have been a victim of identity theft, refer the youth for services to address the issue. (§ 10618.6.) Foster youth are especially vulnerable to identity theft because of their frequent moves, exposure to numerous related and unrelated adults, and lack of adult protection and support. Children's attorneys should ensure that the credit check is conducted and any identity theft issues are resolved before jurisdiction is terminated.

At the last review hearing before a foster child turns 18, the court must ensure that the child

- Has a case plan that includes a plan for the child to satisfy one or more of the participation conditions described in section 11403(b) so that the child is eligible to remain in foster care as a nonminor dependent (NMD);
- Has been informed of his or her right to seek termination of dependency jurisdiction; and
- Has been informed of his or her right to have dependency reinstated under section 388(e).

(§ 366.31(a).)

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

- The minor's or NMD's plans to remain in foster care and meet one or more of the participation conditions described in section 11403(b)(1)–(5);
- The social worker's efforts made and assistance provided to the child or NMD so that he or she will be able to meet the participation conditions; and
- Efforts made to comply with the requirements of section 391.

1. Provision of Required Services and Documents

Whenever termination is recommended for a youth who has reached the age of majority, under section 391 the county social services agency must do the following:

- Ensure that the youth is present in court, unless the youth does not wish to appear, or that diligent efforts to locate the youth are documented; and
- Submit a report verifying that the following information, documents, and services have been provided to the youth:
  - Written information on the case, including family and placement history, the whereabouts of any dependent siblings (unless that information would jeopardize the sibling), and directions on how to access the dependency file under section 827;
  - Documents, including social security card, certified birth certificate, health and education passport, driver's license or identification card, and, if applicable, death certificates of parents and/or proof of citizenship or legal residency;
  - Assistance in applying for MediCal or other health insurance and referral to transitional housing or assistance in securing other housing;

- Assistance in applying to and obtaining financial aid for college or vocational training and a letter verifying dependency status for purposes of federal and state financial aid eligibility; and
- Assistance in maintaining relationships with individuals important to the youth.

Former foster youth are extremely vulnerable to homelessness and poverty as they often have been involuntarily estranged from their families and therefore lack extended family as a system of support to fall back on when times get hard. Therefore, before jurisdiction is terminated, counsel must ensure that the county social services agency has provided all the assistance required under section 391 and that the youth is as well prepared as possible for life outside the dependency system.

2. When the Child May be Eligible for Immigration Relief

Be careful if a federal petition for classification of an undocumented dependent as a special immigrant juvenile (SIJ) is pending. A petitioner must generally remain under juvenile court jurisdiction when the SIJ petition is filed and when it is adjudicated. However, termination of jurisdiction solely because a child has been adopted, been placed in a legal guardianship, or reached his or her 18th birthday does not invalidate an otherwise sufficient SIJ petition. As long as the juvenile court made SIJ findings when it held jurisdiction and the petition is filed before the child turns 21 years old, the federal government will not deny the petition on the ground that the child is no longer under the court's jurisdiction. However, if the child may be eligible for SIJ classification and the court has not yet made SIJ findings, *do not* submit to termination of jurisdiction until the court has made those findings. (See Immigration fact sheet for more detailed discussion.)

Terminating Dependency Jurisdiction Under Legal Guardianship

Once a legal guardianship has been established, the court may either continue supervision or terminate court jurisdiction while maintaining jurisdiction over the child as a ward of the guardianship as authorized under section 366.4. (§ 366.3(a).) If the child's needs change after jurisdiction is terminated, such that additional services and supports are needed to ensure the child's safety, well-being, and/or successful transition to adulthood, a section 388 petition to reinstate dependency jurisdiction may be filed at any time before the child turns 18. (*In re D.R.* (2007) 155 Cal.App.4th 480.)

1. With a Nonrelative Guardian

When jurisdiction is terminated with a nonrelative guardian, the child remains eligible for funding and is supervised by a social worker. However, if the dependency case is closed before the child's eighth birthday, the child will not be eligible for services from the California Department of Social Services' Independent Living Program (ILP). (§ 10609.45.)

There is talk of remedying this gap in services; practitioners can look for updates on the ILP website: *www.ilponline.org.* In the meantime, termination of jurisdiction is discretionary; the child's counsel may want to advocate for keeping the case open until the child turns 16 in order to ensure the availability of this benefit.

2. With a Relative Guardian—Kin-GAP and Kin-GAP Plus

Under section 366.3, the court should terminate dependency jurisdiction over a child in a relative guardianship who is eligible for the Kinship Guardianship Assistance Payment (Kin-GAP) program, unless the guardian objects or the court finds that exceptional circumstances require that the case remain open. (§ 366.3(a).) Kin-GAP is a California state program that provides a continuing funding stream and other support for qualified families after dependency jurisdiction has terminated. (§ 366.21(j).) Children whose cases are closed under the Kin-GAP program are eligible for ILP services.

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

a. Eligibility

In order to qualify for closure under Kin-GAP,

- The child must have lived with the caregiver for at least the 12 preceding months;
- An order of legal guardianship must have been entered by the dependency court; and
- Dependency jurisdiction must be terminated.

b. Benefits

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

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

VISITATION

Parent-Child Visitation

The focus of dependency law is on preservation of the family as well as on the protection and safety of the child. (§ 300.2.) When a child has been removed from the home, visitation is vital to maintaining family ties.

Modification of existing visitation orders must properly be pursued via a section 388 petition. Changes made without providing notice and an opportunity to be heard violate due process. (*In re Lance V.* (2001) 90 Cal.App.4th 668, 677.)

1. When Child Is Placed With Previously Noncustodial Parent

When the court removes a child from a parent at disposition and places the child with a previously noncustodial parent, the court may make a visitation order regarding the parent from whom the child was removed. (§ 361.2.) If the court terminates jurisdiction, any juvenile court orders made at the time as to custody and visitation may not subsequently be modified in family court unless there is a showing that there has been a significant change of circumstances and that the request is in the child's best interest. (§ 302(d).)

Given the relative finality of such "exit" orders, counsel should try to ensure that future interests are as well protected as possible. Willful violations of such orders by either parent may also lead to additional agency involvement.

2. When Reunification Services Are Offered

Visitation is an essential component of any reunification plan. (*In re Alvin R.* (2003) 108 Cal.App.4th 962.) Any order placing a child in foster care and ordering reunification services must provide for visitation between the parent/guardian and child that is "as frequent as possible, consistent with the well-being of the child." (§ 362.1(a)(1)(A).) Although the frequency and duration of visits can be limited and other conditions imposed if necessary to protect the child's emo-

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

a. County Social Services Agency's Role

The social worker must address any barriers to visitation (such as the child's need for therapy before visitation begins). (*In re Alvin R., supra,* 108 Cal.App.4th at p. 962.)

b. Incarcerated Parents

Visitation must be provided to an incarcerated parent "where appropriate." (§ 361.5(e)(1)(C).) Denial may not be based solely on the child's age or any other single factor but must be based on clear and convincing evidence that visitation would be detrimental to the child. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 774.) Reunification services may be found inadequate if no visitation is arranged for an incarcerated parent who is located within a reasonable distance from the child. (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1476.)

It is the Legislature's policy to encourage the reunification of families of incarcerated parents by easing the difficulties incarcerated parents encounter in maintaining contact with their children. Thus, when the court is exercising its discretion to continue or terminate reunification services, the court should consider, among other factors, the parent's inability to have contact with the child because he or she is incarcerated. (*S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016–1017.) Specifically, section 361.5 requires the court to consider the special circumstances of an incarcerated parent

when determining whether to extend reunification services, including the parent's ability and good faith efforts to maintain contact with the child. Sections 366.21(e) and (f) and 366.22 also require the court to take into account the incarcerated parent's ability to maintain contact with the child when considering the efforts or progress demonstrated by the parent in reunification and the extent to which the parent availed him- or herself of services provided when determining whether return would be detrimental.

3. When Reunification Services Are Not Offered

Even if reunification services are denied under 361.5(b) or (e)(1), the juvenile court has the discretion to allow ongoing contact unless it finds that visitation would be detrimental to the child. (§ 361.5(f).)

4. When a Section 366.26 Hearing Is Pending

Upon denying or terminating reunification services and setting a section 366.26 hearing, the court must continue to allow visitation unless it finds that visitation would be detrimental to the child. (§ 366.21(h).)

Whenever reunification efforts are denied or terminated, counsel should consider advocating for continued visitation in order to leave the door open for possible 388 petitions or challenges to termination of parental rights under the (c)(1)(A) exception. Consistent visitation is required for a successful showing in the latter case and is a key element in establishing the "best-interest" standard for the former.

5. After Section 366.26 Hearing

a. If Parental Rights Have Been Terminated

Adoptive parents, birth parents, and/or other relatives may voluntarily enter into postadoption contact agreements pursuant to Family Code section 8616.5, which also includes provisions for mediation, modification, and termination as well as limited court enforcement of such agreements.

However, the enforceability of postadoptive contact agreements remains in question; ultimate control appears to be in the hands of the adoptive parents.

b. When Parental Rights Remain Intact

Upon selection of a permanent plan of legal guardianship, placement with a fit and willing relative, or an order that the child remain in foster care, the court must make an order for continued visitation unless it finds by a preponderance of the evidence that visitation would be detrimental to the child. The court may not delegate to a legal guardian the decision of whether to allow visits, although it may leave the time, place, and manner of visits to the guardian's discretion. (§ 366.26(c)(4)(C); *In re Rebecca S.* (2010) 181 Cal.App.4th 1310; *In re M.R.* (2005) 132 Cal.App.4th 269, 274.)

Grandparent Visitation

Upon removing a child from the child's parents under section 361, the court must consider "whether the family ties and best interests of the child will be served by granting visitation rights to the child's grandparents" and, if so, must make specific orders for grandparent visitation. (§ 361.2(h).) However, grandparents, even if appointed de facto parents, have no constitutionally protected right to visit their dependent grandchildren. (*Miller v. California Dept. of Social Services* (2004) 355 F.3d 1172.)

Sibling Visitation

Any order placing a child in foster care must include provisions for visitation between the child and a dependent sibling unless the court finds by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of either child. (§§ 361.2(a)(2), 16002(b); *In re S.M.* (2004) 118 Cal.App.4th 1108.)

- Sibling contact is an ongoing issue subject to juvenile court review throughout the dependency proceedings. (*In re Asia L.* (2003), 107 Cal.App.4th 498.)

- Any person, including the dependent child, may petition the court to assert a sibling relationship and request visitation with a dependent child. (§ 388(b).)
- The county social services agency must facilitate postadoption sibling contact by giving prospective adoptive parents information about the child's siblings and encouraging continued sibling contact. With the adoptive parents' consent, the court may include in the adoption order provisions for postadoption sibling contact. (§§ 366.29, 16002.)

Such provisions have no effect on the continuing validity of the adoption and do not limit the adoptive parents' right to move within or outside the state. Also, the adoptive parents may terminate the sibling contact if they later determine that it poses a threat to the health, safety, or well-being of the adopted child. In other words, the enforceability of these agreements is questionable.

General Constraints

No visitation order may jeopardize the safety of the child. (§ 362.1(a)(1)(B); see *Los Angeles County Department of Children and Family Services v. Superior Court (Ethan G.)* (2006) 145 Cal.App.4th 692 [order allowing parent in sex abuse case to live in home on condition that all contact with child would be monitored was abuse of discretion].)

- To protect the safety of the child, the court may craft visitation orders in a manner that keeps the child's address confidential. (§ 362.1(a)(1)(B).)
- If a parent has been convicted of first degree murder of the child's other parent, the court may order unsupervised visitation only if the court finds there is "no risk to the child's health, safety, and welfare." (§ 362.1(a)(1)(A); Fam. Code, § 3030.)
- The court may not order unsupervised visits in which the person to be visited or anyone in his or her household is required to register as a sex offender as a result of a crime against a child, unless the court finds visits pose "no significant risk to the child." (*Ibid.,* § 3030.)

- If visitation is ordered in a case in which a restraining order has been issued, the order must specify the time, day, place, and manner of transfer as designed to protect the child from exposure to domestic violence and to ensure the safety of all family members. (§ 213.5(l); Fam. Code, § 6323(c) & (d).)

In keeping with their clients' wishes, minors' and parents' attorneys should not only focus on whether visitation with parents, siblings, other relatives, and significant others should occur but also consider seeking new orders or filing a 388 petition to modify existing court orders on a wide range of visitation issues, such as frequency and duration, scheduling, location, supervision, and contact outside of visits (e.g., phone calls, mail, attendance at school or sports events). It is important to maintain all existing relationships whenever possible.