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2010

### A Child's Journey Through the Child Welfare System.

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#### Publication Information & Recommended Citation

Badeau, Susan, Ann M. Haralambie, and Donald N. Duquette. "A Child's Journey Through the Child Welfare System." In *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, edited by Donald N. Duquette and Anne M. Haralambie, 341-362. 2nd ed. Denver, CO: Bradford Publishing, 2010.

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# Chapter 16: A Child's Journey Through the Child Welfare System\*

by Susan Badeau, Ann M. Haralambie, and Donald N. Duquette<sup>1</sup>

## § 16.1 Introduction

*While 463,000 children were in foster care on September 30, 2008,<sup>2</sup> nearly 750,000 spent some time in care over the course of that year.<sup>3</sup>*

*Children in care in 2008 had been in foster care for an average of 27.2 months. More than 12% (53,763) of the children had been in care for five or more years.<sup>4</sup>*

Once a child is known to the government child welfare agency, the child and his or her family become subject to a series of decisions made by judges, caseworkers, legal representatives, and others—all of whom have an important role to play. A child may encounter dozens of other new adults, including foster parents, counselors, and doctors.

Most children enter foster care when removed from their homes by a child protective agency because of abuse or neglect, or both. Others enter care because of the absence of their parents, resulting from illness, death, disability, or other problems. Some children enter care because of delinquent behavior or because they have committed a juvenile status offense, such as running away or truancy. A small

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\* The authors thank Sarah Gesiriech for her contribution to this chapter which is based on the original work *A Child's Journey through the Child Welfare System*, Copyright 2003 by The Pew Commission on Children in Foster Care by Sue Badeau and Sarah Gesiriech.

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<sup>2</sup> U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *The AFCARS Report Preliminary FY 2008 Estimates as of October 2009*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## *Child Welfare Law and Practice*

percentage of children enter care because of a disability.<sup>5</sup> For many, foster care represents their only access to disability services, such as mental health care for a child with severe emotional disturbance. In these rare instances, in states that allow such placements, a child is placed in foster care voluntarily at the request of the child's parents.

Foster care is intended to provide a safe temporary home to a child until the child can be safely provided with a permanent family in which to grow up, through reunification, legal guardianship (often with a relative), or adoption. However, being removed from home and placed in foster care is traumatic for a child, and the period of time a child may spend in foster care can be filled with uncertainty and change.

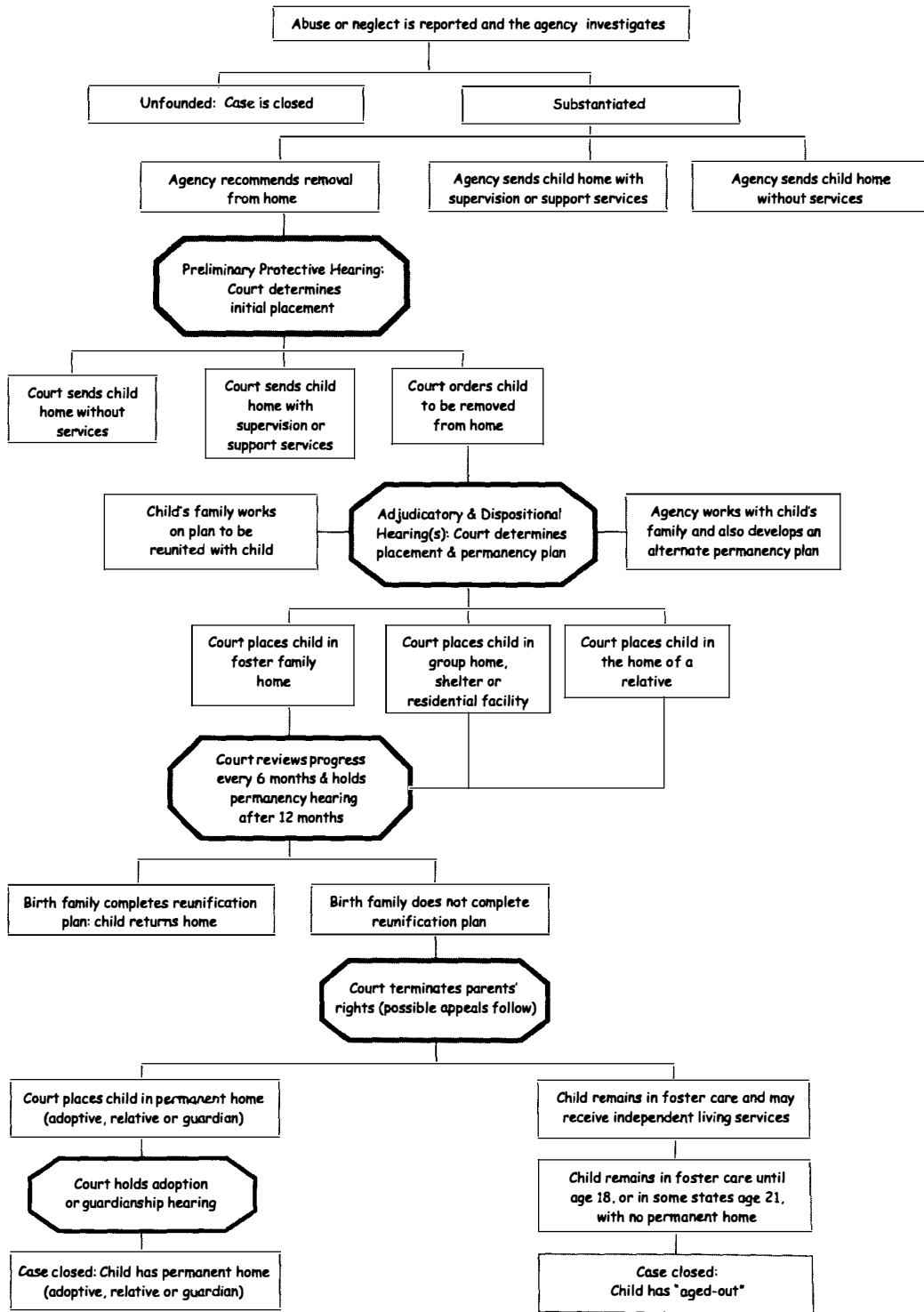
A child in foster care is affected by a myriad of decisions established by federal and state laws designed to help the child. At each decision point, action or inaction can profoundly influence the child's current circumstances and future prospects. The discussion that follows highlights typical decision points on a child's journey through foster care. Although the format is based on federal and typical state law and practice, it is only a model. Laws vary across states, as do the capacity and practices of child welfare agencies and courts to manage their caseloads. While some of these variations are intended to expedite the child's journey, often these factors create delays that complicate a child's journey through the child welfare system and often extend the child's time there.

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<sup>5</sup> U.S. Government Accountability Office, Report to the Chairman, Committee on Ways and Means, House of Representatives, GAO-07-816, *African American Children in Foster Care, Additional HHS Assistance Needed to Help States Reduce the Proportion in Care*, p. 1, (2007), available at <http://www.gao.gov/new.items/d07816.pdf>.

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A Child's Journey through the Child Welfare System



## § 16.2 Reporting Child Maltreatment

The child's journey through foster care usually begins when a mandated reporter<sup>6</sup> or concerned citizen makes a report of abuse or neglect to a state agency. For example, a doctor delivers a baby who has drugs in his or her system; a neighbor notices bruises on a child; a toddler is found abandoned in a public place; or a teacher notices a student who is unclean, unfed, or severely ill.

In 1974, Congress passed landmark legislation in the federal Child Abuse Prevention and Treatment Act (CAPTA).<sup>7</sup> The Act provided states with funding for the investigation and prevention of child maltreatment, conditioned on states adopting mandatory reporting laws. The Act also conditioned funding on reporter immunity, confidentiality, and the appointment of guardians ad litem for children. Although there is no one commonly accepted definition of "child abuse and neglect," the federal government defines child abuse and neglect in CAPTA as, at minimum, "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act which presents an imminent risk of serious harm." Based on the minimum standards set by federal law, each state provides its own definition of child maltreatment.<sup>8</sup> Abuse is often defined by states as "harm or threatened harm" or "serious threat or serious harm" to a child. All states have mandatory reporting statutes, but there are some differences among the various states concerning who must report and the circumstances under which reports must be made.

The U.S. Department of Health and Human Services (HHS) estimates that in 2007 (the last year for which data is available), CPS agencies received 3.2 million referrals of maltreatment involving 5.8 million children. Approximately 794,000 of these cases were substantiated after investigation.<sup>9</sup>

The following types of abuse and neglect occurred (some in combination with others):

Type of Abuse	Percentage
Neglect	59%
Multiple Maltreatments	13.1%
Physical Abuse	16.8%

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<sup>6</sup> State laws identify certain professionals who are mandated to report suspected abuse. They generally include medical professionals, teachers, coaches, child care workers, photo lab developers, and law enforcement.

<sup>7</sup> Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101 *et seq.*).

<sup>8</sup> Child Welfare Information Gateway, *What is Child Abuse and Neglect?*, p. 1 (2008), available at <http://www.childwelfare.gov/pubs/factsheets/whatiscan.pdf>.

<sup>9</sup> U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2007* (U.S. Government Printing Office 2009), p. 5, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf>.

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Sexual Abuse	77.6%
Psychological maltreatment	44.2%
Medical Neglect	.9%
Other (abandonment, congenital drug addiction)	44.3% <sup>10</sup>

The ages of the victims ranged as follows:

<b>Age</b>	<b>Percentage</b>
Birth to 3 years	31.9%
4-7	23.8%
8-11	19%
12-15	18.5%
16-17 or unknown	6.9% <sup>11</sup>

More than half (57.7%) of substantiated reports were made by professionals, including teachers, law enforcement officers, lawyers, social services staff, and physicians. The remaining 42.3% were made by family members, friends, neighbors, and other members of the community.<sup>12</sup> The majority (80.1%) of the victims were maltreated by a parent, including stepparent. The breakdown is as follows:

<b>Relationship to the Child</b>	<b>Percentage</b>
Mothers (acting alone or with a non-parent)	44.4%
Fathers (acting alone or with a non-parent)	18.8%
Mother and Father	16.8%
Non-parent	10%
Unknown	9.8% <sup>13</sup>

In 2007, an estimated 1,760 children died from abuse or neglect. Three-quarters (75.7%) of child fatality victims were younger than four years.<sup>14</sup>

### **§ 16.2.1 Reporting by Professionals**

Typically, professionals who deal with children are required to report suspicion of abuse. If they fail to do so, they may suffer criminal or civil penalties. Under some statutes, professionals are required to report suspicion of abuse if the suspicion originates from the professional's observation or examination of the child (as opposed

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<sup>10</sup> *Id.* at 26.

<sup>11</sup> *Id.* at 25.

<sup>12</sup> *Id.* at 66.

<sup>13</sup> *Id.* at 52.

<sup>14</sup> *Id.* at 55.

to merely hearing about the abuse from a person other than the child). Doctors, nurses, teachers, psychologists, and daycare workers who have a reasonable *suspicion* of abuse generally must make a report, even if they would not be in a position to testify that they held a professional opinion that abuse had occurred. In other words, it is the duty of child protective services or law enforcement to investigate suspected abuse. It is not the reporter's obligation to conduct an investigation. Tort liability may lie against a mandated reporter who delays making a report because he or she has not determined whether, in fact, the child's injuries were caused by abuse. Similarly, the obligation to report is personal to the mandated reporter and may not be discharged by reporting to an administrative supervisor who decides not to report.

Professional privileges for confidential communications are generally abrogated by the mandatory reporting laws. However, in some states a few privileges remain and excuse an otherwise mandated reporter from making a report if the source of the suspicion is a privileged communications.

### **§ 16.2.2 Reporting by Nonprofessionals**

Any person *may* report cases of suspected child abuse or neglect. But in some states family members or neighbors *must* report suspicions of child maltreatment. Approximately eighteen states and Puerto Rico require all citizens, regardless of their profession, to report suspected child maltreatment and neglect.<sup>15</sup> Additionally, some states require any individual who has contact with children to report suspected child abuse or neglect. For example, Arizona requires all parents and anyone responsible for the treatment or care of a child to report suspected child abuse or neglect.<sup>16</sup>

### **§ 16.2.3 Good Faith: Immunity from Civil Liability**

Even if a person is not mandated to make a report, discretionary reports may be made, even anonymously. In most cases, the reporter is entitled to immunity from civil suit by the parents based on the report, so long as the report was made in good faith.

### **§ 16.2.4 Liability for Making False or Malicious Report**

Many states now provide specifically for tort liability against people making malicious reports. The California penal code addresses liability for persons making false reports; the statute provides in part:

No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article . . . Any other person reporting a known or suspected instance of child abuse or neglect

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<sup>15</sup> Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect* (2008), available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm).

<sup>16</sup> ARIZ. REV. STAT. ANN. § 13-3620 (2009).

shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused . . .<sup>17</sup>

Similarly, the Idaho Code states that any person who reports suspected child abuse or neglect in bad faith or with malice is not provided immunity for reporting.<sup>18</sup>

## **§ 16.3 Investigating Child Maltreatment**

Once a report of maltreatment has been made, the CPS agency investigates whether abuse or neglect has occurred and assesses the risks to the child. According to the National Child Abuse and Neglect Data System, a total of 3.2 million referrals to child protective services, involving 5.8 million children, were made in federal fiscal year 2007.<sup>19</sup> More than one-third (38.3%) of reports made to child protective services were “screened out” and not investigated.<sup>20</sup> The remainder of the referrals were either investigated by CPS to determine if a child was maltreated or assessed for risk of maltreatment. Of the reports that were investigated, 25.2% resulted in a substantiated report of child maltreatment.<sup>21</sup>

### **§ 16.3.1 Time Frame**

Once a report is made, child protective services or law enforcement must investigate within a specific period of time unless the facts alleged would not constitute abuse or neglect under the requisite state statutes. Most states designate reports as higher or lower priority and respond accordingly.<sup>22</sup> Higher-priority reports of child maltreatment are generally investigated within 1 to 24 hours of the report; child protective services agencies respond to lower-priority reports of abuse between 24 hours and 14 days of the report.<sup>23</sup> An example of a lower-priority case could be when there are no specific allegations of abuse or neglect or where the child is over a certain age, whereas reports about children under the age of three are nearly always

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<sup>17</sup> CAL. PENAL CODE § 11172(a) (2004).

<sup>18</sup> IDAHO CODE ANN. § 16-1606 (2009).

<sup>19</sup> U.S. Department of Health & Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2007* (Washington, DC: U.S. Government Printing Office 2009), p. xii, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf>.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 9, 16.

<sup>23</sup> *Id.* at 9, 16.



considered “higher-priority” cases. Given limited funding for child protective services, there is always some degree of triage involved. Sometimes all required investigations are not performed in a timely manner or at all. Other cases are investigated in only a cursory manner.

### **§ 16.3.2 Risk Assessment**

For ongoing safety assessment beyond the stage of the initial child protection intervention, see Chapter 14, Child Safety: What Judges and Lawyers Need to Know.

Initially, child protective services must assess the situation to determine if the child has been maltreated or if the child is at a substantial risk of maltreatment.<sup>24</sup> Most states use risk assessment models designed to structure decision-making, predict future harm, aid in resource management by identifying service needs for children and families, and facilitate communication between the agency and community.<sup>25</sup> The assessment may include a visit to the family home and interviews with the family and persons outside the family. The family may help identify services that may be needed to better care for their child, such as parenting skills training or addiction services. The majority of children entered foster care because of neglect, often the result of a parent’s failure to provide necessary physical (food and shelter), medical, educational, or emotional care,<sup>26</sup> which are conditions that may often be ameliorated by community-based interventions, thus avoiding placing the child in out-of-home care. These approaches are called “alternative” or “differential” responses.<sup>27</sup>

Agencies analyze the risk assessment information and evaluate the situation of the child and family, their strengths and resources, and community services. Child protective services then determines whether there is sufficient and believable information to confirm maltreatment and assigns significance to the risks and family strengths. Additional risk assessment criteria are considered in cases involving substance abusing families, families where partner abuse is an issue, and families with unique cultural backgrounds. Child protective services then evaluates the child’s safety.

### **§ 16.3.3 Safety Assessment**

The Adoption and Safe Families Act of 1997 (ASFA) requires states to provide safe environments for children in birth families, out-of-home care, and adoptive homes.<sup>28</sup> The risk of child maltreatment and the safety of a child are two separate

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<sup>24</sup> DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf>.

<sup>25</sup> *Id.* at 43–45 (internal citations omitted).

<sup>26</sup> Child Welfare Information Gateway, *What is Child Abuse and Neglect?*, p. 2–3 (2008), available at <http://www.childwelfare.gov/pubs/factsheets/whatiscan.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in 42 U.S.C. §§ 670–676 (2004)).

inquiries. Safety assessment requires the caseworker to make two determinations. First, when the caseworker initially meets with the family, he or she must determine if the child is currently in danger. Second, at the end of the initial assessment, the caseworker must consider the following factors:

- Whether the child will be safe in the home without further involvement by child protective services.
- Under what circumstances the case could be moved to community partners.
- Whether home-based services are necessary to protect the child.
- Ultimately, whether the child needs to be placed in out-of-home care.

Child protective services use the findings of the risk assessment to determine the child's safety at the conclusion of the initial assessment.<sup>29</sup>

### § 16.3.4 Investigating Evidence of Child Maltreatment

Child protective services also considers whether the harm to the child constitutes child maltreatment and whether there is sufficient evidence to support a case of child maltreatment. For example, a thorough investigation of a report involving physical abuse includes collecting information about the injury and photographing the child as soon as possible.<sup>30</sup> Additionally the investigator should interview the child and possible witnesses, including siblings, neighbors, teachers, caregivers, and medical personnel. It is crucial that the investigation is conducted using trauma-informed practices and is well documented; legally it is very important to be able to trace what exactly was asked during interviews.<sup>31</sup> The child's medical records, school or daycare records, and family history should also be reviewed.<sup>32</sup>

If the investigation reveals problems that do not pose an immediate danger to the child, and if the family will cooperate with services, the agency might refer the family to voluntary services without filing a court action. The family might agree to an informal period of out-of-home placement of the child with a relative, friend, or foster home. The agency might require the parents to file a written contract covering this arrangement. If the parent does not cooperate with the voluntary services or does not remedy the problem, the agency might choose to pursue court action.

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<sup>29</sup> For a discussion of assessing the child's safety, see Chapter 14, Child Safety: What Judges and Lawyers Need to Know.

<sup>30</sup> Some state statutes explicitly permit photographing children as part of an investigation into child maltreatment. See FLA. STAT. § 39.301(19) (2003); ARIZ. REV. STAT. § 13-3620 (I) (2004).

<sup>31</sup> JOHN E. B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE 166 (2d ed. 1998).

<sup>32</sup> *Id.* at 58; see generally OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, PORTABLE GUIDES TO INVESTIGATING CHILD ABUSE (1996–1998).

### **§ 16.3.5 Interpreting Labels of “Founded” or “Unfounded” on Agency Reports**

Attorneys involved in child welfare cases must understand the limitations of investigations in some circumstances and not assume that reports labeled “unfounded,” “unsubstantiated,” or otherwise closed without a finding of abuse or neglect mean that there was an affirmative determination that abuse or neglect did or did not occur. Many child protective services agencies are limited to two choices (such as “founded” and “unfounded”) and are not permitted to indicate varying degrees of suspicion. In some agencies, reports are designated “unfounded” if the family cannot be located. Sometimes, even with a good investigation, a report may be labeled “unfounded” because there is simply insufficient evidence to prove what the investigator feels was real abuse. Sometimes a series of “unfounded” reports reflects a malicious or hypervigilant reporter. Often it reflects limitations of proof, limitations of time or experience of the investigator, or children and families unwilling to speak honestly. Attorneys need to look carefully at the facts of each case without making assumptions based on the labels assigned to reports.

### **§ 16.3.6 Emergency Protective Custody**

Some states provide that child protective services or law enforcement may take a child into emergency protective custody for an investigative period without the parent’s consent or a court order. When a child is taken into emergency protective custody, there must be a judicial review of the state’s action within a specified amount of time, generally between 48 and 96 hours. For example, in Florida, a law enforcement officer or a social worker may take a child into custody without a court order if he or she has probable cause to believe the child has been abused or is in imminent danger of injury.<sup>33</sup> The child’s parents must be notified immediately and there must be a shelter hearing within 24 hours of removal.<sup>34</sup> State legislatures are challenged with striking a balance between providing law enforcement and child protective services with the authority to protect children, on the one hand, and safeguarding the rights of parents and the integrity of families, on the other.<sup>35</sup> In addition, every effort must be made to minimize the infliction of additional trauma on the child caused by removal from parents or caregivers.

In most states, child protective services or law enforcement may enter a home without a search warrant if they believe a child is in imminent danger. Additionally, many states provide statutory authority for social services, law enforcement, or school

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<sup>33</sup> FLA. STAT. § 39.401 (2003).

<sup>34</sup> FLA. STAT. § 39.402 (2003).

<sup>35</sup> For a discussion of the constitutional issues relevant to removal of children from their parent’s custody, see Chapter 15, Due Process of Law and Child Protection.

personnel to conduct an initial interview with a child at school without giving the child's parents prior notice.<sup>36</sup>

## § 16.4 Initiating Court Action

Every child welfare court case begins with either the filing of a petition or an emergency removal. The case then proceeds to a detention hearing to determine whether the child should be removed from his or her home or returned if he or she was previously removed. The case then proceeds through several procedural stages:

- The temporary custody or emergency hearing
- The adjudicatory (fact-finding) hearing
- The disposition hearing
- A series of periodic review hearings
- The permanency planning hearings
- A termination of parental rights hearing or other final orders
- Further review hearings
- An adoption or guardianship hearing if that is the final plan

A child welfare case can be dismissed at any time during the case process, and appeals or writs can be taken at different stages throughout the life of the case.<sup>37</sup>

If the investigator determines that court action is necessary, the agency will file a petition. Many states restrict the ability to file dependency petitions to the state or county agency. Sometimes a private child welfare agency is given standing to file. In some states, designated private individuals may file. In a few states, any person having a legitimate interest in the child may file a petition; in those states, even if the agency's investigation is closed without the filing of a petition, a concerned adult may nevertheless seek court intervention. Local law determines whether such actions are filed in juvenile court, family court, probate court, or other courts. For purposes of this chapter, we will refer to the relevant court generically as "juvenile court."

## § 16.5 Emergency Removal/Detention

In most cases, the temporary custody order is obtained *ex parte*. Usually, all that is required is a *prima facie* showing that the child is likely to be in danger of imminent harm. In some jurisdictions, the *prima facie* showing may be established by hearsay, written declarations, or other procedures short of a full evidentiary hearing. If a child is placed in temporary custody, the parents and, arguably, the child are entitled to an expedited hearing to review custody. This may be called an "emergency

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<sup>36</sup> ME. REV. STAT. ANN. tit. 22, § 4021(3) (2003).

<sup>37</sup> For a discussion of appellate practice, see Chapter 26, Child Welfare Appellate Law and Practice.

hearing,” “shelter care hearing,” or “preliminary hearing” and is typically held 24 to 72 hours after an emergency removal of the child. Some courts use mediation, family group conferencing, family group decision-making, or other procedures to attempt to work out temporary orders involving placement, access, and pretrial services to address the family’s problems and secure safe, stable permanence for the child at the earliest possible stage.<sup>38</sup> The temporary custody hearing may also address other temporary orders, such as establishing initial services to be provided to the parents and children, visitation if the child is not returned to the parent, diligent search for and notification of fathers and kin/relatives, and the designation of financial responsibility for the child.<sup>39</sup>

The court may provide third parties, such as relatives, limited party status. For example, the court may permit a relative who desires to be a placement for the child to appear at the temporary custody hearing and to participate on the issue of placement. Full intervening party status might be granted under certain circumstances.

The Fostering Connections to Success and Increasing Adoptions Act of 2008 requires a notice of placement to relatives “within 30 days after the removal of a child from the custody of the parent” and requires the state to “exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child.”<sup>40</sup> Moreover, the state must inform relatives of their options “to participate in the care and placement of the child” including the requirements “to become a foster family home and the additional services and supports that are available for children placed in such a home.”<sup>41</sup>

If the child is placed in a shelter, the state’s statute may require interim review hearings of temporary custody until the child is placed in a foster home or other more long-term placement. In such cases, the agency is required to make reasonable efforts to find a more appropriate placement for the child.<sup>42</sup>

The agency has a duty to make reasonable efforts to prevent or eliminate the need for removal of the child from the home, as long as the child’s health and safety is assured. Reasonable efforts are not required under certain circumstances.<sup>43</sup> The agency must be prepared to explain to the court what efforts it has made, why the child must be removed, or why reasonable efforts were not required under the statutory criteria.<sup>44</sup> The agency must develop a case plan for the child within 60 days

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<sup>38</sup> For a further discussion of alternative dispute resolution, *see* Chapter 24, Non-Adversarial Case Resolution.

<sup>39</sup> For a fuller discussion of the legal requirement to identify extended family, including a discussion of The Fostering Connections to Success and Increasing Adoptions Act, *see* §10.6, Fostering Connections to Success and Increasing Adoptions Act.

<sup>40</sup> Pub. L. No. 110-351, § 103 (codified at 42 U.S.C. § 671(a)(29)).

<sup>41</sup> *Id.* *See also* the Fostering Connections Resource Center, *Kinship/Guardianship: Relevant Sections of P.L. 110-351* at <http://www.fosteringconnections.org/resources/sections?id=0004>.

<sup>42</sup> 45 C.F.R. § 1356.21(b).

<sup>43</sup> 45 C.F.R. § 1356.21(b)(3).

<sup>44</sup> 45 C.F.R. § 1356.21(b)(3).

of the child's removal from home.<sup>45</sup> The parents or guardians have a right to be involved in developing the case plan.<sup>46</sup> Once a child is removed, the agency has a duty to make reasonable efforts to maintain the family unit and make it possible for the child to return home safely as long as the child's health and safety is assured.<sup>47</sup> Reasonable efforts are not required under certain circumstances.<sup>48</sup>

The court's determination at a temporary custody hearing is non-appealable, but it may be reviewed by filing for an extraordinary writ. Child placement decisions are time-sensitive for children, and extraordinary writs are an appropriate means for reviewing a temporary custody order or order denying temporary custody.<sup>49</sup>

## **§ 16.6 Pretrial Discovery and Motion Practice**

Child welfare law includes trial practice, and child welfare law specialists should be capable trial lawyers. Because many courts schedule only short hearings in child welfare cases, it is particularly important to be well prepared, well organized, efficient, and compelling in presenting evidence and cross-examining witnesses.

In most states, the state rules of civil procedure apply to child welfare cases. In some states, there are additional juvenile court rules or local rules. In states that follow the Federal Rules of Civil Procedure, parties to child welfare cases may have an affirmative duty to provide disclosure.<sup>50</sup> In addition, discovery should be available, at least with respect to the adjudicatory dependency or termination hearings. Children's attorneys, as well as agency attorneys and parent's attorneys, should avail themselves of discovery techniques when appropriate. Appointed counsel may or may not be given funds with which to conduct discovery. In such cases, while it may not be possible to take depositions, the attorney can still use less costly methods of discovery, such as requests for admission, requests for production of documents, and interrogatories. Requests for admission are particularly helpful in narrowing the contested trial issues. Where discovery is permitted after adjudication, interrogatories can be used to clarify expectations and to monitor the compliance and progress of all parties with rehabilitative services.

Attorneys for each of the parties should develop a trial strategy, plan and prepare witnesses and exhibits, and present a cogent, efficient case.<sup>51</sup>

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<sup>45</sup> 45 C.F.R. § 1356.21(g)(2).

<sup>46</sup> 45 C.F.R. § 1356.21(g)(1).

<sup>47</sup> 45 C.F.R. § 1356.21(b).

<sup>48</sup> 45 C.F.R. § 1356.21(b)(3).

<sup>49</sup> For a discussion of writs, see Chapter 26, *Child Welfare Appellate Law and Practice*.

<sup>50</sup> FED. R. CIV. P. 26.

<sup>51</sup> For in-depth treatment of trial practice issues, see Chapter 32, *Trial Advocacy*.

## **§ 16.7 Adjudication**

The court at the dependency trial determines whether or not the facts alleged have been proven true by a preponderance of the evidence<sup>52</sup> and whether the case meets the statutory requirements for a dependency adjudication under state law. Under the federal Child Abuse Prevention and Treatment Act (CAPTA), the court must provide representation for the child by an attorney, guardian ad litem, or court appointed special advocate who has received training appropriate to the role.<sup>53</sup> Various states have different requirements for who provides such representation and the role of that person. Although not required as a matter of federal constitutional law,<sup>54</sup> most states appoint attorneys for indigent parents.

State law determines how quickly the adjudicatory hearing must be held. If the child is placed out-of-home, the hearing may be accelerated. The hearing may have to be completed in as little as 60 days from the date of filing the petition.<sup>55</sup>

The petitioner has the burden of proving the abuse or neglect by a preponderance of the evidence, except in ICWA cases. A heightened standard of proof is not required because dependency cases balance the interests of the child as well as those of the parents and the state or county. While a parent's criminal conviction for abuse or neglect involving the same facts may establish the grounds for dependency, acquittal on the criminal charges is not relevant because of the heightened criminal standard of proof and the different statutory requirements for the juvenile court proceeding.

## **§ 16.8 Disposition**

If the child is adjudicated dependent, the court may enter dispositional orders at the same time as the adjudication, or it may set a separate dispositional hearing. The child may be adjudicated dependent but permitted to remain in the home, under the supervision of the agency and court. The dispositional hearing will determine: (1) the child's custodial placement; (2) terms of contact between child and parent if the child is not placed in the home; and (3) services to be provided to both the parent and child. ICWA contains special requirements if the child is an "Indian child."<sup>56</sup>

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<sup>52</sup> Except that the standard for at least some findings is clear and convincing evidence in cases falling under the Indian Child Welfare Act (ICWA). 25 U.S.C. § 1912(f). For further discussion of ICWA, see Chapter 12, The Indian Child Welfare Act.

<sup>53</sup> 42 U.S.C. § 5106a(b)(2)(A)(xiii). For a more detailed discussion of CAPTA, see Chapter 10, Federal Child Welfare Legislation.

<sup>54</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981).

<sup>55</sup> For a discussion of adjudication times, see NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995).

<sup>56</sup> See Chapter 12, The Indian Child Welfare Act.

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The permanency plan for the family should be specified. In 2008, the case goals of 463,000 children in state custody were:

<b>Case Goal</b>	<b>Percentage</b>	<b>(number)</b>
Reunify with Parent(s) or Principal Caretaker(s)	49%	(226,867)
Adoption	24%	(111,225)
Case Plan Goal Not Yet Established	5%	(22,642)
Long Term Foster Care	8%	(37,522)
Emancipation	6%	(29,556)
Live with Other Relative(s)	4%	(16,922)
Guardianship	4%	(18,266) <sup>57</sup>

In 2008, the placement settings for children in state custody were:

<b>Placement Setting</b>	<b>Percentage</b>	<b>(number)</b>
Foster Family Home (Non-relative)	47%	(217,243)
Foster Family Home (Relative)	24%	(112,643)
Institution	10%	(47,165)
Group Home	6%	(29,122)
Pre-Adoptive Home	4%	(17,485)
Trial Home Visit	5%	(24,358)
Runaway	2%	(9,766)
Supervised Independent Living	1%	(5,217) <sup>58</sup>

Placement of the child is reevaluated at disposition and remains an essential and ongoing concern of the case. Placement at home may be risky for a child, but out-of-home placement can carry its own hazards. Children may have multiple change of placement. Children move for many reasons, including attrition and lack of training or support for foster families, lack of resources to address a child's special needs, or because the child's behavior may be difficult for some foster parents to manage. Lawyers for all the parties are well advised to see placement "through the eyes of the child." If the child is removed from his or her home, the child is separated from his or her parents and may be separated from siblings, as well. The child will meet new temporary "parents" and adjust to their lifestyle and house rules. Foster parents may have their own children or other foster children in their homes. The child may have to

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<sup>57</sup> U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *The AFCARS Report Preliminary FY 2008 Estimates as of October 2009*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm); U.S. Department of Health and Human Services, Children's Bureau, *The AFCARS Report #8* (March 2003), available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/report8.htm>.

<sup>58</sup> *Id.*



attend a new school, leaving old friends behind and adjusting to a new teacher, new classmates, and new rules. The emotional adjustments may differ for children placed with relatives or placed in their own neighborhood. The child will have to make these adjustments each time he or she is moved. All of these moves and adjustments can create or exacerbate a child's experience of trauma. Attorneys involved in child welfare cases should become familiar with the impact of trauma on children and work to ensure that trauma is reduced or mitigated whenever possible.<sup>59</sup>

Federal law recognizes a preference for placement with relatives.<sup>60</sup> However, the regulations clarify that health and safety are the paramount considerations when any placement decision is made regarding a child in foster care, including care with a relative.<sup>61</sup> Generally, relatives do not receive foster care payments unless they are licensed foster care providers.

In some jurisdictions, mediation, family group conferencing, or family group decision-making are available to assist the parties in reaching a dispositional agreement. The best dispositional orders are clear and specific in outlining the terms of placement, and in setting forth the specific expectations of all the parties.

## **§ 16.9 Case Plans**

At any time the child is removed from the parent's home, federal law requires that the agency develop a case plan within a reasonable time, not to exceed 60 days.<sup>62</sup> Parents, guardians, and youth are entitled to participate in developing the case plan.<sup>63</sup> The case plan should outline the responsibilities of each party, including what services the agency will provide and what is expected of the parents and child. Any party may suggest alternate services, different visitation, participation of the child in ongoing activities, or different time lines.<sup>64</sup> The goals and objectives of the case plan and the services provided should always be permanency-oriented, and reflect the court's findings and the statutory bases for the dependency adjudication. The services should be designed to remedy or address the problems identified and should include realistic time lines by which each party is expected to be responsible for meeting the goals and objectives. The case plan should build on the strengths and resources of the parents, child, and family. The case plan should address both the reasonable needs of the child and the deficits of the parents.<sup>65</sup> The case plan should also address ICWA

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<sup>59</sup> See the National Child Traumatic Stress Network, [www.nctsn.org](http://www.nctsn.org).

<sup>60</sup> 42 U.S.C. § 671(a)(19).

<sup>61</sup> Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 FED. REG. 4020-01 (January 25, 2000), pp. 4032-33.

<sup>62</sup> 45 C.F.R. § 1356.21(g)(2).

<sup>63</sup> 45 C.F.R. § 1356.21(g)(1).

<sup>64</sup> 45 C.F.R. § 1356.21(g)(3).

<sup>65</sup> 45 C.F.R. § 1356.21(g)(3). *See also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 11 Stat. 2115.

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compliance and/or issues related to any child's connection to his or her cultural, racial, ethnic and religious heritage. The child's needs are broader than those merely designed to return the child home or find an alternative permanency plan—addressing the child's needs could also include responding to the child's educational, medical, mental health, sibling connections, extracurricular, and associational needs. The more specific and objectively measurable the case plan is, the easier it will be for the parties to determine when and whether each party is in compliance. Such specificity also assists the court in determining whether the agency has made reasonable efforts toward achieving the case plan, and whether the parents have made reasonable efforts at compliance.

Concurrent planning is explicitly permitted.<sup>66</sup> Therefore, even if the permanency plan is return to the child to his or her parent, the agency may also prepare for a different plan in the event that the reunification does not occur. For example, if it appears that the agency must provide reasonable efforts to reunify the family, but reunification seems unlikely, the agency might choose to place the child in a foster-adoptive home so that if the plan changes to termination of parental rights, the child's foster parents could adopt the child. Such concurrent planning shortens the time to permanency and increases the likelihood that the child will not have to move if the plan changes.<sup>67</sup>

### § 16.10 Review Hearings

Federal law requires review hearings must be held at least every twelve months from the previous hearing until the child is reunified, adopted, or until an alternate permanent plan has been effectuated.<sup>68</sup> Some states hold review hearings quarterly or even more frequently. Federal law permits review hearings to be conducted by the court or an administrative body (including a citizen review panel). But state law may specify that review hearings must be heard by the court. Notice of the review hearings must be provided not only to the parties, but also to foster parents, foster-adopt parents, and relative caregivers who are entitled to be heard at review hearings even though they are not parties.<sup>69</sup> In some states, review hearings may include hearsay reports, so long as the caseworker providing the report is available for cross-examination. One particular type of review hearing, the permanency planning hearing, is discussed separately below.

In a review hearing, the court needs to be able to determine from the evidence whether the child is safe, whether additional or different steps must be made to ensure

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<sup>66</sup> 45 C.F.R. § 1356.21(b)(4).

<sup>67</sup> See Child Welfare Information Gateway, *Concurrent Planning for Permanency for Children: Summary of State Laws*, available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/concurrent.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/concurrent.cfm).

<sup>68</sup> 45 C.F.R. § 1356.21(b)(2)(1).

<sup>69</sup> 45 C.F.R. § 1356.21(o).

the child's safety, or whether the child may now be safely returned to the parent.<sup>70</sup> The court needs to be able to determine whether the parent has achieved the case plan objectives, and if so, whether there should be changes to the child's placement or visitation, or whether there need to be changes in the services offered. If the parent has not yet achieved any of the case plan objectives, the court needs to be able to determine whether there should be changes in the objectives, changes in the services, or changes in the case plan or whether the parent should be given more time to achieve the objectives. The case review must also set a target date for the child's return home, adoption, or other permanent placement. This thorough review must be conducted for each child within a sibling group while also addressing the collective needs of the sibling group as a whole. Efforts to place siblings together and maintain their connections should be given priority consideration.

As well as reviewing the parent's progress, the court will review whether the agency has provided timely and appropriate services. Unless the case circumstances fall within an exception, the agency has a continuing duty to make reasonable efforts to prevent the need for removal of the child from the home or to reunify the child with the family if the child has been removed.<sup>71</sup> At each review hearing, the court must make specific findings concerning whether the child continues to be dependent and whether the agency is making reasonable efforts to reunify the family or pursue another approved permanency plan. The court will review the appropriateness of the current case plan and order appropriate changes or additions to the case plan.

## **§ 16.11 Permanency Hearings**

The Adoption and Safe Families Act (ASFA)<sup>72</sup> requires that the court must hold a permanency planning hearing within 12 months from the time the child enters foster care.<sup>73</sup> If the court determines that the agency is not required to make any or further reasonable efforts at reunification, the permanency hearing must be held within 30 days of that determination.<sup>74</sup>

There are a variety of permanency plans other than simply the choice between return to parent and termination of parental rights followed by adoption.<sup>75</sup> For example, in some cases an appropriate plan could be permanent guardianship or a relative placement. While independent living is a legally acceptable permanency plan, it is recognized that this does not give the same lifelong stability, security, or rights to a young person that are conferred by other family-based permanency options.

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<sup>70</sup> For a more detailed discussion, see Chapter 14, Child Safety: What Judges and Lawyers Need to Know.

<sup>71</sup> 42 U.S.C. § 671(a)(15)(B), (C).

<sup>72</sup> The Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115.

<sup>73</sup> 42 U.S.C. § 675(5)(C).

<sup>74</sup> 42 U.S.C. § 671(a)(15)(E)(i).

<sup>75</sup> See Chapter 25, Establishing Legal Permanence for the Child.

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Therefore, the use of independent living as a permanency plan should be rare. All youth, however, can benefit from and are entitled to skill-building services that will help prepare them for a successful transition to adulthood. Such services can include independent living skills, post-secondary education, employment, and other supports. These services can occur concurrently with permanency planning and should not replace efforts to seek a family-based permanent connection for each youth.<sup>76</sup> It is important that permanency plans be made thoughtfully, based on an individualized assessment of the particular child's needs and family circumstances, rather than on generalized philosophical positions. The agency must propose a permanency plan and engage the parents and youth in the development of the plan.

Under special circumstances, the courts are allowed to extend foster care for an additional period to continue reunification efforts. This is particularly likely when there have been defects in the services offered by the agency. For example, the agency may not have been diligent in obtaining appropriate services, or long waiting lists may have precluded a parent from participating in a service identified in the case plan, despite the parent's best efforts. If the parent has been diligent in participating in the case plan and is making good progress but is not yet ready to assume custody of the child, and if reunification is in the child's best interests, the court may continue the child in foster care.

A court may choose from among several permanency options for the child. In 2008 285,000 children exited foster care in the following ways:

<b>Outcomes for Children Exiting Foster Care</b>	<b>Percentage</b>	<b>(number)</b>
Reunification with Parent/Primary Caretaker	52%	(148,340)
Living with Other Relative(s)	8%	(23,944)
Adoption	19%	(54,284)
Guardianship	7%	(19,941)
Emancipation	10%	(29,516)
Transfer to Another Agency	2%	(5,195)
Runaway	1%	(3,324)
Death of Child <sup>77</sup>	less than 1%	(456) <sup>78</sup>

If the parents are successful with the court-ordered treatment plan, the child is reunited with his or her parents, and the case is closed. Many states are beginning to offer post-reunification services to support the success and stability of the reunified family, and attorneys for children should advocate for such services when available.

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<sup>76</sup> See Chapter 23, Foster Youth: Transitioning from Foster Care into Self-Sufficient Adulthood.

<sup>77</sup> These deaths resulted from all causes, including accidental and natural. Only 18 deaths resulted from abuse.

<sup>78</sup> U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *The AFCARS Report Preliminary FY 2008 Estimates as of October 2009*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm).

*In 2007, more than 52% (148,340) of children in out-of-home care were reunited with their families.<sup>79</sup>*

*However, other studies have noted that approximately 33% of children who are reunited with their families re-entered foster care within three years.<sup>80</sup> And, approximately 17% of children who entered foster care had been in foster care before.<sup>81</sup>*

## **§ 16.12 Termination of Parental Rights**

If a parent fails to comply with the reunification plan, the child welfare agency will petition the court to terminate the parent's rights to the child. At any point during the court process, a parent may seek to voluntarily relinquish his or her parental rights. When the parent's rights are terminated, a permanent plan for the child will be created.

Federal law requires states to initiate Termination of Parental Rights (TPR) proceedings for: (1) children who have been in foster care for 15 of the most recent 22 months; (2) infants determined to be abandoned; (3) cases in which a parent has killed another of his/her children; or (4) certain other egregious situations. States may opt not to initiate TPR if: (1) at the option of the State, the child is in a relative's care; (2) the child welfare agency has documented a compelling reason that TPR would not be in the child's best interest; or (3) the state has not provided necessary services to the family.<sup>82</sup>

*In FY 2008, the living parents of more than 75,000 children had their parental rights terminated.<sup>83</sup>*

As a matter of federal constitutional law, the petition must prove the grounds for termination by clear and convincing evidence.<sup>84</sup> Typically, the petitioner must also prove by a preponderance of the evidence that termination is in the best interests of the child. Even if the parent's actions or inactions constitute statutory grounds for termination, the child's circumstances may be such that maintaining the legal parent-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> U.S. Department of Health and Human Services, Administration for Children & Families, National Clearinghouse on Child Abuse and Neglect Information, *Foster Care National Statistics* (April 2001), (2000b).

<sup>82</sup> 42 U.S.C. § 675(1)(5)(E). In the case of an abandoned child, regulations require States to initiate TPR within 60 days of a court determination of abandonment and in the case of a child whose parent has been convicted of a felony specified in the law 60 days of a court determination that reasonable efforts to reunite are not required.

<sup>83</sup> U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *The AFCARS Report Preliminary FY 2008 Estimates as of October 2009*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm).

<sup>84</sup> *See Santosky v. Kramer*, 455 U.S. 745, 747-49 (1982).

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child relationship promotes the child's best interests. With the accelerated time lines provided by ASFA, agencies are moving more quickly to termination. For some children, however, termination does not result in the child having a permanent home. Some children will reach 18 and leave foster care without being reunited with their families, adopted, or placed in another permanent home. In these cases, the child welfare agency may provide basic living skills training, housing assistance, and educational and employment opportunities through federally funded independent living programs or extension of foster care to the age of 21 for the purpose of providing continuing services and continued efforts to achieve permanence.<sup>85</sup>

*In FY2008, approximately 29,516 youth left foster care when they reached the age of 18 (or 21, in some cases).*<sup>86</sup>

If the case falls within the federal Indian Child Welfare Act (ICWA),<sup>87</sup> then notice must also be provided to the child's Indian tribe or Native Alaskan Village.<sup>88</sup> The tribe or village may have the right to have the case transferred to tribal court.<sup>89</sup> If the case proceeds in state court, the tribe or village has the right to participate in the state proceeding.<sup>90</sup> The standard of proof, at least for the required ICWA findings, is proof beyond a reasonable doubt; this is true even when applied to the non-Indian parent of an Indian child.<sup>91</sup> ICWA also requires that certain findings be supported by expert testimony.<sup>92</sup>

### § 16.13 Post-Termination Review Hearings

When a child is not immediately adopted, so long as the court maintains jurisdiction over the child, review hearings will continue, even after termination of parental rights. Post-termination reviews are like regular review hearings, with some additional features. Family reunification is no longer a goal, but the court must still ensure that adequate services are provided to the child and that a realistic placement plan is aggressively pursued.<sup>93</sup> Continuation of sibling and other familial relationships may also be an appropriate part of the case plan. The Fostering Connections to

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<sup>85</sup> For further discussion see Chapter 23, Foster Youth: Transitioning from Foster Care into Self-Sufficient Adulthood.

<sup>86</sup> U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *The AFCARS Report Preliminary FY 2008 Estimates as of October 2009*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm).

<sup>87</sup> 25 U.S.C. §§ 1901–1963. For a more detailed discussion of ICWA, see Chapter 12.

<sup>88</sup> 25 U.S.C. § 1912(a) (2004).

<sup>89</sup> 25 U.S.C. § 1911(b) (2004).

<sup>90</sup> 25 U.S.C. § 1911(c) (2004).

<sup>91</sup> 25 U.S.C. § 1912(f) (2004).

<sup>92</sup> 25 U.S.C. § 1912(f) (2004).

<sup>93</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 94 (1995).

Success and Increasing Adoptions Act of 2008 (Pub. L. No. 110-351) added a new requirement that case plans also ensure the educational stability of the child.<sup>94</sup> Because the child is a “legal orphan,” having no legal parent, the court and agency or other legal guardian have a particularly important role to play in the child’s life, especially in preparing the child for transition to adulthood.

## **§ 16.14 Achieving Permanence for the Child**

Achieving safe, legal permanence for every child is a primary responsibility of the State, and the child’s journey is not complete until he or she as a safe, stable, loving, permanent family. Options for legal permanence for the child are discussed in Chapter 25, Establishing Legal Permanence for the Child.

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<sup>94</sup> 42 U.S.C. § 675(1)(G) (2008).