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Chapter 4

The Juvenile Court Process

Other than judges or attorneys, most people find court proceedings intimidating and confusing. Child protective services (CPS) caseworkers and families involved in juvenile court face the daunting task of understanding the court process, the roles of court personnel, the complex legal jargon, and the court's expectation of them. CPS caseworkers need to be competent in navigating the juvenile court process to achieve positive outcomes for children and families. This chapter discusses the juvenile court process and the responsibilities of child protection caseworkers, attorneys, and judges at each step of a family's involvement with the court.

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The Petition for Removal

Cases of any type begin with the filing of an initial pleading with a court. A child protection proceeding is initiated by filing a petition. The petition usually will be captioned "In re Jane Doe," meaning it is brought regarding her. The State or county is the petitioner and the parents, caretakers, or child may be referred to as respondents. They are not "defendants" and the petition does not "charge" them with child abuse or neglect. The petition contains the essential elements of the conduct that is alleged to be child maltreatment. It does not need to contain all the facts known to the petitioner, but should include enough to establish the court's jurisdiction.

The decision to file a child maltreatment petition is made by the CPS caseworker and supervisor, often in consultation with the agency's lawyer. Most States allow only CPS to initiate child protection proceedings, but some also permit other public officials or even private citizens to do so. It is a complex and difficult decision that requires assessing the risk of harm to the child and weighing it against the distress caused by removal. The decision to file should always be based on safety considerations and not on how likely it is that the case can or cannot be won in court. As a result, child maltreatment petitions tend to concern children who are exposed to serious threats to their safety.

The requirements for reasonable efforts have resulted in more attempts to "remove the harm and not the child" by effectively addressing maltreatment without going to court. These attempts include diverting families to community-based programs and services, such as residential mental health treatment, substance abuse treatment combined with the placement of the child with a relative, housing subsidies, child care, or financial support; in-home services ranging from intensive family preservation to periodic monitoring; and ordering violent or sexually abusive adults out of the child's home.

Another important factor that CPS caseworkers and others in the court process, including service providers, must keep in mind is the importance of learning and respecting the cultural traditions and strengths of the families in which they intervene. Every effort must be made, either through written materials in the native language of the parents and child or by using certified interpreters, to ensure that CPS and the parents understand each other.

Content of Petitions

Petitions, or "complaints," alleging child maltreatment should be prepared by lawyers with the information provided by CPS caseworkers. These facts need to be conveyed in a manner that clearly describes what the parent or parents did or failed to do and how it affected the child. Together, the lawyer and the caseworker should construct a real-life story by identifying the characters, by describing the setting and the events, and by relating their impact on the child or other participants.

In documenting cases, caseworkers need to be careful to state only the facts and not legal conclusions. For example, the caseworker should write, "On January 1, 2003, Joe Smith hit his son Jack Smith, age 7, on the arm with a baseball bat, breaking the boy's arm," instead of "the father physically abused his son."

Lawyers' opinions and practices vary widely regarding whether a petition should be detailed or should recite only the facts essential to establishing jurisdiction. (See [Chapter 2, *The Court System and Child Protection*](#), regarding jurisdiction.) The length of the petition also will vary depending on the complexity of a particular case and on local practice. Long petitions may be a useful guide for gathering and presenting evidence at trial. Care must be taken not to include any allegation in a petition that cannot be proven by evidence in court. Whether short or long, the petition must contain allegations of fact to support every element of the particular claim asserted. Otherwise, the court will dismiss the petition.

Filing and Serving Petitions

The CPS caseworker or attorneys representing CPS typically are responsible for delivering new petitions to the clerk of the juvenile court for filing. The clerk will file the case and give it a docket number and an initial hearing date. The caseworker should request a stamped copy of the petition.

Once a petition is filed, it needs to be served on the respondents. Serving a petition generally is accomplished by personally delivering to each respondent the petition, the summons, and the notice of hearing. Typically, the sheriff or another law enforcement officer is responsible for this act. In many States, service also can be made by registered or certified mail with a return receipt. In some communities, the papers may be served by the CPS caseworker. It can be difficult to serve persons whose whereabouts are unknown, so they will need to be served by following the State's alternative processes for providing notice of the petition, such as placing an ad in a newspaper. (See the section, "Termination of Parental Rights," later in this chapter for further discussion on this topic.)

Petitions and Removals

State and local practices regarding the filing of petitions, emergency removals, and prior authorization of removals by judicial officers are not governed by Federal law and vary widely between and within States. Ideally, no child should be removed from a family until after a petition is filed and the court has conducted a hearing at which the parents were present and had an opportunity to be heard. In reality, most removals are authorized by *ex parte* orders and the first hearing is conducted after the removal has occurred.

Petitions alleging maltreatment do not have to include a request that the child be removed. It sometimes may be useful to file a petition without asking for removal. An example would be a case in which maltreatment is substantiated and removal does not appear necessary, but the parents are resistant to CPS intervention. The court may be convinced to exercise its powers of persuasion, or even coercion, to promote parental cooperation.

Where *ex parte* removal is requested, judges have the option of denying the request or of scheduling an initial hearing at which the issue of placement can be considered more fully. In making the decision whether to grant the application *ex parte*, the judge will determine the risk of harm to the child if removal is not authorized and what efforts CPS has

made or could make to avoid removal or reduce the risk of harm.

When immediate removal of a child is dictated by emergency circumstances, a petition should be filed promptly and judicial approval for the removal obtained. The laws of some States set time limits for obtaining retroactive approval for the removal. Courts have procedures in place to ensure that CPS caseworkers have round-the-clock access to a judge with the expertise and authority to respond to requests for removal. If these procedures are not available or preferred by the court, a CPS caseworker needs to ensure that the timely filing of the petition occurs immediately after emergency removals.

In some jurisdictions, removals by police or CPS caseworkers are sometimes made without judicial authorization or any attempt to obtain it, even in nonemergencies. This practice was condemned by the U.S. Court of Appeals for the Second Circuit, which held that "[I]t is unconstitutional for State officials to effect a child's removal on an 'emergency' basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety."²¹ While this ruling may apply only to States within the Second Circuit, it reminds practitioners of the importance of obtaining judicial authorization whenever possible.

Continuances, Adjournments, Postponements, and Delays

Continuances (postponements of a date of a trial, hearing, or other court appearance to a later date) or adjournments (temporary postponements of the proceedings of a case until a specified future time) should be avoided, if at all possible. They waste court time and inconvenience the parties, CPS caseworkers, attorneys, Guardian ad Litem (GAL) or court-appointed special advocate (CASA) volunteers, and witnesses. Typically, the impact of these delays is felt most acutely by the children and families involved. Most importantly, they delay resolution of the case and permanency for the child.

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The Initial Hearing

The first event in court after the filing of a petition is the initial hearing, known also as the preliminary protective hearing, shelter care hearing, detention hearing, emergency removal hearing, or temporary custody hearing. It occurs soon after the filing of the petition or the removal of the child from the home. The precise deadline for this hearing depends on State law. Ideally, it should occur on the first day following the filing of the petition, upon removal of the child, or as soon as possible thereafter.

The initial hearing is the most critical stage in the child abuse and neglect court process. Many important decisions are made and actions taken that chart the course for the remainder of the proceeding. At this hearing, the relationships between those involved in the process also are established, and the tone is set for their ongoing interactions. Too often, these hearings are brief and perfunctory, but to the extent that sufficient time is devoted to them to address the relevant issues thoroughly, initial hearings facilitate and expedite the resolution of the case.²² From a caseworker's perspective, being ill-prepared, having incomplete information, or having a judge unfamiliar with family court proceedings typically lead to a poor initial hearing. Having thorough documentation, service plans, and an established positive relationship with the judge frequently lead to a good initial hearing.

The main purpose of the initial hearing is to determine whether the child should be placed in substitute care or remain with or be returned to the parents pending further proceedings. The critical issue is whether in-home services or other measures can be put in place to ensure the child's safety.

For information about the appropriate lengths for hearings in the juvenile court process, refer to the National Council of Juvenile and Family Court Judges' *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, and *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* at <http://www.ncjfcj.org/content/view/full/82/146/>.

Parties To Be Present at Initial Hearings

Both parents, including any putative father, need to be notified of the hearing and be present. Extended family members who could become placement options also need to be identified as a part of this process. Issuing domestic violence protective, restraining, or similar orders directed to alleged abusers may be considered as an alternative to removing the child.

The child also should be present at the hearing unless it would be detrimental to the child's well-being. As an alternative, the judge may decide to meet with the child in chambers. Much can be learned from observing the interactions between a child and parent or other relatives, even in an artificial and stressful setting. In addition, the judge and others in the case who will not have ongoing contact with the child can meet, observe, and interact. This has the benefits of humanizing the process, emphasizing that the child is more than another name on another file, and underscoring that the child has real needs that require prompt resolution. Some courts welcome or even require a regularly updated photo of the child for the file.

Counsel should have been appointed for the parents at the time the petition was filed and should be present in advance of the hearing to talk with them and to prepare their presentation to the court. The GAL or CASA and any attorney for the child also should have been appointed and be prepared to proceed in advance of the initial hearing. Courts need to have policies and procedures in place to ensure that these appointments are made and that the initial hearing is scheduled and conducted expeditiously.

Issues Addressed at the Initial Hearing

In addition to assessing the child's safety and making a placement decision, the court must make a reasonable efforts determination. Many courts require the filing of a reasonable efforts affidavit detailing the efforts that were made. Whether it is required or not, CPS caseworkers should be prepared to inform the court, preferably in writing, of the efforts they made to avoid removal and placement of the child or to explain the difficult or unusual circumstances that precluded the need to make such efforts.²³ Guidance for reasonable efforts and safety requirements for foster care placements are laid out in the U.S. Code as part of the State plan requirements of Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)).

Other issues that need to be addressed at the initial hearing include:

- The verification of any immediate needs the child or parents may have and determination of how they can be met;
- The appointment of counsel for the parents and of a GAL, CASA, or attorney for the child, if not previously made;
- The determination of whether the Indian Child Welfare Act is applicable;
- The determination of paternity of any putative father;
- The assessment of the need for mental health, substance abuse, medical, or other diagnostic tests for the

parents and the child (sometimes these assessments cannot be initiated until after there has been an adjudication of child maltreatment);

- The identification and location of any absent parent or family member who is a potential placement option or source of emotional or financial support for the child or family;
- The resolution of child support;
- The provision of relevant records including criminal, medical, educational, and substance abuse or mental health treatment for parents and the child;
- The timing of visitation with parents and siblings if the child is placed outside the home;
- The appropriateness of the case for mediation if that service is available;
- The discovery (pretrial process that allows each party to obtain information relevant to the case from the other parties);
- The determination of the next court date.

The initial hearing should establish a supportive atmosphere in which parents are treated with dignity and respect. It is a process that should focus on understanding the problems the case presents and solving them as quickly as possible so the family can be reunited safely.

The judge also should explain to the parents:

- Their rights;
- The course that the case will take, including possible outcomes ranging from dismissal to termination of parental rights (TPR);
- The roles and responsibilities of each of the other participants;
- What will happen before the next hearing;
- The court's expectations of the parents.

The judge should promote a cooperative, problem-solving approach to resolving the case and control any conflict or hostility between the parties.²⁴ To the extent that the initial hearing may not conform to the process outlined above, CPS caseworkers are encouraged to do what they can to fill in the gaps for parents and to incorporate these approaches in their interactions with all participants. (See [Chapter 7, Going to Court](#), for a discussion of judges' expectations for CPS caseworkers and how to work effectively with others.)

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Pretrial Conferences

Some courts use pretrial conferences, also known as settlement conferences, in child maltreatment cases. These conferences are opportunities for the parents, their attorneys, and the child's advocates to discuss a settlement in the form of stipulated, or agreed to, facts that would make a trial unnecessary. In courts where there are no formal pretrial conferences, these settlement negotiations often occur among attorneys by phone or at the courtroom and as late as right before the scheduled adjudication. The judge may or may not participate, depending on the jurisdiction and the nature of the case, and some judges will initiate such negotiations themselves.

Negotiated settlements can save time and money for courts, attorneys, parents, witnesses, and CPS. They also may avoid the trauma and acrimony that often result from contested adjudications. Additionally, they can expedite the development and implementation of the case plan, the terms of which are frequently included in the settlement.

It is important, however, that provable allegations of significant child maltreatment not be negotiated away. CPS

caseworkers need to participate in settlement discussions to ensure that the terms of the stipulations accurately reflect the seriousness of the maltreatment. A stipulation that the child was neglected, for example, provides no information about what actually happened. To support the development of an appropriate case plan, the critical facts of a case need to be included in the stipulations. These facts also enable participants in future proceedings to know exactly what issues necessitated court action and to measure progress.

Settlement discussions should include the child's advocates. The advocates and the CPS caseworker should ensure that the child's safety and needs are reflected in the settlement. The court should require the recommendations of the child's GAL or CASA before it approves the agreement. Parents must not be coerced or be enticed to admit facts that they deny. Before accepting any settlement, the court must ask that the parents be certain that they have entered into the agreement freely and voluntarily and with a full understanding of the potential consequences and rights they have waived by doing so.

Mediation

An increasing number of juvenile courts across the country are using mediation and other nonadversarial dispute resolution methods, such as family group conferencing, to settle child maltreatment and TPR cases. The mediation process usually is called "dependency mediation" and is similar in many ways to settlement conferences, except that there is a skilled and trained mediator facilitating the discussion. Family group conferencing also utilizes a facilitator, but tries to involve the child's extended family more fully and encourages family members to craft their own plans for the support of the child and parent. When settlement conferences and mediation fail to produce agreement on the entire case, they nevertheless may produce agreement on some issues and at least shorten the time necessary for the adjudication.²⁵

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Discovery

Discovery is a pretrial process that allows each party to obtain information relevant to the case from the other parties. It is intended to avoid "trial by ambush," to narrow the contested issues, and to expedite settlement.

Discovery in child maltreatment cases usually involves the parents' and child's attorneys asking CPS for its records. In most States, they are entitled to those records. While details of the initial and investigative reports are revealed, the name of the reporter is not. CPS may not be able to look at certain records from other sources, such as mental health evaluations or substance abuse treatment records that carry their own confidentiality protections. Such records, however, usually can be obtained by other means. Records from a private practitioner may be obtained through a subpoena *duces tecum* (an order requiring a person to produce for the court specified documents or records). State agency records can be obtained by submitting a Freedom of Information Act request.

Other forms of discovery also are available in some States and jurisdictions. These include:

- Interrogatories or written questions that need to be answered under oath within a specified time frame;
- Requests for admissions that are deemed admitted if not denied under oath by a specific date;
- Depositions or transcribed oral examinations under oath.

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The Adjudication Hearing

If the case is not settled by agreement of the parties, it will go to adjudication. Once the petition is filed, the court schedules an adjudication hearing (also known as the "fact-finding hearing" or "jurisdictional hearing"). At the adjudication hearing, the court decides whether CPS can prove the allegations in its petition. The CPS attorney will present evidence through the testimony of the CPS caseworker, law enforcement officers, or other witnesses, including any experts. Documents such as medical records or photographs also may be entered into evidence. The attorneys for the parents and the child will have the right to question or to cross-examine the witnesses and to present evidence. The parents may testify, as may other family members or neighbors who have knowledge of the facts alleged in the petition or of the care the parents provided their children.

Parent Testimony

Because child maltreatment cases in juvenile court are civil as opposed to criminal, the parents do not enjoy the right against self-incrimination contained in the Fifth Amendment to the U.S. Constitution. Therefore, they can be called to testify by CPS, the other parent, or the GAL. They still can "take the Fifth," however, and refuse to testify on the grounds that their answers may incriminate them.

In a civil case, a refusal to testify can be weighed against the witness. This issue surfaces when a parent is charged with a crime arising from the same underlying facts as the child maltreatment case in juvenile court. Criminal prosecutions, particularly complex ones like child sexual abuse, usually are not resolved until after the adjudication of the child maltreatment case. Thus, a parent who is called to testify in a juvenile court maltreatment case and who is facing criminal charges may refuse to testify to avoid having her testimony used against her in the subsequent criminal prosecution. The parent's lawyer may not call her to testify for the same reason. In some courts, parents may be granted "immunity" whereby judges can order that the statements by the parents in juvenile court cannot be used against them in other court proceedings. For more on immunity, see [Chapter 2, *The Court System and Child Protection*](#).

Burden of Proof

CPS holds the burden of proof, and its attorney needs to present enough evidence to convince the judge that the maltreatment of the child alleged in the petition occurred. The burden of proof is either the greater weight (or preponderance) of the evidence or clear and convincing evidence, depending on the State. In determining whether the burden of proof has been met, the judge will take into account the quantity, quality, credibility, and convincing force of the evidence.

If the judge determines that CPS has met its burden, that determination justifies continuing CPS intervention and further court involvement. On the other hand, if the judge determines that the evidence presented by CPS fails to satisfy the burden of proof, the case will be dismissed, and CPS will have no authority to continue its involvement with the family without the family's consent.

Order

At the conclusion of an adjudication in favor of CPS (whether it is by agreement or after a contested hearing), the judge needs to enter an order finding specific facts regarding the child's maltreatment and the problems that must be resolved before the child can return home safely. Other issues to be addressed include whether CPS has made reasonable efforts to avoid placement or to achieve reunification, the child's placement, all incomplete or unresolved

issues from the initial hearing, and the disposition hearing date.

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The Disposition Hearing

At the disposition hearing, the court decides whether the child needs help from the court and, if so, what services will be ordered. For example, the court may enter an order that mandates counseling and rehabilitative services. The court also may enter orders providing for out-of-home placements or visitation schedules or for controlling the conduct of the parent. It also can order CPS to conduct follow-up visits with the family to ensure the child's protection. Essentially, the disposition hearing determines what will be required to resolve the problems that led to CPS intervention.

The rules of evidence are relaxed in disposition hearings, and they are generally less formal than adjudications, although witnesses sometimes testify and are cross-examined. While the disposition hearing is sometimes held on the same day as the adjudication hearing, the National Council of Juvenile and Family Court Judges recommends that the disposition hearing be separate and follow the adjudication within 30 days.²⁶

Court Report

CPS must prepare a disposition court report and present it to the court, the counsel for all parties, and any GAL or CASA at least 7 calendar days prior to the hearing or by the time specified in any local court rules. The court report should:

- Outline the history of CPS involvement with the child and family including identification of the current placement as well as all prior placements;
- Specify the reasonable efforts made to avoid placement and, if the child was placed, to achieve reunification;
- Identify and evaluate placement options;
- Update the status of any unresolved issues from the initial or adjudication hearings;
- Attach the case plan and any relevant evaluations, assessments, or reports (medical, psychological, psychiatric, developmental, or educational) related to the child or parents;
- Make other appropriate recommendations for court action.

The GAL or CASA also should prepare and distribute a court report in the same manner, addressing the same issues.

The Case Plan

Before the disposition hearing, CPS should confer with the parents and develop with them a case plan that identifies the problems that led to CPS involvement with the family and are specified in the adjudication order.²⁷ The case plan will state the goal for the child's permanent placement. When the goal is reunification, which it usually is at this stage of the proceedings, the case plan will:

- Identify the actions to be taken and the behavioral improvements to be achieved by the parents;
- Specify the services to be provided by CPS to support the parents in eliminating or in alleviating the identified problems;
- Set forth the time frame for completion of each component of the case plan;
- Articulate objective, measurable criteria for determining whether the necessary improvements have been

achieved;

- Identify any special needs of the child and the proposed strategies and services for addressing those needs.

If inadequacies in parenting must be addressed, the case plan should identify the specific problem behavior, spell out how the behavior must change, and suggest some way of determining whether the desired change has been accomplished. For example, if a parent disciplines a 6-month-old infant for continuing to cry after being told to stop, the desired change would be that the parent learns about developmentally appropriate behavior and can demonstrate reasonable expectations of behavior by a child of that age. The mere requirement that a parent complete a parenting course would not be sufficient because course completion does not necessarily result in improved parenting skills.

Case plans should be tailored to the facts and circumstances of each case. A template for the case plan is useful, but "boilerplate" statements of needs and services to meet those needs are not acceptable.

In some States, TPR is a dispositional option, used only in the most severe and unresolvable circumstances, such as when adoption is clearly the long-term plan for the child's placement. More commonly, a plan to pursue TPR and adoption will involve separate court proceedings.

In some States, the court must approve the case plan. In all States, the plan must be discussed and refined at the disposition hearing, and any disagreements regarding its terms must be resolved. The case plan is the blueprint for permanency.

The Placement Decision

Placement is the key issue at the disposition hearing. The child can be:

- Left with or returned to the parents, usually under CPS supervision;
- Kept in an existing placement;
- Moved to a new placement;
- Placed in substitute care for the first time if removal was not ordered previously.

The option that the court chooses will depend on the circumstances of the case, principally the risk of harm to the child in the home and the possibilities for reducing that risk to a safe level. The options for placement will depend on the needs of the child and include:

- Either or both parents;
- The extended family or kinship care;
- Foster care;
- A group home or institutional care.²⁸

As a part of its reasonable efforts inquiry, the court needs to scrutinize carefully any CPS recommendation that the child be placed outside the home. The caseworker making that recommendation always should be prepared to discuss why the child cannot be maintained safely in the home through the provision of in-home services, a restraining order prohibiting contact by the abusive parent, close supervision, or other means. If the recommendation is foster care, the caseworker also should be prepared to say why it is preferable to placement with any available family member.

Both CPS and the court should take care to ensure that the placement is supportive of the CPS plan for reunification of the child with the family and is otherwise appropriate to the needs of the child. Where feasible, sibling groups should be placed together. Ideally, the child's ethnic heritage, cultural identity, language, religion, or special diet, if

any, should be accommodated without causing any delay in the child's placement. The placement should be in close geographic proximity to the child's school, family, and any siblings who may be placed elsewhere, if possible.

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Review Hearings

Review hearings are the next stage of a continuing process that begins with the initial hearing and continues through adjudication and disposition. The review hearing is an opportunity to evaluate the progress that has been made toward completing the case plan and any court orders and to revise the plan as needed. If no progress has been made, and none seems likely, it is a chance to change the goal of the plan completely. Review hearings should guide the case to permanency for the child. Unless a permanent placement is accomplished on or before the date of the permanency hearing, the court must continue to review the case periodically.

Review Hearing Report

CPS caseworkers must prepare a court report for each review hearing that includes or is accompanied by a reasonable efforts affidavit detailing what has been done to achieve the permanency plan. Like the disposition report, the report should be delivered to the court, the counsel for all parties, and any GAL or CASA at least 7 calendar days prior to the hearing or by the time specified in any local court rules. The GAL or CASA also needs to prepare and distribute a court report in the same manner. The court report should update the disposition hearing report and also should include:

- Whether the case plan is on target;
- Whether the child's physical, emotional, and mental health needs are being met;
- Whether progress has been made toward achieving the case plan's objectives;
- What reasonable efforts were made to achieve reunification;
- Whether the child should be returned home and, if not, why;
- What remains to be accomplished before reunification can occur;
- What timetable has been established for returning the child home;
- Whether and how the case plan should be modified.

These inquiries are the essential issues to be addressed at the review hearing. The court also should consider any lingering issues from previous hearings or orders; modify child support, visitation, and other matters as needed; and set the date for the next hearing, if one is necessary.

Timing of Review Hearings

Federal law, through Title IV-E of the Social Security Act (42 U.S.C. 675(5)(B)), requires that States make provision for cases to be reviewed at least every 6 months after the child is placed in substitute care. Many States' laws also require court reviews, sometimes more frequently than Federal law dictates. The review requirement of the Adoption Assistance and Child Welfare Act (P.L. 96-272) also can be satisfied by internal CPS teams or citizen review boards.

The National Council of Juvenile and Family Court Judges encourages judges to schedule reviews more frequently than the law requires.²⁹ They may do so to expedite resolution of the case, to address an unresolved issue, to monitor parent or agency compliance with a court directive, or to respond to a party's motion. These extra reviews

can be burdensome to the CPS caseworker and other participants, but they also can aid in moving the case toward resolution more quickly. CPS caseworkers who establish a reputation for making diligent efforts to implement case plans, for supporting the parents and child, and for pursuing permanency expeditiously will earn the trust and confidence of the judge. For these caseworkers, additional reviews are less likely to be scheduled. For more information on this topic, see [Appendix D, Guidelines for Child Protective Services Caseworkers for Permanency and Review Hearings](#).

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The Permanency Hearing

Review hearings are intended primarily to monitor compliance with the case plan, adjust the plan as necessary, and ensure that the case is progressing toward resolution. The permanency hearing is fundamentally different as it is the point at which a definitive decision is made about the child's permanent placement. ASFA requires that the permanency hearing occur no later than 12 months from the date the child is considered to have entered foster care.³⁰

The Placement Decision

The options for permanent placement include:

- Returning the child home;
- Returning the child home by a specific date (no more than 3 months later), provided the court finds from the evidence that the parents are making significant progress toward completing the case plan;
- Terminating parental rights, if necessary, and permitting adoption by a relative, foster parent, or other nonrelative;
- Granting legal guardianship;
- Permanently placing the child with a relative, foster parent, or other nonrelative;
- Providing another specified permanent living arrangement if the court documents and finds that there is a compelling reason why it would not be in the best interests of the child to proceed with one of the other options.³¹

In making the determination about the permanent placement of the child, the court must weigh which option is in the child's best interest.³² In some cases, concurrent planning may be pursued. Under concurrent planning, an alternative, permanent placement is developed at the same time as family reunification is attempted. With this approach, the child can be moved quickly to a stable home if reunification with the birth family cannot take place.

Permanency Hearing Reports

To prevent miscommunication between the agencies and the courts, CPS caseworkers should submit a detailed report to the court discussing the preferred permanent placement option, the reasons for that preference, and each of the potential alternatives. This report should be distributed at least 7 calendar days in advance of the permanency hearing and in the same manner and to the same people as the disposition and review hearing reports. The report should be accompanied by a reasonable efforts report in affidavit form to aid the court in its reasonable efforts determination.

Timing of Permanency Hearings

In some cases, the permanency hearing is the last stage of child maltreatment litigation. It determines whether the final plan will be to reunite the child and parent or to pursue an alternative, permanent home. It is a more formal hearing than reviews. If it is contested, witnesses may be called to testify and to be cross-examined. Some cases, however, may never have a permanency hearing because the children are reunited with their families after brief stays in foster care, while other cases proceed directly to the TPR hearing.

The permanency hearing usually is held after 1 year. However, if it becomes readily apparent earlier that a reunification plan will not be successful, the permanency hearing should be scheduled as soon as possible.

As presented in [Exhibit 4-1](#), ASFA specifies circumstances under which reunification should not be the goal and in which reasonable efforts to reunify are, therefore, not necessary. ASFA also allows States to specify additional aggravated circumstances.³⁴ The agency's lawyers should ensure that CPS caseworkers are aware of what those are in their respective States. Whenever the court finds aggravated circumstances, ASFA requires that a permanency hearing be held within 30 days.

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Termination of Parental Rights

The 14th Amendment to the U.S. Constitution protects the fundamental liberty interest of natural parents in the care, custody, and management of their children. This protection does not disappear simply because they have not been model parents or have lost custody of a child temporarily.³⁵ Because the stakes are so high, TPR hearings are the most formal, longest, and frequently appealed of all child maltreatment proceedings. TPR hearings also may be called "permanent commitment," "severance," or "guardianship with the power to consent to adoption."

Exhibit 4-1 **Circumstances Under Which Reunification Is Not Attempted**

ASFA provides that under some circumstances reunification should not be the goal:

- A parent has aided, attempted, conspired, solicited, or committed the murder or voluntary manslaughter of another of his or her children;
- A parent has committed a felony assault resulting in serious bodily injury to the child or another of the parent's children;
- A final decision is being made regarding an involuntary TPR to a sibling;
- Other circumstances under which efforts to preserve or to reunify the family are inconsistent with the child's permanency plan, which holds the child's health and safety as paramount.³³

Grounds for Termination of Parental Rights

The grounds for TPR are specified in the statutes of each State, and CPS caseworkers are advised to familiarize themselves with these. ASFA requires that filing for TPR must be instituted when:

- A child of any age has been in foster care for 15 of the most recent 22 months, unless exceptions apply;
- The child is an abandoned infant;
- The parent has committed, aided, or attempted the murder or voluntary manslaughter of a sibling of the child;

- The parent has committed a felony assault resulting in serious bodily injury to the child or a sibling of the child.

Most TPR proceedings arising from child abuse and neglect are initiated by CPS, but in some States, the GAL also can petition on the child's behalf for TPR. ASFA requires that if anyone other than CPS files for TPR, CPS must join in the action.³⁶

Ending the Legal Rights and Responsibilities of Parents

Biological parents whose parental rights are terminated as a result of child maltreatment have no right to have contact with the child, knowledge of the child's whereabouts, pictures, or information regarding the child. In addition to losing legal rights to the child, parents whose rights have been terminated generally have no further responsibilities to the child, except to pay child support that is past due. Because of the seriousness and finality of the consequences, TPR has been called the "death penalty" of family law.

There are exceptions. Children who are old enough to remember and to know how to contact their parents may choose to do so. Some children are never adopted and remain in foster care; others are returned to foster care because of a disrupted adoption or because they were abused or neglected by an adoptive or other surrogate parent. In these situations, the original parents may be the best placement option if their circumstances have improved to the point that they pose less risk of harm to the children and if the children are older and better able to protect themselves.

Termination of Parental Rights Petitions and Service

Drafted by the CPS attorney, TPR petitions will allege facts that, if proven, would satisfy the grounds for termination in State law. In many States, TPR is a separate action from the child maltreatment case and sometimes must be filed in a different court. When it is a separate action, the complaint or petition and summons should be served on each of the parents.

Every effort should be made to locate both parents and to serve them personally. The burden of locating parents likely will fall on the CPS caseworker, which can be a difficult and time-consuming process, particularly if one or both parents has disappeared while the child maltreatment proceeding was pending or if one of the parents was never located and served at the start of that case.

Each State has a process for providing notice to the parents, or "constructive service," if a parent cannot be located after diligent efforts. Constructive service can be posting a notice in a legal newspaper or in the courthouse. Although it almost never results in actual notice, it takes time and may involve some expense. One option is to access the Federal Parent Locator Service (FPLS) of the local Federal Child Support Office.³⁷ (For more information on FPLS, see [Chapter 6, Domestic Relations Cases and Other Court Proceedings](#).) Other sources that may yield results are State Department of Motor Vehicles records, State and local prison system records, phone directories, and various online search engines. Agencies are encouraged to develop a routine practice for completing this process, including using form affidavits to document their efforts.

Failure to make legally sufficient service can become grounds for dismissal of the termination petition or for reversal on appeal and consequently can disrupt the child's placement. In States where TPR is a dispositional alternative, service is a less complicated process, provided that each parent was served with the petition in the underlying child maltreatment action. It may be sufficient to mail the notice to the respondent's last known address. Notice of the proceeding and its time and location still should be served, but the process is less formal and technical.

Termination of Parental Rights Trials

TPR cases rely heavily on what happened in the underlying child abuse and neglect cases. In some States, some of the findings of the court in child abuse or neglect cases may be admissible as evidence to prove aspects of the termination case.³⁸ Most importantly, a trial will focus on what the parents did or did not do since CPS became involved and on what CPS did to support the parents' efforts to regain custody of the child. There are appellate laws in almost every State related to TPR cases, and reversals and remands for retrial frequently are based on perceived CPS shortcomings. Caseworkers who anticipate testifying in TPR trials need to be thoroughly familiar with the history of the case, including the details of everything CPS offered to do or did for the parents and how the parents responded.

TPR cases take longer than other child maltreatment proceedings, but predicting how long is largely guesswork. Scheduling and concluding them, therefore, is a chronic problem in most courts. Frequently, they are tried piecemeal for a few hours or half days at a time. Each rescheduling of successive sessions of the trial requires finding a date and time that is satisfactory for all essential participants. Such an approach often delays conclusion of the case and permanency for the child for months. Some courts have addressed this problem by establishing "long cause" calendars for cases that do not fit into the normal, relatively short scheduling blocks of the juvenile court. Others courts may set aside large blocks of time on future calendars in anticipation of having protracted TPR trials. CPS can urge courts to adopt these or other scheduling practices that permit termination cases to be tried from beginning to end on consecutive days.

Mediation

Mediation also can be an effective alternative to formal termination proceedings. In courts where it is an option, it often results in voluntary relinquishment of the child by the parents. Rather than focusing on parents' failures or inadequacies, mediation focuses on the child's needs and how they can best be met, and it offers parents an opportunity to make a self-sacrificing choice to give their child a safe and stable future. Most often, it is successful in States that allow "open adoptions" or "adoptions with contact" or that otherwise permit parents to receive information about their child, including letters and photographs, or even limited personal contact. Such agreements may not be enforceable depending on State law, but even where they are not, parents may choose to trust the good will of prospective adoptive parents, particularly if their identities are known, and commit to honoring a continuing contact agreement.

Burden of Proof and Best Interest Issues

TPR usually involves two issues. First, CPS must prove by "clear and convincing evidence" that one or more of the grounds for termination exist.³⁹ Note that this is a higher burden of proof than is required in many States to prove child abuse and neglect. The "clear and convincing evidence" is also a higher burden of proof for TPR than what existed prior to the *Santosky v. Kramer* decision upholding due process under the 14th Amendment. In this case, the Supreme Court found that a "fair preponderance of evidence" is not sufficient to terminate parental rights, and that "before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."⁴⁰

If the court finds that CPS has met the burden of proof with respect to at least one ground for termination, it will proceed to the second issue-whether termination is in the best interest of the child. CPS can enhance the prospects for a favorable decision by preparing a report weighing the pros and cons of termination from the child's point of view and by being prepared to testify regarding the best interest issue. The prospect of a safe, stable, and permanent home

is a strong selling point when contrasted with the likelihood that the child cannot return home safely within any reasonable period of time.

Some courts insist on a showing of adoptability before termination will be ordered, although the basic goal and premise of ASFA is that all children are adoptable. It obviously is more difficult to find adoptive homes for some children than for others, but if children are not "cleared for adoption," meaning that their parents' rights have not been terminated, adoption agencies may not actively pursue adoptive placements. If agencies cannot place them, they will not be adopted.

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Adoptions

Children placed for adoption by CPS are entitled to a timely placement with an adoptive family. When parents' rights have been terminated, their child's involvement with juvenile court does not end at the TPR hearing. CPS caseworkers should continue to participate in post-hearing activities to ensure that CPS is complying with ASFA requirements, incorporating Federal adoption legislation into practice, and accessing a variety of adoption subsidies and post-adoption services for eligible children.

Post-termination Reviews

Many post-termination reviews, or post-permanency hearings, will focus on whether CPS has made reasonable efforts to recruit an adoptive placement. The reasonable efforts inquiry might question whether the agency has an effective recruitment program for adoptive parents and whether its adoption program is adequately and expertly staffed, knowledgeable about subsidies and interstate placements, and able to provide appropriate post-adoption services. In cases involving special needs children, CPS may be asked whether it is utilizing the specialized agencies that serve these populations. Caseworkers will want to be prepared to respond to such inquiries.

The Multi-Ethnic Placement Act

Another issue that may arise at hearings to review efforts to place children available for adoption is whether the agency is complying with the Multi-Ethnic Placement Act (MEPA) of 1994, as amended by the Inter-Ethnic Adoption Provisions of 1996, laws that prohibit discrimination in foster care and adoption. These acts provide that States may not "...deny to any person the opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the person or of the child involved; or...delay or deny the placement of a child for adoption or into foster care on the basis of the race, color or national origin of the adoptive or foster parent or the child involved...."⁴¹

MEPA primarily addresses considerations in finding out-of-home placements. During court proceedings regarding placements, the judge may ask about compliance with this and other pertinent laws, particularly if there is an aggrieved party contesting the placement. Therefore, caseworkers must be prepared to document compliance so it can be submitted in the court documents. MEPA also requires that special efforts be made to recruit minority foster and adoptive homes.

The Interstate Compact on Adoption and Medical Assistance

The Interstate Compact on Adoption and Medical Assistance (ICAMA) addresses medical and other post-adoption

services, as well as payment for those services, for the ongoing needs of children who are adopted across State lines. Not all States are signatories to ICAMA. Those that are have a designated ICAMA administrator who can be an invaluable source of assistance to caseworkers in ensuring post-adoption services for children placed across State lines.

ICAMA is important since ASFA requires State child welfare plans to:

- Specify that the State will not deny or delay the placement of a child for adoption when an approved family is available outside of the court jurisdiction that has the responsibility for handling the case of the child;
- Contain assurances that the State will develop plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children.⁴²

Interstate placements also need to comply with the Interstate Compact on the Placement of Children. (See [Chapter 3, *The Interplay Between Child Maltreatment Legislation and Caseworker Practice*](#), for more information.) Again, the caseworker needs to provide full documentation for court records that ICAMA was adhered to before the adoption or placement is legalized; otherwise, the home State may not pay for this assistance.

Adoption Assistance Subsidies

Parents adopting children who are "IV-E eligible" are entitled to receive a subsidy. According to amendments to the Social Security Act, a child is IV-E eligible if the family from which the child was removed was eligible for Aid to Families with Dependent Children, as the program existed on July 16, 1996, and the child is classified as having "special needs." (See below for more information about special needs. A child classified as having special needs also is IV-E eligible if receiving Supplemental Security Income (42 U.S.C. 673(2)).⁴³

Special needs are defined differently by each State and may include:

- A sibling group of two or more;
- An ethnic background that is non-Caucasian;
- Any child age 6 or older;
- A documented physical, mental, or developmental disability or disorder, or an emotional disturbance or behavior problem;
- An identified or reasonably identifiable risk of developing a physical or developmental disability, mental disability or disorder, emotional disturbance, or behavioral problem that is related to the child's history of abuse or neglect, genetic factors, or other environmental traumas;
- Psychological attachment to the foster caregiver due to placement of at least 1 year, such that placement with another family would not be in the child's best interests.

Caseworkers will need to know and be able to apply the definition of special needs to children in their States. States have discretion to determine the amount of the subsidy, but it cannot be greater than the amount that a family would have received if the child was in foster care. They can pay more if the additional amount can be supported through State or local funding. The State can make subsidy payments to a family until the adopted child is 18, but can extend assistance to age 21 for children who are disabled physically or mentally. All special needs children who are IV-E eligible, and most who are not, also are eligible for Medicaid. States are required to provide the same subsidies for special needs children who are not IV-E eligible as they provide for those who are, except that for children who are not IV-E eligible:

- Eligibility can be limited based on family income;

- All funding must be from State or local sources.

Caseworkers need to be able to inform prospective adoptive parents of the financial assistance and medical insurance to which the child will be entitled. Additionally, the courts often will ask if the caseworkers are aware of all available assistance and whether it has been provided to the adoptive parents or special needs children. Therefore, caseworkers should document all efforts to help adoptive parents secure appropriate financial assistance and insurance.

Post-adoption Services

Adequate financial and health care support of children is critical to the ultimate success of an adoption. The same is true of post-adoption services, which may include providing information and referrals, parent training, education and support groups, individual and family counseling, respite care, and home-based or residential treatment services. The details of the financial support and other services adoptive parents will receive or have available to them must be put in writing, along with information about what they can do if their circumstances change or other unanticipated issues arise. The court will require documentation to ascertain that, in addition to receiving adoption assistance, provisions have been made for post-adoption services, as well as a follow-up schedule to ensure that the adoptive parents have received such services. This documentation is particularly important in cases where the adoption is disrupted. CPS caseworkers also will want to be prepared to respond to any inquiry from the court as to whether the subsidy and other post-adoption supports are sufficient to ensure reasonably that the adoption will be a permanent placement.

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Appeals

Parents and CPS have the right to appeal some decisions of the juvenile court in child abuse and neglect and TPR cases. At the very least, the right to appeal attaches at the conclusion of any adjudication, disposition, or TPR trial. Some States may allow appeal from other trial court orders or decisions, but generally, only final decisions are appealed or accepted for appellate review.

Appellate courts decide cases based on the written record, or a videotape in some locations, from the trial court. They examine the record and determine whether:

- The trial judge abused his or her discretion in finding the facts;
- The facts support the judge's conclusions of the law;
- The judge correctly applied the law to the facts.

Although the child is the subject of the litigation, the child is not a "party" and, depending on the laws of that State, may not have an independent right to appeal. In States that have intermediate appellate courts, appeals most likely will be addressed to these courts. In other States, the appeal will be made directly to the State Supreme Court.

The appellate process often is extremely slow. Orders, transcripts, and appellate briefs need to be prepared, filed, and selected for submission to the appellate court. Appellate judges should confer, make a tentative decision, and identify one member to write the opinion. Negotiations over the decision can take considerable time in cases where there are significant differences of opinion. It is not uncommon for this process to take more than a year from the time of the trial court's decision until an appellate opinion is published. Meanwhile, the child, parents, and foster or adoptive parents are in limbo. Some State appellate courts have attempted to correct this problem by prioritizing the completion of cases.⁴⁴

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