

CHILD AND FAMILY LAW CLINIC DEPENDENCY HANDBOOK

**CHILD AND FAMILY LAW CLINIC
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INTRODUCTION TO THE CLINIC

Welcome to the Child and Family Law Clinic. You are about to engage in a unique and special learning experience -- one that will not only help you develop your skills as a lawyer but will also challenge you to engage in a journey of self-discovery.

What is the Child and Family Law Clinic?

The Child and Family Law Clinic is a working law office in which law students are the lawyers. The Arizona Supreme Court allows law students who have completed three semesters of law school to represent persons in court under appropriate supervision.¹ In the Clinic, students perform all aspects of that representation for our clients.

We also believe that law practice is inherently multi-disciplinary. No legal proceeding or contract negotiation or policy initiative is conducted in a law bubble. There are always substance or evidence or policy considerations that are outside the law. Lawyers regularly work with other professionals – accounting, medicine, engineering, chemistry, psychology . . . It's a pretty long list. Whether these other professionals are clients, collaborators, advisors or expert witnesses, you will need to develop your skills in working with other professionals in order to be a quality lawyer.

As our name suggests, our clients are mostly children who are involved in child abuse and neglect (dependency) cases in the Pima County Juvenile Court. Occasionally, we are asked by the Juvenile Court to represent parents as well -- usually teen parents. And, once in a while, we are asked by the Superior Court to represent children in private custody disputes when there is an allegation of abuse or neglect. .

This semester, we may also interview and provide advice to adult victims of intimate partner violence. This Handbook is about Dependencies. If we represent victims of domestic violence, we will provide you all with other materials.

The Child and Family Law Clinic is assigned clients directly from the Courts. The Clinic has a contract with Pima County to provide legal services to children and to a few adults. In rare situations we might take a client on referral from another agency, but only where there is a unique learning opportunity.

What is the Student's Role in the Clinic?

The Child and Family Law Clinic is a live-client experience. By that, we mean that you will be working with real people who have real legal problems. The clients will be your clients and the cases will be your responsibility. We want you to make the key lawyer decisions, choices, strategies and implementations in your case. **We don't**

¹ **Rule 38, Arizona Rules of the Supreme Court.** There are a number of other conditions that apply including internal law school requirements.

want you to be the assistant to a more experienced lawyer; we want you to be the lawyer.

Representing clients for the first time can be heady stuff. For some, it may be exhilarating. For others, it may be frightening or unsettling. For some, it may be both at the same time. We offer no predictions for you. We do, however, know that one of the best ways to learn professionalism and good lawyer judgment is to practice them in a setting that is designed for and focused on your learning.

That does not mean that you will be swimming alone. Quite the contrary, the Clinic faculty and staff will be there with you to help prepare you, guide you, and offer constructive feedback. We are a collaborative law office where all of us work together for the benefit of our clients and for the professional development of our students and ourselves. The bottom line, however, is that the final lawyer decisions are yours.

What makes the Clinic different from other courses?

First and foremost, your work is not theoretical or doctrinal. It is practical and experiential. That does not mean that doctrine and theory are unimportant. In fact, the opposite is true. We expect you to draw on all of your previous work in law school and apply it in action on behalf of your clients.

One of the more exciting aspects of the Clinic is that it introduces you directly to the lawyer-client relationship. You will represent clients and they will rely on you to represent them well. Experiencing this reliance is the best way to appreciate the implications of the role of a lawyer, the foundations of professional responsibility, and the core values of the profession. You will need to draw on your previous law school experience, your life experience, and your common sense to perform tasks well.

When someone is relying on you, you may face difficult strategic choices. Sometimes you may face ethical or moral dilemmas. Your faculty supervisor and your other clinical colleagues will help you make those choices for yourself.

Thus, a second obvious difference between the Clinic and most of your previous courses is the relationship you will have with the faculty member who supervises you. Even if you have worked closely with an attorney in an outside job, you will find that there is a difference when the attorney with whom you are working makes what and how you learn a high priority.

A Clinic course puts you in regular, sometimes daily, contact with a faculty member. Much of the contact is spontaneous and informal. You may feel some awkwardness about this relationship. We expect that. Nevertheless, be assertive and take advantage of the Clinic faculty's presence. Clinic faculty are expected to be accessible to you, but it is up to you to initiate the informal contact.

Third, in the Clinic, we work collaboratively. Because we represent real people, we have to put their needs ahead of our egos. But isn't that the task of a lawyer in any

event? No ego means there is no embarrassment. There are no dumb questions -- only the questions we did not ask. We encourage a frank and honest exchange of views. Only then can our clients be guaranteed the best legal services that we can offer.



With those considerations in mind, the Child and Family Law Clinic has four main goals:

(1) Enhancing Lawyer Skills. Through practical experience in the field and in classroom simulations, we want you to develop your skills and learn a little about the law. You will have a chance to interview clients and witnesses; to investigate facts; to research the law; to write motions and court reports; to negotiate; and to stand up and advocate in a real courtroom.

(2) Learning how to learn from experience. In addition to cultivating lawyer skills, we want you to begin to master the lifelong skill of learning from experience -- not only about the law, but also about yourselves. We hope that we can help you help yourselves to become reflective lawyers -- that is lawyers who are not only highly skilled professionals, but who also care and think about the quality of the justice, ethics, and morality of the profession.

(3) Developing good lawyer judgment. In the process of (1) and (2) and drawing on lessons from all your other classes, we hope that your sense of lawyer judgment will develop and mature. By "lawyer judgment" we mean making the kinds of decisions -- both practical and ethical -- that lawyers are called upon to make regardless of their area of practice. We want you make decisions with a purpose and be true to the values of the profession and to your own moral compass.

(4) Delivering high quality, purposeful, legal services. Finally, we expect the Child and Family Law Clinic to provide the highest quality legal services to our clients. Our clients deserve nothing less.

How do these goals affect you?

One result of all this is that you have an opportunity to shape the agenda for your learning. A clinic is a more individualized learning experience than most other courses. As with most things, you will get out of this experience what you put into it. You play the primary role in establishing your working relationships within the Clinic. You have significant control over the content of the learning within the context of the issues and tasks presented by your cases. If you take the initiative, you can make this a great experience.



You have heard that in law school, you learn how to “think like a lawyer”. That is certainly one of the goals of this clinic. But a clinic experience is about more than thinking. We want you to explore how to **act** as a lawyer, how to make **decisions** as a lawyer, and how to **relate** to clients as a lawyer.

In the Clinic, you will discover that there are aspects to thinking like a lawyer that are not easily taught in other courses or contexts. When the decisions you make affect people’s lives, they are different from the decisions you make in a classroom discussion or while

writing a paper. The decisions lawyers make come with real world responsibility. Making a three foot putt in a tournament or playing an etude at a recital is a different experience than doing the exact same thing in practice. We hope you can embrace the notion that your decisions will matter.

Scary? Maybe a little. But we have all the confidence in the world that you are ready.

Becoming accomplished in your new lawyer role will require you do things you may never have done before, or, at least, require you to do them in a new context. For example, you may have negotiated over many things in the past, but now you may have to negotiate as an agent for your client, adding your special expertise as a lawyer. You may have explored legal analysis of a problem with many hypothetical variations in which the facts change each time. But here, you may have to discover and prove those facts. They may not be so visible and accessible.

Newness is ok. We want you to stretch yourself, to take on new experiences, to take a few risks. We want you to test yourself. And we also want you to recognize that it is just as important that you learn to put these individual experiences in a broad context that will make them useful and interesting over a long career. This will help you better appreciate the lessons of your other law school courses.

Good luck. Work hard. Challenge yourself. Learn a lot. Oh, remember this as well, have some fun while doing it.

ABOUT THE HANDBOOK

This handbook is an informal and somewhat unrefined reference work designed to be a starting point for some of the problems that you will encounter. The handbook contains chapters, training materials, and other materials gleaned (or stolen outright) from various child- advocacy and child-welfare sources.

While the handbook contains a wealth of materials, it is not designed to be an answer manual for all of your questions. Nor is the handbook the last word on any subject. The handbook will **NEVER** be a substitute for proper research. The handbook should be used as a starting point only. Nonetheless, we hope the handbook will be a useful tool in helping to get you started.

The Clinic handbook contains four types of materials. The first type sets out the basics of dependencies, severance, and guardianships. Included are statutory and case references. **Again, these articles are not ultimate truth, but should provide an overview. Always check out the *current* statute or rule. Laws change. Sometimes overnight – and without much fanfare.**

The second type of material provides a how-to commentary or practical background information about a particular aspect of a juvenile case.

The third type of material is an Appendix, which includes examples of minute entries, common pleadings, letters, and other documents with which you may come in contact. In the law library of nearly every law office, you will find some compilation of these documents in the “form drawer” or the “form file”.

Here are our thoughts about “forms”. Forms are provided for examples only. Forms are not a substitute for thinking. Remember, “form” is a four letter word beginning with “F” and we should always be careful of such words. Our examples are for guidance not for gospel. Never rely on someone else’s form or someone else’s words for content. Every letter or pleading you prepare should be the result of YOUR well planned thoughts for your particular task. One size rarely fits all.



Finally, we have included references to relevant statutes and rules throughout the Handbook. They are hyperlinked. Nevertheless, **remember, statutes get revised more quickly than the handbook. Check the pocket parts or on-line to make sure that your version is the current version.**

One final, final note: the handbook is always a work in progress. If you have any suggestions, additions, corrections, or proposed deletions, please feel free to talk to the Clinic Director. If you work on an interesting case and would like to add a form [oops, there we said it], pleading, or your own insight, please do not hesitate to come forward.

Getting Started

At first, the child protection system will seem to be a very confusing and cumbersome collection of courts, governmental agencies, and private entities -- both non-profit and for profit. There are a host of different players in the system with different titles and different roles. There is no shortage of agencies with a plethora of acronyms.² It will sometimes appear as if people in the system are speaking a foreign language - - at least as foreign as the language of lawyers must seem to the justice-consuming public.

Part of your job will be to learn the language of child protection just as you are learning the language of the law. You need to understand child-protection talk so that you can properly represent your clients with these agencies and in court. You also need to be able to translate for your clients so that they can make intelligent decisions in their own best interests. We hope this handbook will provide a healthy starting point.

The good news is that we have every confidence that you will master the terrain and the language of child protection. In many ways, the child protection community is peopled by a remarkable collection of individuals extremely dedicated to helping children. There is a lot to be learned from most of the people in the child-protective system. And most of them are more than happy to assist you in any way they can.

So, our first piece of advice is simple: Go slowly. Take your time and, above all, **ASK QUESTIONS**. If you don't understand something, ask about it. If you hear a new phrase or acronym, ask what it means. **One of the first steps in learning how to learn from experience is learning how to ask questions.**

You will be encountering some experiences that are new to you -- whether they are speaking in court, writing a motion or interviewing a child. It may seem like you are leaping off a cliff with no knowledge of how to fly. And while we want you to stretch yourselves, remember that you are not alone. Don't try to be the Lone Ranger. We are a team -- a team that includes your supervising attorney, your clinic partner, your social work intern, and the rest of the members of the Clinic.

Our second bit of advice is just as simple as the first. **Talk to each other. Don't be afraid to ask for help.** Share your problems and experiences with the other members of the Clinic team. Brainstorm with other Clinic students. Knock on your supervisor's door. Use what others have learned to help you to solve problems. Use the team.

Third, despite all the lawyer jokes, we know full well that lawyers have feelings, too. In the course of representing your clients, you will undoubtedly be exposed to some of the darker sides of life -- drug-abusing parents who don't seem to care about their children; angry or frightened children who don't seem to be able to negotiate the world

²A list of common acronyms is included in the Appendix

into which they have been thrust; agency personnel who don't seem to have the time, energy, or resources to do their jobs properly.

It is not easy to watch other people's difficulties -- particularly those of children. It will be especially frustrating to realize that, as a child's lawyer, you cannot fix everything. It may be even more difficult if your client's situation evokes something personal in you. It is perfectly normal to experience anger, frustration, or sadness at what you observe.

While we cannot tell you how to feel, we can tell you that it is important to recognize your feelings and to deal with the fact that they exist. Share them with others if you feel comfortable doing so; if you don't, keep a journal or diary. Whatever you do, try to be reflective about how the experience of representing children affects you.

Learning to reflect is one great and important step in learning how to learn from experience. It is central to what we are trying to accomplish in the Clinic.

RULE 38 (D) AND THE ROLE OF THE SUPERVISING ATTORNEY

As law students, you are allowed to practice law under Arizona Supreme Court rule 38(d). Under the rule, you are called a "**certified limited practice student**"³. [We didn't make that up]. Get used to the phrase "**certified limited practice student**" -- you'll be using it a lot and it is a mouthful. Go ahead. Try it out loud. In front of a mirror:

*"My name is _____. I am appearing as a **certified limited practice student** on behalf of _____."*

As a certified limited practice student, you will be given primary responsibility for your cases. You meet with your client. You gather information. You marshal evidence. You appear in court. You make the arguments. You do the negotiations. You make the decisions. These are **your** cases.

BUT, you are not alone. Your supervising attorney is there to help. Your supervising attorney will help you plan, will be with you in court, will review your legal writing, and will offer you feedback. It is the supervisor's role not only to assist you to perform your job well but to help you learn from your experiences in the Clinic.

You will also be practicing in an area of law that requires you to interact with human services agencies of all shapes and colors. **Take advantage of the offers of help.** Hopefully, you, your clinic partner, and your faculty supervisor will develop healthy, professional relationships. Don't be shy.

³ **Rule 38, AZ Rules of the Supreme Court.**

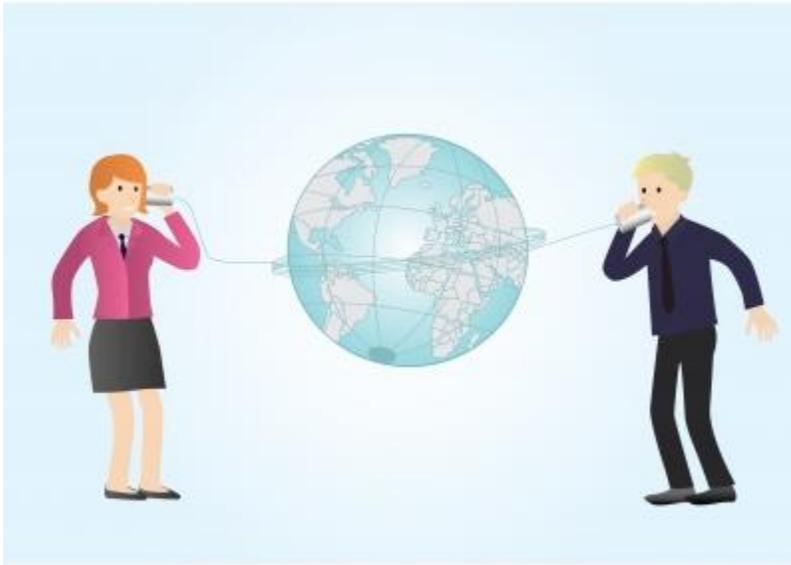
A small note of self interest. It is also your supervising attorney's law license that is on the line whenever you act as a certified limited practice student. Your supervising attorney has more than a passing interest in making sure that you are the best lawyer you can be for your client. Make sure that you keep your faculty supervisor well informed about what is happening in your cases so that the supervisor's ulcers will be kept in check. So:

- 1. Make sure that you meet regularly with you Faculty Supervisor.**
- 2. Check your mail box and email frequently for messages.**
- 3. Be in the Clinic during your office hours.**
- 4. Meet with your supervisor before and after all significant case events.**
- 5. Before you send something in writing (including email) out the door, show it to your faculty supervisor.**
- 6. Keep your files up to date.**
- 7. ASK QUESTIONS!!**

TEN RANDOM THOUGHTS ON GOOD LAWYERING

Before getting into the basics of dependency law, we thought we would share a couple of thoughts about being a lawyer in the Juvenile Court. We often say that being a lawyer in Juvenile Court is like being a lawyer in any other trial court -- except more so. Accordingly, the following thoughts apply to all courts, but apply especially in the Juvenile Court. These thoughts are in no special order but can be useful aphorisms to get you going in the Clinic and are somewhat reflective of our general philosophy.

1. Learn to Listen



Listening, really listening, is one of the most useful and important skills that a lawyer can develop. Listening means not just hearing the words but getting the actual and hidden meanings behind what someone else is saying. Listening takes concentration and can be hard work. But it is work that will be well rewarded.

Listening means getting to know the person with whom you are talking. This is especially true with child clients. Get to know them in the context of their own lives. Then you can really hear what they say.

Listening will help you understand what your clients really want. Listening will help you see where a Judge may be leaning. Listening will help you interview effectively. Listening will help you see if there is common ground for compromise. Listening is a skill -- like playing piano, swimming, or painting portraits. Like all skills, listening needs to be practiced and cultivated. Work at your listening skills. They will be well worth it.

2. Courtroom style is way overrated; clarity is not.

In Court, all other things being equal, the better prepared lawyer will get better results. The flashy lawyer, without quality preparation, doesn't get much of anything.

If you think about it for just a moment, it is easy to see that the Judge in Juvenile Court is far more concerned with making the correct decision about a child than in evaluating the performance of the lawyers -- you included. Whether or not a lawyer looks nervous or stutters or is not smooth takes a far distant second place to clear communication and making the right decision for a child.

So what helps Judges make the correct decision? Presenting all the relevant facts; answering all their questions; having presenting argument in a clear, lucid, and digestible fashion. It does not take Clarence Darrow to present a case in Juvenile Court. It does, however, take hard work and quality preparation.

That is why the Clinic has been successful for our clients. We work hard. We gather all the relevant information. We are on top of things. Our preparation helps us assist the Judge in seeing our client's point of view. Style points do not count; preparation does.

3. Judges are busy; make their jobs easier



Be concise. Keep it simple. Get to the point quickly. While style points don't count, it is still important to be a good communicator. We don't need to look flashy, but it is essential that we get our point across within the limited time allotted.

How do you do that? **Prepare, prepare, prepare.** Think about what you want to convey to the Court in advance -- and work on it. Don't assume that the Judge knows everything you know but make sure that you don't waste time on matters about which the Judge is fully informed. Put yourself in the Judge's shoes and ask yourself the following: "***What would help me make a better decision?***" Then, provide that.

4. Planning is everything; reflection is learning

Everything we do -- whether it is interviewing our clients, telephoning a case manager, talking to a doctor, or advocating in court -- will go much more productively if we plan before and reflect after. Be a purposeful lawyer. Try these four simple steps:

Step (1) Before undertaking any task, ask and answer the following question: **“What am I trying to accomplish?”** Then, define your actions and goals according to the answer.

Step (2) Review your plans and ask yourself: **“Will this help accomplish my goal?”** If you are still on track, go for it. If not, revise your plans.

Step (3) Once you’ve completed your task, ask yourself the following: **“Did I accomplish what I set out to do? Why or why not?”** File that answer under “Something useful that I learned today”. Don’t forget this step. This is where real learning takes place.

Step (4) After completing the first three steps, ask yourself the “big picture” question: **“What did I learn today that will help me as a person and as a lawyer?”** This step is where real insight takes place.

5. Do not underestimate the power of the written word

Getting information to a Judge in a form designed to communicate your position is one of the main tools of good lawyering. Advance written reports and motions can be extremely effective communication media. In Court, Judges have only a few moments to make decisions; there is little time for a Judge to ponder the finer points of the law.

Judges are fully aware that rushed decisions are never the best decisions. By offering quality written work in advance of the hearing, we give the Judge time to decide. The more time a Judge has to think through the correct decision, the more likely it is that the Judge will make that decision correctly. Likewise, the more time the Judge has to think about our arguments, the more likely the Judge will be to understand and accept them.

As a corollary, never underestimate the power of advance notice: Be heard first. A well written report, motion, or brief helps to focus the argument where you want it focused. Judges may not always accept what you want them to accept, but if you can get them thinking about it early, you have a better chance of being successful.

6. You cannot speak too slowly in Court

Speaking too quickly is like bad handwriting. It is an unnecessary obstacle. If your Judge cannot follow your argument, you will not have much impact. If you speak too quickly, it is a guarantee that your argument will not be followed.

In court, your adrenalin pumps. Your heart beats 1,000 times per minute. You lose your sense of time. Time seems move more quickly than it actually does. So take the time to take time. **Slow down. Take a deep breath. Pause.** No matter how slowly you think you are talking, talk even more slowly. Speak up. Slow down. Then you can be understood.

7. Write it down

Whenever you do anything on a case, write it down NOW. Make an immediate record and put it in the file. None of us can remember everything accurately. However, we are more likely to remember it if we make a contemporaneous record. As Stephen Wright says, *“Everyone has a photographic memory, some just don’t have film.”*

8. Return all phone calls promptly

Nothing irritates people more than not getting return phone calls. And little pleases more than a promptly returned phone call. The consequence of each choice is obvious.

9. Silence is golden



Keep your client’s secrets. Confidentiality goes to the heart of the lawyer-client relationship. That relationship is about trust. It is exciting to talk about your cases. But there is a client at the heart of every conversation who deserves his or her privacy.

10. Keep your client informed

We will often have a lot more information about our cases than our clients will have. If your clients are old enough or mature enough to understand what is going on, keep them as well informed as possible. It is, after all, their lives. They have a right to know what is happening around them. They also have the right to the information they need to make intelligent choices about their lives.

How many lawyers does it take to change a light bulb? None. Lawyers like to keep their clients in the dark.

10 1/2. Life is Short. Have Some Fun

A LITTLE BIT ABOUT CHILD PROTECTION

The legal protection of children is a relatively recent phenomenon. Historically, children were considered chattel. The State did not interfere with the manner in which parents raised their children in the same way that the State did not care how parents treated their furniture. The State's only involvement was in caring for orphans who had no relatives to care for them.

As late 1970, many states had no laws whatsoever dealing with child abuse. In cases of severe abuse, such as broken bone beatings or whippings, the states had to protect children under animal cruelty laws. Even into the early 1970's, most states' responses to child abuse were limited to criminal prosecutions of only the most serious cases.

In the early 1970's, two parallel trends began to emerge. Congress began to provide money to the states to investigate child abuse and neglect. In addition, Congress allocated money to help states remove abused and neglected children from their homes, care for those children in foster care, and provide remedial services to help reunify families.

Around the same time, many states passed laws creating a civil child protection system. Laws were enacted providing a mechanism for a state's response to allegations of abuse and neglect. Juvenile and Family Courts were established in recognition of the special expertise necessary to make complicated child-protection decisions.

In the last 25 years, the child protection system has grown enormously as societal attitudes about the role of government in protecting children have changed. Every state has a hotline through which citizens can telephone anonymously to report cases of abuse or neglect. Most states mandate that certain professionals such as doctors, nurses, teachers, and therapists report suspected cases of child abuse.

Over the years, concepts of abuse and neglect expanded to include more than severe beatings or the failure to feed children. They now include emotional neglect, chronic unsanitary conditions, and parental substance abuse. The bureaucracy necessary to administer this system has also expanded as literally thousands of children became wards of the state. The latest report shows nearly 16,000 children in foster care in Arizona alone.⁴

With the growth of the child-protection industry, controls were necessary to ensure that children had adequate protection from the bureaucracy as well as from their parents. Courts became more vigilant in monitoring the status of children in state care. Children, themselves, were assigned lawyers or guardians ad litem to look out for their interests.

While different states approach abuse or neglect differently, the Federal government maintains an enormous influence on the nature of child protection. In a later section, the handbook will look at the current role of Federal involvement in setting standards. Our first section deals with the basic concept of dependency.

⁴ **Child Welfare in Arizona Semi-Annual Report Update June 13, 2014, page 4.**

DEPENDENCY PROCEEDINGS

What is a dependency?

A dependency proceeding is a formal court process to determine if a child's well-being requires the state to intervene in the parent-child relationship.⁵ The proceeding determines whether or not the child is dependent on the state to provide parental care because of the parents' inability or unwillingness to provide proper and effective care and control.⁶ A child may be dependent on the state because the child has been abused or neglected or because the child is at risk for abuse or neglect in the imminent future.⁷

Dependency is a somewhat broader concept than abuse or neglect and does not necessarily imply that the parent is at fault or has committed some kind of wrongful act. For example a parent may be ill or under some disability and unable to care for a child. Thus, the focus of a dependency proceeding is on the capacity of the parent -- not just the parent's motives. There is really only one question: **Does the child have a parent who can provide minimally adequate parental care or does the state have to step in?** Thus, for example, a mentally retarded parent who would never harm a child or deliberately neglect a child might nevertheless be considered incapable of caring for a child faced with a life threatening disease which requires specialized training to monitor.

In other states, a dependency proceeding might be called a "child protective proceeding" or a "child abuse and neglect" proceeding. The distinction is important because the Arizona definition of dependency is significantly more inclusive than some traditional notions of child abuse and neglect.⁸

Dependency proceedings in Arizona are heard exclusively in the Juvenile Court.⁹

⁵ **ARS §§ 8-201(14); 8-801, et seq.** children are raised by their birth parents. **For our purposes, we will use the term "parent" to mean birth parent, adoptive parent, guardian or some other legal custodian. We will use the term "parent" to mean the person who is legally raising the child.**

⁶ **ARS § 8-201(14)**

⁷ Thus the State does not have to wait until the child is actually hurt to step in. If a parent is a demonstrable crack cocaine addict, for example, the state does not have to wait until that parent causes actual harm to the child in order to act.

⁸ Different states approach this problem in different ways. New York and Pennsylvania, for example, utilize the concept of "abused or neglected child" rather than the notion of dependency. The focus in those states is whether the child has been harmed or is in imminent danger of being harmed. There are some subtle advantages and disadvantages to the more parent-focused dependencies versus the more child-focused definitions of an abused or neglected child. The growing case law in both types of jurisdictions, however, appears to be making the distinctions nominal at best.

⁹ **ARS§8-202(B)**

While Juvenile Court is, technically, a part of the Superior Court, the Pima County Juvenile Court is housed in a separate building on Ajo Way near Kino Hospital (now called UMC South). Throughout the state, the Juvenile Court operates under a different set of rules and procedures than those used in other civil proceedings. Juvenile Court also has its own culture or way of doing things that is less formal and, in many ways, more innovative than that of other courts.

In theory, the Juvenile Court is not in the business of finding fault, assessing blame, or meting out punishment. Rather, the Juvenile Court is interested s in protecting the child from immediate harm and in providing the services necessary to help preserve the family. If efforts to help make the family functional do not succeed, then the Juvenile Court is empowered to find an alternative permanent and safe home for the child.¹⁰

We say that the Court is not about parental fault. That is certainly true under the law. However, the dependency process is a terrifically human. While the law may say otherwise, in actual practice fault, blame, shame, attitude, and a host of other technically irrelevant considerations play a huge role in determining what will or will not happen to a child in the court process. None of the participants -- including the Judges, case managers, therapists, and lawyers -- are immune from visceral reactions to parental behavior. That will, no doubt, include you as well.

Dependency proceedings are usually initiated by the State through the Arizona Department of Child Safety [DCS].¹¹ Up until this past May, the Department of Economic Security [DES] through Child Protective Services [DCS] handled child protection matters. Because of a variety of factors, the Governor and State Legislature abolished DCS and created the new agency, DCS.¹² If that isn't confusing enough, people have been calling the agency DCS for the last 30 years. It will be a hard habit to break. So, for the foreseeable future, CPS and DCS are acronyms that refer to the same folks. In Juvenile Court, DCS is represented by the Arizona Attorney General's Office [the AG].

In Arizona, a dependent child is a person less than 18 years old who is:

- (i) In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.
- (ii) Destitute or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or whose home is unfit by

¹⁰ **ARS §8-862**

¹¹ *Congratulations, you have now learned your first acronym!!* There are many more to come. Arizona law also provides that private individuals can initiate dependency proceedings (**ARS §8-841**).

¹² **<http://www.azcentral.com/ic/pdf/brewer-DCS-executive-order.pdf>**

reason of abuse, neglect, cruelty or depravity by a parent, a guardian, or any other person having custody or care of child.

(iii) A child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.¹³

Thus, dependencies include traditional concepts of abuse and neglect, such as excessive corporal punishment or failure to provide medical care. Dependencies may also include less clear-cut notions of “risk”. For example, a child might be “at risk” of neglect from a parent who -- although adequately caring for the child today -- is becoming increasingly dependent on drugs or alcohol and whose long term capabilities are in doubt. Similarly, a child might be at risk of long term psychological harm when the child has been exposed to domestic violence in the household -- even when the violence is not directed at the child.¹⁴

To some extent, dependency may also relate to the particular needs of the child rather than to the conduct of the parent. A dependency has been found where a child has cerebral palsy and the parent, while capable of providing care for a healthy child, had difficulty managing the child’s special needs.

One of the difficult aspects of practicing dependency law is that you will not find a further definition of “dependent child” in the statutes. Trial Courts rarely publish their decisions. And when decisions are appealed, the appellate courts grant broad discretion to Juvenile Court Judges. It is, therefore, imperative that a juvenile court lawyer get to know the lay of the land of the jurisdiction in which lawyer practices. Situations that may result in dependency adjudications in one venue may be dismissed as insufficient in others.

What does it mean when a child has been adjudicated dependent?

Essentially, it means that the State may intervene to provide protection to the child and/or services to the child and the family in order to try to remedy the problems that caused the dependency in the first place. In practical terms, a number of outcomes can result. The child could remain in the home or the child could be removed temporarily, for a long time, or in some cases, permanently.¹⁵

¹³ **ARS §8-201(14)**. The statute further defines a dependent child as one who is (a)(iii) Under the age of eight years and who is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child if committed by an older juvenile or child and (iv) Incompetent or not restorable to competency and who is alleged to have committed a serious offense as defined in §13-604.

¹⁴ See, Adrine, Donald B. and Alexandria M. Ruden, *Impact of Domestic Violence on Children*, OHIO DOMESTIC VIOLENCE LAW TREATISE, Ch. 14 (2000); and Ver Steegh, Nancy, *The Silent Victims: Children and Domestic Violence*, 26 WM.MITCHELL L.REV 775 (2000).

¹⁵ **ARS §8-821, §8-822, §8-845**

If the child stays at home, the case could remain monitored by the Juvenile Court for a time or dismissed outright. In either case, the State might provide services to support and strengthen the family.¹⁶ If the child is removed from the home, the child will be placed in **foster care** or with a relative.¹⁷ In addition, under court supervision, the State must develop an appropriate individualized **case plan** to ensure the child's health and safety and to attempt to reunify the family.¹⁸ The case plan should be designed to provide the assistance necessary to alleviate the problems that gave rise to the dependency in the first place. **In most instances, if the parent follows and completes the case plan, the child will be returned to the parent.**

Removing a child from his or her family is serious business. Even when removal is clearly warranted to protect the child's physical safety, being taken from home can have huge negative consequences for a child. Separation -- even from abusive parents -- is traumatic. In addition, the child may be separated from brothers and sisters, forced to change schools, isolated from friends and relatives, or placed in unfamiliar and often scary surroundings. For an infant child, separation may impede or even forever destroy the natural bonding and attachment process between parent and child.

Separation is no less difficult for a parent. In addition to the emotional shock of losing one's child, a parent may become ostracized by his or her family, stigmatized by neighbors, or may lose eligibility for child support, government subsidies and public housing. Further, in order to reunite with the children, a parent may be forced to navigate a child protective bureaucracy that is often confusing, contradictory, and speaks an alien language. Many times, completing a case plan is a task for which many sincere and well-meaning parents are ill equipped.

Thus, continued visitation, good communication, and an intelligent case plan are necessary to maximize the chances for successful reunification. The attorneys for the child, the parents, and the State play key roles in this process.

Of course, whether or not a child is adjudicated dependent is subject to full court process. Parents have significant rights to raise their children free from interference from the State. Parents have a right to Court review of temporary decisions as well as the right to a trial on the substantive allegations of dependency and on any proposed dispositions. That process will be discussed in later sections of this handbook.

¹⁶ **ARS §8-845, §8-846**

¹⁷ **ARS§8-821, §8-501**; Foster home is defined in **ARS §8-501** as a home maintained by any individual(s) having the care or control of minor children other than those related by blood or marriage. Foster homes are licensed and supervised by the state pursuant to **ARS §8-516**. Relative placement may be ordered by the court even if the relatives are not licensed foster placements. Relative placements may be eligible for state foster care payments. Even though the placement is with a relative --which potentially minimizes disruption of the child's life -- the court will require the relative to obey the court orders regarding such things as visitation between the parent and the child.

¹⁸ **ARS §8-846**

When a child is declared dependent and removed from the home, in nearly all cases, the State is obligated to make “**reasonable efforts**” to help reunify the family.¹⁹ These efforts may include supervised visits, transportation, psychological testing and counseling services, medical assistance, drug or alcohol monitoring and treatment, parental education, job training, housing subsidies, or any number of other services that would help put the family back together.²⁰

In many cases, parents and children are reunited with help from the Courts, the State and other family members. In other cases, things do not proceed so smoothly. The current reunification rate in Pima County is 49%. That means that about on half of all children removed from their homes are returned. The other half will face a different path.

In some situations, such as severe child sexual abuse or acute drug addiction, reunification is simply not a reasonable alternative. In others, for a variety of reasons, the parent or guardian will be unable to remedy the conditions that caused the dependency in the first instance within the time prescribed by law. The Court, then, is obliged to find a **permanent placement** for the child either through **adoption, permanent guardianship** with a relative or other appropriate person, or long term care consistent with the child’s best interests. Long term care is called “**Another Planned Permanent Living Arrangement**” or **APPLA**. **There is a decided preference for adoption or guardianship over long-term foster or relative care under Federal and State law.**

In any event, whether or not progress is being made towards reunification, if a child remains placed out of the parent’s home for **twelve months** [or for **six months** for a child under 3], the Juvenile Court must hold a **permanency hearing** to determine a long term plan for the child.²¹ At a permanency hearing, the Judge must choose among the possible permanent plans for the child. The permanent plan may involve returning the child; continued reunification services for an additional six months; discontinuing reunification services and placing the child in some other planned permanent arrangement [usually long-term foster care]; seeking a **permanent guardianship**; or seeking **permanent termination** of parental rights and freeing the child for adoption.²²

If, by the time of the permanency hearing, the parent is unable or unwilling to complete the case plan and/or is unable or unwilling to remedy the problems that caused the child’s removal, then the State may seek permanent termination of the parent’s rights. The Juvenile Court refers to a permanent termination of parental rights as a **severance**.²³

In a severance proceeding, the State must not only prove certain specified statutory **grounds** for termination, but also show that termination of parental rights is in the **child’s**

¹⁹ **ARS §8-846** [In other parts of the law the phrase “diligent and appropriate” efforts is used.](#)

[More on that later.](#)

²⁰ **ARS §8-846**

²¹ **ARS §8-861, §8-862**

²² **ARS §8-862**

²³ **ARS §8-531, et seq.**

best interests.²⁴ In most cases where the parent’s rights are terminated, the State will seek to place the child for adoption. In some cases, when reunification is not likely but when termination is not in the child’s best interests **and** someone (usually another family member) is willing to take permanent care of the child, the State may seek permanent guardianship with the relative.²⁵

In the next several sections, we will discuss the dependency process in more detail. The discussion will emphasize the critical role of the child’s attorney in helping to make the process work. While this manual is designed to focus on the practical aspects of Juvenile Court, keep in mind that there are a number of difficult philosophical and ideological themes that challenge all the participants in the process.

THE PLAYERS

There are a number of important players in the child protective system. You, as the child’s attorney, are one of the most important. Others include the Judge, the DCS Case Manager, the Attorney General, the parents, the parents’ attorneys, Court Appointed Special Advocates (CASA), Guardians Ad Litem, Court clerks, Court Reporters, court mediators, and a host of others. The following is a list of some of the participants and their roles. As you read through the handbook, feel free to come back and review this collection of people.

The Child

The child is the center of the whole process. The court has jurisdiction over children from birth until age 18. Because the child is a child, adults, sometimes, do not listen to the voice of that child. When the adults don’t listen, it is our job to make sure that the child and the child’s legal interests are heard by the people that need to listen.

The Parent

The parent is the birth parent and/or any other lawful custodian. The parent can be an adoptive parent, a legal guardian, a non-custodial parent, a grandparent or other relative under some circumstances. There may be many parents involved in one of our cases. For example, siblings might have a different father [or mother]. In most cases, the parent will be the legal parent [the birth or adoptive parent] and/or the person who was taking care of the child at the time DCS got involved if someone other than the birth or adoptive parent. Families come in all shapes and sizes.

The Judge

Pretty much everything in the child protective system revolves around the Juvenile Court Judge. Judges are charged with the ultimate responsibility for decisions concerning

²⁴ **ARS §8-533**

²⁵ **ARS §8-862B** and **§8-871, et seq.**

the lives of children who are before the court. There are no juries in the Juvenile Court.²⁶ The Judge is the final word on both the law and facts in every case.

There are two kinds of Judges in the Pima County Juvenile Court. There are Superior Court Judges who are appointed by the Governor for fixed terms. At the end of their term, they must stand for a retention election. A retention is an up or down vote by the electorate with no opposition candidate. There are also Commissioners who are appointed by the Presiding Judge of the Pima County Superior Court. Commissioners serve at the will of the Presiding Judge.

In Juvenile Court, both types of Judges have the **same responsibilities and powers** and are due the **same respect**. Any differences between Judges and Commissioners are internal to the Court and rarely affect us -- except that Judges get law clerks and often hire our students to fill those jobs. Exposure to Judges can be an unintended career perk for some of you.

The Judges are assigned to the Juvenile Court by the Chief Judge usually on a three- to five- year rotation. The Chief Judge controls the rotation and also appoints a presiding Judge who is in charge of the administrative operations of the Juvenile Court. Currently the presiding Judge of Juvenile Court is **Kathleen Quigley**. The other Judges and Commissioners are:

Hon. Lisa Abrams
Hon. Jane Butler
Hon. Michael Butler
Hon. Julia Connors
Hon. Geoffrey Ferlan
Hon. Richard Gordon
Hon. Susan Kettlewell
Hon. Jennifer Langford
Hon. Brendan Griffen
Hon. K.C. Stanford
Hon. Catherine Woods
Hon. Wayne Yehling

²⁶ There were jury trials for about three years in the early 2000's. Parents could request a jury trial for a petition to terminate parental rights. Apparently the only people who liked jury trials were some parents and clinical professors. (We thought it was cool to have you doing jury trials). So the Legislature went back to the Judge only system.

The Judges in the Juvenile Court work extremely hard. The Pima County Juvenile Court is nationally recognized as one of the more innovative, responsive and hard-working Juvenile Courts in the nation.

As you will quickly learn, a Judge's day is made up of non-stop hearings, with very little down time to prepare for the next case. As a result, Judges rely heavily on the participants to bring them up to speed. Traditionally, Judges have relied on written reports from DCS workers. But that does not always tell the whole story. (It is, after all, an adversary system). For that reason, we encourage you, as the child's attorney, to submit written reports to ensure that the Judge is as fully informed as possible about the child's interests and needs.

All of the Judges have Chambers in the Juvenile Court Building at 2225 E. Ajo Way, Tucson, AZ 85713. The main telephone number for the court is 740 -2000. The individual Judges' telephones are listed in the Blue pages of the phone book under Pima County Juvenile Court and on the Pima County Superior Court website.

<http://www.sc.pima.gov/?tabid=103>

Case Managers

The Child Protective Services workers assigned to each family are called Case Managers. There are two principal types of case managers: **investigating** workers and **on-going** case managers.

As their name suggests, the investigating workers are responsible for the initial response to an allegation of abuse or neglect. The investigating workers make a determination whether or not there is credible evidence to make an administrative finding of abuse or neglect. With help, they decide whether or not to remove a child from the parents. They prepare an initial report to the Juvenile Court, notifying parents of their rights, and develop and implement an initial **case map**²⁷.

Once the matter has been brought to the Court, the investigating worker is supplanted by the on-going case manager. The on-going worker is responsible for developing the long- term case plan, for setting up therapy or other services, for working with the parents to help them meet the case plan goals, and for communicating with the Court.

In addition, both the investigator and the on-going workers are responsible for providing **disclosure** to the other participants in the Juvenile Court process—that is, for making sure that the information gathered by DCS is made available to all the litigants. Disclosure might include reports of drug tests, police reports, reports of therapists, psychological evaluations, and other communications that are sent to DCS. Case Managers are grouped geographically throughout the County in various units. The addresses and

²⁷ A case map is a preliminary plan of reunification services.

phone numbers are listed in our course materials. You will also periodically receive e-mail attachments with updated names, addresses and phone numbers of DCS workers.

We receive most of our disclosure through our mail box at the Juvenile Court. Our mail box is in the attorney room as the far west side of the first floor. The boxes are alphabetical. We are under “Bennett/child and family”.

A note of caution: There are behaviors we cannot control. One is the knee-jerk insistence by some case managers to place our disclosures in the bin for the Office of Children’s Counsel (OCC). The Office of Children’s Counsel represents the vast majority of children in Juvenile Court – but not all of them. If there is something you are waiting for – and it is not in our box – check with someone from OCC to see if they received it by mistake. It happens way too often.

Two other notes of caution: DCS is represented in a dependency by the Office of the Attorney General. Since the case managers are the contact persons for DCS, they are technically “parties represented by counsel” in the dependency proceeding. As such, we are not allowed to communicate with them absent their attorney’s permission pursuant to Rule 4.2 of the AZ Rules of Professional Conduct.²⁸ Lately, the Attorney General’s Office has become less comfortable allowing us – or any other lawyer – to communicate directly with their client for anything other than the most minor pieces of information. For example, it’s probably ok to send an email asking for the date and time of a Child and Family Team meeting with a copy to the AG. It’s probably **not** ok to send an email asking the case manager to reconsider visitation supervision.

Thus, whenever you want to speak to a DCS employee, go through the Assistant Attorney General assigned to the case. It’s a pain but it is the best way to avoid Bar complaints. This also means that if you plan on attending a Child and Family Team meeting [CFT] or some other situation where DCS workers are present without their lawyer, **make sure that you notify the AAG, in advance, that you will be attending.**

Second, DCS is undergoing a severe budget crunch. They do not have enough case managers. They do not have enough resources to do their job as they would wish. That creates an extremely uncomfortable situation. The workers are overworked, underpaid, and cannot access the services they probably know would be most optimal. They have been instructed to be somewhat minimalistic in their approach. They often have to say “no” when they wish they could say “yes.”

We can and should be sympathetic with the difficult position of the individual case manager. Nonetheless, we have a job to do – making sure our kids are well cared for,

²⁸ “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

ER 4.2 is found within Rule 42 AZ Rules of the Supreme Court. In the remainder of the handbook, we will cite the ethical rules as ER ____.

getting the services they need. And that our client's goals – whatever they may be – have a fair chance of being reached. That puts us in an increasingly adversarial position with DCS.

Adversarial positions are not, however, best served by being needlessly confrontational or rude. We should always try working cooperatively when possible. Sometimes it is not possible and we need to resolve differences in court. But we should never be impolite or uncivil; nor should we make differences personal.

The Attorney General

In Arizona, the Office of the Attorney General represents the Department of Economic Security [DES] and its Division of Child Protective Services [DCS]. The AG's office prepares dependency petitions, severance motions, and other court pleadings. In addition, the AG's office advocates for DCS both in and out of court in the same manner as any other lawyer would advocate for any other client.

Over the years, we have developed a very positive working relationship with the AG's Office -- even though we often oppose each other's positions in court. One of the more remarkable aspects of the Juvenile Court is the way in which opposing counsel have recognized the critical importance of maintaining respect and communication for the mutual benefit of our clients and ourselves. We can be adversaries without being needlessly adversarial -- and never personal. With apologies to Ecclesiastes and the Byrds, there is a time for drawing lines in the sand but, more often, there is a time for honest efforts to seek mutually beneficial solutions.

The local AG's office is at 3939 South Park Avenue, Suite 180, Tucson, AZ 85714. Their phone number is 294-6655.

Parent's Attorneys

Each parent in a dependency proceeding is entitled to and receives separate counsel. Often, at first blush, both parents look like they have identical legal interests. After all, they have been raising the child together. However, the potential for conflicts of interest is always present. One parent might be dealing with a drug problem where the other is in denial. There might be some domestic violence in the household. One parent might be cooperative with the Court and the other defiant. As a result, the Court routinely assigns separate attorneys to avoid conflict problems down the road.

Most of the parent's attorneys are assigned directly by the court. These attorneys have a contract with the Court whereby they get paid a prearranged flat fee per case. All of the parent's attorneys have to pass a minimum training and are required to maintain continuing legal education with the Court as well. Parents may be assessed a fee to offset the costs of their lawyer. There is a list of parent's attorneys and their addresses and phone numbers in the course materials.

The primary role of the parent's attorneys is to advocate for their clients in court. A good parent's attorney, however, will perform many non-litigation functions to assist the

parent in navigating the case plan process. A good parent's attorney will help the parent understand the child protection process and negotiate visitation; advocate for appropriate services for the parent; advise the parent on the choices that will most likely result in return of the child; and assist the parents to carry out their case plan tasks.

Sometimes being a good parent's attorney means delivering bad news or advice that the client does not want to hear [*"No, having a six pack each night is not a good idea."*]. Parent's attorneys often have to deal with clients in denial or who are high or who are mentally ill. It is not an easy job but it is an important one.

Guardian Ad Litem

A Guardian Ad Litem (GAL) is an attorney appointed by the Court to advocate for the client's best interests (as opposed to the client's stated legal objectives). Therefore, unlike an attorney appointed to represent a party as an attorney, the GAL's functions independently of the client's wishes and reports directly to the Court regarding the client's best interests.

A GAL is appointed whenever the court determines that the client (whether adult or child) is not capable of making decisions in his or her own best interests and needs protection. A GAL might be appointed where the client is too young, is under a mental or psychiatric disability, is incapacitated, or chooses a position that the client's attorney [or perhaps others] feels is dangerous to the client. We will often act as GAL's when our clients are too young to understand the process. The Court may appoint GAL's for parents who have some condition that impairs their ability to protect their own legal interests.

Court Appointed Special Advocate (CASA)

The CASA is usually a non-lawyer who provides the Court with reports concerning the best interests of a child. The CASA is a volunteer specially trained to spend time with children, to get to know them, and to gather information for the Court. CASA is an independent program administered by the Arizona Supreme Court. CASA's are given wide authority to access police files, hospital records, and even sealed court records. Unlike an attorney/GAL, CASA's cannot question or cross examine witnesses in court. They can, however, provide extensive information that would not otherwise be available to the Judge and may testify in court.²⁹

²⁹See **ARS 8-522** for a listing of CASA authority and responsibilities

The Role of the Child's Lawyer

In Arizona there are two types of lawyers for children in dependency proceedings: attorneys³⁰ and guardians ad litem. The essential difference between the two is that an attorney for a child attempts to maintain a normal lawyer-client relationship with the child. By "normal" lawyer-client relationship, we mean that, as with all attorney-client relationships, the child-client sets the basic goals while the attorney is responsible for carrying out those goals. The attorney keeps the client's secrets and confidences, advises the client on the best course of action, keeps the client reasonably informed of what is happening and owes his or her primary loyalty to the client.

On the other hand, the Guardian Ad Litem reports directly to the court and advocates for what the Guardian perceives to be the child's best interests irrespective of the child's stated wishes. There is no attorney-client relationship. Nor is there any obligation to keep the client's secrets and confidences.³¹

WHEN IS AN ATTORNEY AN ATTORNEY AND WHEN IS AN ATTORNEY A GAL?

First a little background music.

The federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a "*guardian ad litem*" "to represent the child" in abuse or neglect proceedings.³² CAPTA allows that the representative may be "*an attorney or a court appointed special advocate.*" But CAPTA does not specify precisely what "represent the child" means. May the CAPTA-GAL act as a traditional client-directed counsel? Is the GAL something more like a "best interests" attorney? Or may the GAL be something else?

CAPTA itself does not offer an answer. Instead, the Act says that the purposes of the guardian ad litem are

- (I) to obtain first-hand, a clear understanding of the situation and needs of the child;**
- and**

³⁰ In Arizona statutes and rules referring to Juvenile Court, the term "attorney" is used interchangeably with the term "counsel"

³¹ See **AZ Ethics Opinion 2000-6**, September, 2000.

³² See **42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)**, which requires states to have "provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child."

(II) to make recommendations to the court concerning the best interests of the child.³³

The “best interests” language does not sound as though the GAL can be a traditional client-directed attorney. Nonetheless, many places, including Pima County Arizona, recognize that that appointing a client-directed attorney satisfies the CAPTA-GAL requirement:

“because advocating the child’s wishes and preference could be seen as in the child’s best interests, serving the child’s best interests, and helping the court to better arrive at overall decisions that are best for the child.”³⁴

The Arizona statute is similar but not exactly the same as CAPTA. **ARS § 8-221 (I)** requires that

In all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court shall appoint a guardian ad litem to protect the juvenile's best interests. This guardian may be an attorney or a court appointed special advocate.³⁵

There is a little disconnect between 8-221 and actual practice. First, courts in Arizona appoint either a GAL or an attorney irrespective of whether or not there is an allegation of “abuse and neglect.” Dependency can result from circumstances where there is no abuse or neglect – such AZ courts routinely appoint representatives for children in all cases.

In addition, Rule 40 of the Rules of Procedure for Juvenile Court allows the Court to appoint a GAL “to protect the interest of the child.”³⁶ Rule 40.1 impliedly authorizes the appointment of attorneys for children. Rule 40.1 also sets out the responsibilities of both.³⁷ These new rules set out some basic standards – meet with child clients before hearings, attend trainings, explain the attorney or GAL role to the child in a developmentally appropriate manner.

In Pima County, the Court has chosen to appoint only attorneys as GAL’s – no lay people.³⁸ Pima County has also chosen to distinguish between attorneys appointed to

³³ See, e.g., **Ala. Code § 12-15-102** (2013) Guardian ad litem is a “licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual.”

³⁴ See *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of Health and Human Services, Administration on Children Youth and Families, 2002 found at http://archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu_djvu.txt

³⁵ **ARS § 8-221(I)**

³⁶ **Rule 40, Rules of Procedure for the Juvenile Court**

³⁷ **Rule 40.1, Rules of Procedure for the Juvenile Court**

represent a child as “counsel” and those appointed to represent a child as GAL. This distinction appears to be authorized by ARS § 8- 824(B)(3) which mandates the presence of the child’s “*guardian ad litem or attorney*” at the preliminary protective hearing.³⁹

When is an attorney a Guardian Ad Litem and when is an attorney a Lawyer?

In Pima County, the default position is that we are a child’s attorney and not the GAL. In Maricopa County, it is the opposite. Confusing? Wait, we’ve got more.

In Pima County, by **local court policy**, the Juvenile Court appoints an **attorney** for each child in a dependency proceeding.⁴⁰ Thus, when the Clinic represents children, unless specifically directed by the Court, our default position is that **we act as the attorneys for our child-clients**.

In addition, pursuant to another local rule, we follow the American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases.⁴¹



The ABA standards distinguish a client-directed lawyer [“child’s attorney”] from a GAL. The ABA standards define a child’s attorney as:

³⁸ Although Rule 40 above contemplates that the GAL be either an attorney or lay person, new **Rule 40.1 [Duties and Responsibilities of Appointed Counsel and Guardians Ad Litem]** seems to imply that GAL’s need to be attorneys statewide. Rule 40.1 Rules of Procedure for Juvenile Court.

³⁹ **ARS § 8- 824(B)(3)**

⁴⁰ GALs are not routinely appointed but may be appointed where circumstances warrant. We will discuss those circumstances a little more fully below.

⁴¹ ABA Standard A-1. These standards can be found at the ABA web site at:

http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf There is not universal agreement about the role of a child’s lawyer and the ABA standards are not the only ones. We will explore some of the other standards in class during the semester.

The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

The ABA standards define a GAL as follows:

A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

So, our default position is that we are client directed lawyers for children.

Here is what the ABA says:

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child-client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.⁴²

That may work for a teenager. But how do you take direction from a 2 year old?

The ABA standards recognize that a very young or a pre-verbal child is unable to direct a lawyer. Therefore, the ABA standards imply that these are situations – especially for a very young child – where the attorney essentially acts as a Guardian ad Litem:

the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.⁴³

The short answer is that we do what we can to try and figure out what the child's position would be -- knowing what we know about the child. In other words, try and figure out – from the child's point of view – what the child's legal interests are. It is a pretty fine line between that and being a Guardian ad Litem where we simply advocate for what we perceive to be the child's best interests. And reasonable persons can and do disagree. That's one of the things that makes this work so interesting.

⁴² **Standard A-1 Commentary**

⁴³ **Standard B-4 Commentary 2**

The ABA standards [and those of the Arizona State Bar] recognize that a court may need to appoint a GAL when the attorney believes that the child's age and/or level of development impairs the child's ability to comprehend what is happening and to make informed and intelligent choices; and the often closely related situation where the attorney believes that the child's choices are not in the child's best interests.⁴⁴

Both the ABA Standards and the State Bar Committee Opinion ask us to follow Rule 1.14 of the Model Rules of Professional Conduct [which is identical to Rule 1.14 of the Arizona Rules of Professional Conduct]. Rule 1.14, as interpreted by both the ABA and Arizona Committee, treats age like any other disability related to the client's capacity to make reasoned decisions. Essentially, we are asked to deal with the disability as best we can while attempting to maintain as close to a lawyer-client relationship as possible.⁴⁵

Rule 1.14 also asks attorneys to make an independent determination of the client's capacity and requires lawyers to request that the court appoint a guardian [in this case, a GAL] when the client is not capable of a reasoned decision.⁴⁶ The scope of the guardianship should be related to the area in which the client is having difficulties. The attorney would continue to advocate the client's articulated position once the guardian is appointed.

FYI, in Maricopa County, attorneys are appointed as child-directed advocates only for older children – usually 12 and up. Otherwise, the Maricopa default position is to appoint Guardian Ad Litem for all children.

What does the GAL do?

The Guardian Ad Litem reports directly to the court and advocates for what the Guardian perceives to be the child's best interests -- even if they are contrary to the child's expressed wishes. There is no attorney-client relationship. The GAL owes his or her loyalty directly to the court. Nor is there any obligation to keep the client's secrets and confidences.⁴⁷

Under the ABA standards, the determination of the child's best interests must be made as objectively as possible.

⁴⁴ **Standard B-4 Commentary 3**; AZ Ethics Opinion No. 86-13, November 11, 1986

⁴⁵ **ER 1.14(a)** "(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

⁴⁶ **ER 1.14** "(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

⁴⁷ See **AZ Ethics Opinion 2000-6, September, 2000.**

The determination of the child's interests should be based on objective criteria addressing the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive/detrimental alternatives available.

Commentary

*A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally James Garbarino & Frances M. Stott, *What Children Can Tell Us: Eliciting, Interpreting, and Evaluating Critical Information from Children* (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.⁴⁸*

Even though a GAL is not functioning as a traditional lawyer, a GAL in Pima County is still an attorney and must abide by the Arizona Rules of Professional Conduct.⁴⁹ The only caveat is that, since the GAL is not the lawyer for the child, the GAL is not obligated to keep the child's secrets nor is the GAL in a position to give the child legal advice. That role is reserved for the child's attorney.

Because the GAL is an attorney, the GAL should not act as a sworn witness under ER 3.7. That rule states that:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue*
- (2) the testimony relates to the nature and value of legal services rendered in the case; or*
- (3) disqualification of the lawyer would work substantial hardship on the client.*

Since the GAL is advocating for the child's best interests on behalf of the court, it would seem that, unless there would be a substantial hardship on the court, the GAL should not be called as a witness. That prohibition would not prevent the GAL from offering a reasoned position statement based on other evidence.

Thus, the major differences between a GAL and a child's attorney can be summed up in the following chart:

GAL	ATTORNEY
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⁴⁸ **Standard B-5**

⁴⁹ **AZ Ethics Opinion 2000-6, September, 2000.**

OWES LOYALTY TO CHILD'S SECRETS	court	child
SHARED WITH	court	child only
ADVICE GIVEN TO	none	child
INFORMATION GIVEN TO VOICE	court	child
	GAL'S own	child's

Nearly every state and jurisdiction handles this question differently when providing representation for children. Within the basic attorney versus GAL continuum, there is no shortage of permutations and hybrids among the various states.⁵⁰ Arizona itself is a bit schizophrenic. ARS §8-221 has two somewhat contradictory provisions. ARS §8-221 Subdivisions A and E state that a juvenile is entitled to be represented by counsel in a dependency and that the Court may appoint counsel for the child if the child is indigent or if there is a conflict of interest with the child's parents.^{51 52}

The reality is that most children are indigent when they are not with their parents. Also, Pima County assumes that a child with agency has a conflict of interests with the child's parents. That doesn't mean that a child's position is necessarily adverse to that of the parents. Many, if not most, children want to return home. In most situations, a conflict of interest presents itself when the child engages in privileged attorney-client communications or when there is a risk that the child's interests on a particular issue differs from that of one or both parents.

On the other hand, subdivision I of the same statute, states that the Court must appoint a Guardian Ad Litem in a dependency where there is an allegation of abuse or neglect.⁵³ Under Subdivision I, the GAL can be either an attorney or a CASA. In addition, Juvenile Court Rule 40 authorizes the appointment of a GAL when the court deems it necessary to protect the interest of the child.⁵⁴

The Court may also appoint a Court Appointed Special Advocate [CASA] when it appears that a CASA will either provide some special assistance to the Court or could provide some special services to the child. Because the CASA program is peopled by volunteers, the need for CASAs usually exceeds their availability. CASAs will often perform one of the major functions of a GAL, that is, reporting to the court and making

⁵⁰ See Koh-Peters, Jean, [Representing Children In Child Protective Proceeding: Ethical and Legal Perspectives](#)

⁵¹ **ARS §8-221**

⁵² It is hard to imagine a situation in a dependency in which there is not, at the very least, a potential conflict of interest between children and their parents. See ER 1.7, AZ Rules of Professional Conduct. However, for an interesting counterpoint see Guggenheim, Martin A., [Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings](#), 29 Loy.U.Chi.L.J. 299 (1998).

⁵³ **ARS §8-221**

⁵⁴ **Rule 40** Arizona Rules of Procedure of the Juvenile Court

recommendations about what is in the best interests of the child. CASA's may even testify as witnesses in some cases. Unlike GALs, non-attorney CASA's may not call witnesses at trial nor may they cross-examine witnesses.

So What Does It Mean When We Say That We Are Attorneys for Children?

The easy answer is that we follow the American Bar Association Standards. We strongly encourage you to spend some significant time reading the ABA Standards -- a copy of those standards are appended to this handbook. Whether you agree with them or not, they are a terrific starting point for identifying the cusp issues of ethically representing children. Get to know the standards and to understand the principles behind them.

BUT, as your Clinic experience progresses, we fully expect that most of you will experience one or all of the following three reactions to the ABA Standards at some point:

1. There will be at least one ethical choice for which the ABA Standards provide little helpful guidance.
2. You will flat out disagree with at least one standard.
3. You will confront a situation where you find that it is one thing to understand the ABA standards; it may be quite another to use them to answer particular ethical choices that you will have to make. There is a difference between finding a line in theory and making a choice in the context of a particular case.

This question of what we do when we represent children is perhaps the single most recurring and fascinating ethical challenge you will face this semester. It is one of those questions about which child advocates have debated since the first day that courts began to recognize the children's voice in abuse and neglect cases.⁵⁵ It is one of the questions that make representing children such an inherently interesting and stimulating area of practice.

With those caveats in mind, let us examine the ABA standards a little more closely.

The ABA standards operate under one overriding principle about which there is little disagreement. That principle is that children are entitled to attorneys who owe the same levels of competence, diligence and loyalty to their child-clients as that demanded by their adult clients.⁵⁶ We agree. Child clients are entitled to no less than our very best work.

⁵⁵ Atwood, Barbara Ann, *Representing Children: The Ongoing Search For Clear And Workable Standards*, 19 J. Am. Acad. Matrim. Law. 183 [Yep, that Barbara Atwood]

⁵⁶ Standard A-1. The Child's Attorney.

Where the standards provide some controversy is where and how they deal with the awkward situation present by two circumstances: (1) where the attorney believes that the child's age and/or level of development impairs the child's ability to comprehend what is happening and to make informed and intelligent choices; and (2) the often closely related situation where the attorney believes that the child's choices are not in the child's best interests.

Before dealing with the controversial, let us take a look at what the ABA Standards mean by a competent lawyer for children. The ABA Standards defines a lawyer as:

The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.⁵⁷

The phrase "undivided loyalty" is important. That means that our jobs as children's lawyers require us to focus on the legal needs of our child clients first and last. It is not our job to try to please the Agency or the parents or even the Courts which pay our contract. Our job is to **independently** assess each of our client's legal interests and act accordingly. If our representation of a child is impaired, in any way, by our representation of another client or by our working relationship with DCS or by any other factor, then we have a conflict of interest which we must resolve in favor of our client.⁵⁸

Undivided loyalty also means that a child's attorney must make an **independent investigation** of the facts. In Juvenile practice much of our information comes from DCS disclosures. After all, DCS arranges for evaluations, therapy, supervised visits and other services so reports are generally made directly to the case managers. That disclosure is vital to our ability to represent our clients.

Nevertheless, we must not necessarily take what is contained in DCS or parent disclosures as gospel. Like all second hand reports, they are subject to human error and human biases. **We have an obligation to our clients to independently check things out for ourselves.**

"Confidentiality" is the third aspect of the definition of attorney. Remember, under the Arizona Rules of Professional Conduct, our confidentiality obligation to keep our clients' secrets goes far beyond privileged private communications between lawyer and client.⁵⁹

⁵⁷ Id.

⁵⁸ There may be occasions where our "loyalty" to our client's wishes may be compromised by our loyalty to what we see as our clients' best interests. We will discuss that difficult situation below.

⁵⁹ Privilege is an **evidentiary rule**. Privilege describes the rule of evidence that makes the content of certain private communications between lawyers [or clergy or others by statute] inadmissible in court. Privilege is a separate and distinct concept from the ethical duties to keep our clients secrets under the Arizona Rules of Professional Conduct.

Our obligations extend to any information acquired by us from any source in the course of representing a child.⁶⁰

In the Clinic, we can and should share information among ourselves. The duty of confidentiality does not mean that we cannot share information **within** the Clinic. We encourage you to talk with each other about your cases and clients. Just remember, it stops at the Clinic door. Be careful when talking about your clinic cases with others that you do not reveal information about a particular client.

In Juvenile Court, difficult confidentiality issues sometimes emerge in more subtle ways. For example, in Juvenile Court practice, DCS is obligated to share information about children with the Court, with other parties, with therapists, with physicians and with other service providers. We do not have the same obligation to share. We should only share information -- even with DCS or parents -- where the release of information is authorized by our clients or otherwise required by Court order or Court rule.

In the atmosphere of the Juvenile Court -- and in the spirit of cooperation that is one of the underpinnings of the Model Court -- it is easy to start talking about our clients' lives with the people who are trying to help them. That conversation is not a bad thing. We can, and should, communicate frequently with the Attorney General, with DCS, with foster parents, and with service providers. However, in those communications, we still must not forget the principle of confidentiality as it applies to us as the child's attorney. Again, unless we have our client's permission to communicate information, or unless the release of information is otherwise authorized by Court order or Court rule, we must be careful not to reveal to others information acquired during the course of our representation.

Perhaps, the most difficult challenge when dealing with confidential information may be when we possess information which we **know** would be in our clients' best interest to share with others but which our clients will not allow us to reveal. For example, we may be representing a teenager who is a runaway. That child may contact us. We may learn where the child is living; and it may appear to us to be an unsafe place.

We may feel in our hearts that the best thing in the world would be for us to contact DCS and bring that child in out of the cold. Nevertheless, none of the Arizona rule 1.6

⁶⁰ **AZ ER 1.6(a)** states: “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or **ER 3.3(a)(3)**”

exceptions would apply to that secret.⁶¹ Unless we can convince our client to permit us to release the information, we must keep that secret under the ABA Standards.⁶²

Similarly, a child client might inform us that he or she is being abused by a stepparent but does not want us to reveal that information because of perceived repercussions in other aspects of the child's life. Again, we might wish to try to persuade the client to allow us to reveal that information, but we must nevertheless respect both the privileged and confidential nature of the disclosure to us. That's not always easy.

So Does That Mean We Don't Report Child Abuse When We Know About It?

In light of Penn State, there is great pressure to report suspected child abuse.⁶³ How does that play out for us? Are attorneys mandatory reporters under Arizona Law? Should we report to the hot line if one of our child-clients discloses information to us that reveals suspected abuse or neglect? Would we violate attorney-client confidentiality if we did?

The short answer is that these are really tough questions. So, if there is any question whatsoever, report your concerns to your supervising attorney.

The longer answer is this:

1. We are not mandatory reporters. ARS 13-3620 requires:

Any person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means . . . shall immediately report or cause reports to be made of this information to a peace officer or to child protective services in the department of economic security, except if the report concerns a person who does not have care, custody or control of the minor, the report shall be made to a peace officer only.⁶⁴

⁶¹ **Note, the Arizona rule is different from Rule 1.6 of the ABA Model Rules of Professional Conduct.** Under the ABA rule, we might be *allowed* to reveal this information. However, under the Arizona rule, the exceptions to Rule 1.6 require *mandatory* disclosure of client secrets that are necessary to prevent *our client* from causing substantial physical injury to another or the permissive disclosure of an intent by *our client* to commit a future crime. These exceptions do not apply to past conduct or to the conduct of others.

⁶² That does not mean that we cannot make our best effort to convince our client to take a different position. Under **AZ ER 2.1**, we are allowed and encouraged to give our clients our best advice. The ABA Standards similarly instruct us to help our client make good decisions for themselves. See Commentary to **Standard A-1**. “As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child.” We just cannot try to override a client's free will by our position of perceived authority or by superior muscle.

⁶³ In fact, the U of A has proposed rules that would require anyone working with children, including us, to report suspected child abuse. We have requested an exemption from that rule for lawyer-client and guardian ad litem relationships.

⁶⁴ **ARS 13-3620**

On the surface, that appears to apply to us and would trump confidentiality. However, ARS 13-3620 defines a person as:

For the purposes of this subsection, "person" means:

1. Any physician, physician's assistant, optometrist, dentist, osteopath, chiropractor, podiatrist, behavioral health professional, nurse, psychologist, counselor or social worker who develops the reasonable belief in the course of treating a patient.
2. Any peace officer, member of the clergy, priest or christian science practitioner.
3. The parent, stepparent or guardian of the minor.
4. School personnel or domestic violence victim advocate who develop the reasonable belief in the course of their employment.
5. Any other person who has responsibility for the care or treatment of the minor.

So, it appears that a lawyer is not a "person" – and, therefore, not a mandatory reporter. Perhaps Shakespeare was correct.

But that does not resolve the question of whether or not we **may** report. Our ethical rules are where we turn to address that. Rule 1.6 does not appear to have an exception for client information relating to child abuse or neglect. See footnote 50 above. So the default position is that we cannot report without client permission.

Of course, part of our job is to counsel clients to make wise decisions. Nothing prevents us from talking through the options and possible scenarios to counsel our clients to give us permission. The latter task is where good lawyering may be most important.

If this kind of situation arises, make sure you don't go it alone. Talk it over with your supervising attorney. Explore all the options. And don't ignore your instincts, they are there for a reason.

Competent representation means just that. We must possess sufficient information about the law, the system of child protection, and about our case to professionally represent our client.

In addition to loyalty, confidentiality and competence, the ABA Standard's definition of attorney implicitly recognizes the other functions of an attorney-client relationship -- some of which the Standards later address explicitly and in detail. When reading these standards, try to keep in mind these other essential aspects of lawyering:

1. Clients set the goals of representation.⁶⁵

⁶⁵ **ER 1.2.** With a child client, it may be difficult to broach that question or to discern the child's position. Depending on a child's age and developmental stages, understanding the child's goals may be an extremely daunting task. See [ABA Standards B-4](#).

2. Lawyers have an obligation to keep their clients reasonably informed so that clients can make intelligent goal-setting decisions.⁶⁶

3. Lawyers should give their clients the full benefit of their advice -- including practical and moral non-legal advice where appropriate.⁶⁷

GETTING SPECIFIC

Rule 40.1 of the Arizona Rules of Procedure for Juvenile Court sets out very specific guidelines for lawyers who represent kids in dependencies:⁶⁸

A. Attorneys appointed for children **shall** make clear to children and their caregivers whether their appointment is as a guardian ad litem or as an attorney and the ethical obligations associated with their role.

B. Attorneys and guardians ad litem **shall** inform the child, in an age and developmentally appropriate manner, about the nature of the proceedings, the attorney's role, that the child has the right to attend hearings and speak to the Judge, the consequences of the child's participation or lack of participation, the possible outcomes of each hearing, and other legal rights with regards to the dependency proceeding and the outcomes of each substantive hearing.

C. Attorneys and guardians ad litem **shall** participate in discovery and file pleadings when appropriate and attorneys must develop the child's position for each hearing. The duties of the attorney and guardian ad litem may include identifying appropriate family and professional resources for the child, as well as subpoenaing witnesses, and the attorney and guardian ad litem shall inquire of the child regarding potential placements and communicate this information to Child Protective Services as appropriate.

D. The attorney and guardian ad litem **shall** meet in person with the child **before** the preliminary protective hearing, if possible, or within fourteen (14) days after the preliminary protective hearing. Thereafter, the attorney and guardian ad litem for the child shall meet in person with the child and have meaningful communication before every substantive hearing. Substantive hearings include all preliminary protective hearings, all periodic review hearings, permanency hearings, any hearings involving placement, visitation or services, or any hearing to adjudicate dependency, guardianship or termination. If the child is under the age of 5 or is not able to communicate effectively, meetings should include observations within each placement home. At each substantive hearing the attorney or guardian ad litem shall inform the court as to the child's position concerning pending issues and, if the child is not present, an explanation for the child's absence. In all cases, attorneys and guardians ad litem for children should also communicate with placements, and if practicable, observe the placement. . . .

⁶⁶ ER 4.2

⁶⁷ ER 2.1

⁶⁸ Rule 40.1, note 35 supra.

E. Attorneys and guardians ad litem shall also maintain contact with caretakers, case managers, service providers, childcare providers, CASAs, relatives and any other significant person in the child's life as appropriate in order to meet the obligations of informed representation of the child.

F. To the extent possible, attorneys and guardians ad litem should attend or provide input to Child Protective Services staffings, Foster Care Review Board reviews and Child and Family Team meetings. . . .

H. Attorneys and guardians ad litem shall promptly identify any potential and actual conflicts of interest that would impair their ability to represent a child. Either the attorney or the guardian ad litem shall, if necessary, move to withdraw or to seek the appointment of an additional attorney or guardian ad litem if he or she deems such action necessary.

I. Attorneys and guardians ad litem shall be knowledgeable of the child welfare agencies, governmental programs, and community-based service providers and organizations serving children (e.g., behavioral health, developmental disability, health care, education, financial assistance, counseling support, family preservation, reunification, permanency services and juvenile justice). Attorneys and guardians ad litem shall be knowledgeable about how these services are accessed and shall advocate for such services as appropriate for the child.

Part C of the ABA Standards [“ACTIONS TO BE TAKEN”] lists some particular functions of a child’s lawyer⁶⁹. The titles of the various articles in the ABA Standards speak volumes about the ABA Standards’ expectations of children’s attorneys.

Without getting into great depth, we repeat the titles here:

- C-1. Meet With Child.
- C-2. Investigate.
- C-3. File Pleadings.
- C-4. Request Services.
- C-6. Negotiate Settlements.

Part D of the Standards sets out the attorney’s obligations at hearings. Most of the obligations are self-evident -- e.g. attend hearings, make motions, ask questions. Several, however, are (1) not always easy to accomplish and/or (2) may be difficult decisions to make.

Regardless of your point of view of the proper role of a child’s lawyer, Part D presents a checklist of important matters for every child’s lawyer to consider:

1. Explaining to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.⁷⁰

⁶⁹ **Part C ABA Standards**

⁷⁰ **D-2 ABA Standards**

2. Making decisions about whether or not a child should attend a hearing.⁷¹
3. Making decisions about whether or not a child will testify.⁷²
4. Making decisions about whether legal representation is necessary in non-juvenile court matters such as child support, school matters, mental health hearings, etc.⁷³ as well as the continuation of services to the child.⁷⁴

TOUGH TASKS AND TOUGH CHOICES.

The more hotly debated aspects of the ABA Standards deal with the ultimate role of the lawyer. Are children's attorney's mere mouthpieces? How can we be sure what our clients want? What happens when our view of a child's best interests conflict with their choices?

The ABA Standards resolve most doubts in favor of the traditional lawyer role of advocating the client's stated position. The Standards assume the competency of a child to make decisions with the assistance of the child's attorney. Thus, the ABA Standards state that a normal lawyer-client relationship is possible when a child can express a preference to the attorney.

The ABA Standards are not ambiguous on this point:

B-4 The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.”

For some, this line of articulation is unrealistic. After all, what five-year old is going to say that he or she does not want to go home? And at age five, what could a five year old possible know about her mother's addiction to crystal meth or her father's refusal to pay child support? For others, the real issue is whether or not the child's voice will be heard. Children often know more than we give them credit for. Besides, if we refuse to advocate for the child's point of view, we will effectively silence the child's voice in critical life decisions that will affect that child forever.

As you undertake your representation of children, consider where you stand in your particular cases. If you could write the standards, where would you draw the lines? In the context of particular cases, are you comfortable with the ABA position?

⁷¹ **D-5 ABA Standards**

⁷² **D-6, 7, 8 ABA Standards**

⁷³ **D-12 ABA Standards**

⁷⁴ **D-13 ABA Standards**

One thing is certain. Especially for younger children, helping them to articulate a position is an extremely difficult task for any child's attorney. It requires a real sense of the child's capabilities. The lawyer must spend sufficient time with the child to begin to know the child in the context of the child's own world and interests.⁷⁵ The lawyer must be able to get behind the child's words to understand where the child is truly coming from. This is no easy effort.

In addition, the lawyer may face the difficult dilemma that the mere fact of asking the question could be harmful to the child. For example, should we ever force a child to choose where the child should live? "*Do you want to live with your mother or your father?*" What a heavy burden to place on a young child.

Indeed, the lawyer may face the corollary question of whether giving the child the necessary information to make an informed decision might, by itself, be harmful to the child. Do we tell a child that her mother is a prostitute or a drug addict? The last thing we want as lawyers is to exacerbate the pain or the emotional harm that some of our child clients face. Yet we have a duty to keep them informed.

Making such decisions may require us to consult with experts. At the very least, we need to carefully consider the ramifications of our own actions on the life of our child clients.

The other major question is: "**what happens when the child's wishes are clearly contrary to their best interests?**" The ABA Standards, AZ Rules of Professional Conduct and an opinion from the Arizona State Bar Committee on Rules of Professional Conduct all offer some guidance.⁷⁶

However, before we examine the standards and rules, it is critically important to remind ourselves that, as attorneys for children, we ought to be sure that what the child wants is clearly not in the child's best interests. Sometimes, what appears to be clear on the surface becomes a lot more opaque when we dig deeper. We need to be sure that we understand the reasons that the child expresses wishes that concern us. There is a big difference between:

1. "I want to go home because my parents promised me an i-pad" and
2. "I want to go home because I miss my parents, my friends and all my stuff gets stolen at the group home."

Once we understand the reasons, two things may happen. First, the reasons may convince us that what the child wants may make some sense. Second, the reasons may cue us in to a different set of options that may work for the child. Of course, the possibility that what the child wants is truly not in the child's best interests should always be considered.

⁷⁵Prof. Koh Peters talks extensive about the "child in context" in her book, [Representing Children in Child Protective Proceedings: Ethical and Practical Considerations](#), Lexis Law Publishing, 1997.

⁷⁶**AZ Ethics Opinion No. 86-13**, November 11, 1986

Both the ABA Standards and the Committee Opinion ask us to follow Rules 1.14 of the Model Rules of Professional Conduct [which is identical to Rule 1.14 of the Arizona Rules of Professional Conduct]. Rule 1.14, as interpreted by both the ABA and Arizona Committee, treats age like any other disability related to the client's capacity to make reasoned decisions. Essentially, we are asked to deal with the disability as best we can while attempting to maintain as close to a lawyer-client relationship as possible.⁷⁷

Rule 1.14 also asks attorneys to make an independent determination of the client's capacity and requires lawyers to request that the court appoint a guardian [in this case, a GAL] when the client is not capable of a reasoned decision⁷⁸. The scope of the guardianship should be related to the area in which the client is having difficulties. The attorney would continue to advocate the client's articulated position once the guardian is appointed.

Both the ABA Standards and the State Bar Opinion define the point at which the client cannot adequately act in the client's own interest as when the client takes a position contrary to his or her best interests. In those situations both the ABA and the State Bar say that we must ask for a GAL.

Interestingly, the two documents interpret best interests slightly differently. The State Bar Committee Opinion refers to the child's best interests as a generalized concept.⁷⁹ With a slightly different twist, the ABA Standards says that the attorney should ask for a GAL only when the client's position is contrary to the client's best interests concerning an issue of safety or harm.⁸⁰ Under either cast of "best interests", the trigger point at which an attorney

⁷⁷ **ER 1.14(a)** "(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

⁷⁸ **ER 1.14** "(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

⁷⁹"The point at which a lawyer believes that the client cannot act in his own best interests is the same point at which the client's wishes conflict with what the lawyer believes to be the client's best interests." **AZ Ethics Opinion No. 86-13** at page 3 (1986)

⁸⁰ **B-4 ABA Standards Comment (3)** (3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position."

should ask for a GAL is when -- despite the advice of the attorney -- the client advocates a position that the attorney believes is contrary to the child's best interests.

In contrast to the ABA and State Bar Standards, others posit that if a client can make a reasoned argument for the client's position, the attorney should respect that position and not ask for a GAL regardless of the lawyer's view of whether that position conflicts with the client's best interests. A literal reading of Rule 1.14 would suggest that the line is not when there is a conflict between what the client wants and what the lawyer thinks is in the client's best interests. Rather the focus is solely on the lawyer's assessment of the client's capacity to act. Can the client act on her own behalf or not?

Perhaps in a practical sense, there is no difference.

Some would argue that asking for a GAL is tantamount to waving a red flag that the child-client's voice should be ignored. Once a lawyer tells the Judge -- even indirectly -- that his client does not have the capacity to make decisions, there is a very human tendency to then give little shrift to the client's position. Thus a decision to ask for a GAL should be a decision of last resort. Nevertheless, the duty under the ABA Standards and under the State Bar Opinion is for the lawyer to make the request if the lawyer deems it necessary.

Special Problems of the Pre-verbal Child

Obviously a very young child who cannot articulate what he or she wants is not able to tell the lawyer what his or her position might be. The ABA Standards tell us:

“ . . . the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.”⁸¹

The ABA Standards further state:

“(1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem

There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.⁸²

⁸¹ **B-4 ABA Standards (First Commentary)**

⁸² **B-4 ABA Standards (Second Commentary)**

Implicit in this standard is the concept that the lawyer may be able to figure out the child's wishes without a clear statement from the child. The child's legal position may be discernible to the lawyer even without express instructions from the child. The idea is that if the lawyer gets to know the child well enough in context, the lawyer may be able to divine the position of even a preverbal child.

Note, the ABA Standards tell us that we must request appointment of a GAL when the child is preverbal or lacks capacity to understand what is going on. **However**, under the Arizona Rules, it appears [and it is certainly the custom in Pima County] that attorneys are appointed **both** GAL and Counsel at the outset.⁸³ When we cannot act as counsel because the child cannot communicate at a sufficiently functional level, then we simply assume the role of GAL. No further appointments are generally made or requested.

On this latter point, at least, the practice in Pima County appears to be at odds with the ABA Standards required in the Juvenile Court Attorney's Contract. But local practices usually win out over written rules.

The Silent Child

Sometimes, with good reason, our child clients may not want to take a position. Perhaps they do not yet trust us enough to open up. Perhaps the act of choosing might be more difficult to face than any of the actual choices. Should a child ever be asked to choose between mother or father? Or whether or not to visit an abusing parent? Sometimes kids just want the controversy to end and for the adults to make the decision.

In those situations, the ABA Standards instruct us to respect our client's decision NOT to exercise choice.

The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. . . The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. . .⁸⁴

A Final Comment on Representing Children Before You Get Out There

Representing children is not easy. There are great rewards but they come at a price. First, there is so much to learn about the law, about children, about the agencies, about services. There is more to learn that you could possibly learn in two semesters -- maybe two lifetimes. Knowing that you don't know enough can be enormously frustrating. But it can also be educational. A good lawyer does not need to know all the answers. A good lawyer needs to know how to find them.

⁸³ **Rule 40. Arizona Rules of Procedure for the Juvenile Court**

⁸⁴ **B-4 ABA Standards (Third Commentary)**

Second, it is often not an easy job to work with children in abuse and neglect settings. They are fragile. They may be confused. They may be angry or scared. They may not talk to you or may tell you to drop dead or worse.

They are most likely experiencing things that children should not have to experience. But if you understand them and get beyond their defenses, you can have a significant impact on their lives. As an added bonus, if you can learn how to develop a solid lawyer-client relationship with a child, that will transfer to any lawyer-client relationship in the future.

Third, the adversary Court system, even though it is there to protect children, was not designed with children in mind. Lawyers, testimony, disclosure, due process are all things for adult law students -- not for children. There is little privacy for children in this system because Courts need information to make the best decisions. You may be asking children to make some very adult-like decisions which may be difficult for you to honor and respect -- and for them to make.

As a result, as a child's lawyer, you may face some very challenging strategic and ethical decisions -- not the least of which is deciding what your own role will be. These are not easy problems. So one final reminder. **Don't go it alone. Be part of the team. Help each other out. And never be afraid to ask a question.**

THE ROLE OF FEDERAL LAW

Although each state is empowered to handle child protection in its own way, federal law plays a powerful role in the process. The federal government, through the power of the purse, sets out a number of guidelines for states to follow. There are significant financial incentives for states to comply with the federal requirements.

As mentioned in an earlier section, federal involvement in child protection is a relatively recent phenomenon. As late as 1973, there was little or no federal involvement in child protection. In 1974, Congress adopted the Child Abuse Protection and Treatment Act (CAPTA), which provided financial assistance to the states for both foster care and the investigation of suspected child abuse and neglect.

By the late 1970s, more than 500,000 children were living apart from their families.⁸⁵ The foster care system was overloaded. Children were forgotten and shuffled from foster home to foster home. In 1977, the United States Supreme Court expressed concern over "foster care drift" in Smith v. Organization of Foster Families for Equality and Reform.⁸⁶ There, the Court noted that "many children apparently remain in this 'limbo' indefinitely."⁸⁷ In 1980, in response to the mounting criticisms of the foster care system, Congress passed the Adoption Assistance and Child Welfare Act of 1980 ["CWA"]⁸⁸.

One commentator stated the following:

Congress passed the CWA to provide children with more permanent placements than foster care permitted. It sought to prevent unnecessary foster care placements, to encourage permanency planning for children, and to reunify families where possible. . . [H]eralded by child advocates across the country, [the CWA was based on a family preservation philosophy and, thus, actually promoted the rights of the entire family]. . .

This philosophy has as its starting point the belief that a child's biological family is the placement of first preference and that "reasonable efforts" must be made to preserve this family as long as the child is safe. Where these efforts fail and the child must be removed, the family preservation philosophy holds that reasonable efforts must still be made to reunify the child with the family. This pro-family sentiment was a great change from the child-rescue philosophy of the 1970s, which neglected or failed to recognize the harm that separation can cause to both children and their parents.⁸⁹

⁸⁵Bailie, Kathleen A., *The Other "Neglected" Parties in Child Protective Proceedings: Parents In Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2289 (1999).

⁸⁶ 431 U.S. 816 (1977).

⁸⁷ Smith, 431 U.S. at 836.

⁸⁸ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

⁸⁹ Bailie, *supra* note 28 at 2289-2291.

The key provision of the CWA was the requirement that states must make “reasonable efforts to reunify the child with the family.” This requirement that the state has an affirmative obligation to preserve and strengthen the ties between children and their parents has been codified in Arizona law⁹⁰ and remains a fundamental principle of the child protection system. What, in fact, constitutes “reasonable efforts,” however, is hotly debated and often is the central issue in Juvenile Court dependency hearings. In addition to the principle of “reasonable efforts” the CWA also mandated, for the first time, that children who are removed from their families are entitled to representation either through a Guardian Ad Litem, a Court Appointed Special Advocate [CASA], or through litigation counsel.

Despite the passage of the CWA, the average length of stay in foster care remained unacceptably lengthy. As a result, Congress passed the Adoption and Safe Families Act of 1997 (ASFA), which aspires to speed up achieving permanency for children.⁹¹ Among other things, ASFA revised the “reasonable efforts” requirements in cases of extreme abuse and mandated time lines within which the states must establish a permanent plan for each child. ASFA, essentially, encourages states to hasten efforts to terminate parental rights. For example, when children have been in foster care for 15 of the previous 22 months, ASFA requires states to commence proceedings to permanently terminate parental rights [often referred to as TPR or a severance] . In addition, ASFA offers significant financial bonuses to states that successfully place children in adoptive homes.

The requirement for a termination hearing has changed the face of child protection proceedings. In essence, Congress has said that parents no longer have an unlimited time frame in which to get their acts together. If they cannot make the home minimally adequate (in the eyes of the state and court) within the ASFA time frame, they may lose their children forever.⁹² There are three exceptions to the ASFA requirement that the State file a termination proceeding:

1. the child is being cared for by a relative (if the state elects to include this exception);
2. the state documents and makes available to the court a “compelling reason” that seeking termination would not be in the best interests of the child; or
3. The state determines that certain services identified in the child’s case plan are necessary for the child’s safe return home, but that it has failed to provide them according to the schedule specified in the case plan.⁹³

⁹⁰ **ARS§8-845C**; *see also* Mary Ellen C. v. ADES, 287 Ariz. 185 (App.Div.1, 1999) (right to parent is a fundamental right, which the state has a duty to preserve).

⁹¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

⁹² Arizona has taken that time mandate one step further. Arizona law now requires that the state hold a permanency hearing within one year of the date that a child was taken into state care. If the resulting plan is for termination of parental rights or for guardianship, then the state must file a proceeding to carry out that plan within ten days thereafter. If the child is under age three, the time frame for permanency hearing is six months. **ARS§8-862(A)(2)**.

⁹³ ASFA, §302(4), **42 U.S.C. §675(5)(E)**

The ASFA mandate requires only that the state commence a TPR proceeding; it does not mandate the result. In other words, the Juvenile Court is free to make findings either that the state requirements for termination have not been proven or that, even if proven, termination is not in the best interests of the child. Thus, the state need not be successful in terminating parental rights to meet the requirements of federal law.

Even though the State is not required to be successful in terminating parental rights, the state has a financial incentive in the form of adoption bonuses to be successful. Moreover, once a proceeding is filed, it has a life of its own. Human nature being what it is, the State's case managers and the state's attorney will try to win.

There are many other federal influences on child protection law. The most important are the federal supports for the services offered to parents and children to reunify the family. Federal funds for medical assistance, housing, therapy, and training are all significant factors in determining whether or not some families can be reunified.

While there is no space here to go into detail, the availability of specific categories of support -- either to individuals or to the states -- certainly has impact on the "reasonable efforts" made by the states.

HOW A DEPENDENCY PROCEEDING GETS STARTED

Reports and Initial Investigations

Dependencies start with some kind of report to the authorities (the appropriate authority in Arizona being the Child Protective Services (DCS)). Reports of suspected abuse or neglect are made to Child Protective Services in many different ways. They can come from neighbors or relatives. They can also come from **mandated reporters** (that is, professionals who are statutorily bound to report suspected cases of child abuse.⁹⁴ Mandated reporters include professionals like teachers, doctors, nurses, social workers, police officers, and day care providers. Parents are also considered mandated reporters.

Reports can be made anonymously or by identified persons on the Child Abuse Hotline. That number is 1-888-767-2445. Reports on the hotline are sent into a Central Statewide Registry operated by DES. Regardless of the source, once contacted by the Central Registry, local DCS is required to investigate reports of suspected abuse or neglect. The standard procedure is for DCS to obtain information from the reporter and to personally check on the child. If deemed appropriate, DCS will visit the child's home, talk to parents or other caretakers, consult with medical providers, and interview other persons with relevant information.⁹⁵

⁹⁴ **ARS §13-3620.**

⁹⁵ The DCS investigating criteria are reproduced at the end of this chapter.

When there is a report of suspected abuse or neglect, there is often a parallel criminal investigation. Acts which can give rise to a dependency may also violate criminal statutes. Technically, the presence of a criminal investigation has no bearing on the DCS investigation. DCS must complete this investigation regardless of the decisions of law enforcement to prosecute or not.⁹⁶

In practice, there is a growing trend for law enforcement to drive some of the decision-making when criminal charges are being investigated. There is new societal undertone is to emphasize the criminality of child abuse and neglect. There have been a number of high profile abuse cases that have caused a fairly seismic shift in focus. The short term result is that DCS has begun to defer to law enforcement in a number of ways that impact children. For example, a criminal court protective order preventing a parent from seeing a child now takes precedence over any Juvenile Court order.⁹⁷

This past year, in response to the shifting landscape, the State of Arizona created the Office of Child Welfare Investigations. OCWI is an independent branch of the Department of Economic Security and is responsible for responding and investigating criminal conduct allegations of child abuse and neglect with the appropriate local law enforcement entity.

OCWI's objectives are to:

- Investigate criminal conduct cases called into the Child Abuse Hotline as well as those determined to be criminal conduct cases by DCS case managers
- Consult on cases in which law enforcement and assigned DCS case managers have encountered barriers
- Assist in the implementation of the joint investigation protocol where law enforcement has declined or been unable to participate
- Provide training to law enforcement, DCS and other multi-disciplinary team members to ensure best practices and best outcomes for at-risk children

How does that play out for our clients? First and foremost, their parents may be charged with crimes. Criminal charges make it much harder for parents to engage in rehabilitative services and to speak out in court. Criminal charges add stress to a stressful situation. Their criminal attorneys have likely advised them to exercise their rights to remain silent. So addressing their issues becomes more problematic.

DCS may change its protocols as well. Recently, where a child has been the victim of sexual or physical abuse by a family member, DCS has begun recommending that visits with non-offending relatives be supervised or eliminated so “that they won’t talk with the kids about the criminal case.” Prosecutors have requested “no contact” orders from the criminal court for the same purpose. While separation from well-meaning non-offending relatives

⁹⁶ In theory, the criminal justice process operates independently from the child protective process -- each process having different objectives and policies. Nevertheless the existence of a criminal investigation can have a dramatic impact on the course of a dependency matter. Counsel for children need to be mindful of what is happening with any parallel criminal investigation.

⁹⁷ **ARS § 8-862(E).**

may be beneficial to a criminal investigation or prosecution, separation may have an adverse impact on the child and on the ability of the family to begin to address its problems. [On the other hand, no kid needs pressure from relatives or friends to recant]. It's complicated.

If, after investigation, DCS determines that no credible evidence exists to support the allegation, it will make a finding that the allegation is unfounded and administratively close the case. DCS will NOT expunge the records of unfounded investigations. Only seal the records from public scrutiny. The State Legislature has decided that even unfounded allegations may hold some future relevance in applications for foster care licenses, teaching positions, and possible future allegations of abuse or neglect.⁹⁸

If DCS determines that a report is serious enough to warrant intervention, they will commonly choose one of three tactics:

1. Offer services to the family without initiating formal dependency proceedings.
2. Initiate a **dependency proceeding** but leave the child in the home -- sometimes called an **in-home dependency**.
3. Remove the child and initiate a **dependency proceeding**. We will normally be involved only if a dependency proceeding has been started.

The TDM

In Pima County, unless there is an emergency situation, DCS will not remove a child without holding a meeting of all concerned called the **Team Decision Meeting** or **TDM**. At the TDM, DCS will try and get the family to agree to a voluntary plan to strengthen the family and family dynamics without removing the child. That plan could involve temporarily placing the child outside of the home and/or connecting the parent to **in-home services**. Part of the TDM will be to assess the family's strengths and weaknesses to see if a realistic plan can be created. If DCS and the family can agree on services that do not require that the child be removed, then no formal dependency will be filed [and we will never know about the matter]. If they cannot come to an agreement, then a dependency is sure to follow.

Removing a child

The State has broad powers to temporarily remove a child from the home if temporary custody is clearly necessary to protect the child because the child is either:

1. suffering or will imminently suffer abuse or neglect⁹⁹ or 2. suffering serious physical or emotional damage that can only be diagnosed by a medical doctor or

⁹⁸ **ARS §8-807**

⁹⁹ "Abuse" means the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage

psychologist¹⁰⁰ Note: the State need not show that actual abuse or neglect has occurred -- only the imminent probability that abuse or neglect **will** occur.

Once a child has been removed, the State must immediately notify the parent and file a petition with the Juvenile Court alleging the grounds for the dependency proceeding. The parent is entitled to a **temporary custody hearing** to determine if removal was necessary or if the child can now be safely returned. The parent is given a temporary custody notification (TCN) -- which is the beginning of the legal process.¹⁰¹

When a child is removed, the child will be **placed** in some form of temporary foster care. A **temporary placement** can be with a relative, a foster family, a group home, a temporary shelter for children, or a hospital facility. **The clear preference is for the child to be placed with a relative.**

DCS CRITERIA FOR RESPONDING TO A REPORT OF MALTREATMENT

The Department of Child Safety maintains a website to explain how they work and their criteria for making decisions. The website is very interesting reading. It contains a wealth of important items of information and, of course, it is designed to show DCS in its best light. The following is taken from the DCS website.¹⁰²

Arizona Department of Child Safety

as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist pursuant to section 8-821 and is caused by the acts or omissions of an individual having care, custody and control of a child. Abuse includes:

(a) Inflicting or allowing sexual abuse pursuant to section 13-1404, sexual conduct with a minor pursuant to section 13-1405, sexual assault pursuant to section 13-1406, molestation of a child pursuant to section 13-1410, commercial sexual exploitation of a minor pursuant to section 13-3552, sexual exploitation of a minor pursuant to section 13-3553, incest pursuant to section 13-3608 or child prostitution pursuant to section 13-3212.

(b) Physical injury to a child that results from abuse as described in section 13-3623, subsection C. **ARS§8-201(2).**

"Neglect" or "neglected" means the inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child's health or welfare, except if the inability of a parent or guardian to provide services to meet the needs of a child with a disability or chronic illness is solely the result of the unavailability of reasonable services."

ARS §8-201(24)

¹⁰⁰ **ARS §8-821**

¹⁰¹ **ARS §8-824**

¹⁰² Check it out for yourself. **DCS Assessment Process**

Child Safety and Risk Assessment (CSRA) Practice Guide

Section I: Background Information (review priors and DPS history before the initial response whenever possible)

A. Prior History in Arizona or other states or jurisdictions:

- Document each report, including the current report, with the date, summary of allegations, findings, and service outcomes
- Document if there is a pattern of maltreatment, chronicity, increasing severity of the allegations, or a change in the household composition

B. Department of Public Safety (DPS) background checks and results:

- List any arrests, charges, and disposition for all parents of the child victim(s)
- List any arrest, charges, and disposition for each adult in the home where the maltreatment occurred
- Document each adults relationship to the child(ren)

C. Court Orders Limiting or Restricting Contact:

- Document a good faith effort was made to obtain the information: as part of this good faith effort, the CPS Specialist must ask the parent, guardian, or custodian under investigation if a current Court order exists
- List any Court order that may restrict or deny custody, visitation or contact with the child(ren)
- Identify jurisdiction and involved parties
- Summarize any Court orders that indicate a potential safety concern

D. Joint Investigation and/or Police Involvement:

- Identify Law Enforcement agency, Detectives names, contact information, and DR# for the incident
- Document the status of the police investigation and outcomes
- Joint Investigation Detail (LCH 431) will still need to be completed for all reports containing the "Criminal Conduct" tracking characteristic

E. Documents Reviewed (if applicable):

- Police reports
- Other Criminal history
- Medical records
- School records
- Court orders
- Provider reports on services provided to the family

Section II: Interviews with all required parties – Document each interview in narrative form with the date, type, location and who was present, information collected, or the concerted efforts to locate, contact, and interview all required parties

A. Reporting Source – The interview must gather information about:

- Any additional information the reporting source has related to current maltreatment, child functioning, adult functioning, parenting practices or disciplinary practices

B. Each alleged child victim – Children must be interviewed separately and the interview must gather information about:

- Who lives in the home and who are the child's caretakers
- Observations of the child (Infants, toddlers, non-verbal children) and the home
- Child functioning (Medical and dental health, mental/behavioral health, emotional well-being, education and/or development, special needs that would make the child vulnerable or unable to self-protect)
- Response to allegation(s)
- Assessment of all types of maltreatment
- Parent/caregiver functioning (Substance use, mental health, domestic violence or violence out of the home, intellectual and physical health or limitations)
- Family rules, chores and disciplinary practices
- Relationships among family members
- Whether child feels safe at home and with caregivers, why or why not?
- Is there anything the family needs?

C. All other children in the home where the child victim(s) reside (primary residence) and all other children in the home where the alleged maltreatment occurred - The interview must gather information about:

- Who lives in the home and who are the child's caretakers
- Observations of the child (Infants, toddlers, non-verbal children) and the home
- Child functioning (Medical and dental health, mental/behavioral health, emotional well-being, education and/or development, special needs that would make the child vulnerable or unable to self-protect)
- Response to allegation(s)
- Assessment of all types of maltreatment
- Parent/caregiver functioning (Substance use, mental health, domestic violence or violence out of the home, intellectual and physical health or limitations)
- Family rules, chores and disciplinary practices
- Relationships among family members
- Whether child feels safe at home and with caregivers, why or why not?
- Is there anything the family needs?

D. Custodial parent / Non-custodial parents of the child victim(s) - (If applicable and if the identity and whereabouts can be reasonably determined and contact would not be likely to endanger the life or safety of any person or compromise the integrity of a criminal investigation or the CPS investigation) – The interview must gather information about:

- Notification of rights and parent's response
- Both parents must be asked if there are any Court orders (Good faith effort)
 - Who lives in the home/child's caretakers
 - Location of each victim's non-custodial parent, if applicable
 - Observations of the parent and the home
- Response to allegation(s)
- Assessment of all types of maltreatment
- Protection of child by non-abusing caregiver, if applicable

- Child functioning (Medical and dental health, mental health, emotional well-being, education and/or development, general perception and expectations of each child, and attachment to and nurturance of each child)
- Parent/caregiver functioning (Substance use, mental health, intellectual and physical health or limitations, domestic violence or violence out of the home, criminal involvement/history, history of abuse or neglect as a child, recognition of problems and motivation to change, economic resources, adequacy of housing, family social supports, family stressors, coping skills, current services and the need for additional services)
- Family rules, chores and disciplinary practices
- Relationships among family members
- Court orders that restrict or deny custody, visitation or contact between any parent or other adult in the home and any child in the home

E. Spouse/Partner/Significant Other of the custodial parent/Other adults living in the home where the alleged maltreatment occurred, if applicable – Interviews must gather information about any of the following that are applicable to the individual:

- Who lives in the home/child’s caretakers
- Observations of the parent and the home
- Response to allegation(s)
- Assessment of all types of maltreatment
- Protection of child by non-abusing caregiver, if applicable
- Child functioning (Medical and dental health, mental health, emotional well-being, education and/or development, general perception and expectations of each child, attachment to and nurturance of each child)
- Parent/caregiver functioning (Substance use, mental health, intellectual and physical health or limitations, domestic violence or violence out of the home, criminal involvement/history, history of abuse or neglect as a child, recognition of problems and motivation to change, economic resources, adequacy of housing, family social supports, family stressors, coping skills, current services and the need for additional services)
- Family rules, chores and disciplinary practices
- Relationships among family members
- Court orders that restrict or deny custody, visitation or contact between any parent or other adult in the home and any child in the home

F. Alleged perpetrator, if someone other than listed above – Interviews must gather information about any of the following that are applicable to the individual:

- Who lives in the home/child’s caretakers
- Observations of the parent and the home
- Response to allegation(s)
- Assessment of all types of maltreatment
- Protection of child by non-abusing caregiver, if applicable
- Child functioning (Medical and dental health, mental health, emotional well-being, education and/or development, general perception and expectations of each child, attachment to and nurturance of each child)
- Parent/caregiver functioning (Substance use, mental health, intellectual and physical health or limitations, domestic violence or violence out of the home, criminal involvement/history,

history of abuse or neglect as a child, recognition of problems and motivation to change, economic resources, adequacy of housing, family social supports, family stressors, coping skills, current services and the need for additional services)

- Family rules, chores and disciplinary practices
- Relationships among family members
- Court orders that restrict or deny custody, visitation or contact between any parent or other adult in the home and any child in the home

G. Collateral contacts (other persons known to have knowledge of the maltreatment or who could confirm or rule-out a safety threat to the child victim or any other child in the home where the alleged maltreatment occurred):

- These may include but is not limited to other relatives not living in the home, school personnel, pediatrician and other medical professionals, law enforcement, tribal representatives, and out-of-state contacts
- Any additional information gathered related to the alleged abuse or neglect, child safety or risk of maltreatment

Section III: Analysis of information and conclusions about the presence of risk factors and/or safety threats and type of intervention needed:

A. Assessment of Present Danger – Narrative must include:

- Based on the initial contact with the child, was an immediate action required in order to ensure child safety before any further interviews or assessment could take place?
- If a protective action was required, describe the action.
- If the protective action includes a safety monitor, briefly describe how the safety monitor will manage the current safety threat to the child(ren)

B. Assessment of Risk Factor(s) for each child in the family and parents, guardian, or custodian and need for intervention:

- Identify and document risk factors based on information about the family's history and current functioning in each life domain which include the following:
Child Risk factors: Child Vulnerability/Self Protection; Child's Special Needs (disability)/Behavior Problems (alcohol abuse, drug abuse)
Parent, Guardian, Custodian Risk factors: Parenting Skills/Expectations of child; Parent Empathy, Nurturance, Bonding; Parent Substance Abuse (alcohol abuse, drug abuse); Parent Mental, Emotional, Intellectual or Physical Impairment; General History of Violence by Caregiver towards Peers and/or Children; Domestic Violence in Family; Protection of Child by Non-Abusive Caregiver; Parent History of Child Abuse/Neglect as a Child; Parent Recognition of Problem/Motivation to Change, Level of Cooperation
Family Risks factors: Economic Resources of Family; Family Social Support System; and Current Family Stressors
- Document protective factors (behaviors) by the parent, guardian, and custodian that mitigate the level of risk in the family.
- Document family strengths, positive qualities or resources the family can build upon to enable them to care for their child(ren), support case planning.

- Prior to closing a case, the family, CPS Specialist and other service team members should meet to obtain the thoughts of the parents and children about their unmet needs and develop a aftercare plan to address these needs and improve family functioning.

C. Assessment of Impending Danger = Narrative must include:

- All safety criteria **must** be met to identify a safety threat.
 - a. **Vulnerable child:** Is the child victim unable to protect him or herself or seek protection from others, regardless of the child's age? Is the child defenseless, exposed to behavior, conditions, or circumstances the child is powerless to manage?
 - b. **Out-of-control:** Is there an adult in the home who is able to control the identified safety threat to the child victim? Will the safety threat continue without external intervention?
 - c. **Severity:** Could the threat cause or result in serious pain, injury, suffering, terror or extreme fear, impairment, or death of child?
 - d. **Specific Time Frame:** Is the safety threat to the child's safety occurring now or likely to occur within the next 30 days? Could it happen just about any time within the near future-today, tomorrow or during the upcoming month?
 - e. **Observable Family Condition:** What is the specific behavior, emotion, attitude, perception, or situation by the parent/caretaker that can be seen and described and makes the child victim unsafe? Observable does not include suspicion and gut feeling. It can be clearly described and reported.

D. Safety Decision:

- Safe - No child is in present or impending danger
- Unsafe - At least one child is in impending danger
 - List the name of each unsafe child

Safety Plan: If a child is unsafe, a safety plan is required. The safety plan must be the least intrusive/restrictive intervention to the family and sufficient to control the safety threats (in-home, out-of-home, or combination).

- If a child is placed in a licensed home or facility, a safety plan agreement (CPS 1030B and CPS 1030 C) is not required.
- Document DPS checks for all non- DES licensed safety monitors in a Key Issue case note type.
- Complete the hard copy safety plan agreement with the family and the safety monitor. Scan the document into a Key Issue case note type.

Reminder: CHILDS Windows still needing completion

- Report Detail (LCH031)
- Joint Investigation Detail (LCH431)
- Investigation Tracking Characteristics Findings (LCH049)
- Investigation Allegation Findings (LCH048)
- NCANDS
- Case Closure (LCH060) – Closures only

Section IV: Clinical Supervision Discussion

- Review the Child Safety and Risk Assessment to confirm enough information was gathered to make an informed decisions on child safety and family risk factors
- If there are three (3) or more prior DCS reports in Arizona or other jurisdictions:
 1. Have the previous investigation/assessment outcomes been reviewed to assess causes for repeated reports
 2. The need for intervention based on the current and prior investigations regardless of the investigation findings (including proposed substantiated and unsubstantiated allegations); and
 3. Whether unresolved risk factors or service needs are present that warrant voluntary or involuntary intervention and provision of services to support the family, including an in-home intervention or in-home dependency, regardless of the investigation findings
- Review the Child Safety and Risk Assessment to confirm all required documents were obtained (the Child Safety Specialist must obtain or gather sufficient information to rule out the need or ability to obtain the following records: medical exam record, if one was required by policy; child medical records; child educational records; DCS history records from Arizona or other jurisdictions; DPS criminal history information on all victim's parents and adults in the home where the maltreatment occurred; court orders that restrict or deny custody, visitation or contact between any parent or other person in the home and the child victims; parent or child behavioral health records or other provider reports
- Review the Child Safety and Risk Assessment to confirm it demonstrates sufficient information was gathered during each interview (sufficient information confirms the presence or absence of each of the 17 safety threats and reveals the risk level in relations to each of the 14 risk domains)
- Discuss with the Child Safety Specialist the information gathered from all interviews and documents reviewed to determine the existence of child maltreatment, circumstances surrounding the maltreatment, adult functioning, child functioning, general parenting practices, and disciplinary practices. Analyze and determine if present danger, impending danger, or risk factors require DCS intervention. If no intervention is required, explain why. In addition, explain the level and type of aftercare planning required.
- When a DCS report alleges a criminal conduct allegation, review with the Child Safety Specialist the Criminal Conduct Investigation Practice Guide to ensure that all investigative tasks on a criminal conduct investigation have been completed.
- Discuss with the Child Safety Specialist and document if there was sufficient evidence gathered to draw a conclusion on findings for each allegation in the case.
- Document your Clinical Supervision Decision

THE PPH PROCESS

When the State removes a child, a number of legal processes are triggered. In Pima County, we follow **Model Court** procedures which we now call **PPH** procedures. The Model Court procedures were created in 1997 after studies showed that Pima County Juvenile Court cases were not working their way towards resolution in a timely and effective manner. Cases were taking an average of 3.2 years to get through the system. Also, families were spending up to 90 days in limbo before serious reunification efforts were put into place. As a result, during this initial period, minimal services were in place, minimal visitation was provided, and the family was deteriorating rather than healing.

These delays were not unique to Pima County. Indeed, they were endemic throughout the country.¹⁰³ With the help of some very decisive action by Nanette Warner, Presiding Judge of the Juvenile Court at that time, Pima County was designated one of thirteen model courts nationally. Pima County began to experiment with procedures designed to streamline the process. The entire Child Protection Community was engaged and the result was what we call the Model Court procedures. Procedures included attempting to engage all the parties in a cooperative effort at reunification at the earliest possible time; implementing more training and accountability to the court and for the attorneys and parties; and revising the calendaring system to help alleviate court congestion. After some experimentation, the PPH procedures were adopted for all cases.

The key to the model court process is to engage all the participants in a cooperative effort to support the family at the earliest possible time. Attorneys are assigned to both the parents and the children in advance. Within seven days of the child's removal -- even before legal process is served and the dependency petition is filed with the court -- a 30 minute meeting (**Pre-hearing Conference**) is scheduled back to back with an initial 45 minute hearing (**Preliminary Protective Hearing [PPH]**). The PPH also serves as a mandatory temporary custody hearing if necessary.¹⁰⁴ The parents are given information about the process in the form of a document called the **temporary custody notice (tcn)**. DCS puts together an initial proposed case map before anyone even gets to court.

PPH notification process

The Juvenile Court sets aside prescheduled times called Model Court or PPH Blocks for the Pre-hearing Conference and the Preliminary Protective Hearing¹⁰⁵. Attorneys are

¹⁰³ See RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, National Council of Juvenile and Family Court Judges, 1996. A copy is available in the Clinic Library.

¹⁰⁴ This new process is considerably more productive than the old way of proceeding. Prior to the model court, the child would be removed. Within 5 days a petition would be filed. The parent would be served and a hearing would be held within 21 days. If the parent wanted an attorney, the process could be delayed a week or two further. By the time the court took a substantive look at the case or the parent requested a temporary custody hearing the child may have been away from home for over a month.

¹⁰⁵ The Clinic is notified every three months of the days that we are "on call" for a PPH block. Pre-hearing Conferences and Preliminary Protective Hearings are held most days at 8:30 and 10:00 am. We will know in advance the dates and times of our PPH hearings. We will not

pre-assigned to a date and time to represent the parents and children for each PPH Block. The times available for prescheduled blocks are made known to DCS intake workers.

When the child is removed, the worker must request the Attorney General's Office to file a dependency petition with the Court within 72 hours. At the same time as the request, the parent is given the temporary custody notice with the prescheduled time for the PPH Block. The worker must then telephone a "case intake" to the Dependency Unit of the Juvenile Court. That phone call puts the court on notice that a petition is coming.

The Dependency Unit will assign the case to a PPH Block and assign the attorneys to the case. The Dependency Unit will notify the attorneys of their assignments both by phone and by delivery of a notification form to their mail boxes at the Juvenile Court.¹⁰⁶ The notice form given to the lawyers will contain the name and address of their clients; the client's telephone, if any; the names of the other lawyers, parties and case manager. The parents will **not** be told the location of the child or the name of any foster parents.¹⁰⁷

Prior to the PPH Block, an ex-parte **petition** will be filed with the Court. The petition will be faxed to the court even before it is filed to help expedite the process. The petition will include an application for temporary court orders which must include a ratification of the removal of the child. Temporary orders include the right to take custody of the child, to place the child in school and to provide medical care.

Attorneys, **including the attorney for the child**, are supposed to meet with their client **before** the PPH block. Attorneys for children should meet with the placement as well. **Under new law, attorneys for children must ask inform their child-clients of their legal rights and ask them if they wish to come to court – regardless of age.**

In addition, the DCS worker should arrange at least one visit between the parent and the child after the removal and before the court date. The parents should be encouraged to come to the PPH and be encouraged to bring supportive family and friends.

know anything at all about the case until we receive notice confirming the PPH. In a good week, we will have a week's notice. Sometimes, we have as little as one day's notice.

¹⁰⁶ Each contract attorney (including the Clinic) has an open cubbyhole or box at the courthouse (on the far west end of the building right in the attorney's room). The mailboxes are used by the court to deliver documents and notices. We often use those boxes to communicate with other counsel as well -- although be mindful that placing a document in an attorney's courthouse mailbox may NOT be sufficient for service of process. Check with the attorney to be sure.

¹⁰⁷ **It is standard practice NOT to tell parents where their child has been taken for temporary placement. This may seem cruel at first -- and in some ways, it is. However, the Court has had too many experiences with too many irate or intoxicated parents coming to the placement and creating incidents which are not healthy for the child or the child's placement. Many foster care homes or facilities will only take children if they can be insulated from the parents. As a result, the names and locations of placements are almost NEVER mentioned in front of the parents or on the court record. The term "foster placement" or "foster parent" is used. Obviously when there is a relative placement known to a parent the same precautions may not be necessary.**

DCS Report to the Court

While all this is going on, the investigating worker will be preparing a written report to the Court. That report will be the first detailed look at what this case is all about. Attorneys, clients, and the court rely on this report even though it is preliminary and contains assertions that may end up looking very different on further investigation. On the next page is the outline that DCS uses for its preliminary reports. The report is supposed to contain a history of the case, the reasons the children were removed, information about other possible placements, and a preliminary assessment of the services that DCS intends to provide.

The report will usually contain an attached narrative and supporting documents. Since our clients often do not know all the family history and may not know about the family's interactions with DCS, all of this information is significant. At the same time, since this information is both preliminary and filtered through DCS perspective, we should be cautious about drawing too many long-term conclusions from first impression information. The following is the format of a DCS report to the Court:

REPORT TO THE JUVENILE COURT FOR PRELIMINARY PROTECTIVE HEARING AND/OR
INITIAL DEPENDENCY HEARING

Court Case Number

Date of Report

Case Name

ID:

I. CHILD INFORMATION

A. Name and Date of Birth for Each Child Subject to This Court Case Number:

B. Child or Children Subject to This Report If Different From Above.

II. REASON FOR CPS INVOLVEMENT

A. Necessity for Temporary Custody:

Describe why temporary custody was necessary and continues to be necessary (include evidence of abuse or neglect). Describe how the parent, guardian or custodian's behaviors caused the child to be unsafe and/or at risk of harm.

B. Parent's Response: Parent's/Guardian's/Custodian's verbal or written response to the allegations.

C. History of Reports: (Summarize each report and include the date of the report and the outcome starting with the most recent report).

III. PROPOSED CASE PLAN

A. Case Plan Goal: List goal and target dates.

Include concurrent plan if applicable.

B. Visitation Plan: Describe visitation plan schedule and summarize the results of the visits with the child's parent/guardian/custodian, family members (including grandparents and siblings), relatives, friends and any former foster parents that have occurred to date/since removal. State whether visitation or contact is in the child's best interest. If visitation or contact is not recommended, state reasons why this would be contrary to the child's safety or well-being.

IV SERVICES AND SUPPORTS

- A. **Parent Locate:** Describe efforts (including dates) to locate missing parent(s) or indicate not applicable.
- B. **Services and Supports Provided/Necessary to Prevent Removal, to Remedy the Need for Continued Temporary Custody, and to Facilitate Reunification including the behavioral changes the parent or guardian must demonstrate in order to eliminate the safety threats and risk factors identified in the case plan:**

For each applicable service, include information regarding the following:

1. Service description including who requested the service
2. Dates requested, initiated, and provided
3. Parent/guardian/custodian participation.
4. Outcome, including behavior changes
5. Explanation if service not provided
6. Describe coordination with the Regional Behavioral Health Authority (RBHA) or other provider

V. CHILD'S STATUS

Describe child's overall functioning. Include medical, social and educational status.

VI. CHILD'S PLACEMENT

- A. **Current Placement:** Identify and describe the type of current placement. Explain: whether this placement ensures the safety of the child, that the child's needs are met in the least restrictive setting available and in close proximity to the home of the parents. State whether this placement is temporary or permanent.
- B. **Placement With Grandparent, Relatives or Extended Family:** Describe efforts to identify and assess placement with a grandparent, relative or extended family, including a person who has a significant relationship with the child (include the child's and/or parent's tribe, if the child is or may be Native American). If the child(ren) is/are not placed in the home

of a grandparent, relative or extended family, including a person who has a significant relationship with the child, explain why such placement has not been identified or is contrary to the child(ren)'s best interests.

- C. **Placement with Siblings:** If the child has a sibling(s) in out of home placement, describe what efforts have been made to place the siblings together. If not placed together, state why and describe efforts to facilitate frequent visitation or contact with siblings. If frequent visitation or contact is not recommended, state reasons why this would be contrary to the child's safety or well-being.

- D. **Support for Out-of Home Caregiver:** Describe the services provided to address the child's placement/special needs and to support the out-of-home caregiver

- E. **Out-of-State Placement:** If an out-of-state placement is appropriate and in the best interest of the child, state why (include ICPC and/or out-of-state visitation status).

VII. **ICWA Preferences:** If the child is a child of Native American Heritage, describe active efforts to provide culturally appropriate remedial services and rehabilitative programs, and efforts to comply with placement preferences of the Indian Child Welfare Act. Include efforts to identify and contact the child's tribe and confirm the child's membership status including the name of the tribe and membership number, if applicable.

VIII. DEPARTMENT'S SUMMARY AND CONCLUSIONS

IX. DEPARTMENT RECOMMENDATIONS:

A. Department

It is respectfully recommended that _____ be made a ward(s) of the court, committed to the care, custody, and control of the Arizona Department of Economic Security.

It is further respectfully recommended that _____ be placed in the physical custody of _____ with appropriate medical, social, and educational authorizations.

If the child is in out-of-state placement, it is further respectfully recommended that the court find that the out-of-state placement continues to be appropriate and in the best interest of the child.

B. Financial:

It is respectfully recommended that beginning (date) _____, the parents listed below be assessed the following amounts on a monthly basis per child as the contribution towards the cost of foster care:

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

C. Reasonable Efforts Findings

It is respectfully recommended that the court find that the Arizona Department of Economic Security has made reasonable efforts to prevent or eliminate the need for removal and to make it possible for the child to safely return home.

If the child is an Indian child, it is further respectfully recommended that the court find that Arizona Department of Economic Security has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

If the child is an Indian child, it is further respectfully recommended that the court find that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

It is further respectfully recommended that the court approve the proposed case plan.

What happens at the Pre-hearing Conference and at the PPH?

The PPH Block is designed to deal with three matters:

- 1) temporary, short term placement of the child;
- 2) visitation between parent and child, if the child will not be returned immediately (and other visitation, if appropriate);
- 3) services that can be put in place

The conference will also briefly address whether or not paternity has been established and whether or not the child is an “Indian child” as defined by a federal law known as the Indian Child Welfare Act or ICWA.¹⁰⁸ If a child is potentially an Indian Child, certain federal standards are invoked that require additional findings as well as notice to the tribe or tribes to which the child might belong. The Indian Tribe may then have the right to intervene in the proceedings, to have a say in the appropriateness of any placement, and a to require a different standard of proof. There is more on ICWA later in the Handbook.

The Pre-hearing Conference

Parties are asked to appear at least 15 minutes in advance to discuss issues.¹⁰⁹ Sometimes they meet; sometimes they do not. In any event, we should show up 15 minutes early.

The Pre-hearing Conference is convened in a room large enough to accommodate all who are present. A Court facilitator will provide an overview of the PPH and introduce the participants to each other. If an interpreter is necessary, the facilitator will make sure one is available. The Judge is **not** present for the Pre-hearing Conference. The parties are directed to discuss **placement, visitation, and case plan services**.

The parties are supposed to be encouraged to have their say in an open dialogue.¹¹⁰ Sometimes that happens; sometimes the discussion is a little too structured for an active engagement. A lot depends on the facilitator and the particular attorneys.

The parties will be reminded to try to act in and to consider the best interests of the child or children. Generally, the parties are directed not to discuss the allegations in the petition. The allegations are reserved for a later time and place.

After initial introductions, the first thing that will happen is that we, the child’s attorney, will be asked to describe how the child is doing. **That means that we must visit the child or children in the placement beforehand.**

“How is the child doing?” may not seem like much of a question. But in a large number of cases, the parents have not seen their child since removal and this will be their

¹⁰⁸ **25 U.S.C.S. §§ 1901 et seq**

¹⁰⁹ **ARS § 8-823(D)**

¹¹⁰ **Rule 49 RPJC**

first opportunity to hear from someone -- other than DCS -- about their kids. Our reassurance that their kids are ok can be meaningful. Of course, if there are issues, then we need to raise them.

The second thing that will happen is that someone from an outside agency will have done an emergency assessment of the child called an “**Emergency Response.**” The responders are usually from the Blake Easter Seals Foundation for younger children or, for older children, from Southern Arizona Mental Health Corporation (SAMHC – sometimes referred as Sam Heck as if it were a person). Both agencies look for developmental delays, behavioral health issues, medical issues, and the like. The idea is to get any helpful services started immediately.

Unfortunately, immediate is a relative term. Because of the way DCS contracts services with other providers, the standard protocol is to schedule a **Child and Family Team Meeting or CFT** at which the particular services will actually be discussed. The CFT will be scheduled right there in the pre-hearing conference.

The CFT is an out of court meeting of all the relevant individuals – the parents, the child, the case manager, any mental health professionals, support persons, placements – who have an interest in the children. At the CFT, the family and professionals will discuss and try to agree on a plan to make the family whole. The primary purpose of the CFT is to insure that the family will be engaged in and have input into behavioral health decisions.

At the CFT -- **which we should attend** -- referrals will be made to other agencies or people to provide behavioral health or other services. There may be a gap between referral and actual therapy.¹¹¹ So if our kid needs services NOW, we need to speak up at the pre-hearing conference and convey our sense of urgency that services need to be provided quickly – scheduled CFT or not.

A problem with CFT’s is that parents and case managers likely will attend without their attorneys. That places us in a Rule 4.2 bind. We cannot communicate with people who are represented by counsel without counsel’s permission. On the other hand, our clients need to have a voice at the CFT. **So, our protocol is to announce at the Pre-Hearing conference to all counsel that we will intend to attend all CFTs.** Other counsel can then choose to come or not. If lawyers are not present at the CFT, we will have to be careful not to direct conversation at represented parties. But we can direct our conversation to the CFT facilitator who is employed by a behavioral health agency and not represented by counsel. Whew! That’s awkward. But it is doable.

While we try to attend as many CFT’s as possible, most attorneys do not have the time to attend with their clients. So our attendance may be off-putting (if that’s a word). Attorneys – especially the AG – can justifiably feel uncomfortable that we will be present while their clients are present and unrepresented. We need to respect that ethical rule 4.2

¹¹¹ It might take a week or two to set up a CFT, then a week or so for an initial appointment with a behavioral health provider, then a week or so to meet with a therapist. Before you know it, a month has passed and our client’s condition may have deteriorated.

prohibits unauthorized communication with represented persons. Thus, while it may be redundant, it will never hurt if we remind the AG and other counsel before each CFT that we will be attending and that we won't talk to their clients. CFT's should occur about once a month.

Sometimes, the behavioral health agency confuses ethical rule 4.2 with a non-existing rule that “**if one attorney attends, they all must attend.**” That rule (which does not exist) has caused some CFT's to be canceled unless we leave. If that comes up, contact your supervising attorney. Usually the confusion can be straightened out with a phone call. More on CFT's a little later in the Handbook.

The odd thing is that the cultural norm seems to be that children's attorneys do not attend CFT's. And yet, the court rules expect the opposite. Juvenile Court Rule 40.1(F) states very explicitly:

*F. To the extent possible, attorneys and guardians ad litem should attend or provide input to Department of Child Safety staffings, Foster Care Review Board reviews and Child and Family Team meetings.*¹¹²

This just seems to be an issue that we have to keep addressing like hamsters on a wheel.

In most instances, at the pre-hearing conference, DCS will provide all parties with an investigatory report containing information in the format above. DCS may also present a preliminary **case map** prepared in advance by DCS. In addition, the Agency will make recommendations for the immediate and long-term placement of the child. The facilitator should ask everyone present if they know of a relative or kinship placement possibility. More often than one might think, the family may know of an appropriate and available placement that is familiar to the child and can facilitate parent child visits or other contact.

After discussing the temporary placement of the child and visitation, the proposed services are reviewed. The parties discuss and try to identify points of agreement. Some issues can be negotiated successfully; others will not.

The major sticking point usually concerns **visitation** between the parent and the child – and often visitation between the child and other significant people in the child's life. At the beginning of a case, DCS will most likely insist that visits be **supervised**. In most instances, visits will be supervised by a DCS employee or someone contracted with by DCS. The main reason for insisting on supervision is the safety of the child -- especially if there are allegations of substance abuse or some form of physical or sexual abuse. A secondary reason is to make sure that the parent does not do something inappropriate -- like promise the child that he/she will be home soon when that may not happen or pressure a child to say certain things to the DCS worker.

¹¹² **RPJC 40.1**

Supervision creates systemic obstacles to visits – mostly around transportation and supervision resources. What we know from research is that parents are more likely to accept the help they need when they see their children frequently. What we also know is that arranging for visits with a child can be costly to the Agency. Supervised visits require someone to transport the child to and from the DCS office or visit site¹¹³ and someone to supervise the visits. That’s expensive and really stretches the DCS budget.

On the other hand, we know from experience that most children want and need to see their parents **[and their siblings and their relatives and their friends]**.¹¹⁴ We also know that parents who see their children more often are more likely to successfully complete their reunification plan. So it is important that we take an active role in securing as much visitation as possible for our clients consistent with their wishes.¹¹⁵ We will talk more about how to accomplish that later in the Handbook.

Preliminary case plan or case map

The case map is a simple chart of the initial plan to reunify the family. At the time of the PHC, most parents are not functioning at their best. The parents are under the stress of having their children removed and of having to come to court. And the odds are that this is all happening while they have untreated mental health issues, substance abuse issues or both. So, after much debate and experimentation, it was decided to give parents a one-page overview of what is expected of them to get their children back. Simple can be useful.

The case map give parents a time-table of what they need to do and when. The case map is **not** the same as the **case plan**. The case plan is a much more detailed formal legal document that will be an individualized plan for family reunification. The case plan will be introduced about 60 days into a case if the case goes that far. DCS needs that time to get a better view on the family’s strengths and challenges before developing a formal case plan.

Below, you can see what the case map looks like for substance abusing parents. There is also a case map where substance abuse is not an issue. The individual tasks are listed on the left. The time line is colorized so that the parent can get a sense of priorities. Take a look at the case map before reading on.

¹¹³ Remember, the parents will, most likely, not be able to go to the child’s foster placement because the name of the placement is kept a secret. Also, most placements do not have supervision services. That’s not always the case. Casa de Los Ninos, for example, is a temporary shelter for younger children. The parents are actually encouraged to visit their children on site at Casa.

¹¹⁴ See **ARS § 8-513(C)** “A child placed in foster care has the right to maintain contact with friends and other relatives unless the court has determined that contact is not in the child's best interests as determined pursuant to a court hearing.”

¹¹⁵ If our clients tell us that they do not want to see their parents, that will, obviously, change our approach.

Name:	Preliminary Protective Hearing	Settlement Conference & Disposition			1st Dependency Review			2nd Dependency Review				Permanency Hearing
Court Case #:	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Preliminary Protective Hearing Date:												
Task:												
Maintain Contact with your CPS Case Manager.												
Participate in Visitation												
Participate in Drug/Alcohol Testing												
Participate in Family Team Meetings (Child and Family Team & Adult Recovery Team Meetings)												
Complete a Substance Abuse/Mental Health Assessment												
Observe 1 Session of Family Drug Court												
Establish Paternity												
Complete Psychological Evaluation (if recommended by CPS consulting psychologist)												
Participate in Substance Abuse Treatment												
Participate in Parenting Education												
Participate in Other Recommended Treatment (may include: psychiatric evaluation, individual therapy, group therapy, family therapy, etc.)												
Participate in Therapy to Address Domestic Violence Issues												
Provide CPS with a Relapse Prevention Plan (Obtain a guide from your CPS investigator)												
Obtain and Maintain Legal Income												
Obtain and Maintain Safe and Secure Housing												

The case map above is pretty standard. Note how some of the case tasks start at the beginning and some begin at later stages. At the beginning, we try to keep the tasks simple: go to visits, test for drugs/alcohol, attend some team meetings and complete an initial assessment for substance abuse and/or mental health issues. We also require parents to attend a single session of the Family Drug Court [more on that later] and make sure that paternity has been established for each child.

Paternity can be very straightforward – e.g., the parents were married at the time of the birth of the child or there is a prior judicial order of paternity. The latter usually occurs in conjunction with a child support order. Paternity can be more difficult to determine when there is more than one possible father or if paternity is unknown. The question of “Who’s your Daddy?” can be very profound both legally and emotionally for our clients. When paternity is in doubt and the putative father has been located, DNA testing is available.

It is pretty standard for parents to be required to undergo a psychological evaluation at the early stages of a proceeding. Psychological evaluations -- commonly referred to as “psych evals” -- are very useful tools for putting together a case plan that makes some sense based on the parent’s individual strengths and weaknesses. We used to try and schedule the evaluations as early as possible. However, we have learned that psychological evaluations of parents with substance abuse problems can be distorted unless the parents are substance free. So, the Court may wait a month or so when, hopefully, they will be sober.

Preliminary Protective Hearing

When the Pre-Hearing conference is completed, the parties are moved into the courtroom for the **Preliminary Protective Hearing [PPH]**. While the parties are walking over to the courtroom, the Judge will be given a short report by the PHC facilitator. The Judge can then quickly ratify the points of agreement. The Judge will also have a heads up on the areas of disagreement.

In Court, after hearing brief argument, the Judge can resolve those differences. The Judge may also hold temporary custody hearing if the parents request one. A temporary custody hearing is a parental challenge to the State's taking custody of the child. There will be more on the temporary custody hearings later in the Handbook.

A quick note on decorum

Some attorneys dress up for court. Some don't. Some attorneys stand up when they speak in the Juvenile Court. Some don't. We prefer to be more formal. Wear a suit; stand up when you talk; address the Judge as "Your Honor" -- all of that good stuff.

You certainly have a constitutional right to free expression which includes the right to wear flip flops and tie dyed shirts. You also have a job to do – i.e., represent your client. At some point, too much informality can irritate a Judge or be taken as a sign of disrespect. Wearing jeans, reclining in the chair, calling the Judge "Dude" are not likely to be viewed positively.

It is not that Judges are a stuffy bunch of fuddy-duddies. Judges can party, too. It is that proper decorum adds a level of seriousness to the very serious business of family protection. Even if you do not care about your image, negative feelings about your demeanor can and do reflect back on your client. Why take a chance and hurt your ability to represent your client by projecting a poor image? No case was ever lost by showing respect for the court. We cannot say the same about the opposite.

In the PPH, the Judge must make certain findings of fact.¹¹⁶ The first is that it would be contrary to the welfare of the child to continue living in the home. If the Judge cannot make that finding then the child should be returned to parental care. The Judge must also determine if DCS has made an effort to identify and assess whether there is a grandparent or other relative with a significant relationship to the child who might serve as a placement.¹¹⁷

¹¹⁶ **ARS §§ 8-824 and 8-829.**

¹¹⁷ **ARS §8-829** Locating relatives is a priority under the Arizona child protection scheme. If a child is not placed with a relative within 60 days after the removal, the State has the burden of showing that such a placement would not be in the child's best interests. See also **ARS §8-845.**

The Judge will also deal with a number of routine administrative items. The parents and child's attorney (on behalf of the child) will be **formally served** with a copy of the **petition** unless that has been previously accomplished. The parents will fill out a financial affidavit for the Court to see if they are eligible to continue with court appointed counsel. The Court may attempt to identify non-custodial parents or to deal with issues of establishing paternity for children born out of wedlock. The court must identify whether or not the child is an "Indian Child" pursuant to federal law.¹¹⁸ If the child is old enough, the Judge will make sure that someone is responsible for the child's educational needs.

In addition, the court will give the parents a calendar to keep track of important dates – including future court dates. It is important, both legally and therapeutically, for the parents to attend all court hearings and meetings. The court will warn the parents that their failure to attend hearings could jeopardize their legal status.

The court must also warn the parents that:

*"substantially neglecting or wilfully refusing to remedy the circumstances that cause the child to be in an out-of-home placement, including refusing to participate in reunification services, is grounds for termination of parental rights to a child."*¹¹⁹

That warning is a pretty negative way to start the process of family reunification. In fact, that warning can set the stage for permanently removing the children from the family. You might wonder about the psychology of beginning the process of family reunification with the warning to a parent that *"if you screw up, you may lose your children forever."*

The court will also inform the current placement or a potential placement that the placement has a right to be heard at all future hearings.¹²⁰ The right to be heard does not mean that placement is a legal party who has a right to call witnesses and cross-examine witnesses. The placement only has the right to make a statement.

Finally, the Court will set further hearings. The court is fairly accommodating of people's schedules. Always bring your calendars so that a hearing is not scheduled during your most difficult final exam or during your honeymoon. [Really, that happened once].

In most instances, nobody will have yet discussed whether or not the allegations in the petition are true. That is left for the adjudicatory phase of the proceeding. The Court may set a trial date at the PPH. The court must schedule a **settlement conference** or a **status hearing** to be held within the next 30 days for the express purpose of seeing if there is common ground to settle the matter without a formal trial. Cases that appear amenable to a successful mediation may be referred to a **facilitated settlement conference** with the court mediator for possible resolution.¹²¹ The dependency will then proceed to the adjudicatory phase.

¹¹⁸ **ARS §8-815**

¹¹⁹ **ARS§8-824(7)** note 99

¹²⁰ **ARS§8-824(10)** note 99

¹²¹ **ARS§8-844**

THE COURSE OF A DEPENDENCY

Parents are entitled to a completed trial within 90 days of service of the dependency petition.¹²² For good cause, the trial date can be extended for an additional 30 days. Any further extensions must be approved by the Arizona Supreme Court.¹²³ At the trial, DCS must prove the allegations in the petition and demonstrate that the allegations, if proven, meet the legal standard for a dependency – i.e., that the child does not have a parent able and willing to properly care for the child. DCS must prove the allegations by competent evidence. Hearsay, with certain specialized exceptions, is not admissible.¹²⁴ The burden of proof is by a preponderance of the evidence except in matters involving Indian children where the burden is by clear and convincing evidence.¹²⁵

Each party has the right to call witnesses, offer exhibits, and to cross examine the witnesses for the other side. Dependency trials follow the general procedures set out under the Arizona Rules of Civil Procedure. There are specific Juvenile Court rules and statutes, however, which provide for a more streamlined and informal process than other types of civil litigation.¹²⁶ For example, formal discovery is rarely used. The trial is conducted with less formality than a civil trial in Superior Court.

The Court may make a decision either orally right after the trial or by an in-chambers **minute entry**. If the court finds that a dependency has not been established, it will dismiss the petition and immediately return the child to the parents. If the Court finds that a dependency has been proven, then the Court will hold a **dispositional** hearing within 30 days to determine what happens next.¹²⁷

The dispositional hearing is an evidentiary hearing to determine what to do about the dependency. The dispositional hearing is usually the point at which the formal case plan is introduced and adopted by the Judge.

The Court has a number of dispositional alternatives available by statute. These include options to either place the child back in the home or with relatives or to place the child in foster care. Relative placement is the preferred placement option. The available dispositions also include providing remedial services to the child and to the family to promote reunification.¹²⁸

¹²² **ARS §8-842 (C)**

¹²³ **Id.**

¹²⁴ **See Rule 45 Arizona RPJC**

¹²⁵ The Indian Child Welfare Act or ICWA greatly modifies the state's rights and responsibilities for Indian children. The standards for removal, for finding a dependency and for terminating parental rights are different for Indian children. See section on ICWA infra.

¹²⁶ **Rule 6 AZ Rules of Procedure for the Juvenile Court.**

¹²⁷ **ARS §8-845.**

¹²⁸ **ARS §8-846.**

The key decision by the Judge at a disposition hearing is the preliminary **case plan**.¹²⁹ A case plan is the blueprint by which the State hopes to reunify the family. The case plan should identify problems to be addressed and offer an individualized strategy to address them. Part of the case plan will involve the parents completing certain tasks such as a parenting classes or random urinalysis. Part of the case plan may involve the state supplying therapeutic or medical services or providing supervised visitation.

In theory, if a parent follows and completes the case plan, the child will be returned and the dependency will be dismissed. On the other hand, failure to complete the case plan may be proof that returning the child to the home is a risky proposition¹³⁰ or may even justify a termination of parental rights.¹³¹ Thus the case plan takes on enormous importance. It is critical that the case plan be a well-conceived and intelligent blueprint for each particular family. One size does not fit all.

Over the next several months, all the parties are expected to work to implement the goals and tasks of the case plan. Periodically the Court will reevaluate the situation at a hearing called a **dependency review**.¹³² The statute requires that the reviews be held at least every six months. Under the model court procedures, however, reviews are usually schedule 90 days apart.

At the dependency reviews, the Court will assess the progress of the case plan. The court may modify the plan if that is deemed appropriate. If the parents are not making enough progress on their case plan, the court may take action to impress on the parents the importance of completing the case plan if they want their children returned home.

If the court feels that the parents may not be able to succeed in resolving their parental problems, the court may approve a **concurrent case plan** of severance and adoption. A concurrent plan allows the State to start the process of planning to terminate parental rights while continuing to offer remedial services. The idea behind the concurrent case plan is to plan for the contingency of the parent's failure enabling the State to find the child a permanent home without unnecessary delay.

In addition to dependency reviews in the Juvenile Court, whenever a child is in an out of home placement, an independent organization called the **Foster Care Review Board** will conduct periodic hearings to assess the status of the child. The Foster Care Review Board operates under the auspices of the Arizona Supreme Court. The FCRB conducts reviews every six months and makes recommendations to the Juvenile Court concerning such matters as the efforts made by the Agency to implement the case plan and the progress towards achieving a permanent plan for the child.¹³³

¹²⁹ **ARS §8-845**

¹³⁰ **ARS §8-861**

¹³¹ **ARS §8-533(D)**

¹³² **ARS §8-847**

¹³³ **ARS §8-515.03** see section on Foster Care Review Board below.

Within one year of the child’s removal, the court must hold a hearing to determine a **permanent plan** for the child – six months if the child is under 3 years old. The hearing is called the **permanency hearing**.¹³⁴ The permanency hearing is a formal hearing in a manner similar to that of the dependency adjudication. Each party has the right to call witnesses, to introduce documents, and to cross examine witnesses.

At the permanency hearing, the court must first decide if it is safe to return the child to a parent.¹³⁵ The statute requires the court to decide whether “*return of the child would not create a substantial risk of harm to the child's physical, mental, or emotional health or safety.*”¹³⁶ The statute specifies that evidence that a parent did not complete the case plan is proof that “*return of the child would create a substantial risk of harm to the child.*”¹³⁷

If a preponderance of the evidence shows that the child cannot be safely returned, then the Court must order a final permanent plan for the child. The final plan may be either severance and adoption, permanent guardianship, or “another permanent planned living arrangement”¹³⁸ (formerly “long term foster care”). If the parents are making substantial progress but the child may not be safely returned at the time of the permanency hearing, the Court may grant the State and the parents more time to continue reunification efforts.¹³⁹

Because of the limited options available to the Court, the Judge may order the discontinuance of reunification services. Essentially, unless the parent is successful at the permanency hearing – or at least making substantial progress -- the State may be relieved of its obligation to make reasonable efforts to reunite the family.

If the Court confirms a plan of severance and adoption, then a motion must be filed by the state to commence severance within 10 days of the final hearing. If the plan is for permanent guardianship, the State has 10 days to file that motion as well. Any plan for long term foster care can be made only if there is a finding of extraordinary circumstances. Hearings for both must be scheduled within 30 days of the final permanency hearing.

The statutory grounds for a motion for severance and adoption or for a permanent guardianship must be proven by clear and convincing evidence and be consistent with the best interests of the child. If those motions are successful, the dependency will terminate upon the completion of the adoption or the guardianship. Otherwise the dependency will continue until the child reaches the age of 18.

In Part II of the Handbook, we will explore the steps in a dependency in much greater detail with special emphasis on the ethical and functional roles of a child’s lawyer.

¹³⁴ **ARS §8-862**

¹³⁵ **ARS §8-862**

¹³⁶ **ARS §8-861**

¹³⁷ **Id**

¹³⁸ ASFA uses the term “another planned permanent living arrangement” instead of “long term foster care” and/or independent living for children 16 years and older. ASFA requires a showing of “compelling reasons” for plans that do not involve adoption or permanent guardianship.

¹³⁹ **ARS §8-862**

Clinic Procedures for a New PPH

I. What Happens When the Clinic Gets a New PPH?

Under the Juvenile Court Protocol, when the Clinic is assigned a new case, we will receive a single sheet of paper called the "Intake Sheet". The Intake Sheet will provide the name and age of our client as well as the address and phone number of the child's placement. The intake sheet will also contain the names of the parents or guardians¹⁴⁰; the addresses of the parents, if known; the name of each parent's attorney; the attorney's phone number; and the name and phone number of the intake worker. Below is a sample intake sheet.

The intake sheet gives us a lot of information – e.g. the name and address of our client and the placement, the name and phone number of the case manager, whether or not there are drug allegations or domestic violence allegations. But the intake sheet does not give us a lot of other information such as why the children were removed, whether or not our clients have special needs, how are they doing, and what is the back story to all of this.

CIRCLE REACTIVATED? SUPPLEMENTAL? DELINQUENCY: Crt hrg history? No crt hrg history? NEEDS TO BE HEARD ON SPECIFIC JUDGE BECAUSE?

INTAKE SHEET REMOVAL DATE: 1/18 J# 000000 Today's Date: 1/19

DES Intake Worker: Daniel A. [REDACTED] Phone: 802 570 0000 Ongoing Worker/Unit: _____

PPH Hrg-Date/Time: 9/2 10:15 Judge: Knuck Initial Hrg-Date/Time: 9/8 8:40 Judge: Sabatino

A.G. Heidi Date Notified: 1/19 PO: _____ Date Notified: 8/19 Email? _____ Phone? _____ Was there a team decision making meeting? Yes No

Mother's Name: Maria E. DOB: 8/8/80 Phone: _____ Location: _____ Zip Code: 05

Mother's Attorney: Stucky Date Notified: 1/19 * Was this case previously assigned to an IN-HOME Service Unit? Yes No

Is substance abuse a contributing factor to your CURRENT dependency action? Mother drugs? _____ Father drugs: Marijuana, Meth

Has Parent been referred to AFF? M F Other No ART Pilot: yes no Special Needs/Comments: _____

Interpreter Needed?: Language: I For who? _____ Domestic Violence Noted?: _____

Which Network did you select on the 24 hr Urgent Response Referral to SAMHC? Providence Pantano La Frontera None Selected

**IS THIS AN INDIAN CHLD/CHILDREN? Yes No

Mom: SS# _____ Dad: SS# _____ Tribal Affiliation _____ Enrollment# _____

RACE	DOB	Current Location /Mailing Address	Phone #	Attorney/Child's Name	Date / Who Notified
<input checked="" type="checkbox"/>	1. Child				
	<u>Jose</u>	<u>1/18/98</u>		<u>Bennett</u>	<u>PB 1/19</u> <u>VM 1/19</u>
	Father				
	<u>Raul</u>	<u>2/2/76</u>		<u>Lafayette</u>	<u>VM 1/19</u>
	2. Child				
	Father				
	3. Child				
	Father				

MOTION TO CONTINUE? YES NO HOW MANY DAYS? 7

11/28/2007\Pejco-fs01\Departme
Folders\Dependency\dependency forms\FORM - DES Intake Sheet.

¹⁴⁰ For brevity purposes, the term "parents" will include any type of custodial guardians (grandparents, title 14 guardians, family friends) unless stated otherwise.

We do not usually know much else at this point. We do not routinely receive a copy of the dependency petition until a few days after we receive the intake sheet.¹⁴¹ So, at the beginning, we are pretty hungry for information.

Initial Administrative Procedures

We have a few internal protocols that must be followed once we receive the intake sheet.

1. The very first thing you need to do when you receive a copy of the intake sheet is to photocopy it and give the original to Gloria Klinicki, our Administrative Assistant. Gloria needs the original to create a new permanent file. You will need to retain a copy of the intake sheet so that you can begin to work on the case while Gloria is putting the file together.

2. Double check the date and time of the PPH Hearing and make sure it is correctly scheduled on the Clinic's court calendar and on your personal calendar.

3. If she has not already done so, ask Gloria to change the listing on our calendar from the generic "PPH" to the name of the case by last name of **our** client. [The Juvenile Court lists cases by the last name of the custodial parent -- sometimes that can be confusing if the last names are different.]

4. In a few days you will also receive a copy of the Petition with a slew of attachments that include **temporary orders** issued by the court. As soon as you receive the petition, make a photocopy for yourself and give the petition to Gloria for inclusion in the new file.

5. When the file is ready, Gloria will give you a note in your mailbox.

II. OK, So I Have This New Case and An Intake Sheet. Now, what do I do?

At this point, you have the name and age of your client and not much more. When we receive the intake sheet, we may have no information about why the client was removed from his or her parents or anything at all about the mental state or physical health of the child. With little information at hand, it may be helpful to take another look again at steps one and two of the three-step planning process mentioned earlier in the handbook. "What do I need to accomplish right now?" and "What is my plan to accomplish it?"

What do I need to accomplish?

¹⁴¹In a private dependency, we might receive a petition right away. Unfortunately, in a private dependency we might not learn the name of the investigating worker right away. You can't have it all.

In order to prepare a plan for yourself, remember the short term goal that you are facing in approximately five to seven days: you will be attending a Pre-hearing Conference and Preliminary Protective Hearing. At that conference, you will be asked to participate in decisions concerning the child's placement, visitation, the case plan, and possibly whether or not the dependency will proceed to trial.

What will put you in the best position to respond on behalf of your client at the PPH Hearing? **Information!** You need to gather as much information as possible about the situation and about our client. Here are a few places you can start to get a picture of what is happening:

A. Telephone the DCS Investigating Worker.

The person in the best position to give you preliminary information is the investigating worker. The investigating worker is the person who made the initial determination to remove the child. The investigating worker will also be preparing a report for the court. You are unlikely to receive a paper copy of the report more than a single day before the PPH Hearing as the investigation will be on-going until the day of the PPH. But the worker may already know much of what will be included in the report.

However, the investigator is an employee of DCS and, thus, represented by counsel. So, because of ethics rule 4.2, we need to contact the Assistant Attorney General assigned to the case and receive permission to talk to the investigator. Whether or not we receive permission is really out of our control. Permission may depend on the AG's availability to respond to your request or particular concerns of the AG the dictate limited direct contact with attorneys.

If you are given permission to talk to the investigating worker, the next step is to telephone or email the worker and inform him or her that the Clinic has been assigned to represent the child and that you (and your partner) will be the child's attorney. In addition to basic factual information, this first phone call will be a good opportunity to discover how DCS perceives the underlying situation. Was there an emergency? Are the children okay for the short term? Are there long term concerns?

The investigating worker should also be able to give you an initial assessment of the condition of our child and describe the nature of the placement. While the investigating worker can give you a cursory overview of the dependency, be mindful that the information you have received is from one source only -- that source being the Agency. **Remember that as a child's lawyer, you have an independent obligation to assess all the facts before making any decisions about a course of action.**

In your telephone conversation with the DCS worker, make sure to let him or her know the best way to reach you if something comes up that needs our attention. Lastly, don't be offended if you don't get a return phone call. These intake workers are overworked and under-resourced. Sometimes they just don't have time. It stinks. But it's not personal.

B. Contact Other Sources.

The investigating worker may be able to provide you with some names to contact for more information: e.g., school teachers, neighbors, police officers, relatives. The intake sheet itself provides you an additional take off point.

A **parent's attorney** may have significant information as well as an alternative point of view to that of the DCS worker. You cannot contact the parents themselves as they are represented by counsel. But there is nothing to prevent you from seeking information directly from their lawyers.

Unfortunately, at this early stage, some parent's attorneys might not have had the opportunity to meet with their clients. They may be just as new to the case as you. Nevertheless telephoning the parents' attorneys may still be worth the effort if only to open lines of communication for later use.

The child's **placement** is an important source of information about the condition of our child. Whoever is caring for the child will have had a chance to observe our client. Feel free to contact the placement and ask how the child is doing both emotionally and physically. Is the child well? Is the child adjusting? Does the child appear to need anything? Is there anything that the caretaker thinks we should know?

It is highly unusual for a placement to be represented by counsel at the initial stages of a dependency. So direct contact with the placement is fine. If you find out that the placement is represented, discuss that with your supervising attorney.

There are four main types of out-of-home placements. The child could be placed in a temporary group shelter, in a group home, with a foster family or with a relative.

Whatever the nature of the placement, the location of the child is confidential. The Court has a hard and fast rule not to disclose the name of the placement -- even in court hearings. The placement will generally be referred to as the "foster home" or the "group home". The foster parents will **never** be identified by name in reports or when they appear in court but will similarly be referred to as "foster parents" or "foster mother" or "foster father".

C. Visit the Client.

The Preliminary contacts noted above will help you formulate an initial picture of the case and of our client. **But the most important source of information about our client is our client.** Your initial visit with the client is extremely important. Depending on the age and developmental level of our client, your first visit may be a significant information gathering event. More importantly, your first meeting with your client may set the tone for the entire course of your lawyer/client relationship.

Notice how we use the term **visit** the client. Our general philosophy is that we go to our client not the other way around. First, in most cases, our client is a child who has been

recently separated from home. The last thing he or she needs is to be carted off to one more sterile professional's office – even some place as cool as Rountree. It is far easier to begin a relationship in a more child-friendly place than the College of Law. [We know, that's where all your friends are -- but you do go out now and then, don't you?] And it is helpful to send a message to our clients that we care enough about them to come to their place.

More significantly, we need to see the child in the context of the child's life. We need to observe the placement. No matter how much we may read in reports or hear from other people, nothing measures up to our own first hand observations -- both of the placement and of our client in the placement. That does not mean that we cannot take the child away from the placement -- to a park or a schoolyard or to McDonald's or Eegee's – in order to have some private time. On the contrary, physically getting away from the placement may help the child open up a little. Nevertheless, we should personally observe the placement if at all possible.

1. Planning the visit.

Every time you see your child-client, you will be part of a dual assessment. On the one hand, you will be obtaining valuable information from your client about the facts of the dependency and about your client's legal and personal needs. At the same time, your client will be assessing and developing a relationship with you.

In your very first visit with the child, you need to have realistic and limited expectations of what you can accomplish. For a very young child, your expectations will be less that they might be for an older and more interactive child. You may want to consider a number of things before deciding whether or not you want to make some of these goals a part of your very first visit with your child-client.

Before undertaking your first visit with the child-client, we strongly suggest that you review the materials assigned in class on interviewing and questioning children. The [ABA Handbook on Questioning Children: A Linguistic Perspective](#) is an excellent source of information about the developmental considerations in interviewing a child-client.¹⁴² You might also want to read the chapters in Binder, Bergman, and Price on active listening and questioning.¹⁴³ Copies of those books are available in the clinic offices and the Law Library.

In any event, we recommend that you consider the following in assessing what you wish to accomplish by your first interview (or interviews with your child-client).

2. Establishing a relationship with your child-client.

¹⁴² Walker, Anne Graffam and Kenniston, Julie, [Handbook On Questioning Children](#), 3rd Edition, American Bar Association, 2014.

¹⁴³ Binder, Bergman & Price, [Lawyers as Counselors: A Client Centered Approach](#), West Publishing, 1991

First impressions mean a lot. Establishing a relationship with the child-client is a critical phase in your longer term attorney-client relationship with that child. To most kids, you are another stranger asking uncomfortable questions. So how do you change likely discomfort into a trusting relationship? There is no easy answer or one size fits all. That said, here are a couple of approaches to ponder.

1. **Establishing a relationship with a child is not always easy--especially for older children.** It is okay to take your time. You don't have to accomplish everything in one meeting.
2. It is okay to trust your instincts in the moment. However, you have better instincts when you plan the first meeting.
3. We suggest two rules regardless of your plan. First, always, always, always, tell your client the truth. There is nothing that undermines trust between an adult and a child more than the feeling on the child's part that the adult is not being straight up.

That does not mean that you have to answer every question. You don't. Sometimes, you can't because you don't know the answer. But when you do give an answer or offer information, be accurate and honest. If you say something to a client or make any promises, make sure that you carry them out.

Second, **listen** to the client. There is nothing that turns a child, especially a teenager, off quicker than the feeling that they are being talked to and that nobody is listening to them. Take a little extra time to make sure that you listen to the things that your child-client has to say.

You might want to think about how to put the child at ease. For younger children you might bring a coloring book and crayons, food, etc -- perhaps even use the digital camera from the Clinic office. **If you use the digital, be mindful of our client's privacy.** You can certainly take a picture to print and give or show to the child. However, asking if we can keep a picture can be threatening to some children. There are very few uses that we have for a picture on the first visit.

For older children, explain your role in a way they can understand. Depending on the child's age, you may want to try to explain what an attorney does and why you are there in the first place. For older children, it is important that you explain the concepts of confidentiality and privilege to help build some trust between you and your client.

As a child's lawyer, **you are probably the only person in the child protection system that can listen to a child and not have to report anything that child says.** For a lot of kids, distrust is inherent in the situation. Most everything they have said to an investigating adult has likely been used to separate them from their families. Knowing that they can talk to you without fear that everyone else will know what they have said – and knowing that you care and will listen – is a great first goal. Trust and information can come over time.

Reminder: privilege only applies where the conversation with your client is private. More practically, it is difficult for a child to open up to a lawyer if others are in on the conversation. It is also important that you explain that your job is to advocate their decisions not your own. **So, at some point in each visit, you need to meet with your client privately.**

A private meeting can be disconcerting to some caretakers – especially relatives who are not familiar with the role of a child’s lawyer. In some circumstances you may need to be a little assertive about privacy. The placement caretaker may, naturally, want to protect this child. The child has, after all, been placed there for a reason. And you are just some stranger coming into their space. Often, the caretakers hover about -- with all good intentions. It is certainly okay for the caretaker to be close by for a little while as you are introduced to your client and begin to establish a comfort zone. However, at some point you may need to explain confidentiality and privilege to the caretaker so that you and your client can have a private conversation.

Thus, you must be politely firm about meeting privately with your client. Kids will often tell you things that they won’t say when others are around. Kids might be reluctant to be critical, might not want to hurt their caretakers feelings or they might be afraid. So, it is critically important that they be able to talk with you privately at some point in every visit.

Feel free to go slowly. You don’t have to conquer the world in your first meeting with a child. Even though you may want to leave the first meeting with a clear sense of the child’s point of view, clear goals, and answers to all your questions, that just may not be possible in a single meeting in a time crunch. It’s okay to lower expectations. It is far better to develop an on-going relationship over time than an awkward relationship that never matures because we tried to accomplish too much at once.

Besides, even in a short visit, you can learn a lot that will help you set the short term goals for a PPH.

Court rules require us to ask kids if they want to come to court.¹⁴⁴ Some do, some don’t. It’s their choice. And we have to ask irrespective of their age.¹⁴⁵ It’s not their parents’ choice or their foster family’s choice or the case manager’s choice or our choice. That choice belongs to the child. The fact of that choice is often hard to explain to a concerned caretaker. Nevertheless, we are the ones who usually have to explain it.

Since most of our clients can’t get to court by themselves, it is best to ask the placement to take them. If the placement can’t or won’t, we need to let the DCS worker know ASAP. It is not our job to transport them.

¹⁴⁴ **Rule 40.1 Rules of Procedure for the Juvenile Court**

¹⁴⁵ It probably seems silly to ask a newborn or a one year old if he/she wants to come to court. But Rule 40.1 does not differentiate by age. So we have to ask.

Sometimes, we have asked our clients who do not want to go to court if they would like us to take a picture to show to the Judge. The Judges actually appreciate pictures. Judges don't always get to see the children they oversee. We rarely request a picture for the Judge on the first visit. We wait until we have a more solid relationship with the client.

3. Gathering Information.

Certainly a significant part of any visit is gathering as much information as possible to help you assess the situation. But do not be limited to the verbal facts that you can elicit from a child. Look around, observe the child's surroundings. Assess the child's emotional maturity, knowledge and capacity, medical needs, and general health. Take away from this meeting as much as you can of the unspoken pieces of information by observing the child carefully.

4. Giving Information.

Part of your relationship with the child is to give the information to help your client start to make some initial decisions. If the child is able to understand, tell him or her about the dependency proceeding. Answer questions if you can. And if you cannot answer questions right away, let child-clients know that you will get back to them. **And do it!**

5. Decision Making.

You and your client may have to make a number of decisions. You may want to consider whether some of those can be made at the first visit. These decisions may include whether you are not you are going to act as an attorney if the child lacks capacity. Do you need to act as a guardian ad litem or request a guardian ad litem? Is the child in safe circumstances? Does the child attend the PPH and PHC? Can you elicit or otherwise figure out the child's preferences for the short term considerations of placement, visitation, or elements of a case plan.

You do not have to make all decisions at once. Your first visit with the child, although important, should never be your last visit with the child. Take the time to get to know your child-client. Visit as frequently as it makes sense to help develop a relationship. Don't feel rushed or pressured into having conversations with kids that they are not ready to have. And talk things over with your clinic partner and your supervising attorney.

6. Assessing Special Needs.

Although we may not be experts in all areas, sometimes we may notice that our child clients have special needs. For example, does the child look healthy or sickly? Are there obvious dental problems? Does the child behave in an unusual manner? Is the child classified as special education in school?¹⁴⁶ If you note something unusual [or even if you

¹⁴⁶ You might hear an acronym that a child has an "I.E.P." An IEP is an Individual Educational Plan for a child who has been identified with special learning needs. If you hear the letters "IEP" applied

don't] you may want to follow up with a few questions to the caretaker to see if he or she has noticed the same thing or some other area of concern.

If you identify special needs, the Clinic will need to make sure that someone – the case manager, the foster placement, or a relative placement – is aware of those special needs and is able to access services for the child. The court has resources that are available to us to help with special educational needs. There is also a new program called “Foster-Ed” that is accessible to help with educational issues of children in foster care. See <http://www.foster-ed.org/ourworkaz.html>.

7. After the Visit

Once you have completed the visit, write down all of your thoughts. Note taking is very difficult during a visit with your child-client. It is distracting, and it is often disturbing to the child that you are taking notes. Instead, immediately after your visit, write down not only the data and the information you have gathered but your impressions and your thoughts as well and any follow up that you think may be necessary.

Your thoughts may change over time as will your impressions. **The odds are that your first impressions will be revised over and over throughout your relationship with this client.** Nevertheless it always helps to keep a contemporaneous record of your thoughts. Those records will be useful as you reassess what is happening with your child-client over the course of the dependency.

Next, go to Step 3 of the planning process. Ask yourself, “Did I accomplish what I set out to do? Why or Why not?” In answering those questions, reassess the situation from two perspectives:

(1) From the lawyer-client perspective, decide if you need to schedule a second visit or implement some other follow up action.

(2) From your own perspective, take the time to ask yourself, “What did I learn from this experience?” Remember our Clinic theme. **Reflection is where the real learning takes place.**

D. How Do I Determine My Client’s Position?

Perhaps it is appropriate at this point to offer a few more thoughts about determining your client’s position for the PPH as well as for other future hearings.

1. When your client is capable of articulating a position.

to your child, you will know that the child has been identified by the school district as a special education child.

Determining your client's position is not a passive process. You must do more than just ask your client what he or she wants. An important part of being an effective lawyer is preparing your clients to make the best decisions for themselves. An effective lawyer for children actively counsels clients before decisions get made.

There are a number of theories on how to counsel clients to make the best decisions for themselves.¹⁴⁷ Most of them contain the following common elements:

- a. **Get to know your client.** We repeat this theme often. The only way to make sure that you accurately determine your client's real position is to get to know that child in his or her own context.¹⁴⁸
- b. **Establish a working relationship which includes a basic trust.** For younger children, it may be that all you can reasonable hope for is to establish a comfort zone. For older children, you may need to communicate a basic appreciation and understanding of the principles of confidentiality and loyalty. Whatever you do, trust implies being honest with your clients and always keeping whatever promises you make to them.
- c. **Make sure your client has all the relevant factual information.** It is your obligation as a lawyer to keep them informed. You will be the one who receives disclosures from DCS and their parents; you know the schedule of events; you independently investigate.

It is not an easy task to keep your client informed. Passing on information is the kind of artful task that should be well planned in consultation with your faculty supervisor.

First, you must pass on information in a way that your client can understand. That often means simplifying data into developmentally appropriate and absorbable pieces. However, simplifying never means that you paint a false picture. For example, if a mother is in the hospital for cancer treatment you might say "your mother is sick and in the hospital." You would never say; "your mother is on vacation and won't be home for a while." Simplifying does not mean lying. Simplifying means that talking at a level and using concepts and language that your client can understand.¹⁴⁹

Second, you must be conscious of the emotional impact when your client receives negative information about his or her family. On the one hand, children often know much

¹⁴⁷ See e.g. Binder, Bergman & Price, Lawyers as Counselors: A Client Centered Approach, West Publishing, 1991; Cochran, DiPippa & Peters, The Counselor-at-law : a Collaborative Approach to Client Interviewing and Counseling, New York : Matthew Bender, 1999; Shaffer & Elkins, Legal Interviewing and Counseling in a Nutshell, West Group, 1997

¹⁴⁸ For an excellent discussion of the child in context, see chapter 1, Koh Peters, Jean, Representing Children in Child Protective Proceedings: Ethical and Practical Considerations, Lexis Law Publishing, 1997.

¹⁴⁹ See Walker, Anne Graffam and Kenniston, Julie, Handbook On Questioning Children, 3rd Edition, American Bar Association, 2014.

more than adults think they know.¹⁵⁰ Even preverbal children can sense when something is not right with their parents.

Nevertheless, there are situations where a child’s attorney, in trying to keep the child client fully informed, is placed in the extremely awkward position of being the bearer of bad news. Perhaps you have information that the child should know and should have been told to the child a long time ago by his or her parents. “Jimmy, you are adopted.” Coming from you, the information could be devastating. Coming from the parents, at an appropriate time and circumstances, the information might be therapeutic.

Perhaps you have the kind of information that most children ought never to know. “Your mother had unprotected sex with a HIV infected heroin addict.”

Perhaps, in delivering the news, the trust relationship between attorney and client may be place in peril:

Lawyer: “Your parents are not doing well. So, you may not be able to go home soon.”

Child Client: “You are just telling me lies about my family!”

The ABA Standards and Ethical Rule 1.14 give us quite a bit of leeway in delivering potentially damaging information to our clients.¹⁵¹ The rule allows us to consult with experts such as a physician or a client’s therapist. It also allows us to withhold information under certain circumstances.

Ultimately, the rules place the responsibility on us to make intelligent and thoughtful decisions about how much and in what manner we keep our clients informed-- balancing the need to help our clients make good decisions with our desire to avoid harming our own clients.

- d. **Identify Alternatives.** Part of your role as counselor is to help your client identify the available alternatives. Identifying alternatives can be a joint effort with your client. For example, if the issue is placement, your client may be able to name possible relatives or friends who might be willing and able to help. Through your own research you can confirm the relative’s willingness and qualifications. Or, by talking with other family members, you might become aware of other possibilities to present to your client. Working together with your client, you can generate a maximum number of alternative choices.

¹⁵⁰ Bennett, Paul, *Secret Reflections: Some Thoughts about Secrets and Court Processes in Child Protection Matters*, 45 Ariz. L. Rev. 713, 729-734. (2003).

¹⁵¹ **E.R. 1.14 (b)** When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

- e. **Explore the consequences of each alternative.** Identifying choices is important. But you must also help your client understand the consequences of each choice. Will living with Aunt Marie mean changing schools? How might moving out of state to live with Dad impact the case plan to return to Mom?

As attorneys, one of our most significant functions is to help our clients see clearly the long and short term consequences of their choices. Exploring consequences is not qualitative. It is geared towards making sure that our clients see clearly what each alternative means to them. Take the time to explore those consequences in light of your client's needs.

Here is a common example. A child has been recently removed from home. You talk with the child. You realize that the child wants to go home but also wants her parents to get help. You might successfully argue, in a temporary custody hearing, that state intervention was precipitous and that there are no grounds for removal. That would get the child home.

But that same decision might make it far less likely that the child's parents will get help. With the State of their backs, the parents might revert to old behaviors. The best long term strategy might be for the child to remain in foster care while her parents get help. Those are tough conversations.

- f. **Help the client decide -- offer advice when appropriate.** The final stage is to help our clients decide. Once they are fully informed of the facts, of the law, of the alternatives and of their consequences, our clients can make more intelligent choices. At this point, while the choices are theirs to make, it is perfectly appropriate to offer your advice about the better alternatives.

Both the ethical rules and the ABA Standards not only allow us but encourage us to offer our clients advice. Advice can be legal advice but it can also be practical or even moral advice.^{152 153}

Offering advice to a child can be powerful and should be exercised with caution to make sure that our advice does not overpower our client's free choice. As the ABA Standards comment:

A lawyer must remain aware of the power dynamics inherent in adult/child relationships. . . On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision,

¹⁵² **Ethical Rule 2.1.** "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

¹⁵³ **B-4 ABA Standards (First Commentary)** "As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation"

including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child.¹⁵⁴

As you give advice, assess yourself you make sure that your advice is helpful but not coercive. For one author's very thoughtful and thorough discussion of the decision-making process, see Chapters 3 and 5 of Professor Jean Koh Peters' book on representing children in the Clinic library.¹⁵⁵

2. When Your Client is Not Capable of Articulating a Position.

When your client is not capable of articulating a position, you should first attempt to figure out a position from your client's conduct and situation. Essentially, you should try to ask yourself the question, "if my client were able to tell me what he or she is thinking, what would that be?" If you can answer that question one way or the other from what you know about your client, then you should try to advocate for that position.¹⁵⁶ If you cannot determine what your child's position would be, then you should assume the role of Guardian Ad Litem and advocate for the client's best interests consistent with our appointment under the Pima County contract.

E. Review The Petition, Temporary Orders and the Court Report.

The Petition

As part of PPH procedures, DCS must file and serve a petition alleging the grounds for the dependency and for the removal of the child.¹⁵⁷ In addition, DCS must prepare a thorough report for the Court.¹⁵⁸ The two documents serve two different purposes.

The petition serves as the jurisdictional document. Filing a petition invokes the Court's power. The petition also provides the basic due process notice to the parents and the child. The petition must contain the basic allegations of a dependency.¹⁵⁹ In addition, the petition serves as the State's application for temporary custody. When DCS removes a child, removal must be ratified by a Court for the State to retain custody of the child.¹⁶⁰

¹⁵⁴ **B-4 ABA Standards (First Commentary)**

¹⁵⁵ Koh Peters, Jean, Representing Children in Child Protective Proceedings: Ethical and Practical Considerations, Lexis Law Publishing, 1997.

¹⁵⁶ See section on "Role of the Child's Lawyer" in this handbook.

¹⁵⁷ **ARS § 8-841**

¹⁵⁸ See Pima County PPH Protocol – Court protocols for various purposes can be found on the court website at:

<http://www.pjcc.pima.gov/HTML%20files/Judiciary/ProceduresPolicies.html>

¹⁵⁹ Like any other pleading, the petition must contain a factual statement, with reasonable particularity, of the acts, conduct or conditions which bring the child within the jurisdiction of the court. Mere recital of the statutory definition is insufficient. In Pima County Juv. Act. No. J-46735, 25 Ariz. App. 424, 544 P.2d 298 (1976)

¹⁶⁰ **ARS § 8-822**

Lastly the petition also serves as an **ex parte** application for temporary custody, Arizona ethical rules require that the document contain all of the pertinent facts -- including those adverse to the petitioner's position.¹⁶¹ Consequently, the petition often appears to be a rambling document full of denials and contrary information. For example, a petition might allege that the parent uses cocaine. The petition might also contain a statement that the parent denies all drug use.

Unlike a standard civil complaint, therefore, the petition is rarely drafted as a document with short, individually numbered paragraphs which can be admitted or denied by the responding party. ***In the Juvenile Court, none of the responding parties are required to file an answer or other formal reaction to the petition.***¹⁶² We are a no pleading court. Instead, the parent may orally deny the material allegations in the petition at the time of the initial court appearance.¹⁶³

The petition must be personally served on the parents unless they cannot be located. Then the petition can be served by certified or registered mail or by publication.¹⁶⁴ Because of the PPH time constraints, the petition is rarely served before the PPH Hearing. Instead, the petition is generally served on the parents in Court on the record during the Preliminary Protective Hearing. The petition will be formally served on you, as well, as the attorney for the child.

But we already had a copy of the petition

We will usually be given a copy of the petition a few days in advance of the initial PPH block. However, that delivery does not meet the standards for service of process. For one thing, the orders contained our copy may not be signed by the Judge. For another, pages are sometimes left out. Accordingly, the Assistant Attorney General will formally serve us in court, as the child's attorney, at the same time the parents are served. A sample petition is included in the Appendix.

Temporary Orders

When the petition is filed, the Court will also issue **temporary orders.**¹⁶⁵ These orders will include granting temporary custody to the state, an order appointing us as counsel for the children, an order authorizing the state to provide medical and other care, and an order requiring that the child remain in the State of Arizona unless otherwise authorized by the Court.

¹⁶¹ **ER 3.3 (4)(d)** "(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

¹⁶² **Rule 48(D)(4)** Arizona Rules of Procedure for the Juvenile Court

¹⁶³ **Id., ARS § 8-843**

¹⁶⁴ **Rules 4.1 and 4.2 AZ Rules of Civil Procedure; Rule 48(D)(4)** AZ Rules of Proc. for Juvenile Court

¹⁶⁵ **Rule 48 RPJC**

Court Report

The report to the court is prepared by the DCS investigating worker.¹⁶⁶ The DCS report will include all of the information obtained by DCS to date relating to the allegations in the petition as well as information necessary to make decisions about placement, visitation and the case plan. The court report will, of necessity, contain hearsay statements as well as refer to other reports and records. The report will be the clearest statement for us of DCS's initial position on most matters. An outline of the information contained in the report was included in the previous section of the Handbook.

The court report should include a preliminary case map for services to the child and the family. Unfortunately, because of the shortened time periods of the PPH, the initial case map is a computer generated product that attempts to be one size fits all. We have to look beyond the case map to make sure that it suits the immediate needs of our client.

The law requires an "urgent response" assessment for each child to be evaluated for both physical and mental health concerns. The court report should include copies of those assessments. If not, *usually*, the person who makes the mental health assessment will be at court for the PHC and PPH. So there is an opportunity for follow up. That assessment is particularly important because, despite all our good work at the first visit, we are not trained in child development – unless you had that class as a 1L.

Finally, the court report should include a summary of the TDM. That summary will help you get a handle on where everyone is coming from.

To sum up, in the brief period of time before the PPH Block, we have much work to do. The following is a short check list of things to do. At the end of this Handbook in Appendix I, we have included an informational checklist to guide you in your interview with your client, preparation for the hearing and organization of your file.

Checklist:

Visit with the child at the Placement

¹⁶⁶ **Rule 45 RPJC**

- ___ Contact Placement
- ___ Visit with Child
- ___ Review the Petition
- ___ Review DCS Report
- ___ Review Proposed Case Map
- ___ Talk with Intake Worker.
- ___ Contact Parents' Attorneys
- ___ Determine the child's positions, if any.

III. Planning for the PPH Hearing.

Assuming that you have gathered all the information that you can, it is time to formulate your plan for the PPH Hearing. By this time, you should have observed at least one PPH Hearing. Yours will follow the same basic procedure as the one you observed.

Before looking at substantive issues, you should address whether or not your client wants to come to court. Some children want to be part of the process; others would rather eat lint. For the younger children, court may be too scary or confusing. For older children going to court may satisfy a need to know what is going on; to see things for themselves. Some kids just want to see their parents. A few don't want to go in case they see their parents.

Some children may want to go to court only to meet the judge and get a sense of place. If the latter is the case, we may be able to make arrangements for the child to meet the Judge on a more informal basis independent of the PPH.

The statutes allow us to bring our clients to the Pre-hearing Conference¹⁶⁷ and to Preliminary Protective Hearing¹⁶⁸ in the court's discretion. The practice at Pima County Juvenile Court is to routinely allow children to attend the Pre-hearing Conference and the PPH, if nobody files a written objection. The burden is on the person or entity objecting to raise that issue with the court. DCS will be responsible to arrange transportation for the child. Nonetheless, if our clients are going to attend, we should notify the Judge and the other parties as much in advance as possible.¹⁶⁹

Our experience has been that others [not Judges] may get upset if our clients attend court. Many placements feel protective of the children and want to keep them protected from a perceived potential "trauma" of a court hearing. Some investigating workers [especially those who have seen firsthand what the children have been through] feel that our clients may be too fragile to hear some of the negative things that might be said about their families. Some have expressed that a child's presence changes the dynamics of the courtroom. People won't feel as free to speak their minds if a child is listening. Still others argue that children get confused and angry at a court process that is hard to figure out.

¹⁶⁷ **Rule 49(B), RPJC**

¹⁶⁸ **ARS § 8-824(C)**

¹⁶⁹ Time constraints sometimes make it impractical to notify all the parties. In this instance, notice is not a legal requirement. It is a courtesy. Just do the best you can with the time you have.

Going to court can also mean contact with the child's parents. For some children, contact with parents may be a benefit; for others seeing parents may be traumatic -- especially if there are allegations of serious abuse. All of these concerns have merit. We should discuss them with our clients before making a final decision about attendance. Nevertheless, if a child wants to be in court, we should take every available step to ensure the child's participation.

In planning for the PPH Hearing, remember the three basic topics at issue in the Pre-hearing Conference and the Preliminary Protective Hearing:

- A. Initial Placement
- B. Visitation
- C. Initial Case Plan [services for the child and the family]

A. Initial Placement.

If our client has a preference for short-term placement we should be prepared to express that preference at the pre-hearing conference. The child might want to return to a parent. Or the child might want to live with a relative or a friend or what we sometimes refer to as a kinship placement – someone who is not a blood or marriage relative but someone whom the child thinks of as family.

It is all the better if we are able to marshal enough information to make a meaningful argument for the client's position. Most often the child's preference is to return to mother or father. If so, it is important that we understand the parent's situation so that we can informatively argue for a return. We should also be prepared to advocate for a **back-up plan** if the client's choice is not feasible or not acceptable to the court. Second choices are often all that are available.

If our client has no position or no alternative to the parents presents itself, we should nevertheless insist on sufficient information to make sure that the placement is safe and healthy from our client's point of view.

If we suggest a non-parent placement, DCS will usually demand the right to make a **home study** of the placement if it is not a licensed foster home. Home studies are done by an outside agency. Home studies take time. Thus, if we have any suggestions, we should make them as early as possible -- even before the hearing. Because home studies take time, we cannot reasonably expect that our placement choice will be instantaneously agreed to at the Pre-hearing Conference.

"Home studies" are not found in the law. Nor is a home study a legal prerequisite to placement with an unlicensed family. Home studies are departmental policy – i.e., an internal mechanism that DCS uses to determine if a home is safe and appropriate for a child. When the home is that of a licensed foster care provider, DCS assumes that the home is safe. When someone proposes to place a child with an unlicensed adult – usually a

relative -- DCS's preferred procedure is to conduct a home study. DCS is unlikely to agree to a placement without the home study. DCS places its comfort zone over speed.

A home study is an investigation conducted by an outside Agency which contracts with DCS for that purpose. A home study consists of criminal and child protective background checks, interviews with the principals, contacts with references and visits to the home. The home study will recommend whether or not the proposed home is safe and appropriate. It is all great information to have. The downside is that it takes too much time – perhaps weeks or months.

There are two quicker alternatives to a home study. They both involve a decision by the judge that the proposed placement is proper. The first alternative is where the proposed placement is a grandparent or other close relative. The statutory **default** is that a relative placement is deemed appropriate unless DCS demonstrates or the court determines that such placement “is not in the best interests of the child.”¹⁷⁰ The burden is on DCS to nix the relative placement.

If the proposed placement is not with a grandparent or close relative, then the court can also make a determination that the placement is with a “*reputable citizen of good moral character*.”¹⁷¹ If DCS will not agree, we may need to file a written motion to for a determination that the placement is a reputable citizen of good moral character. A sample motion for placement is set out at the end of this section.

The following are some questions to consider in any placement for our clients:

1. **Will the placement provide a safe, clean and nurturing home for our client?**
2. **Is our client familiar with the placement? Is that a positive or a negative?**
3. **If there is more than one child, will the placement require that siblings be separated or enable them to be together?**
4. **Will the placement make it harder or easier for our clients to visit with their parents?**
5. **Are there other children at the placement? If so, how will that affect our client?**
6. **Will our client be able to stay in the same school?**
7. **Will our client be able to access services from this placement?**
8. **How long will our client be able to stay at the placement? Will our client be forced to move at some point?**

¹⁷⁰ See **ARS §§ 8-829, 8-845.**

¹⁷¹ **ARS § 8-845.**

9. Can the placement financially afford to keep this child?

We are sure that more questions will arise with any placement decision. Try and plan for those questions as much as possible.

CHILD AND FAMILY LAW CLINIC
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
JUVENILE COURT

In the Matter of) No. J1111111
M – dob 01/01/00)
M – dob 01/01/99) MOTION FOR HEARING ON CHANGE OF
) PLACEMENT
)
) Judge Rubin
)
_____)

Pursuant to A.R.S. § 8-845(A)(5), the children, M and M, request this court approve an immediate change of placement to the home of Ms. J. Ms. J is a reputable person of good moral character, and it is in the children’s best interests to be placed with her.

The children desire to be placed with Ms. J in her home instead of their current group home. Criminal and child protective backgrounds check on Ms. J has cleared, and the children want to be in a small home environment as soon as possible.

Ms. J has demonstrated her interest in being part of this dependency process. As a high school teacher, Ms. J first met the children over two years ago during their first dependency. She had interest in taking in the girls during the first dependency, but the children were successfully returned to their mother. After the children were returned to their mother, Ms. J continued to be a part of their lives. She sees them at school and speaks to them frequently over the phone. As part of the current dependency process, Ms. J has attended Child and Family Team (CFT) meetings. Ms. J realizes that the dependency goal is family reunification, and she does not want to interfere with that goal. She simply wants to provide more personal care for the children in accordance with their wishes, until they can be returned. Furthermore, Ms. J will fully comply with DCS placement rules, and she is willing and able to care for the children.

Ms. J lives with her youngest daughter (age 11) in a four-bedroom home in a quiet, safe neighborhood. Her oldest daughter, who is 19 years old, frequently visits her home. M and M would share a room and have much more personal space than they currently do. They get along with Ms. J’s

daughters. Ms. J has a good relationship with her children's father, but no one else lives in the home besides Ms. J and her daughter.

Ms. J has worked for almost six years at the P Middle School. Her current line of work requires that she maintain her clean record. She has no criminal convictions, no history of substance abuse, and does not consume alcohol or use tobacco. In addition, she has CPR and first aid training. Her work schedule would allow her to be home whenever the children are not in school. Ms J's only major commitments are her family and work. Her youngest daughter attends school while she is working.

Ms. J is realistic and recognizes that taking care of all the children will be an increased financial burden. She is willing to obtain certification as a foster parent. However, the certification process can take time, and the children desire to be placed in a small home environment as soon as possible. No relatives have ever been identified as potential placements, and at this time, no tribal foster parents appear to be available. Moreover, the children have difficulty bonding with people. Above all, they desire to be placed with Ms. J because they have a special relationship with her. The children therefore ask that this court find that Ms. J is a person of good moral character and immediately place them with her.

RESPECTFULLY SUBMITTED THIS ____ of May, 20__.

CHILD AND FAMILY LAW CLINIC

By Jason S
Certified Limited Practice Student

Sibling placement

Some families have more than one child. We have had cases with as many as eleven in one family. [That's our record!] In many multi-children situations, it becomes apparent from the first meeting with our clients that siblings are extremely attached to each other. For many abused or neglected children, their brothers and sisters are the only people they feel that they can count on.

Sibling attachment and separation are not insignificant issues. It is hard enough to be removed from one's parents. To be separated from brothers and sisters can be even more traumatic.

Unfortunately, as you might imagine, DCS has a very difficult time finding placements that will keep all brothers and sisters together. The foster care system is very lucky when it finds a placement that will take a group of siblings. Despite that difficulty, if our clients need to be together, we should advocate as strongly as possible for a placement that keeps them

together. And if we cannot house them together, we need to advocate for frequent sibling contact.¹⁷²

The law requires DCS to explain why they are separating sibling groups.¹⁷³ But there is no requirement that siblings be kept together.¹⁷⁴ It is kind of like an environmental impact statement. On a helpful note, this past spring, Arizona passed legislation to allow licensed foster parents to exceed their licensing limits in order to keep sibling groups together.¹⁷⁵

B. Visitation:

Unless there is a serious abuse allegation or unless our clients insist otherwise, children who have been removed from their homes need to see their parents. Visits should be as frequent and as long in duration as possible. The child-parent bond is not easily strengthened if the children and parents do not have frequent contact.

Research indicates that the more frequently parents are able to have meaningful contact with their children the more likely parents are to engaged in rehabilitation services.¹⁷⁶ The reverse is also true. The more frustrated parents become when they can't see their kids, the more likely they are to turn to their personal comfort mechanism. Unfortunately, that comfort food may be self-medication by substance abuse, not ice cream or Cheetos.

There are two types of child-parent visitation: supervised and unsupervised. In unsupervised visits, the parent simply takes the child for a specified period of time. No monitoring is required.

Supervised visitation is necessary when the visiting parent:

1. May be a threat to flee with the child;
2. Is deemed dangerous to the child;
3. Might behave inappropriately with the child.

Depending on the nature and severity of the perceived problems, supervision may be performed by trained therapists, visitation professionals, other family members or responsible friends. If the allegation is sexual abuse, the Court may insist on visits supervised by DCS in the DCS office. If the allegation is alcohol abuse, it may be sufficient to have visits supervised by a responsible relative who can stop a visit if the parent appears intoxicated.

¹⁷² **ARS § 8-845**

¹⁷³ **ARS § 8-513(D)**

¹⁷⁴ **ARS § 8-824(G)**

¹⁷⁵ **ARS § 8-514(A)**

¹⁷⁶ See e.g., Davis, Inger P.; Landsverk, John; Newton, Rae; and Ganger, William, *Parental Visiting and Foster Care Reunification*, 18 Children and Youth Services Review 363, 1996.

The pros and cons of supervised visits

The obvious advantage of supervised visits is that supervision ensures the safety of the child. The presence of the supervisor can guard against abduction or mistreatment or other inappropriate parental behavior. In addition, visit supervisors can often provide valuable observations for the court about how the parent relates to the child and can even provide helpful parenting tips.

On the other hand, the fact that a stranger is present can affect the nature of the visit. It is hard to be relaxed when you are being scrutinized in a fishbowl. For some parents, the artificial nature of a supervised visit can negatively affect the visit. Other disadvantages are logistical. Supervisors must be available. Locations may be limited. Transportation needs to be arranged for the child or the parent or both.

As a result, the logistical problems generally mean that children will receive fewer visits of shorter duration when visits are supervised. Fewer, shorter visits usually are not in a child's best interests. We know that reunification is difficult when visits are low quality and infrequent. Nevertheless, when we have reason to be concerned for the health or safety of our clients, we should carefully consider supervised visits.

Under the PPH procedures, the children have maybe had only one visit before the Pre-hearing Conference. In addition, the standard initial DCS recommendation offers one visit per week.

For most children, one visit is way too few if not completely unacceptable. If children are very young or have told us that they want to see their parents or miss their parents, we should aggressively assert their right as a child to additional meaningful visits -- even supervised visits. Accordingly, we should not take obstacles as insurmountable. We should examine each obstacle and propose alternatives when we can. Separation and infrequent visits can have a severe negative impact on a child and should be avoided.

Of course, if our clients do not want to see one or both parents or if visitation might be dangerous or harmful, we should act accordingly to oppose visitation.

C. Services.

At the PPH Hearing, the parents will be presented with a preliminary services plan. The plan will outline tasks and responsibilities of all the party participants. The preliminary case plan will set out the services to be provided by DCS and to be accepted by the parents and the child. The initial case plan is just that -- a temporary plan for activities between the PPH and any disposition. Nevertheless, the initial case plan has enormous consequences.

The first few months of services can set the tone for the entire dependency. The first few months will determine if the parents and DCS will have a cooperative working relationship. Attitudes will be established. Postures will be taken. Opportunities may be seized or lost in the first few months. Also, the first few months may be the most traumatic

time for the child. Those early months may be the time at which the most appropriate and productive services and the best parental behaviors are most needed.

In addition, the initial case plan, unlike a long term plan, has immediate litigation consequences. Information gleaned as a result of these tasks -- such as data from psychological evaluations or patterns of drug testing -- can be used at a later dependency trial. Failure to follow the plan may, by itself, be proof of a dependency. For that reason, parents' attorneys, especially, may take a very guarded approach to the initial case services.

The initial plans usually contained two main elements: assessment services and remedial services.

1. Assessment Services

a. Assessment of Parents

We have already discussed visitation. Outside of visitation, the biggest area of dispute is commonly over the assessment services for the parents. Assessment services include psychological evaluations [often referred by the diminutive "*psych eval*"], random urinalysis ["UA"s or "drops"], specialty evaluations such as alcohol, drug or psycho-sexual evaluations, and physical examinations.

From the Agency and, more often than not, from the child's point of view, it is usually best to complete assessments as early as possible. The sooner we identify parental problems, the sooner we can address them. Unfortunately, DCS initial case proposals can be one-size fits all. The same plan is proposed for nearly every family. The proposed array of services may or may not make sense for a particular family. They may not address an obvious immediate need. For example, if a parent is a drug addict, may not be a priority over, say, substance abuse treatment.

From the parents' point of view, there are two dangers from an early assessment of the parent. The first is that the assessment device may provide admissible proof of a dependency where little proof now exists. The assessments may even identify problems of which the state was not aware, thus broadening the scope of the dependency. The second danger is that, if the parents are abusing substances, an assessment could be skewed by the substance abuse itself. Some psychological tests will not produce valid results if a parent is high. In those situations, DCS may want to wait until the parent is clean to properly assess the parent's condition.¹⁷⁷

¹⁷⁷ The most commonly used psychological test – the Minnesota Multiphasic Personality Inventory or MMPI – can actually be an effective screening device for substance abuse. It does not make much sense to wait for clean drops before sending the parent to a psychological evaluation if the psychologist uses the MMPI. See Rouse, Steven V., Butcher, James N., and Miller, Kathryn B., *Assessment of Substance Abuse in Psychotherapy Clients: The Effectiveness of the MMPI-2 Substance Abuse Scales*, 11 Psychological Assessment 101 (1999).

Like all other decisions, we should approach assessment services from our client's perspective. What will help our client? That will obviously depend on the situation. If there is an identifiable parental problem, then the assessment services should be directed towards confirming the problem. If the existence of a problem seems evident but the nature of the problem is unclear, then more broad based assessments might be in order.

Having a parent assessed will rarely cause a direct problem for a child. After all, more information rarely hurts. However, some assessments, such as regular random urinalysis, require such an investment of time and resources for the parent that there may be some indirect negative consequences. In addition, needless assessments can appear to the parents to be unnecessary obstacles to reunification and can cause resentment.

For that reason, we should carefully scrutinize a shot-gun approach to initial assessments of the parents to ensure that the assessments are necessary and appropriate.

b. Assessment of the Child

Because the initial focus is on family reunification, the assessment of the child sometimes gets lost in the moment. It is our job to make sure that necessary assessments of our clients should not be overlooked.

State law requires that if a child was removed from home because the child is suffering serious physical or emotional damage, DCS must immediately take the child to a medical doctor or psychologist for an examination.¹⁷⁸ Sometimes what gets lost in the shuffle is that our clients may need physical, dental or psychological examinations when no apparent serious condition can be observed.

Our clients can come from uninsured families and may have not been examined by a doctor or dentist for years. Our clients can suffer from low level malnutrition, tooth decay, allergies or a host of other not-so-obvious physical problems. Sometimes our clients have reacted poorly to the stress of being removed from the home or suffered from mild depression to begin with and need therapeutic help.

If we even suspect there is a problem, we should plan to forcefully advocate for appropriate assessment services for our clients.

Two assessment services are used more often than others and are worthy of mention. They are psychological evaluations and random urinalysis.

(1) Psychological Evaluations

"Psych Evals" can come in two parts. The first consists of standardized psychological tests. Currently, parents take a rudimentary intelligence test to see if they have a minimal capacity to work with DCS. They are also given an MMPI personality

¹⁷⁸ **ARS § 8-821(b)**

inventory¹⁷⁹ which can be used to red flag psychological disorders. They may be given a child abuse predictor test. Not all psychologists use these or other written tests. Most do, however.

The second part of the evaluation consists of a face to face meeting with a psychologist chosen by DCS. The psychologist then issues a report attempting to diagnose any psychological conditions and recommending a course of treatment. If the psychologist believes there may be an organic or medical problem, the psychologist will recommend that DCS have the parent evaluated by a psychiatrist. Similarly the psychologist may make a referral for a different specialized diagnosis – neurology, hearing, dental.

Both DCS and the Juvenile Court place great stock in psychological evaluations. In nearly all circumstances, recommendations for treatment contained in the psychological evaluation will become part of the permanent case plan.

Parents (and lawyers) have expressed concern that the DCS chosen psychologists are biased because “they know who pays them”. Certainly some are better than others at giving accurate diagnoses. Unfortunately the perception of bias is endemic. Most parents cannot afford to hire their own psychologists. As a result, parent chosen evaluators are very rare. The DCS ones are all we have available.

Psychological evaluations can be extremely helpful tools if prepared competently and used appropriately. On the other hand, as the frequent bearers of unhappy news, they can generate angry and resentful reactions on the part of those who feel they have been evaluated unfairly.

(2) Random Urinalysis

In nearly 75% of dependencies, there is an allegation of drug or alcohol abuse. The Juvenile Court takes substance abuse very seriously. There is pretty much a zero tolerance of drug or alcohol use in a dependency proceeding with a substance abuse allegation.

The theory is pretty straightforward. Good parenting and substance abuse do not go hand in hand. More importantly, the Juvenile Court regards any parent who would risk using illegal drugs or alcohol while under the scrutiny of a pending dependency as having demonstrated a fundamental lack of understanding of what it takes to be a parent -- that is,

¹⁷⁹“The Minnesota Multiphasic Personality is . . . an empirically-based assessment of adult psychopathology. The MMPI-2 instrument, provided by NCS, is the standard that mental health professionals use to help measure psychopathology across a broad range of client settings. The MMPI-2 instrument is used by clinicians in hospitals, clinics, counseling programs, and private practice to assist with the diagnosis of mental disorders and the selection of an appropriate treatment method.” Source NCS Pearson advertising literature, <http://www.pearsonclinical.com/psychology/products/100000461/minnesota-multiphasic-personality-inventory-2-mmpi-2.html>

putting the child first. Such a parent is deemed to have put him or herself first by using drugs or alcohol when the Court has indicated that there will be a period of zero tolerance.

The way the Court detects drug use is through random urinalysis [also called “UA’s” or “drops”. The system of random urinalysis works as follows:

- 1. Each day the parent telephones a specified number.**
- 2. The person or computer answering the phone call will inform the parent whether or not he or she must drop on that day.**
- 3. The parent must then personally appear at one of the urine collection sites before it closes that day [usually by 6:30 pm].**
- 4. At the collection site, someone will observe the parent giving a urine sample and will take the sample.**
- 5. The sample will be sent to laboratory for testing.**
- 6. The results will then be sent to the DCS worker who will disclose it to the court and to all parties.**

If the parent fails to call on a given day or fails to report when directed, the parent will be deemed to have given a "dirty drop" -- that is, a sample that is positive for the suspected substance.

If the parent tests positive for a substance, at the very least, the court may order that future visits be supervised until the parent demonstrates that he or she is clean. More likely, a positive test while under the microscope of a dependency proceeding indicates a sufficiently serious problem that treatment will be required.

Parents who test positive often argue that the tests were inaccurate or mistakenly registered a perfectly legitimate chemical in the urine. Moreover, without an expert witness and testimony from one of the lab technicians from Kansas, these tests would hardly meet criteria for admissibility at a dependency trial.

While those arguments are technically possible under some circumstances, our experience indicates that they will be rejected out of hand by the Juvenile Court judges.¹⁸⁰ A parent who tests positive for drugs has pretty much guaranteed that the Court will find a dependency based on substance abuse regardless of any evidentiary problems.

The upside of random urinalysis is that it is a very effective way to identify users. The downside is that it poses a tremendous burden on the parents. Transportation may be

¹⁸⁰ The Clinic library has literature about the testing procedures commonly used by DCS. The library also contains a copy of the American Bar Association Judicial Benchbook on Drugs and Families.

difficult as many parents have no automobiles and live or work at a great distance from the collection sites. Many parents have to take significant time off of work on less than a day's notice -- with employers who have little tolerance for missing work -- in order to drop during the limited hours of collection.

Random urinalysis is not an easy burden for a parent. The Court does not tolerate most excuses for missed drops.

A sample urinalysis report is included in the Appendix.

2. Other Remedial Services.

Services recommended at the PPH Hearing are just that -- recommendations. While DCS may believe such services to be necessary, the need for such services has not yet been adjudicated by the Court nor acknowledged by the parents. Parent may be reluctant to agree to such services before trial -- especially where accepting the services recognizes the validity of the petition.

Nonetheless, IF a parent agrees to remedial services, that parent will have a head start on reunification -- especially where a finding of dependency appears inevitable. Often parents' attorneys will candidly advise their clients that, from the known circumstances, the Court will probably declare a dependency. They may then advise their clients that it is in the parent's and the child's best interests to agree to remedial services from the outset.

Not every parent contests services. Many parents recognize their limitations and welcome the help from the state. On the other hand, many parents are angry and resentful at the State's intrusion into their family. Those parents may offer resistance at all fronts.

Typical remedial services include:

- i. Random Urinalysis
- ii. Parenting Classes
- ii. Substance Abuse Treatment
- iii Individual, Family, and/or Relationship Counseling
- iv. Use of a parent aide in the home
- v. In-home services such as “Family Builders”

Last, but not least, during the Pre-hearing Conference, the facilitator will ask that a **Child and Family Team meeting (CFT)** be scheduled. **It is very important that we attend our clients’ CFT’s.** ¹⁸¹

3. Other Requirements of the Case Plan.

Although Juvenile Court Rules limit discussion at the Pre-hearing Conference to placement, visitation and the services aspect of the case plan, the initial case plan will routinely impose some additional requirements on the parents. These may include requirements that the parent have a job or other legal source of income¹⁸², have a safe residence for the child, obtain a car seat, or take steps to establish paternity. Most of these additional requirements are not controversial and are usually agreed to by the parents.

D. Placement of the Child.

1. Out of Home Placement.

We have already discussed some of the factors associate with placement of our clients. If our client has a position, we should be prepared to use those factors to advocate effectively. We should note, however, that there are certain disqualifying circumstances for nearly all placements. These include:

- a. A recent serious criminal history.
- b. Credible allegations of substance abuse for anyone living in the home.
- c. Lack of physical space for the child.
- d. A pending dependency involving the caretaker.
- e. A substantiated allegation of abuse or neglect for anyone living in the home.

¹⁸¹ See discussions at text surrounding fn. 113 and 234.

¹⁸²Some case plans call for the parent to obtain employment. The better practice is for the case plan to simply state that the parent must obtain a legal source of income. For some parents, obtaining employment may be difficult or even impossible. They have no work history or job training. It is a terrible economy. They have no child care. For others, out of home employment may be unnecessary or adverse to the child’s interests. The call for poor people to work out of the home when raising young children is a central part of the recent welfare “reforms”. One might question the trend to make poor persons leave their young children in child care while encouraging more wealthy parents to stay at home and nurture their children. **Regardless where you stand on this issue, if the parent is seeking employment, it is in our clients’ interests to make sure there is quality child care available when the parent is working.**

In addition, we should be aware of any personal or emotional reasons why a parent might object to our child’s choice of placement. Family feuds and personal slights can cause some parents to vehemently oppose apparently perfectly appropriate placement suggestions. Sometimes feelings run deep.

2. Temporary Custody.

We should also be prepared for the parent to argue for return of the child and to request an immediate temporary custody hearing. Under the statutory scheme, every parent is entitled to an immediate hearing to determine temporary custody.

In a Temporary Custody hearing, the State has the burden of showing the necessity of keeping the child in care. The standard of proof is whether the State can present sufficient evidence that:

“ . . . there is probable cause to believe that continued temporary custody is clearly necessary to prevent abuse or neglect pending the hearing on the dependency petition.”¹⁸³

A temporary custody hearing follows a very particular order.

a. First the State presents its evidence.¹⁸⁴

Because this is a probable cause hearing scheduled on relatively short notice, the State can rely on certain types of hearsay¹⁸⁵. The enumerated forms of hearsay are:

- (1) The allegations of a verified¹⁸⁶ petition.
- (2) An Affidavit¹⁸⁷
- (3) Sworn testimony
- (4) The written reports of experts.¹⁸⁸
- (5) DCS reports if the caseworker who make the report is present¹⁸⁹

¹⁸³ **ARS § 8-824(F)**. In making a probable cause finding the Court may refer to the grounds for removing a child in the first instance. Those are set forth in **ARS § 8-821 B**:

B. A child may be taken into temporary custody by a peace officer or a child protective services worker if temporary custody is clearly necessary to protect the child because the child is either:

1. Suffering or will imminently suffer abuse or neglect.
2. Suffering serious physical or emotional damage that can only be diagnosed by a medical doctor or psychologist.

¹⁸⁴ **Rule 51 Arizona RPJC**

¹⁸⁵ **Rule 51 Arizona RPJC**

¹⁸⁶ A verified document is one in which someone swears under oath that the information contained in the document is true. All dependency petitions must be verified. **ARS § 8-841**.

¹⁸⁷ An affidavit is a written statement sworn to under oath.

¹⁸⁸ **Rule 45 Arizona RPJC**

¹⁸⁹ **Rule 45 Arizona RPJC**

- (6) Documentary evidence without foundation **if** foundation will be available at the dependency hearing.
- (7) Out of court statements by persons who will be personally available at trial.
- (8) Essential witnesses who cannot be physically present at the hearing can testify by telephone in the Judge’s discretion.¹⁹⁰

b. At the conclusion of the State’s case, the Court may make a finding of whether or not there is probable cause based on the evidence presented by the State¹⁹¹.

c. The parent or guardian who requested the hearing can then submit evidence to rebut any evidence put on by the State

d. The Court must then make a final ruling about the sufficiency of the evidence to establish probable cause. If there is not sufficient evidence, the Judge must return the child to the parent. If there is probable cause, then the child will remain in State custody as a temporary ward of the court.¹⁹²

In addition, under Federal Regulations, the Court must make a finding that "reasonable efforts have been made to prevent the child's removal from home". That Federal Law finding can be delayed past the TCH for up to 60 days from the date of the child’s removal.¹⁹³

IV. Change of Judge.

If, for any reason, a party does not feel comfortable in front of the assigned Judge, that party can file a “Notice of Change of Judge” with the Clerk of the Court. The notice must be filed within **five days** of the party’s receiving notice of that the particular Judge has been assigned to the case.¹⁹⁴ A party waives the right to a change of judge on request once the party participates in any contested matter or hearing before the Judge.¹⁹⁵

A party can also petition to change Judges for “cause” -- the cause usually being personal interest or prejudice on the part of the Judge.¹⁹⁶ If the assigned Judge disagrees with the petition, the court will schedule a hearing before a judge other than the challenged Judge.

IV. Conduct of the PPH Hearing.

You have formulated a plan for the hearing. What else might you expect? First, expect the unexpected. While we stress planning and more planning, a good lawyer must

¹⁹⁰ **Rule 42 Arizona RPJC**

¹⁹¹ **Rule 51 Arizona RPJC**

¹⁹² **Rule 51 Arizona RPJC**

¹⁹³ **45 C.F.R. § 1356.21(b)**

¹⁹⁴ **Rule 2 (B) RPJC**

¹⁹⁵ **Rule 2 (A) RPJC**

¹⁹⁶ **Rule 2 (A) RPJC**

also be flexible. This is especially true at a hearing like the initial PPH where there has been no opportunity for formal discovery, where the proceedings are somewhat rushed, and where you have not had the opportunity to meet many of the people involved.

So be prepared to **listen** and to adjust your plan based on what you hear. That does not mean that you should abandon your goals at the first piece of new information. Being flexible simply means that you should be well enough prepared to make adjustments while keeping to the basic positions you have worked out.

The Pre-hearing Conference will be very informal. No Judge will be present. There is no court reporter or tape recording. All the parties and other participants will sit around a large table. Everyone will sign an attendance sheet.

While no verbatim record is kept, court rules specifically state:

*Statements made by the parties and participants in the course of the pre-hearing conference may be used in future proceedings.*¹⁹⁷

As a result of Rule 49, parents' attorneys may advise their clients to say very little or nothing at all in the Pre-hearing Conference.

The very first thing that will happen is that **you** will be asked how the child is doing. Since you have visited the child – and parents may not have seen the child – your response can be very reassuring to a parent that the kid is alright. Of course, that is only if the kid is alright. If there are health or mental health issues, that is the time to voice them. Also, if true, it is perfectly ok to say that Johnny and Maria miss their parents.

The facilitator will make introductions and will try to get everyone to participate in the discussion. The facilitator will try to keep people on topic -- that is, placement, visitation, and services -- and away from interpersonal conflict.¹⁹⁸ So be polite but feel free to speak your mind or to ask questions within a framework of cooperation.

Immediately after the Pre-hearing conference, the facilitator will send a brief report to the judge. If all sides reached agreement, then the facilitator will let the judge know what happened. The parties will proceed to court and the agreements will likely be ratified. If the sides did not agree on some or all of the issues, the parties can present argument to the Court in the Preliminary Protective Hearing. Argument will be informal without the court taking testimony -- except if there is a hearing for Temporary Custody.

The PPH will be more formal. The Judge's Law Clerk or Bailiff will call us into the courtroom. The courtroom is set up in a semi-circle facing the Bench. The parents and their attorneys will sit on the left facing the Judge. The Intake worker and the Attorney General will sit on the right.¹⁹⁹ **And we will sit in the middle.**

¹⁹⁷ **Rule 49 (A) RPJC**

¹⁹⁸ **Rule 49 RPJC**

¹⁹⁹ If one or more parents are in jail or prison, they will be accompanied by a deputy sheriff. For security reasons, the deputy may change the seating arrangements.

To the side of the Judge will be a court clerk who will take minutes of what happens. In front of the Judge will be a court reporter. The reporter will make a verbatim record of the proceeding. **It is a really, really good idea to write your name on a several pieces of paper and to hand one each to the Court Clerk and to the court reporter.** That way, they don't have to interrupt you to find out how to spell your name.²⁰⁰ Also, it is not proper protocol to hand documents or exhibits directly to the Judge. Hand them to the Court Clerk or to the Bailiff.

When the Judge enters the courtroom, everyone should rise and stay standing until the Judge tells us to be seated. The Judge will then announce the case. Some Judges will then state into the record each individual who is present. Others will ask the parties to announce their presence on the record -- usually beginning with the Attorney General. If non-parties are in the courtroom, the Judge will want them identified for the record as well -- including other Clinic students who may be observing.

If you are asked to announce your presence, please stand up and say these three statements:

- 1. "My name is _____.**
- 2. "I am a "certified limited practice student" appearing on behalf of _____ the minor child(ren) who is/are [is/are not] present."**
- 3. "I am under the supervision of _____, who is present in the courtroom." Then point in the direction of your supervising attorney.**

The Judge will then address some preliminary issues:

Assignment of counsel for the parents. Up until this point, the parents' attorneys have been assigned only on a temporary basis. The parents will have completed a financial affidavit. The Judge will then determine each parent's eligibility for an assigned attorney. If the parents are eligible, the attorneys will be assigned by the Court at the PPH.²⁰¹

The parents may be assessed the cost of their attorneys.²⁰² The cost is set by the County Board of Supervisors.²⁰³ In Pima County the cost is 1,000.00. The Judge can waive the assessment or make a partial assessment if the parents are indigent.²⁰⁴ If the Judge makes the assessment, payments can be made over time. The parents can appeal the Judge's decision to a court administrator who is empowered to make adjustments.

²⁰⁰ Is "Bennett" spelled with two "t's" or just one? You should do this for every hearing in which you participate. Court personnel, like law professors, take a while to learn all your names.

²⁰¹ **ARS § 8-824 (D); Rule 50 RPJC**

²⁰² **Rule 38 RPJC**

²⁰³ **Rule 38 RPJC**

²⁰⁴ **Rule 38 RPJC**

Service of the petition. The Attorney General will serve a copy of the petition on the parents and on the child’s attorney in Court if AG has not already done so. The Judge will check to see if that service has been completed.

Ask the parties if they want an “open or closed hearing.” A new law passed by the legislature now presumes that all hearings are open to the public. The new law is a dramatic change from the old law in which hearings were closed to the public unless a parent requested that the public be allowed.²⁰⁵

Under the new law, Judges are required to ask about open hearings at the PPH. If the parties request a closed hearing, the judge can close the hearing to the public for “good cause shown” if closing the hearing would be in the child’s best interests. The statute requires that the court examine a number of factors:

1. Whether doing so is in the child's best interests.
2. Whether an open proceeding would endanger the child's physical or emotional well-being or the safety of any other person.
3. The privacy rights of the child, the child's siblings, parents, guardians and caregivers and any other person whose privacy rights the court determines need protection.
4. Whether all parties have agreed to allow the proceeding to be open.
5. If the child is at least twelve years of age and a party to the proceeding, the child's wishes.²⁰⁶

As you can imagine, most children would prefer that these proceedings be closed to the public. **Teenagers especially do not want people knowing their business.** We also should be mindful of cases involving very sensitive issues such as sexual abuse. **No matter what, if our client is old enough to understand, we should discuss the pros and cons of an open or closed hearing with our client and prior to the PPH irrespective of whether or not the child is planning to attend.**

Even if a hearing is open to the public, the information about the child remains confidential. The public can watch but they cannot disclose. At an open hearing, the Judge must warn all those who are watching that

1. Attendees are prohibited from disclosing any information that may identify the child and the child’s siblings, parents, guardians and caregivers, and any other person whose identity will be disclosed during the proceeding.

2. There are possible consequences of violating an order of the court including the fact that anyone who violated the warning may be held in contempt.²⁰⁷

²⁰⁵ **ARS § 8-525**

²⁰⁶ **ARS § 8-525**

²⁰⁷ **Id.**

The court may close an open proceeding at any time for good cause shown and after considering the factors listed above. If a proceeding has been closed, any person may subsequently request that the court reopen a proceeding or a specific hearing to the public considering the same factors listed above.

There are several other ministerial issues to be addressed by the court. They may come at the beginning or during the course of the hearing. They are:

1. **Establishing Paternity.** The Judge will determine if paternity has been established. If paternity has not been established by Court order or under operation of law, the Judge will ask the parties to take the steps necessary to establish paternity.²⁰⁸
2. **Determining if the Indian Child Welfare Act applies.** If so, certain procedures are invoked.²⁰⁹

Vacating the Initial Dependency Hearing. If the parents attend the PPH hearing, there is no need for an initial dependency hearing. If the parents do not show, then the procedure is for them to be served with the petition. Once service has been completed, the parents must attend the initial dependency or the matter can be adjudicated by default.

3. **Entering a Denial for the Parents.** The parents will be deemed to deny the petition unless they admit to all the allegations. In most PPH's the parents will enter a general denial -- even if they eventually intend to admit the petition. Usually, they have not had sufficient time to meet with their lawyers at the PPH for everyone to feel comfortable with an admission with its attendant consequences.

After the preliminary issues are completed, the Court will generally turn to the Attorney General to see if there were any agreements at the Pre-hearing Conference. They will be detailed orally. If the agreements are acceptable, the Court will adopt them. The Court may ask each party if they agree with what the Attorney General says. We should be prepared to make corrections or additions if appropriate.

If the parties have made any changes to the preliminary case plan, the Judge will go over each change in court to make sure that all understand and are in agreement.

If the parties disagree on any subject, the Court may make on the spot decisions. Be prepared to argue your position briefly and concisely.

²⁰⁸ Paternity can be established in a number of ways in Arizona. If the parents were married at the time the child was born, paternity will be presumed as a matter of law. **ARS § 25-814** If the parties were not married, the parties can both sign the birth certificate or can both sign an affidavit of paternity which can be the basis of a court order. **ARS § 25-814** Or the parties can have a contested proceeding. If the matter is contested, the parties are entitled to genetic marker blood test which often settles the matter without a trial.

²⁰⁹ See section on Indian Child Welfare at notes 215 et seq.

If there is a need for a temporary custody hearing, the court will begin the hearing then. The TCH may take more than the time allotted. If so, the Judge will **continue** -- that is, adjourn -- the hearing to a date and time within the next five working days.

Finally, at the conclusion of the PPH, the Court will perform three administrative other tasks:

1. **Schedule the next event.**

Unless a parent admits the allegations at the PPH -- a relatively rare event -- the court will schedule at least one other hearing with an eye towards resolving the matter without an adjudication hearing²¹⁰. There is a strong preference in the Juvenile Court for non-trial resolutions. To that end, Court rules require that the court must schedule a **settlement conference** or, if appropriate, a **mediation**.²¹¹ The settlement conference or mediations are usually scheduled within the next thirty days. If mediation is chosen, the court will also schedule a status hearing to inform the court of the outcome of the mediation.

Some cases will inevitably go to trial. Some cases settle early. Usually, the Judge will not schedule a trial date until after the settlement conference or the mediation and the parties have a sense of where things are going.²¹² Some judges schedule trials at the PPH before the settlement conference. Scheduling is a matter of judicial style.

In any event, a trial must be held within 90 days of the date the parent was served with the petition.²¹³ The Judge can extend the trial date an additional thirty days for good cause.²¹⁴ Any further extensions must get the approval of the Supreme Court.²¹⁵

2. **Make Admonishments.**

The Court will routinely make an “admonishment” to the parents that if they fail to show up at any future hearing, mediation or settlement conference that the court may adjudicate their child as dependent and make dispositional orders in their absence.²¹⁶

3. **Issue an immediate minute entry.**

²¹⁰ An adjudication hearing is a trial on the allegations in the dependency petition.

²¹¹ **Rule 52 RPJC**

²¹² **Rule 53 RPJC**

²¹³ **Rule 55 RPJC**

²¹⁴ **Rule 55 RPJC**

²¹⁵ **Rule 55 RPJC**

²¹⁶ **ARS § 8-824(6); Rule 50 RPJC** “Admonishment’ is the word used in the Pima County Juvenile Court. It is our opinion that admonishment is an unduly harsh term -- implying reprimand or chastisement for parents who have not, as yet, been found to have committed any wrongful acts. It is one more occasion to ponder the power of words. ARS § 8-824 uses the word “inform”; Rule 50 merely uses the word “advise”.

Unlike almost all other hearings, the court will issue an immediate hand written minute entry²¹⁷ that will be available to all parties on the same day as the PPH.

PPH FOR PRIVATE DEPENDENCIES

In Arizona, dependencies need not be brought by the State. They can be initiated privately.²¹⁸ The PPH has developed special procedures for dealing with private dependencies. The basic model of the Pre-hearing Conference and the PPH remain the same. However, the roles of the respective parties are somewhat different. So too, are the behaviors.

Why would anyone bring a private dependency? Who would bring a private dependency?

Most private dependencies are brought by family members: grandparents, aunts and uncles, sometimes even non-custodial parents. Sometimes, these folks have suddenly inherited a child – the mother has been jailed or hospitalized; the child is a runaway; the child has been abandoned. Many private dependencies are brought because of a sincere concern for the welfare of a child. The parent may have a drug problem or a psychiatric disorder. Some private dependencies appear to be brought as part of an on-going family feud.

Whatever the reason, the basic goal of a dependency remains: safety of the child and reunification of the family. As you might imagine, reunification may be more difficult in a private dependency. First, private families may not have access to the array of services and resources available to the State. Second, family dynamics may make open acknowledgment of family problems quite difficult. Third, there may be no motivation on the part of the persons with temporary custody of the child to facilitate reunification.

In most private dependencies, the petitioner is also the placement. The petitioner probably obtained temporary custody as part of the temporary court orders. Since the filing of the petition and the application for temporary custody were made ex parte by people to whom the parents were probably very close, there is a huge potential for anger, resentment and a feeling of betrayal by the parents.

Role of Child Protection Services in a Private Dependency

²¹⁷ A minute entry is the Court Clerk's summary of what happened during a court hearing. The ME also contains any court orders that resulted from the hearing. It becomes official when signed by the judge – although unsigned minute entries are enforceable. **Rule 47.2 RPJC.** Usually a minute entry may take a week or so before the final version is signed. The PPH uses a contemporaneous hand written minute entry so that orders can take effect more quickly.

²¹⁸ **ARS § 8-841(A)** “Any interested party may file a petition to commence proceedings in the juvenile court alleging that a child is dependent.”

Although not a party at the outset, DCS may still play a major role in the PPH portion of a private dependency. After the petition has been filed, the court will order DCS to investigate the allegations. An intake worker will be assigned to prepare a Court report. The report will provide background information and safety check of the current placement and will investigate the underlying allegations in the private petition.

If DCS believes that a dependency exists which requires state intervention, it will so state in the report. DCS will then move the Court to be substituted as the petitioner in the case. If DCS is substituted, then the case will proceed as a regular dependency proceeding with DCS acting as the petitioner. DCS can proceed on the allegations in the original petition or may choose to file a new petition.

If DCS chooses not to be substituted, then the intake worker will file the court report -- giving a copy to all parties. The intake worker will probably attend the PPH Hearing but as a witness, not as a party unless DCS is leaning towards being substituted.

If the Court believes that further investigation is warranted or further information is needed, the Judge may order DCS to continue its investigation and/or to have its worker present at the next hearing. It is very important to note that, if DCS chooses not to be substituted, DCS may still be able to provide voluntary services to the family. As the child's attorney, you may want to contact the DCS intake worker before the PPH block to see what services might be available to the family.

Even if DCS decides not to be substituted, the Juvenile Court can nevertheless order DCS to be substituted as petitioner if the Court believes that the circumstances warrant DCS case management. We should consider that option carefully even if DCS does not want to join in.

Special Considerations for the Child's Attorney

A child's attorney needs to approach matters from a slightly different point of view in a private dependency. Consider the following:

1. *In a DCS case, we must obtain permission of the attorney general before discussing any matter other than scheduling a visit with our client.* In most private petitions, the petitioner does not have a lawyer. Under the dependency statutes only the parents and children are entitled to appointed counsel.²¹⁹ So we have a ready source of information -- the person who brought the proceeding.
2. Unfortunately, the lack of a lawyer may put an extra burden on the child's attorney.
 - a. If a petitioner does not have a lawyer, the petitioner may naturally turn to the child's attorney for advice. We must be very careful to remind the petitioner that the Clinic is the independent attorney for the child -- not the attorney for the petitioner.

²¹⁹ **ARS § 8-841**

Even if our position is in 100% agreement with the petitioner's position, we must be careful to make our role explicit.

b. A **pro per**²²⁰ petitioner may not have the wherewithal to properly present the petition. If our positions are in agreement, we may have to take responsibility for presenting the evidence in the case. This will be especially important if our client's position is to remain in placement care and the parent requests a temporary custody hearing. It may be up to us to make the initial probable cause showing.

3. When we visit our client, there is a greater need for privacy as the placement is likely one of the litigants.

4. We need to be mindful of stronger than usual feelings on the part of the litigants. It is one thing for the State to intervene in a family. It is quite another for family members to initiate their own internecine dispute. The Pre-hearing conference needs to be handled with those emotions in mind. It may be harder to get down to business of reunification.

5. It may be much harder for our clients to make choices. As in #4 above, it is one thing for a child to choose between his or her parents and foster care. It is quite another to have to choose among people whom the child loves. Asking a child to choose between parents or between a parent and a grandparent is not an easy thing.

6. It will be much harder for our client to manage this adversarial proceeding. The conflict between the petitioner and the parents will be much more intense for our client than a DCS dependency. The client will be observing conflict between loved ones as opposed to conflict between a loved one and a bureaucracy. Observing loved ones in conflict can be terribly damaging to children. We may need to be a little more protective of our client without overbearing the client's right to participate fully.

7. Because of personal conflicts or conflict with the ultimate goal, the petitioner and parent may not be able to work together for reunification.

8. Because of cost constraints, not all needed services will be affordable by the private parties.

9. Visitation -- especially supervised visitation -- may require more careful management of transportation, supervision, and case management resources.

Because of all of the above concerns, we should carefully consider whether or not we want to request that DCS be ordered to substitute as petitioner regardless of the Agency's position. We should make sure that we know if DCS can and will provide voluntary services if the Agency is not substituted. Finally, we must take a much more active role in developing and implementing the case plan.

²²⁰ Pro per is termed used in the Juvenile Court to refer to a person representing him or herself. Other jurisdictions may use the term "pro se."

INDIAN CHILD WELFARE ACT

In 1978, Congress passed the Indian Child Welfare Act (ICWA) establishing new policies and practices for states to follow in dependency, foster care and adoption proceedings involving Indian children.²²¹

The Act was needed, Congress said, because in the states' exercise of their "recognized jurisdiction" over child custody issues they had failed to accommodate "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families".²²²

The Act included a somewhat muted *mea culpa* accepting Congressional responsibility

Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. [and] there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children²²³

but acknowledged damage only in the passive voice

[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.²²⁴

The Act articulated national policy toward preservation of Indian tradition, culture and values, at least insofar as Indian child custody issues are concerned.

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.²²⁵

Who is Covered?

The Act requires a course of action with **Indian children** markedly different from that with non-Indians and it is different from the start. The form used by the State of Arizona to

²²¹ **25 U.S.C.S. §§ 1901 et seq.**

²²² **25 U.S.C.S. § 1901 (5)**

²²³ **§ 1901 (2), (3)**

²²⁴ **§ 1901 (4)**

²²⁵ **25 U.S.C.S. § 1902**

initiate a dependency petition now has a box to check indicating whether the child at issue is or is not an Indian child. So the first step of every proceeding is to determine if you are dealing with an Indian child and whether ICWA's regulations are to be followed.

After the most recent "Baby Veronica" decision by the U.S. Supreme Court eligibility under the Indian Child Welfare Act may be in some doubt if the Indian roots are through a non-custodial father. We will have to see how that plays out over time.²²⁶

An Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is **eligible** for membership in an Indian tribe **and** is the biological child of a member of an Indian tribe"²²⁷ Ultimate determination of tribal eligibility is made by a tribe itself, not by the court nor the family, and the eligibility rules can vary widely from tribe to tribe. ICWA applies even if the child is not being removed from an Indian home. As long as the child is an Indian child, ICWA is in force.²²⁸

To begin gathering the information, someone must ask the child, parent or caseworker whether ICWA might apply because the child has a parent with Indian heritage. Of course, no affirmative or negative assumptions may be made based on appearance or domicile. The court must follow through on any possibility.

If it has not already taken place, once a child has been identified as a possible Indian child, the tribe or tribes must be notified immediately that a dependency or other petition has been filed and that the tribe has a right to intervene.²²⁹ The tribe can then decide two things:

1. Is this child an eligible Indian child?
2. Does the tribe wish to participate in the dependency?

The Proceeding and Participants

If the child is an Indian child, the next step is to determine whether the state or tribal court will hear the petition. The process should begin in the Juvenile Court with a fair presumption that the Juvenile Court will end up hearing a case involving an Indian child just as it does all others.

ICWA adds two potential parties to any Juvenile Court proceeding involving an Indian Child. The Act allows the tribe itself to intervene at any time²³⁰ and it permits the intervention of an "Indian custodian"²³¹. An Indian Custodian is "any Indian person who has legal custody of an Indian child *under tribal law or custom or under State law* or *to whom temporary physical*

²²⁶ [Adoptive Couple V. Baby Girl](#), 398 S. C. 625, 731 S. E. 2d 550,

²²⁷ **25 U.S.C.S. § 1903(4)**

²²⁸ [Michael J., Jr. v. Michael J., Sr.](#), 2000 WL 873182 Ariz.App. Div. 1, July 3, 2000.

²²⁹ **25 U.S.C.S. § 1911(a)**

²³⁰ **25 U.S.C.S. § 1911(c)**

²³¹ **25 U.S.C.S. § 1911(c)**

*care, custody, and control has been transferred by the parent of such child.”*²³² (emphasis added)

Both of these parties may also request transfer from state to tribal court. Tribal courts can assert their exclusive jurisdiction when the child lives in or is domiciled in the reservation or is already a ward of the tribe. The tribal court can also accept jurisdiction if either parent makes such a request and the other parent does not object.²³³

Only “in the absence of good cause to the contrary” is there an objection to transfer to a tribal court.²³⁴ While no statistics are readily available, many observers believe that most cases stay in the state juvenile court with the tribe acting as a party to the proceedings, if it is involved at all. But it is important to remember that the tribe or the Indian guardian is able to intervene at any time and have the case transferred to a tribal court even if a state court has already begun to hear the case.²³⁵

Burdens of Showing and of Proof

The Act imposes a unique burden on the state to attempt family reconciliation even before the first dependency hearing. The court must be satisfied that the state has made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”²³⁶ No such strict requirement is in place for non-Indian dependency hearings in which only require **reasonable efforts** at the outset to maintain the family structure

All dependency petitions are initiated because of concern about circumstances in which there is likelihood of serious emotional or physical damage to the child or children. These concerns must be proven to the court, not just alleged. ICWA establishes burdens of proof one notch higher at each stage of a proceeding involving Indian children. ICWA requires “clear and convincing” evidence instead of “preponderance of the evidence” at the dependency phase. ICWA requires proof “beyond a reasonable doubt” instead of “clear and convincing evidence” for final parental severance.²³⁷

Placement

Finally, at each stage of the proceeding, if the court orders foster care or adoption, there are mandated placement preferences that must be followed. For foster care or pre-adoptive placement, ICWA mandates preferences order for:

- i) a member of the Indian child's extended family;
- ii) a foster home licensed, approved, or specified by the Indian child's tribe;

²³² **25 U.S.C.S. § 1903(6)**

²³³ **25 U.S.C.S. § 1911(a)**

²³⁴ **Id.**

²³⁵ **25 U.S.C.S. § 1911(b)**

²³⁶ **25 U.S.C.S. § 1911(d)**

²³⁷ **25 U.S.C.S. §§ 1911(e)(f)**

- iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- iv) a suitable institution for children approved by an Indian tribe or operated by an Indian organization. Tribes may establish different preferences in individual circumstances if they wish.²³⁸

In adoption the Act has fewer choices. The Act specifies placement preferences for:

- i) a member of the child's extended family;
- ii) other members of the Indian child's tribe; or
- iii) other Indian families.²³⁹

Summary

ICWA adds a level of potential complexity to a system that may already seem excessively burdened with opposing lawyers, parties with different interests, and sometimes widely differing perspectives on a single set of facts. But one must remember the objectives of ICWA. ICWA merely recognizes some added characteristics of Indian culture that can be overlooked by non-Indian courts and raises those characteristics to a level of importance they did not historically have. ICWA attempts first, to save families, and then to save the culture if the family cannot be saved.

²³⁸ **25 U.S.C.S. § 1915(b)**

²³⁹ **25 U.S.C.S. § 1915(a)**

THE CHILD AND FAMILY TEAM MEETING

Child and Family Team [CFT] meetings are informal but very significant meetings designed to put appropriate mental health services in place for the family. CFT's were the outgrowth of a long and expensive Federal lawsuit that was brought in Arizona to address the growing problem of professionals making significant behavioral health decisions for families in a grossly paternalistic way and without any regard for the opinions of the members of the family.

In the *Matter of JK*,²⁴⁰ the lawsuit was settled with the State but only after the State agreed to certain "JK Principles." The most current version of JK principles and procedures is set out in a protocol developed by the Arizona Division of Behavioral Health Services. Below are some interesting excerpts of what is supposed to be:

Child and Family Team

The Child and Family Team (CFT) is a defined group of people that includes, at a minimum, the child and his/her family, a behavioral health representative, and any individuals important in the child's life and who are identified and invited to participate by the child and family. This may include, for example, teachers, extended family, members, friends, family support partners, healthcare providers, coaches, community resource providers, representatives from churches, synagogues or mosques, agent from other service systems like CPS or DDD. etc. The size, scope and intensity of involvement of the team members are determined by the objectives established for the child, the needs of the family in providing for the child, and by which individuals are needed to develop an effective service plan, and can therefore expand and contract as necessary to be successful on behalf of the child.

Child and Family Team (CFT) Facilitator

Although, individuals other than the behavioral health service provider may lead a CFT meeting, ultimately the behavioral health service provider is responsible for facilitating the CFT practice. If designated by the CFT, a team member may assume responsibility for leading team meetings and moderating discussions to facilitate consensus in the development of Service Plan goals and interventions. Individuals other than behavioral health service providers (i.e. family members, Child Protective Services' case managers, and natural supports) can learn to lead effective Child and Family Team meetings.

²⁴⁰ CIV 91-261 AZ District Court (unreported)

Background

ADHS has adopted the Arizona Vision, which states, *“In collaboration with the child and family and others, Arizona will provide accessible behavioral health services designed to aid children to achieve success in school, live with their families, avoid delinquency, and become stable and productive adults. Services will be tailored to the child and family and provided in the most appropriate setting, in a timely fashion and in accordance with best practices, while respecting the child’s and family’s cultural heritage.”*

Child and Family Team practice is based on the Arizona Vision and the [12 Arizona Principles](#):

1. Collaboration with the child and family
2. Functional outcomes
3. Collaboration with others
4. Accessible services
5. Best practices
6. Most appropriate setting
7. Timeliness
8. Services tailored to the child and family
9. Stability
10. Respect for the child and family’s unique cultural heritage
11. Independence
12. Connection to natural supports

All families are unique and as such, each CFT experience is necessarily different from another. Frequency of CFT meetings, location and nature of meetings, intensity of activity between CFT meetings, and level of involvement by formal and informal supports necessary to adequately support children and families will vary depending on the following:

-
1. The size of the team, coordination efforts required, and the ability of the CFT to work effectively together;
 2. The number of distinct services and supports necessary to meet the needs of the child and family;
 3. The frequency of CFT meetings necessary to effectively develop a plan, track progress and make modifications when needed;
 4. The number of agencies/systems involved;
 5. The severity of symptoms and the effectiveness of services;
 6. The stress that is currently affecting the child and family.
 7. Geographic location (rural teams may meet, discuss and plan over the phone or via telemed); and
 8. The preferences of the youth and/or family

Procedures

There are nine essential activities that comprise effective CFT practice. These activities are not the goal of the CFT but are rather the process to move toward the goal of identifying and meeting the needs of the child and family. The activities are:

1. Engagement of the Child and Family
2. Immediate Crisis Stabilization
3. Strengths, Needs and Culture Discovery (SNCD)
4. CFT Formation/Coordination of CFT Practice
5. Behavioral Health Service Plan – Development
6. Ongoing Crisis, Planning
7. Behavioral Health Service Plan - Implementation
8. Tracking and Adapting
9. Transition

Activity 5 - Behavioral Health Service Plan – Development

The foundation for plan development begins when the child and family participate in the assessment process (see [Provider Manual 3.9, Intake, Assessment, and Service Planning](#)). The Behavioral Health Service Plan (see [Provider Manual Form 3.9.1, Part D](#) and [Provider Manual Form 3.9.2, Part C](#)), describes the family's vision for the future (stated in their own language) and identifies the short-term objectives, interventions, supports and services that will address their identified and prioritized needs. The CFT members engage in brainstorming options and identify creative and nontraditional approaches, including formal and natural supports, for meeting the needs of the child and family. During this activity the CFT is to give careful consideration and weight to the child and family's preferences, strengths, culture and the parent's expert knowledge of their own child. Objectives that can be readily accomplished and celebrated within a short timeframe are identified to encourage early success and continued involvement and achievement. For children with standard needs, the service planning process may be less complex and involve only the parent/caregiver, child and their behavioral health provider. However the idea of brainstorming options and being sure to strongly consider the child and parent's preferences, strengths, culture and the parent's expert knowledge of their own child is still applicable.

The Behavioral Health Service Plan must be completed no later than 90 days after the initial appointment and must:

1. reflect the family's prioritization of needs and goals;
2. incorporate pertinent, identified strengths and cultural considerations within its strategies to achieve successful outcomes;
3. be individualized and responsive to the child and family's needs;
4. assign responsibility to CFT members for each strategy/intervention/task and establish timelines for implementation;
5. utilize both formal and informal/natural supports and services as indicated;
6. identify natural supports and connections to community supports which may need to be developed or re-energized;
7. identify outcomes, actions and strategies/interventions/tasks related to the family's vision for the future;
8. include measures by which the child/family and CFT can monitor progress; **and**
9. be signed by the parent/guardian and youth (if developmentally appropriate).

As you can see, there are a number of goals and procedures for CFT's. Part of our job is to ensure that others are mindful of these goals. By actively attending CFT's, we can ensure that the child's voice is heard in the development of any service plans.

We cannot stress enough how important the CFT has become. The choice of services for a family will have a profound impact on the end result. Decisions will be made at CFT's that are more than just basic therapy. They can include all types of visitation decisions, parenting plans, placement and even long term goals such as reunification or long term foster care.

As discussed previously, the other parties are not used to children's attorneys showing up at CFT's. So there may be some resistance.²⁴¹ But the CFT is often one of the most critical events in a child welfare proceeding. So we need to insist that we be able to attend and actively participate.

²⁴¹ See text surrounding note 111.

THE SETTLEMENT CONFERENCE

Given the Preliminary Protective Hearing's limited purposes, it is fairly unusual for a dependency to be adjudicated the first time people appear in court.²⁴² Occasionally, but not very often, one or both parents may admit the allegations in the petition at the PPH. If that happens, the children will be adjudicated dependent and the court will hold a **dependency disposition** hearing. On extremely rare occasions, the State might dismiss the petition outright if new facts come to light.

However, in most instances, parents will -- at least initially -- **deny** the allegations in the petition and ask that the matter be scheduled for a **dependency adjudication** hearing. The dependency adjudication is a fact finding trial concerning the allegations in the dependency petition.

Before hearing evidence any dependency adjudication, the Court must hold a **settlement conference** or send the parties to **mediation**. The purpose of the settlement conference is to see if the parties can agree on a mutually acceptable resolution of the petition and save the court and the parties from an adversarial trial. The general theory is that resolution by agreement is more user-friendly and will, in the long run, have a better chance of success in reuniting the family.²⁴³

The Juvenile Court will schedule the settlement conference about 30 days after the Preliminary Planning Hearing. The fact finding hearing will usually take place approximately 30 to 60 days later.²⁴⁴

Interestingly, it often does not take much of a compromise to settle a dependency proceeding. Many parents instinctively recognize that their family needs help but may disagree with how the family circumstances are described in the petition. Some parents may simply need to "save face". Many parents are willing to accept the allegations in the petition if they can add some comment of their own -- sort of "guilty with an explanation."

We should not underestimate the power of words. The way an allegation is phrased can have a profound impact on how the allegation is received. Words are powerful. They can evoke strong emotional reactions.

²⁴² See section on the Preliminary Protective Hearing, *supra*

²⁴³ A mediation has essentially the same end purpose. However, mediation uses a different approach. A settlement conference is more of a traditional negotiation supervised by a judge or court official. A mediation is a more in-depth attempt to help litigants understand each other before attempting a resolution.

²⁴⁴ The adjudication hearing must be held within 90 days from the date the parent was served with the petition. **Rule 55 RPJC**. More often than not, that is 90 days from the PPH as the custom is to formally serve parents at the PPH.

The upside of the power of words is that a slight change of language can sometimes make all the difference to a litigant. A parent may find language that has been gently tweaked to be perfectly acceptable. Even if the change in wording would have little legal impact, the change could have an important emotional distinction for the parent. Of course, sometimes the parties have more fundamental differences making settlement a more difficult process.

A settlement conference is a judicially aided discussion among the parties but without a stenographic record. Presumably, in the absence of a record, the parties may feel freer to openly discuss disputed issues. Most settlement conferences are held before a judicial official **other** than the judge who will hear the case. Having a facilitator other than the sitting judge also allows the parties the freedom to make ex parte statements that would be prohibited if made before the trier of fact.²⁴⁵

In some cases, the settlement conference is the first opportunity for a parent to personally speak to an official about the allegations in the petition. Up to this point, the lawyers have done all the talking in Court. The mere fact that the parent can “say something” to a Judge or to a facilitator who actually listens can be a significantly cathartic event. Having a chance to speak can sometimes allow the parent to admit the petition and “move on” to the work of reunification.

The child’s attorney can -- depending on the child-client’s position -- help facilitate voluntary compromise among the adult parties. A child’s attorney can often play a significant role in brokering a settlement if that serves the child client’s interests. A suggestion coming from the child’s attorney may be more acceptable than the same suggestion coming from DCS or the parents. If you feel that settlement is in your client’s interest, there is nothing wrong with initiating settlement discussions among the parties even before the settlement conference.

Often the attorneys for the state and for the parents get together prior to the settlement conference to try to reach a compromise. Nearly as often, the parties forget to include the children’s attorneys in that discussion. While children’s attorneys have little control over the ultimate outcome, our input is necessary -- perhaps even mandatory -- since any resolution will have a direct impact on our clients. We need to stay on top of the situation to make sure that we are included in the discussion loop.

There are two kinds of settlement conferences: **facilitated and non-facilitated**. The easy one is the latter. At a non-facilitated settlement conference, the parties talk beforehand the conference and see if they can work out an agreement. The matter is then presented to the Judge for ratification. If the parties cannot agree, then the matter is set for trial or for a facilitated settlement conference. The judge gets involved only if the parties need a little nudge and/or to ratify the agreement.

²⁴⁵ **Rule 53 RPJC**

A facilitated settlement conference is a little more interactive. In the Pima County Juvenile Court, the conference is set before one of the **court mediators**. Sometimes, not very often, it is set before a judge other than the assigned judge. The court mediators are quite skillful at helping people move beyond their visceral reactions to their situation and focus on the real decisions that they face. **The facilitators can often provide litigants with their first, and perhaps only, effective opportunity to explain themselves to someone in authority. That can be very therapeutic.**

Mediation is very much like Las Vegas – what happens in mediation stays in mediation. Statements made in mediation are privileged and cannot be introduced by any party in any court hearing.²⁴⁶ Thus a facilitated settlement conference – while not a formal mediation -- allows people to speak frankly without legal repercussions. The mediators are also skilled at explaining the process to parents in a non-judgmental way.

What is our role in a facilitated settlement conference? Most of the time, it is not much. The decision whether or not to go to trial belongs to the parents and to the State. We can't force trial if the parents and State wish to settle. However, we can be very helpful in suggesting possible compromises and in presenting the child's point of view for all to hear. Sometimes a very brief: "*Your child loves you and needs you. But needs you not to be drinking*" may be all a parent needs to be able to move forward.

Confidential Settlement Memorandum

Rule 53 of the Arizona Rules for Juvenile Court Procedure governs the facilitated settlement conference. At least five days before the conference, each party submits an ex parte memorandum to the mediator or to the settlement conference judge. The memorandum should include the following:

1. A general description of the issues to be litigated and the position of each party with respect to each issue;
2. A general description of the evidence to be presented by each party;
3. A summary of any attempts to settle the matter;
4. An assessment by each party of the anticipated result if the matter did proceed to trial; and
5. Any other information a party believes would be helpful to the settlement process, including acceptable settlement proposals.²⁴⁷

²⁴⁶ **ARS § 12-2238**

²⁴⁷ **Rule 53 RPJC**

The format of a settlement conference is pretty straightforward. At least 24 hours in advance of the conference, each side is required to submit to the mediator a short [usually one or two pages] **confidential settlement memorandum**. The memorandum should outline the party's position and parameters of acceptable settlement. The memo is submitted directly to the mediator, and, unlike any other court document, the settlement memorandum is submitted as a sanctioned ex-parte communication.

The ex parte confidential memorandum is to assist the facilitator in determining where the parties are coming from without requiring the parties to divulge their negotiation strategy to the other side. The facilitator can use the confidential memoranda to see if there is some common ground that exists in fact but has eluded the parties.

From the child's perspective, the confidential memorandum is a not only an opportunity to express the child's legal position, it is also an opportunity offer the facilitator some insight into the child's thinking without having to disclose the child's thoughts to the parents. In any other court proceeding, all the parties are entitled to a copy of any communication between a litigant and the court. There are no private communications.

Some children would rather keep silent and tell the facilitator nothing than have to disclose his or her opinion to a parent. A settlement memorandum can be a rare opportunity to "speak" privately to a person with authority without having to let the rest of the world know.²⁴⁸

Thus, it would not be inappropriate to use the settlement memorandum to address the child's ambivalence about her parents or the child's systemic confusion or to offer a comment, from the child's perspective, about placement issues, services issues or other needs.

On the other hand, it can often be in our client's interests to be open about our settlement position. This openness can help the parents' and state's attorneys assess their respective positions and perhaps facilitate a settlement helpful to our client. In those instances, and with our client's permission, we can send copies of our confidential memoranda to the other parties as well as to the court.

Thus, in addition to the requirements of Rule 53, the settlement memorandum should state our client's position, if any, on the following:

1. Any changes in the allegations that would be acceptable to our client.
2. Any additions to the allegations that our client wishes to be included.

²⁴⁸ Depending on the Judge, there are limited occasions where a child can speak directly to a Judge privately in chambers. Most Judges require the consent of all the parties. Many Judges will not hold in chamber interviews under any circumstances.

3. Dispositional recommendations, if appropriate.

The settlement memorandum should also briefly state the rationale behind the position we advocate. Below is a sample Confidential Settlement Memorandum:

CHILD AND FAMILY LAW CLINIC
University of Arizona College of law
1145 N. Mountain Ave.
Tucson, AZ 85719
State Bar No. 008169
(520) 626-5232
Fax: (520) 626-5233
Attorney for Minors

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUVENILE COURT

In the Matter of)	No. J111111
Child P – dob 11/21/91)	
Child E – dob 8/12/02)	CONFIDENTIAL SETTLEMENT
Child I – dob 5/30/04)	MEMORANDUM
Child C – dob 7/28/06)	
)	
)	
)	
)	
)	
)	

The children, by and through their counsel, submit this confidential settlement memorandum on the following matters:

I. UNCONTESTED MATTERS

- a. At the time DCS removed the children from the home, the home was unsafe and the parents were abusing substances.

II. CONTESTED MATTERS

- a. Whether or not a dependency exists.
- b. Whether or not the parents have substance abuse problems.
- c. Whether or not there is domestic violence in the parents' home.
- d. Whether or not the parent have stable housing or finances.
- e. Whether or not the parents have exposed all of the children to unsafe and unhealthy living conditions.

III. POSITION ON CONTESTED MATTERS

The children want to go home. However, they recognize that their parents need help and that a dependency may be the best way to get that help. The parents need to address their substance abuse and domestic violence problems. The parents also need to secure stable housing and finances so that they do not expose their children to unsafe and unhealthy living conditions.

IV. EVIDENCE TO BE PRESENTED

The children do not have independent evidence to present. We expect DCS to present evidence consistent with the preliminary protective hearing report including drug tests, photos, and the testimony of the investigating worker. We expect the worker to testify that the house was unsafe and unhealthy and that the parents admitted to using illegal substances.

V. ATTEMPTS AT SETTLEMENT

The parties have thus far made no formal attempts to settle the issue of dependency.

VI. ANTICIPATED RESULT AT TRIAL

If the matter proceeds to trial, the court will likely find a dependency exists.

VII. OTHER HELPFUL INFORMATION

The children wish to return to their parents. They also believe that their parents need help. They were all affected greatly by the domestic violence. The oldest child recognizes that a dependency may be the best way to get his parents the help that they need. The younger children do not understand the process sufficiently but want their parents to get better so they can go home. On behalf of the children, any settlement has to recognize the need for domestic violence treatment.

RESPECTFULLY SUBMITTED THIS ____ of November, 20__.

CHILD AND FAMILY LAW CLINIC

By Jason S
Certified Limited Practice Student
Attorneys for Minors

Paul Bennett
Supervising Attorney

What to Expect at a Facilitated Settlement Conference

The facilitated settlement conference, like all other court hearings, is an event at which our child clients are entitled to attend. When discussing possible attendance with our client, it may be a good idea to ask our client to consider whether his or her attendance will help or will stifle his or her parent's ability to make a compromise.

Theoretically, all settlement possibilities are on the table -- including dismissal of the petition. However, practically speaking, it will be a cold day in Yuma before DCS will compromise on whether or not there will be a threshold finding of dependency.

Mostly settlement conferences are about modifying the allegations in the petition -- not about dismissing it outright.

The key to a functioning settlement conference is to listen and to be creative. By listening carefully, we can figure out what the parents and what DCS really want. In a good settlement, both sides can get what they want – or at least what they need. [Do you hear a choir?] If we can “hear” the common ground, then we can help them achieve their goals consistent with our client’s interests.

The mediator or judge is present to help facilitate a voluntary resolution of the petition. They are not present to arbitrate or make decisions. Rather they will try to assist the parties in reaching a voluntary accord. The role of the facilitator in a settlement conference will vary depending on the facilitator’s style and/or the underlying case. Some facilitators may be very proactive in encouraging settlement. Others are more hands off.

A more active facilitator might offer practical suggestions for compromise. The facilitator may even perform a little arm twisting by offering his or her analysis of the import of certain alleged facts. For example, a facilitator may tell the parent’s attorney, *“even if the Judge found that explanation to be credible, the Judge would still find a dependency.”* Or the facilitator might tell the attorney general that, *“unless you can prove that fact, there may be no dependency.”*

Other facilitators may leave it up to the parties to see if settlement is possible -- with the facilitator standing by as a resource if needed.

Most discussions will be in a roundtable format with all the parties present. However, some facilitators like to meet with the parties separately as a means of facilitating compromise. As in other areas, it is helpful to know your facilitator’s preferences.

What is a good settlement for our client?

Obviously, any settlement that will enable our client’s long term goals to be met is a favorable settlement. If our client wants to go home, a settlement that realistically enhances that possibility is a good settlement. If our client wants be protected from an abuser, a settlement that clearly establishes the abuse would be preferred.

Whatever our client’s position, the settlement should make it easier for our client’s goals to be met. Sometimes that can be tricky. For example, if our client wants to return home, a settlement that creates a minimal dependency would probably make it easier for the parent to succeed. A parent is more likely to succeed in following the case plan where there are fewer identifiable problems to overcome.

On the other hand, if really serious problems exist and they are not identified in the settlement, DCS may devise an inappropriate case plan that will not address the poor parental behaviors impacting on the day to day life of our client. A settlement that places our client in a position of having to be removed a second time does not accomplish the client's long term goals. Settlement is a situation where our clients need good advice and counsel.

If the parties reach a settlement at the conference, it is the court's custom to try to wrap it up right there and then. If the settlement allows the parent to admit to different language from that contained in the original petition, the petition will have to be **amended**. Simple amendments may actually be handwritten on the original petition. More likely, the amendments will be read onto the court record and then memorialized at a later date by filing of an **Amended Petition**.²⁴⁹

If the settlement is acceptable to all the parties, the facilitator will want to take an admission by the parents to the Amended Petition. That is then presented to the Judge. If the admission is accepted by the Court, the Court will adjudicate the child as dependent and will schedule a dependency disposition within thirty days. If no settlement can be reached, the facilitator will schedule the matter for a trial if a trial date has not already been set.

Admissions

Most dependencies are settled by some form of admission by the parents. There is likely to be some changed language in the allegations. However, very few dependencies go to an adjudication hearing. Before the Judge can accept an admission by a parent, the Judge or facilitator must advise the parent of his or her trial rights and of the consequences of an admission.²⁵⁰ Ultimately, the Judge must also determine that the admission involves a **knowing** and **voluntary** waiver of those rights.

At a facilitated settlement conference the mediator takes over the warning and assessment functions – but the compromise must still be approved by the Judge. If the admission is taken in court, then the Judge takes the lead role in ensuring that any admission is properly made.

“Knowing” means that the parent waiving rights understands those rights being waived -- i.e., there is a right to a trial; the petitioner must prove the allegations, there are possible defenses, etc. “Voluntary” means that the parent waiving rights has not been coerced and/or is not under the influence of drugs, alcohol or medication such that the parent could not think clearly.

In order to protect the rights of the party making the waiver, the Judge or mediator will take a few moments to ask that parent some questions. Most Judges will

²⁴⁹ Amended petitions are usually prepared by the Attorney General.

²⁵⁰ **Rule 55 RPJC** See discussion in the handbook section on Dependency Adjudications.

ask if the parent's attorney explained the parent's trial rights. They may check to see if the person can read, write and understand English -- just to be sure that there are no language misunderstandings.

If for any reason the Judge feels that the parent does not understand, then the Judge will not accept the admission. If the Judge feels that the parent is not capable of understanding by a reason other than a language barrier, then the Judge may appoint a Guardian Ad Litem to act in that person's best interests.

Similarly, the Judge will ask questions to make sure the admission is voluntary. The Judge will ask if anyone has made any promises to the parent. If so, the promises must be placed on the record to make sure that they were not coercive in nature. The Judge will ask if anyone has threatened the parent or coerced the parent in any way. The Judge will also ask them if the parent is on medication. If so, the Judge will explore the nature of the medication and whether or not it might affect judgment. And the Judge will ask the parent if he or she has had any alcohol or drugs. Again, if the Judge feels that the waiver is not voluntary, it will not be accepted.

Some Judges or facilitators will also ask similar questions to the attorneys. *"Have you discussed the case with your client? Have you explained possible defenses? Do you think your client is thinking clearly? Have you made any promises to your client?"*²⁵¹

Once the Judge accepts that the admission is knowing and voluntary, the Judge may also ask questions to determine if there is a sufficient factual basis for a dependency. The Judge may ask the parent questions about the facts being admitted. Or the Judge may ask the attorneys if there is sufficient evidence to support a finding of dependency. Only when the Judge is satisfied that a dependency exists in fact, will the Judge declare that the child is adjudicated dependent.

²⁵¹ So far, we have not heard the Judge ask any attorneys if the attorneys are on medications or have used alcohol in the last 24 hours. But be prepared!

MEDIATION

Mediation is available when the parties feel that a more intense exploration of an issue is required. Mediation will allow for more time. Mediation is often helpful when there are highly emotional issues involved or where the parties just feel stuck. Through mediation, the parties to a dependency try to resolve the dispute with the help of a neutral third party called a mediator. In the course of an informal, off the record meeting the mediator tries to help resolve differences. The mediator does not make a decision; it is up to the parties to reach their own agreement. The mediator is there to help find a solution to their problem.

In the Juvenile Court, we send cases to mediation that appear able to be resolved if the parties could just “talk to each other”. Mediation is not for every case. It seems to work better when there is a private dispute as in a private dependency. Or there is a private aspect to a dispute -- such as a dependency in which there is a concurrent child support or visitation issue in Family Court or a request for a post-adoption visitation agreement in a severance proceeding.

Any party may request mediation. They can be held voluntarily or the Judge could order people to appear for mediation. If the parties are ordered to mediation, they are not required to participate – just to show up and listen to the ground rules. Mediation can be ordered to try to settle the entire case or just one or two unresolved issues within a case. The mediation can be requested and ordered during a hearing or by written motion or by a request to the mediator’s office. A written motion should try to specify what issue is being mediated and who should attend.

In Juvenile Court, even though mediation may be court ordered, once the parties appear at the mediation, actual participation is voluntary. Juvenile Court has five mediators: Stacey Brady, Jessica Findlay, Joseph Berriman, and Leah Cotton.²⁵² The mediators can be reached through their administrative assistant at 740- 4795.

Attorneys for the adults do not always participate in mediation. For some matters – such as parenting time -- the theory is that, for mediation to be successful, the parties themselves need to speak and listen each other directly -- not through intermediaries. There cannot be an open and free flowing discussion if people are concerned with “legalities”. The adult’s lawyers must still be available in the Courthouse to offer legal advice and to review agreements before they are finalized. But they are often asked to stay out of the process.

On the other hand, the custom in Pima County is that child’s attorney must be present at all mediations. The attorney will speak for the child or be present to make sure that an older child’s decisions are not the result of adult overbearing.

²⁵² Stacey and Leah were once clinic students just like you!

At the beginning of mediation, the parties will sign an agreement to participate in mediation and to obey certain ground rules. In Pima County, there are essentially three ground rules:

1. Everything said in the mediation is off the record. Nothing said can be used in court in any fashion except for the final agreement.²⁵³

2. However, if someone makes a statement indicating that there is a present danger or ongoing child abuse, the mediator is obligate to report the statement.

3. The parties agree to be respectful to each other and to try to listen to each other.

Mediation sessions are relatively long -- up to three hours at a time. The extended time gives the mediator the ability to explore underlying feelings as well as nuts and bolts matters. The mediator may meet with people privately in a **caucus** or in small groups to see where people's heads are really at.

Ultimately, the mediator will try to see if there is some common ground buried beneath the adversarial postures of litigation. The mediator will reduce any agreement to writing. The mediator will then review the agreement orally with the participants before allowing anyone to sign it. If the parties reach an agreement, it will be forwarded to the Judge for the Judge's approval.

The Attorney General's Office also has a voluntary mediation program that is available to people before a dependency petition is filed as well as for ongoing cases. The contact person is Adam Glazier at 628-6504.

Does mediation work?

In a word, "yes." The more important question is "why does it work?" We offer two reasons. The first is that the court process does not have the time or the expertise to let people air their issues. Even with the expanded PPH hearings, there is simply not sufficient opportunity for the parties to address a person in authority and express themselves. In Court, lawyers speak for clients, we follow [loosely, perhaps] the rules of evidence, and clients can only speak when spoken to or questioned in court.

The court process may work well for the efficiently and orderly resolution of disputes by third party arbitrators. But it does not work well for a resolution within which all the parties can feel some ownership. Mediation does.

²⁵³ **ARS § 12-2238**

Similarly, with apologies to Eric Burdon, there is a very real human need to “be understood.” Even parents who have done badly by their children need to be understood. Mediation gives them that. Mediators are people in authority who listen.

Don’t underestimate the power of feeling understood. We have been amazed at how many parents, children and even the state, are willing to compromise once they feel acknowledged – even to compromises that one would never have believed possible.

DEPENDENCY ADJUDICATIONS

A dependency adjudication is the process by which allegations of a dependency become judicially adopted by the court and the court officially determines that the children are dependent on the State. There are four types of adjudications.²⁵⁴

1. The parent admits the allegations contained in the dependency petition or admits to an amended version of those allegations.
2. The parent neither admits nor denies the allegations but defaults or otherwise chooses not to contest the allegations.
3. The parties submit on the papers.
4. The court holds a trial to determine whether or not the dependency exists. An adjudication hearing [sometimes called a trial] is a contested process where the state will try to prove the allegations in the petition by a **preponderance** of the competent evidence offered at the trial.²⁵⁵

An adjudication does not decide what to do about a dependency. It is simply a judicial determination that a dependency exists. Decisions about long term placement or the permanent case plan are left to a later hearing called the disposition.

Admissions

For many reasons, a parent may choose to forego a trial and admit to the original or amended allegations in the petition. The most common reason is that the parent recognizes that he or she needs help and wants to move on quickly with the reunification process. For most parents, the earlier they start, the earlier they can work toward getting their kids back. For a great many parents, the one year clock of permanency necessitates an early start. Their problems have taken years to unfold and 12 months is not a lot of time to fix them. For some parents, the stress of a trial can be overwhelming.

²⁵⁴ **Rule 55 RPJC**

²⁵⁵ Except for ICWA cases where the standard of proof is by clear and convincing evidence.

Whatever a parent's reasons, presumably they have had a healthy conversation with their attorney about the pros and cons of admitting a petition rather than exercising their right to a trial. The court will inquire about their awareness of their rights [see section about settlement conferences, *infra*] and the voluntariness of their admission.

The court must also decide if the admitted facts can support a finding of dependency under the law. The court could take additional testimony or rely on the admission and the documents produced to date. If the court finds that the admission was knowing and voluntary and that the facts support a dependency, the court will adjudicate the child to be dependent as to the admitting parent.

Defaults and “no contests”

A parent can also avoid a trial by defaulting – that is, by not showing up at a trial date. If a parent fails to show and was properly warned at the PPH that an adjudication could occur in the parent's absence,²⁵⁶ then the court may make an adjudication with minimal testimony or relying on the previous record.²⁵⁷ The Court may proceed as if the parent had admitted the allegations. The court will then assess if the “admitted” facts constitute a dependency as a matter of law just as it would with an oral admission described above.

Instead of defaulting by not showing up, a parent may simply state that the parent does not wish to contest the petition – essentially entering a “no contest” or *nolo contendere* [for you Latin scholars] plea. If the parent pleads “no contest”, then the court will conduct the same inquiries that it would for an admission -- i.e., is the plea knowing and voluntary? The court will also evaluate the evidence to see if the uncontested facts constitute a dependency as a matter of law.²⁵⁸

Why would a parent plead no contest?

The most likely scenario for a no contest plea is when a parent is also charged in a criminal proceeding for the same or similar acts alleged in the petition. For example, a child might be removed from a parent because of allegations that the parent is using methamphetamines. The parent could also be charged by the police for possession or sale of meth. Maybe that arrest is how DCS found out about the drug use.

The parent may not want to admit to allegations of meth use – even if it is true – because that admission could be used against the parent in the criminal case. The parent might not want to default because failing to show up could send a message to the Judge that the parent does not care or want reunification. So the compromise is a

²⁵⁶ **Rule 50(C)(5) RPJC**

²⁵⁷ **Rule 55 RPJC**

²⁵⁸ **Rule 55 RPJC**

no contest plea. Presumably the message of the no contest plea is this: “*Judge, I want to get my kids back but I have been advised by my lawyer that I should not admit to drug use until my criminal case is resolved.*” The problem of parallel criminal and civil proceedings poses a number of awkward and difficult choices for the child welfare system.

Submitting on the papers

If the parent wishes to contest a hearing but wants to avoid a trial, the parent could submit on the papers. What that means is that the parties will give the Judge the court reports, the petition, police reports and other documentary evidence. Based on the papers before the Judge but without testimony or cross-examination, the Judge can determine if a dependency exists under the law.

Submission on the papers is relative uncommon in Pima County but it is standard operating procedure in Maricopa County. The most likely reason for a parent to submit on the papers is face saving. The parent is not ready to say out loud “I have a problem or I behaved badly.” Maybe the parent wants to be able to tell the world [or the child or friends or family] “I fought the dependency” but does not want the stress of trial or to face a trial that the parent knows he or she will lose. Whatever the reason, submission on the papers is a viable option for some parents.

Adjudication hearing

A parent always has the option of a trial. Dependency trials are rare – occurring in fewer than 10% of cases. Nonetheless, you may have a case that will go to trial. The bad news is that trials are stressful, tough and require very thorough preparation. The good news is that trials are intense and exhilarating. They can be a real buzz. [oops, my ‘60’s are showing].

I. Pre-hearing Procedures.

A. Disclosure.

Arizona has the most liberal disclosure rules in the nation. Aside from ordinary disclosure under the Federal Rules, Rule 26.1 of the Arizona Rules of Civil Procedure puts the burden on all the parties to disclose the names, addresses of all persons who have relevant knowledge or information and the nature of their knowledge; the substance of any witness’ testimony; and a list of any relevant document or piece of tangible evidence known to a party.

However because of the “informal” nature of Juvenile Court hearings, our courts have ruled that the Rule 26.1 does not apply to dependencies.²⁵⁹ Accordingly, litigants

²⁵⁹ S.S. v. Superior Court, 178 AZ 428, 874 P.2d 980 (Division I. 1994)

are not required to submit formal disclosure documents or to utilize standard discovery devices.

Instead, disclosure in Juvenile Court practice is pretty much a one-way street. DCS routinely discloses all the documents, reports and examinations that it receives. In addition, DCS is required to submit reports to the court which contain significant information. On the other hand, the parties -- especially the parents -- tend to disclose little unless asked.

All disclosure is received by the Court as well. Unless the disclosure is contained in a required court report, the Judge will file the disclosure in the "social file" -- a file of court documents that is not open to the public except by Court order.²⁶⁰ The Judges have a need to read these reports in order to make interim case management decisions. They are expected to disregard information in the social file for the purposes of adjudication unless it is later admitted as evidence. The receipt by judges of significant disclosure has been criticized by some as tainting the Judge's ability to fairly decide the adjudication. However, so far, no cases hold that a Judge is incapable of limiting adjudication decisions to the evidence presented.

B. Pretrial Disclosure Statement

The parties are usually ordered to file a pretrial disclosure statement at least 20 days before the trial. The rule actually says that the statement must be filed 60 days after the Preliminary Protective Hearing.²⁶¹ The practical difficulty is that sometimes trial remains uncertain during the first 60 days. So the 20 day policy seems to be what is observed. The pretrial statement must include:²⁶²

- (1) The uncontested facts deemed material;
- (2) Contested issues of fact and law that are material or applicable;
- (3) A statement of other issues of fact or law which that party believes to be material;
- (4) A list of the witnesses the party intends to call at trial, which shall include the names, addresses and telephone numbers of the witnesses in addition to a description of the substance of the witness' expected testimony.No witness shall be used at the trial other than those listed, except for good cause shown.
- (5) A list of and copies of all exhibits which the party intends to use at trial. If a party objects to the admission of an exhibit, the party shall file a notice of objection and the specific grounds for each objection and provide a copy of the notice to all parties

²⁶⁰ **Rule 47 RPJC**

²⁶¹ **Rule 44 RPJC**

²⁶² **Rule 44 RPJC**

and the court within ten (10) days of receipt of the list of exhibits. Specific objections or grounds not identified in the notice of objection shall be deemed waived, unless otherwise ordered by the court. No exhibits shall be used at trial other than those disclosed in accordance with this rule, except for good cause shown.

In addition, the pretrial disclosure statement will certify that exhibits have been exchanged.

If the parties wish to object to any exhibit or witness contained in the pretrial statement, they must do so, in writing, before the trial. Objections not made are waived.

Below is an example of a pretrial disclosure statement.

CHILD AND FAMILY LAW CLINIC
University of Arizona College of law
1145 N. Mountain Ave.
Tucson, AZ 85719
State Bar No. 008169
(520) 626-5232
Fax: (520) 626-5233
Attorney for Minors

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
JUVENILE COURT

In the Matter of

C, J dob 07/00/00

No. J 111111

PRE-TRIAL STATEMENT

Hon. Judge Judy

The minor, JC by and through counsel undersigned, submits the following Pre-Trial Statement:

- I A. Nature of Action: Contested Dependency
- B. Trial Schedule: 06/13/10 9:00 a.m. – 5:00 p.m.

II The names and addresses of the parties are as follows:

Petitioner: AZ Department of Economic Security
Abe Lincoln, responsible case manager
1700 E. Broadway

Tucson, AZ 85719

Respondent: S G

Minor: J C in relative care

III Exhibits for Petitioner:

1. Child Protective Services Court Report(s) of 02/27/10 (disclosed 02/28/10).
2. Child Protective Services Case Plan(s) of 02/27/10 (fax date, Section XI-XV, Case Plan, disclosed 02/28/10) and Summary of Case Plan Tasks (draft, disclosed 03/07/10).
3. SAMHC Behavioral Health Services assessment of the child, prepared by Sigmund Freud, LAC/Clinician, dated 02/27/10 (disclosed 02/28/10).
4. In-Home Service Program Monthly Progress Reports and summaries including but not limited to report of May 2007 prepared by Wily Coyote (disclosed 02/28/10) and Discharge Summary dated 02/29/10 (disclosed 03/07/10).
5. Any and all call-in compliance reports, PSI Drug test results of the step-father, including but not limited to reports from February 2010 to the present.
6. Any and all and Omega Laboratory hair drug test results of the step-father, including but not limited to report of 02/28/10 (date reported).
7. Any and all call-in compliance reports, PSI Drug test results of the mother, including but not limited to reports from February 2010 to the present.
8. Any and all and Omega Laboratory hair drug test results of the mother, including but not limited to report of 03/03/28 (date reported).
9. Any and all call-in compliance reports, PSI Drug test results of J G, including but not limited to reports from February 2010 to the present.
10. Any and all and Omega Laboratory hair drug test results of J G, including but not limited to report of 03/04/28 (date reported).
11. ADHS-DBHS Behavioral Health Assessment and Services Plans of the mother prepared by Carl Jung, Our Family, dated 03/10/10 (disclosed 04/28/10).
12. ADHS-DBHS Behavioral Health Assessment and Services Plans of the step-father prepared by Carl Jung, Our Family, dated 03/10/10.
13. Behavioral Health Service Plan for the child prepared by Carl Jung, dated 03/14/10 (disclosed 04/28/10).
14. Crisis Plan of the child prepared by George Ruth, Intermountain Centers for Human Development, date of plan 03/14/10.
15. Any and all TDM Summary Reports including but not limited to report of 02/02/10 (disclosed 02/28/10).
16. Psychological evaluation of the mother, J G, prepared by Joyce Brothers, Ph.D., date of report 03/17/10, (disclosed 04/28/10).
17. Psychological evaluation of the child, J C, prepared by Joyce Brothers, Ph.D., date of report 02/07/09 (disclosed 03/07/10).
18. Psychological evaluation for the mother, S G, prepared by Joyce Brothers, Ph.D., date of evaluation 04/14/10.
19. Psychological evaluation of the step-father, L G, prepared by Joyce Brothers, Ph.D., date of evaluation 04/14/10.

Any exhibit listed by any other party

IV Witnesses for Petitioner:

1. Respondent Elicited testimony: The mother's ability and willingness to parent and protect her child, and her progress with reunification services.
2. Betsy Ross, investigating caseworker 740-1882 ext. xxx
Expected testimony: The circumstances surrounding the dependency, the case plan and case management, and the mother's participation in the tasks in the case plan.
3. Abe Lincoln, ongoing case manager 884-4755 ext. xxxx
Expected testimony: The case plan and case management, and the mother's participation in the tasks of the assigned case plan.
4. Joyce Brothers, Ph.D. 1000 E. Speedway Blvd. Tucson, AZ 85705 1 888 555-1212
Expected testimony: Her clinical interview, mental health examination, test findings, diagnostic impression, conclusions and recommendations from her psychological evaluations of the parents and the children.
5. Roy Orbison, Ph.D. J2 Laboratories 3640 North 1st Ave., #130 Tucson, AZ 85719 (877) 690-7385
Expected testimony: His review and opinion regarding methods and veracity of drug test results.
6. Wily Coyote Intermountain Centers for Human Development 7920 E. Broadway Suite 100 Tucson, AZ 85710 721-1887
Expected testimony: Services provided to the child, her assessment and recommendations.
6. Yosemite Sam, Clinician The Blake Foundation Child & Family Services 3170 E. Ft. Lowell Rd. Tucson, AZ 85716 795-4977
Expected testimony: Services provided to the family, her case notes, the family's need for services and the family's ability or inability to benefit from services.
7. Foghorn Leghorn, In-Home Services The Blake Foundation Child & Family Services 3170 E. Ft. Lowell Rd. Tucson, AZ 85716 321-3396
Expected testimony: Services provided to the family, his case notes, the family's need for services and the family's ability or inability to benefit from services.
8. Hans Brinker SAMHC Behavioral Health Services 2502 North Dodge, #190 Tucson, AZ 85716 618-8610
Expected testimony: SAMHC assessment of the child, the child's need for services and her recommendations.

9. Foster Parents [names not disclosed] Address not disclosed
Expected testimony: Will testify about the child's special needs and daily care.

10. Any witness called by any other party

V. Objections to Exhibits

All the documents listed by the other parties are hearsay.

VI. Objections to Other Party's Witnesses

None

VII. Uncontested Issues of Fact Deemed Material:

1. S G is the mother of the minor, J C.
2. L C may be the father of the minor, J C.
3. L G is the step-father of the minor, J C.
4. The minor has been in the temporary care, custody and control of the Department since February 15, 2010.

VIII. Contested Issues of Fact Deemed Material:

1. Whether S G is willing and able to provide safe, proper and effective parental care of the minor.

IX. Uncontested Issues of Law:

1. The Pima County Juvenile Court has jurisdiction to hear this matter.

X. Contested Issues of Law:

1. Whether the minor is dependent pursuant to A.R.S. § 8-201 (13).

XI. This Pretrial Statement will be supplemented in a timely manner should the parties become aware of additional witnesses, exhibits or objections.

RESPECTFULLY SUBMITTED this ____ day of _____, 20__

CHILD AND FAMILY LAW CLINIC

By Jason Simon
Certified Limited Practice Student
Attorneys for Minors

Paul Bennett
Supervising Attorney

COPY mailed this _____ day of _____, 20__ to:

Attorney General
3939 S Park St
Suite 1000
Tucson, AZ 85719

Jack McCoy, Esq.
0101 N. Shannon Rd
Phone: 555-1212
Tucson, AZ 85742
Attorney for mother

Judy Blue Eyes
3535 David Crosby Blvd.
Tucson, AZ 85701
Attorney for the father

C. Status Conference

About the same time that the pretrial statement is due, the court will hold a short status conference to make sure that everything is in order for the trial. Sometimes the Court will make a last ditch attempt to settle the case at the final status conference. If the parties do not settle, then the matter will go to trial.

II. Conduct of the Trial²⁶³

A. Finding of Dependency in Absentia

If a parent does not appear for the trial, the court may -- after finding that the parent had proper notice of the hearing and proper warning at the PPH -- declare that the parent has waived the right to a hearing and is deemed to have admitted the allegations in the petition by failing to show. The court can then make a finding of dependency and make dispositional orders based on the record and evidence to date.²⁶⁴

If the court had previously made the admonition referred to in the PPH section, the Judge will most likely make the finding in absentia.

B. “The Rule”

At the outset of the adjudication hearing, you may hear one of the parties stating that they “**invoke the rule**”. While this “invocation” sounds like you might be part of a séance, the parties are, in fact, requesting that the court exclude non-party witnesses under Rule 615 of the Rules of Evidence.²⁶⁵ Under Rule 615, any party may request that the Court exclude all non-party witnesses from the courtroom so that they cannot hear the testimony of other witnesses. The rule does not apply to party witnesses who have an absolute right to be present. Under Rule 615, granting the request is automatic.

When a party “invokes the rule”, the Court will ask all potential witnesses to identify themselves. The Judge will then ask the witnesses to leave the courtroom -- explaining why -- and will also order the witnesses not to talk to each other about their testimony. The latter order cannot be found in Rule 615 but is pretty standard in Juvenile Court. If and when a witness completes his or her testimony, with the consent of all parties the witness may remain in the courtroom but may not testify further.

C. Order of Events at Hearing.

The Judge will conduct the adjudication hearing like any other civil trial but with flexibility to deviate from strict courtroom protocol. The rules state that a “contested

²⁶³ The statute and rules refer to a dependency “adjudication” hearing. **ARS §8-844; Rule 55 RPJC.** For all practical purposes, there is no difference between an “adjudication hearing” and a “trial”.

²⁶⁴ **Rule 55 RPJC**

²⁶⁵ **Rule 615 Arizona Rules of Evidence**

dependency adjudication shall be as informal as the requirements of due process and fairness permit.²⁶⁶

The State has the burden of proving the facts of the dependency by a **preponderance of the evidence**.²⁶⁷ As in any other civil case, each party -- including the child -- has a right to call witnesses, to cross examine witnesses, to present evidence and to subpoena people and documents.

Since the State has the burden of proof, it will present its evidence first. Even if the DCS witnesses are friendly to us, our examination of them will be considered cross-examination and leading questions will be allowed. Different Judges handle the order of cross examination differently. Some have the parent's attorney go first and the child's attorney last. Others do the reverse. It is a good idea to find out before the hearing starts.

As in temporary custody hearings, witnesses may appear by telephone.²⁶⁸ However, the rules require a motion for telephonic testimony in advance of the hearing.²⁶⁹

The Judge may ask for opening statements. The Judge will usually ask for an oral summation with the parent going first and the State last. If requested, the Court may allow written summations.

D. Rules of Evidence

Dependency hearings are designed to be conducted in an informal manner.²⁷⁰ Nevertheless, the rules of evidence apply to most dependency hearings -- especially dependency adjudications, placement hearings, severance hearings and guardianship hearings. Thus, as in any other civil trial, the evidence presented must be competent, material and relevant. The **hearsay** rule applies as do rules concerning **foundation** and **opinion** evidence.

There are some special rules, however, which apply only to the Juvenile Court. It is important that the juvenile court practitioner be aware of these special rules.

1. Privilege.

The doctor-patient, social worker-client and the marital privilege are all deemed waived for the purposes of abuse and neglect hearings.²⁷¹ A person who speaks in confidence about child abuse or neglect is **not** protected by the normal societal privileges. Thus, if a patient tells his psychiatrist about on-going child abuse, the psychiatrist cannot keep that matter secret but, in fact, must report it to the appropriate authorities.

²⁶⁶ **Rule 55 RPJC**

²⁶⁷ **Rule 55 (C) RPJC**

²⁶⁸ **Rule 42 RPJC**

²⁶⁹ **Rule 42 RPJC**

²⁷⁰ **Rule 55 (D) RPJC**

²⁷¹ **ARS § 8-805**

Presumably, the public policy in support of such privileges is outweighed by the public policy of protecting children from abuse or neglect. Note, however, the statutes suspending the privileges do not affect the attorney client privilege. What a client tells his or her lawyer in confidence remains protected by the evidentiary privilege subject to the Arizona Rules of Professional Conduct.²⁷²

2. Hearsay.

The hearsay rule applies in Juvenile Court²⁷³. In Arizona, hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²⁷⁴

Juvenile Court, like all other Civil Courts in Arizona, recognizes the common exceptions to the hearsay rule such as a party admission and the business record exception.²⁷⁵ In addition, the hearsay exceptions have been expanded somewhat in the Juvenile Court.

There are three significant exceptions to which apply only to dependency adjudications in Juvenile Court.

a. Statements by a Child about Abuse or Neglect.

Out of court statements from a child concerning abuse or neglect are admissible by statute.²⁷⁶ The circumstances surrounding the child’s statement must offer some basis of reliability. However, in practice, nearly all statements by children are admitted as special exceptions to the hearsay rule. Unlike other states, Arizona does not require that the hearsay statement of a child to be corroborated.

The obvious purpose of the statutory exception for hearsay statements by children is to protect children from having to testify in court. The theory is that testifying -- especially in front of the child’s parents -- could cause harm to the child. While this may or may not be true in a particular case, the statute obviates the need for proponent of a child’s hearsay statement to make any preliminary showing of harm to a child.

b. Written reports of case managers.

²⁷² See e.g. **Rule 1.6 of the Rules of Professional Conduct and commentary.**

²⁷³ **Rule 802 Arizona Rules of Evidence**

²⁷⁴ **Rule 801(c) Arizona Rules of Evidence**

²⁷⁵ **Rule 803 Arizona Rules of Evidence**

²⁷⁶ **ARS § 8-237** “The out of court statements or nonverbal conduct of a minor regarding acts of abuse or neglect perpetrated on him are admissible for all purposes in any adoption, dependency or termination of parental rights proceeding under this title if the time, content and circumstances of such a statement or nonverbal conduct provide sufficient indication of its reliability.” See also **Rule 45 (E) RPJC**

The second major exception concerns the written reports of case managers. Case managers are required by statute to issue periodic written reports to the courts about the status of each dependent child. Those reports include all sorts of information -- much of it involving statements of third parties such as visitation supervisors, therapists, child care providers, etc.²⁷⁷

Generally, these written reports would not be admissible as they are out of court statements offered to prove the truth of the matters asserted within them. However, by court rule, case manager's reports are admissible without foundation IF:

(1) They have been distributed to the parties at least 10 days in advance of the hearing; and

2) The case manager is available for cross examination.²⁷⁸

While the parties are protected from the statements in the reports that originate with the case manager by the requirement that the case manager be available for cross-examination, this hearsay exception offers little protection from third party "hearsay within hearsay" contained in these reports. As a result, some judges will allow significant amounts of hearsay contained in the case managers reports without requiring the state to produce those witnesses for cross examination.

c. Reports of Evaluators

The Rule 45 (D) also provide that reports of evaluators such as psychologists, doctors, and the like, are admissible if the person who prepared the report is available for cross examination and the report was promptly disclosed under Rule 44.²⁷⁹

Foster Care Review Board and other Official Reports.

The final special Juvenile Court exception is for reports to the court required by law. These reports include Reports of the Foster Care Review Board and reports of the Court Appointed Special Advocate.²⁸⁰ The Judge in a dependency hearing can take full cognizance of those reports without special foundation and without requiring the availability

²⁷⁷See e.g. ARS §8-802(C)(7)(b) [report for the PPH]; and ARS § 8-516(E) requiring a detailed progress report on any child in placement including:

1. An assessment of the extent to which the division or agency is accomplishing the purpose of foster care for the child as described in the case plan.
2. An assessment of the appropriateness of the case plan.
3. The length of time the child has been in foster care.
4. The number of foster home placements the child has experienced while in foster care and the length of each placement.A

See also Rule 45(A) RPJC.

²⁷⁸ **Rule 42(C)(2) RPJC.**

²⁷⁹ **Rules 44 and 45(D) RPJC**

²⁸⁰ **ARS §§ 8-515.03, 8-522(E)**

of the members of the FCRB. As with case manager's reports, FCRB reports regularly contain hearsay statements of third parties who are not required to be available for trial.

d. Other Exceptions Not Unique to Juvenile Court

There are several exceptions to the hearsay rule which a good child's attorney should be familiar with.

- i. Hearsay statements which form the basis of an expert's opinion are admissible if they are the types of information normally relied upon by an expert in the field.²⁸¹ Thus, the family or personal history given to a psychologist is admissible as the basis for the shrink's opinion -- even if they come from a third party source unavailable for trial.
- ii. Statements by the case manager not included in an admissible report are not considered hearsay if they are offered against the State. They are considered a statement by a party opponent.²⁸²
- iii. Business Records [referred to in the rules as "Records of Regularly Conducted Activity"] may be admissible if a proper foundation is laid.

For the purpose of this rule a "business" includes a "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."²⁸³ Thus, Child Protective Services is a business.

The term "records" refer to

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses

Those records are admissible, if they were

- (a) made at or near the time of the underlying event,
- (b) by, or from information transmitted by, a person with first-hand knowledge acquired in the course of a regularly conducted business activity,
- (c) made and kept entirely in the course of that regularly conducted business activity,²⁸⁴

²⁸¹ **Rule 703 Arizona Rules of Evidence**

²⁸² **Rule 801(d) (2) Arizona Rules of Evidence**

²⁸³ **Rule 803(6) Arizona Rules of Evidence**

²⁸⁴ Police reports are not generally admissible as business records in Arizona because they are considered "prepared for litigation" as opposed to prepared in the ordinary course of business. We think that DCS reports can arguably be characterized the same. We suspect that different judges would handle police reports or DCS records differently. There is an exception for public

(d) pursuant to a regular practice of that business activity; and

(e) all the above are shown by the testimony of the custodian or other qualified witness.²⁸⁵

All of the above factors must be established before the record can be admitted as a business record exception to the hearsay rule. In addition, business records can be excluded from evidence if it can be shown that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.²⁸⁶

There is a similar exception for the absence of a business record. Rule 803(7) states:

"Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the non-occurrence or non-existence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."²⁸⁷

E. Mitigation Evidence

Because this is a court about healing, the Court can consider mitigation evidence in deciding whether or not there is a dependency. Specifically the Court can consider the parents' conduct leading up to the hearing. The Court must take special note of the parents' utilization of services offered by the Agency. ARS § 8-844(B) mandates that the

"Court shall take into consideration as a mitigating factor the availability of reasonable services to the parent or guardian to prevent or eliminate the need for removal of the child and the effort of the parent or guardian to obtain and participate in these services."²⁸⁸

Essentially this means that, if the parents work on their problems and are making sufficient progress, the Court can decide that, even though a dependency had been proven, the circumstances may have changed such that a finding of dependency is no longer necessary to protect the child.

records and documents. But that would still face the same question -- i.e. is this record kept for an official purpose or prepared for litigation?

²⁸⁵ **Rule 803(6) Arizona Rules of Evidence**

²⁸⁶ **Rule 803(6) Arizona Rules of Evidence**

²⁸⁷ **Rule 803(7) Arizona Rules of Evidence**

²⁸⁸ **ARS§8-844**

F. Findings of the Court

Once the adjudicatory hearing is completed, the court will make its findings in a minute entry or order. If the court finds the allegations of dependency have been proven by a preponderance of the evidence, the court must make the following findings as to each parent or guardian:

- (1) That the court has jurisdiction over the subject matter and the person before the court;
- (2) The factual basis for the dependency; and
- (3) That the child is dependent as defined by statute.

If the evidence does not sustain the allegations, the court must dismiss the petition.²⁸⁹ If the petition is dismissed, the court no longer has jurisdiction over the family and the children must be returned to their lawful guardian.

If the court finds a dependency, then the court must schedule a dependency disposition within 30 days. Courts may make a disposition finding on the spot if the Judge has heard sufficient evidence.²⁹⁰

On the next page is a checklist of evidentiary matters to consider at any dependency adjudication hearing.

²⁸⁹Rule 16.2(k) Arizona RPJC

²⁹⁰ARS § 8-844; Rule 16.2(l) Arizona RPJC

TOP TEN THINGS YOU OUGHT TO KNOW ABOUT EVIDENCE IN JUVENILE COURT

1. **HEARSAY** -- an out of court statement offered to prove the truth of its contents.

WHETHER OR NOT SOMETHING IS HEARSAY DEPENDS ON THE PURPOSE FOR WHICH IT IS BEING OFFERED

Common Exceptions

- a. Party statements
- b. Statement against penal or pecuniary interest
- c. Business record
- d. Statements for purpose of medical diagnosis or treatment
- d. Business records
- f. Hospital records
- g. Hearsay within hearsay

Exceptions that apply to Juvenile Court only

- a. Statements of a child about abuse 8-237
- b. Court authorized reports
- c. Reports submitted 30 days in advance of hearing

2. **FOUNDATION** -- preliminary information necessary before a witness may answer a question. For example:
 - a. Time, place
 - b. Experience and background of an expert
 - c. Foundation for a photograph or drawing is that it is an accurate representation of the matter depicted in the photograph or drawing. The photographer or artist does not need to testify.
3. **ASKED AND ANSWERED** -- there is no specific rule which prohibits a lawyer from asking a question more than once. Technically A & A is not an objection by which a party can demand relief. However the court has the inherent power to control the conduct of the trial. Thus, a court can limit repetitious questioning. The objection doesn't exist in the statutory rules of evidence -- but it is followed everywhere.
4. **IRRELEVANT** -
 - a. Immaterial --Not germane to proceeding and possibly prejudicial or
 - b. Does not logically tend to prove fact at issue
5. **LEADING QUESTION** -- Question itself suggest the answer.
 - a. Not permissible on direct or redirect examination
 - b. Perfectly acceptable for cross-examination
6. **MOTION IN LIMINE** -- pre-hearing motion to limit prospective testimony

7. **EXPERT OPINION EVIDENCE** – Opinions that are based on specialized knowledge not held by ordinary people. An expert opinion must meet what are called the Daubert requirements.

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

8. **REFRESHING RECOLLECTION** -- Anything can be used as long as it is shown to the other side.

Lawyer holding up an law school transcript: *Does this refresh your recollection?*

9. **STEPS TO ADMIT AN EXHIBIT**

- a. Mark for identification
- b. Show the other parties
- c. Identify
- d. Lay a foundation
- e. Offer into evidence
- f. Make objections
- g. Judge Rules

10. **LOSS OF PRIVILEGE -- ARS § 8-805**

Disposition Hearings

A **Disposition Hearing** is a hearing shortly after a finding of dependency that establishes the plan for family reunification -- or some other plan if family reunification is an unreasonable goal. Once the Judge determines that a dependency is established, the Court now has jurisdiction to order a specific plan for the family.

In most cases, the disposition plan will be a continuation of the services put in place at the initial PPH. However, some time has passed and circumstances may have changed. Or we may know more about the individuals involved from their behaviors or from professional evaluations. The disposition hearing, therefore, can be an opportunity to re-visit the family situation and adopt a plan that has more likelihood of success. We should never consider the disposition hearing as pro forma. It may be a substantial opportunity to make mid-course corrections.

For example, a psychological evaluation may now show the need for a particular kind of therapy. Or a month of dirty drug tests might indicate a need for in-patient care. Or an observable positive engagement by a parent may lead to a change in visitation.

Sometimes the court will hold a **disposition** hearing on the spot immediately after an adjudication. Other times the court will schedule a disposition hearing for a later date within the next 30 days. The timing of the disposition hearing will depend on the nature of the allegations, the readiness of DCS to present its proposed plan, and whether or not the parent has had sufficient time with his or her lawyer to assess disposition alternatives.

Dependency Reviews

Once the Court has issued orders of disposition, both Federal and State Law require that the Court monitor each child in an out of home placement on a regular basis and hold formal reviews not less than six months apart²⁹¹. In Pima County, the Juvenile Court holds periodic **dependency reviews**²⁹² -- every three months in most cases. The first dependency review can be expected about 90 days after the disposition – roughly four months into the case.

There are two kinds of dependency reviews: (1) Cases which have not gone to permanency and (2) cases beyond the first year in which a permanent plan is in place.

PRIOR TO PERMANENCY

Prior to permanency, the Court has four main goals in a dependency review, to:

²⁹¹ **ARS § 8-847**

²⁹² The Pima County Juvenile Court uses the term “dependency review”. The Federal statutes use the term “Report and Review” or just “review”

1. Monitor the child's well-being.
2. Monitor the parent's progress in completing the case plan
3. Monitor the Agency's efforts at reunification
4. Make adjustments to the case plan if appropriate.

Dependency reviews are an opportune time to reassess the case and see where it is going. Are the parents progressing or is there cause for concern? How is our client doing in the placement? Has our client changed positions since the last hearing? Have the parents demonstrated sufficient progress to change the case plan priorities? Is the Agency providing the appropriate services?

If things aren't going well on any front, the dependency review is the time to make corrections.

The dependency review is a critical event. In the very short one-year journey to permanency planning [six months for a child under 3]²⁹³ dependency reviews are the cusp points. The first review is a watershed event -- three to five months into the one year period. The first review will let us know whether or not the family is on the way to reunification. The second review may well be the last call before permanency decisions must be made.

Because of their importance, we need to stay fully informed for dependency reviews. In a sense we must reinvestigate the case as if it were new. If there is a Child and Family Team meeting or a Foster Care Review Board Hearing scheduled before the review, we should make sure that we attend and participate. We should talk with the case manager. And, above all, we should meet several times with our client.

Prior to the court hearing, the DCS case manager will issue a progress report to the Court addressing all three issues. We will receive a copy of the report. In the report, the case manager will describe the original problems, the efforts made to resolve them, and the progress towards resolution. The case manager will also report on the condition of the child and submit an updated case plan for the Court's review.

We should **independently** investigate the case, carefully review the report and carefully review the case plan. If our client has been in therapy, we should check in with the therapist to evaluate the situation.

We should also reassess our client to make sure that we understand our client's wishes and to make sure that his or her needs are being met. By the time of the first dependency review, our client will have been out of the home for a number of months. Our client may have been in therapy for the same amount of time. There may be subtle or substantial changes in the client's mental or emotional state of which we should be aware. After consulting with our client, we should be ready to offer appropriate corrections or adjustments to the case plan.

²⁹³ **ARS § 8-847 (10)**

Part of our consultation with our older clients should be to update our client on the parent's progress or lack of progress. That conversation may be difficult if the parents are not progressing. It is important to be honest with our clients. It is also important that we do not blame the parents for the child client's situation or cause our clients to lose hope about their parents. Sometimes, even though a parent does not appear to be making progress, the groundwork for progress is being laid even if we cannot see it. We need to be very careful about how we talk to children about their parents.

HOT OFF THE PRESSES: Below is a draft of the new format for DCS Progress Reports:

PROGRESS REPORT TO THE JUVENILE COURT
FOR
REVIEW AND/OR PERMANENCY HEARING

Court Case Number:

Date of Report:

Case Name:

ID:

I. CHILD INFORMATION

A. Name and Date of Birth for Each Child Subject to This Court Case Number

B. Child or Children Subject to This Report, If Different from Above

II. CASE STATUS

A. Current Case Status/Summary of Any Changes Since the Last Hearing:

B. History of reports: (Summary of each report including report date and outcome, starting with the most recent report).

C. Original Reason for CPS Involvement:

III. CASE PLAN (Attach Case Plan)

A. Child Safety:

Describe the safety and/or risk factors that would create a substantial risk of harm to the child's safety if returned home. Can these threats and/or risks be managed in the home through an in-home safety plan? If so, describe the in-home safety plan.

B. Current Case Plan Goal: List goal and target dates. Include concurrent plan if applicable.

C. Proposed Case Plan Goal (if changes are being recommended. If not, indicate "not applicable"):

1. **Appropriateness of Change:** Describe why the proposed case plan is the most appropriate and another proposed plan is not appropriate.

PROGRESS REPORT TO THE JUVENILE COURT
FOR
REVIEW AND/OR PERMANENCY HEARING

2. **Compelling Reasons**: Describe any compelling reasons that termination of parental rights is not in the child's best interests, if applicable.

3. **Permanent Placement**: Recommended permanent placement and efforts made to identify and finalize the placement.

- D. **Visitation Plan**: Describe the visitation plan schedule and summarize the results of the visits with the child's Parent/Guardian/Custodian, family members (including grandparents and siblings), relatives, friends and any former foster parents that have occurred to date/since removal. State whether visitation or contact is in the child's best interest. If visitation or contact is not recommended, state reasons why this would be contrary to the child's safety or well-being.

SERVICES AND SUPPORTS

- A. **Parent Locate**: Describe efforts (including dates) to locate missing parent (s) or indicate, "not applicable."

- B. **Services and Supports Provided/Necessary to Prevent Removal, to Remedy The Need for Continued Temporary Custody, and to Facilitate Reunification/Permanency, including the behavioral changes the parent or guardian must demonstrate in order to eliminate the safety threats and risk factors identified in the case plan:**

For each applicable service, include information regarding the following:

1. **Service Description** including who requested the service
 2. **Dates requested, initiated, and provided**
 3. **Participation**
 4. **Outcome, including behavioral changes**
 5. **Explanation if services not provided**
 6. **Describe Coordination with the Regional Behavioral Health Authority (RBHA) or Other Provider**
-
- C. **Continuation of Reunification Services**: State whether reunification services should or should not be continued and why, if applicable.

PROGRESS REPORT TO THE JUVENILE COURT
FOR
REVIEW AND/OR PERMANENCY HEARING

D. Independent Living: If the child is 16 or older with a case plan goal of Independent Living, describe services and supports provided to prepare the child for independent living.

V. CHILD'S STATUS

A. Describe the child's overall functioning. (Include medical, social and educational statuses).

VI. CHILD'S PLACEMENT

A. Current Placement: Identify and describe the type of current placement. Explain how this placement ensures the safety of the child and the child's needs are met in the least restrictive setting available and in close proximity to the home of the parents. State whether this placement is temporary or permanent.

B. Placement with Grandparents, Relatives or Extended Family: Describe efforts to identify and assess placement with a grandparent, relative or extended family, including a person who is a significant relationship with the child (include the child's and/or parent's tribe, if the child is or may be Native American). If the child(ren) is/are not placed in the home of a grandparent, relative or extended family, including a person who has a significant relationship with the child, explain why such placement has not been identified or is contrary to the child(ren)'s best interests.

C. Placement with Siblings: if the child has a sibling(s) in out of home placement, describe what efforts have been made to place siblings together. If not placed together, state why and describe efforts to facilitate frequent visitation or contact between siblings. If frequent visitation or contact is not recommended, state reasons why this would be contrary to the child safety or well-being.

D. Support for the Out-of-Home Caregiver: Describe the services provided to address the child's placement/special needs and to support the out of home caregiver.

E. Out-Of-State Placement: if out-of-state placement is appropriate and in the best interest of the child, state why (include ICPC and/or out of state visitation status).

PROGRESS REPORT TO THE JUVENILE COURT
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VII. **ICWA Preferences:** If the child is a child of Native American Heritage, describe active efforts to provide culturally appropriate remedial services and rehabilitative programs, and efforts to comply with placement preferences of the Indian Child Welfare Act. Include efforts to identify and contact the child's tribe and confirm the child's membership status including the name of the tribe and membership number, if applicable.

VIII. DEPARTMENT SUMMARY AND CONCLUSIONS

IX. DEPARTMENT RECOMMENDATIONS:

A. Department

It is respectfully recommended that _____ be made a ward(s) of the court, committed to the care, custody, and control of the Arizona Department of Economic Security.

It is further respectfully recommended that _____ be placed in the physical custody of _____ with appropriate medical, social, and educational authorizations.

If the child is in out-of-state placement, it is further respectfully recommended that the court find that the out-of-state placement continues to be appropriate and in the best interest of the child.

B. Financial:

It is respectfully recommended that beginning (date) _____, the parents listed below be assessed the following amounts on a monthly basis per child as the contribution towards the cost of foster care:

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

PROGRESS REPORT TO THE JUVENILE COURT
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(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

(parent name) _____ be assessed \$ _____ monthly for each of the following children: _____

C. Reasonable Efforts Findings

It is respectfully recommended that the court find that the Arizona Department of Economic Security has made reasonable efforts to prevent or eliminate the need for removal and to make it possible for the child to safely return home.

If the child is an Indian child, it is further respectfully recommended that the court find that Arizona Department of Economic Security has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

If the child is an Indian child, it is further respectfully recommended that the court find that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

It is further respectfully recommended that the court approve the proposed case plan.

Respectfully submitted:

Name/Title
DIVISION OF CHILDREN,
YOUTH AND FAMILIES
Telephone Number:

PROGRESS REPORT TO THE JUVENILE COURT
FOR
REVIEW AND/OR PERMANENCY HEARING

Date:

Approved by:

Name/Title

DIVISION OF CHILDREN,
YOUTH AND FAMILIES

Telephone Number:

Date:



Just as DCS will submit a report, we can and should do the same if we have a different slant on events or if we want to request a change in the case plan or a change in services. If we have any issues, we should submit our own written report under the title “Report of the Child’s Attorney.” We need to make sure that the Court gets a copy of our report at least five days in advance. A written report will be much more effective if the Judge has time to read and absorb it.

The following is a dependency review information checklist of things to do between the last hearing and each next dependency review:

1. Attend the CFT.
2. Attend Foster Care Review Board Hearing
3. Contact Case Manager
4. Review Case Manager’s Report
5. Contact Therapist
6. Contact Placement
7. Assess the parent’s progress
8. Contact CASA
9. **Meet with client**
 - a. bring the client up to date on court issues.
 - b. assess the client’s current situation
 - i. listen to the clients’ concerns and questions
 - ii. assess the client’s adjustment to placement
 - iii. identify any issues concerning the parents
 - iv. check on mental health and the status of therapy.

- vi. check on school progress or concerns
- vii. assess any other needs
- c. make appropriate decisions with the client

10. Prepare our own Court Report, if necessary, or make a request for an evidentiary hearing.

Foster Parents

Foster parents are entitled to appear and participate in a review hearing.²⁹⁴ That rule also applies for former foster parents going back six months.²⁹⁵ Even though foster parents are **not** our clients, as a matter of courtesy, we should identify and introduce them to the court at the beginning of the review hearing. We do that because we are usually the persons with the most contact with foster parents.

On rare occasions, DCS might try to remove a child from a foster family for some reason other than reunification. If that happens, the foster parent has rights under **ARS § 8-515.05**. Again, while we are not their attorneys, they often turn to us for help. If we think a removal from the foster home is not in our client's best interests or if our client does not want to be removed, we could remind foster families that they have rights and that they should contact their licensing agency. Their rights are set out below:

8-515.05. Removal of child from foster parent's home; requirements; notification; review

A. Unless a child is removed from a licensed foster parent, excluding a shelter care provider and receiving foster parent, to protect the child from harm or risk of harm, to place a child in a permanent placement, to reunite siblings, to place a child in a kinship foster home, to place a child in the least restrictive setting, to place a child in a therapeutic setting or to place a child in accordance with the Indian child welfare act (25 United States Code section 1915), the department shall inform the licensed foster parent of the department's intent to remove a child and place the child in another foster care placement. The department shall inform the licensed foster parent of the specific reason for the child's planned **removal** from the licensed foster parent.

B. If the licensed foster parent disagrees with the **removal**, the licensed foster parent shall notify the department within twenty-four hours of being informed. If the licensed foster parent disagrees with the plan to remove the child and place the child in another foster home placement, the department shall convene a case conference to review the reasons for the **removal**. The licensed foster parent and two members of the foster care review board shall participate in the case conference. A child shall not be removed unless a majority of the members who participate in the case conference agree that **removal** is necessary.

C. The department shall inform the licensed foster parent and the foster care review board of the time, date and location of the case conference to review the planned **removal**. The case conference shall be

²⁹⁴ **Rule 58(B)(1)(b) and (c)**

²⁹⁵ **Rule 58(B)(1)(b) and (c)**

held within seventy-two hours after the licensed foster parent notifies the department that the licensed foster parent disagrees with the planned **removal**, excluding weekends and holidays. The child shall remain in the current placement pending the outcome of the case conference.

D. If, as a result of the case conference, it is the department's continued intent to move the child pursuant to subsection A and the licensed foster parent continues to disagree and the child:

1. Is in the court ordered physical custody of the licensed foster parent, a foster care review board member shall provide a recommendation to the court regarding the **removal** of the child before the change of physical custody. The child shall remain in the current placement pending a court order for **removal**.

2. Is not in the physical custody of the licensed foster parent, the licensed foster parent shall be advised of the department's conflict resolution process. The department shall expedite the conflict resolution process. The child shall remain in the current placement pending the outcome of the conflict resolution process.

Dependency Reviews after Permanency

If the case has already gone to a permanency, then our focus will change significantly. Our job is now exclusively focused on our child-client. We need to make sure that the client is doing well, getting what he or she needs, and that DCS is moving forward with their permanent plan. Usually if a dependency continues after a permanency hearing, it means that the parents were unable to complete the case plan within a year's time. The following section deals with permanency hearings. After you have read that, we will come back to dependency reviews that take place after permanency.

PERMANENCY HEARING

The **Permanency Hearing** means just what it says. It is the hearing at which the court establishes a long term permanent placement plan for a child who will not be returned home. It is the point at which the Court shifts from the initial case plan to something more etched in stone. Under state law, within one year of a child's removal from the home, [six months if the child is under age 3]²⁹⁶ the court must hold a permanency hearing²⁹⁷.

Although the statute does not specify, the permanency hearing must address two questions: First, the Court must determine if it is safe to return the child home. If not, the Court must decide what the permanent plan for that child will be.²⁹⁸

At the permanency hearing, the court must make a threshold finding of whether or not the return of the child would create a substantial risk of harm to the child's physical, mental or

²⁹⁶ **ARS § 8-862(A)** The "under three" time frame was added in 2008.

²⁹⁷ **ARS § 8-862(B)**

²⁹⁸ **Rule 60 RPJC**

emotional health or safety.²⁹⁹ The key to such a finding is if the parents have substantially improved the conditions that gave rise to the removal in the first instance.

Here is where the case plan comes in. Under the statute, the new measure of the parent's abilities is their progress on the case plan. The permanency statute states that:

“The court shall consider the failure of the parent or guardian to comply with the terms of the case plan as evidence that return of the child would create a substantial risk of harm to the child.³⁰⁰“

The thrust of the initial permanency hearing will be the parent's compliance with the case plan. However, if DCS is **not** recommending the return of the child to the parent, then DCS must propose an alternative plan.

The law provides for four alternative plans:

1. Give the parent more time. If the parent is making reasonable progress on the case plan, the court can continue the permanency hearing for a reasonable amount of time to see if the parent can successfully complete the case plan.³⁰¹
2. Termination of parental rights and adoption
3. Permanent guardianship
4. Another planned permanent living arrangement for the child [usually that means some form of long term foster care.

With that focus, fifteen days before the initial permanency hearing, DCS will submit a progress report stating its position on permanency.³⁰² The progress report will be in the same format as the Dependency Review report and will address:

- (1) The parent's progress on the case plan;
 - (2) DCS's efforts to accomplish the goals of the case plan;
 - (3) The recommended plan;
 - (4) The factual basis for a permanency plan;
 - (5) Time frames needed to accomplish the permanent plan
- (6) Other issues required by the Court.

Although the practice is that DCS submits the report, nothing prevents other parties from submitting a report as well. Unfortunately our experience is that, other than DCS, most parties rarely submit such a report. We think it is a mistake and a golden opportunity lost. The Court spends a great deal of time reading reports. Reports help prepare the Court and set the

²⁹⁹ *Id.* Technically, the court need only address this question if the parent asks the court to return the child by filing a motion with the court. See Juvenile **Court Rule 59**; **ARS 8-861**. But local practice makes the assumption that the parent has asked.

³⁰⁰ **ARS § 8-861**

³⁰¹ **ARS §§ 8-862(A); 8-829(A)(5)**

³⁰² **Id.**

tone for the Court's inquiry. If the Court only reads the DCS version of events, it may be very difficult to change the Court's focus in the immediacy of an initial permanency hearing.

It is our practice to try and submit our own permanency report if our position differs from that of DCS.

The permanency hearing is conducted in the same manner as an adjudicatory hearing. The rules of evidence, as used in the Juvenile Court, apply. If the Court determines that it is unsafe to return the child then the court will:

1. Order the department to finalize a permanent plan – either termination, guardianship or another planned permanent living arrangement **[APPLA]**.
2. If the plan is for termination or [sometimes called severance] or for guardianship, the court will
 - a. Order the department or the child's attorney or guardian ad litem to file a motion for severance or guardianship within ten days.
 - b. Set a date for an initial hearing on the motion for termination of parental rights within thirty days after the permanency hearing.³⁰³

After the permanency hearing, the court may also order the termination of reunification services for the parent.

If the plan is for APPLA, the dependency will likely continue until the child turns 18. APPLA plans are usually reserved for older kids for whom adoption does not make sense and for whom there is no person available to serve as a guardian. Some of those older children may be eligible for [and may prefer] an independent living program called the Arizona Young Adult Program [AYAP]. AYAP is for children 16 and older. It is designed to teach them independent living skills such as budgeting, job applications, and accessing health care. AYAP may also provide them with housing assistance and educational benefits.³⁰⁴

AYAP can continue after age 18 up to age 21 if the child wishes. AYAP is part of the Chaffee program after the U.S. Senator who sponsored the original bill. Chaffee participation is strictly voluntary on the part of the young adult. The program is designed to serve as a bridge to adulthood.

How will the Judge make these decisions?

In making the choices, the Judge must take a good hard look at three factors:

- A. If the Judge is leaning towards severance, adoption or permanent guardianship, do the statutory grounds exist?

³⁰³ **ARS § 8-862(D)** If the termination is contested at the initial hearing, the court shall set a date for the trial on termination of parental rights within ninety days after the permanency hearing.

³⁰⁴ For more information about the young adult program see <https://www.azdes.gov/landing.aspx?id=9697>

- B. Has the state make reasonable efforts to institute the case plan?
- C. What is in the child's best interests?

In essence, the Judge will conduct a mini-severance or guardianship trial to make sure that the plan that the judge recommends will be able to be implemented under the law. The standard of proof at a permanency hearing is by a preponderance of the evidence. The standard of proof a severance is by **clear and convincing evidence** in non-Indian cases. So it is possible that there is sufficient evidence to change a plan to severance but not sufficient evidence to prove the case at trial. Confusing? Read on.

A. Statutory Grounds for Severance and Guardianship

The severance and permanent guardianship statutes require separate hearings at which the grounds must be proven by clear and convincing evidence.³⁰⁵ There may not be much sense in ordering a plan of severance or of permanent guardianship, if the Judge does not believe that the grounds could be proven. Therefore, the permanency hearing must, of necessity, address the legal efficacy of those choices.

1. Severance.

There are 10 grounds for terminating parental rights.³⁰⁶

³⁰⁵ **ARS §§ 8-537** [severance] and **8-872** [guardianship]

³⁰⁶ 1. That the parent has abandoned the child.

2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.

3. That the parent is unable to discharge the parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.

5. That the potential father failed to file a paternity action within thirty days of completion of service of notice prescribed in section 8-106, subsection G.

6. That the putative father failed to file a notice of claim of paternity as prescribed in section 8-106.01.

7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the

care of the child has made a diligent effort to provide appropriate reunification services and that either of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances which cause the child to be in an out-of-home placement.

(b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

(c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to section 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

The most commonly used ground are subdivision 8 -- what is called “time in care” and subdivision 9 relating to mental illness and substance abuse.

Time in care relates to the failure of the parent to remedy the underlying cause of the dependency by following the case plan. If the parent has wilfully failed or neglected to remedy the situation within 9 month or for whatever reason [mostly lack of capacity] or 6 months for a child under 3 years old; or has not remedied the situation with 15 months whether or not the result of wilfulness or neglect -- and prognosis is bad -- then the parent’s rights can be terminated.

The mental health/substance abuse ground is applicable where the prospects for rehabilitation are so poor that there is no end in sight in the near future.

In addition to proving the grounds of severance by clear and convincing evidence, DCS must prove that severance is in the best interests of the child by a preponderance of the evidence.

2. Permanent Guardianship

The basic situation in permanent guardianship is that the same hopeless lack of progress exists as in as severance but that it would not be in the child’s best interest to terminate parental rights.³⁰⁷ Permanent Guardianship has the additional requirement that an appropriate guardian has been identified and is willing to serve. More below.

B. Reasonable Efforts

Implicit in most of these grounds is that the state made reasonable efforts at reunification. While the efficacy of the Agency’s “reasonable efforts” is always an issue, those efforts come to the forefront in a permanency hearing. The conduct of DCS is often the only arguable issue for a parent who has not made progress? The question becomes did DCS make the services of the case plan available? Were the services reasonable and appropriate? Did DCS create unjustifiable obstacles?

³⁰⁷The grounds for permanent guardianship are set out in **ARS § 8-871** as follows:

1. The child has been adjudicated a dependent child.
2. The child has been in the custody of the prospective permanent guardian for at least nine months as a dependent child. The court may waive this requirement for good cause.
3. If the child is in the custody of the division or agency, the division or agency has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds that reunification efforts are not required by law or if reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child.
4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests.

Because of the reasonable [or diligent] efforts requirements, a permanency hearing may become the “Trial of DCS.” After all, if the parents had actually been successful, we probably would not be needing a permanency hearing.

Unfortunately, if the parents have reached the point of litigating “reasonable efforts” at the permanency hearing, it is pretty much too late. **Arguments and issues about reasonable efforts to implement appropriate services should have been made long before.** Some courts have held that they are waived if they were not made in a timely manner before the severance petition. The permanency hearing may also be too late.

In addition to severance and guardianship reasons for considering reasonable efforts, the court needs to make reasonable efforts findings to meet the requirements of federal reimbursement of services. Thus, the Court:

“must also make a finding that the agency has made reasonable efforts to finalize a permanency plan. The permanency plan may be to reunify the family or secure the child a new permanent home. In other words, the regulations have consolidated these two reasonable effort findings into one. The finding is based on the agency's permanency plan at the time of the hearing, not on a prior plan the agency has abandoned.”³⁰⁸

C. Best Interests

In any permanency finding, the Court must make a ruling that the permanent plan is in the child’s best interests. Severing parental rights serves no purpose if it would harm the child. The same would hold true for guardianship. Best interests may come into play more with older children who want to maintain their ties to their parents, warts and all. They may value the relationship – even with flawed parents – more than they value permanency. If so, we need to make their voice heard.

Thus, our clients’ preferences play a big role in the best interest determinations at a permanency hearing. There is more on “best interests” in the section on severance below.

III. Time Limits

The Judge must order the permanent plan to be accomplished within a specified period of time.³⁰⁹ The time periods are short. If the Judge determines that the plan should be termination of parental rights or permanent guardianship, then the Judge must order that a motion to start a severance proceeding be filed within 10 days and the first hearing on that motion scheduled within 30 days.³¹⁰

³⁰⁸ **45 C.F.R. § 1356.21(d)**

³⁰⁹ **ARS § 8-862(B)**

³¹⁰ **ARS § 8-862(C)**

Even if the Court orders a severance motion, the dependency will stay in place until the child is adopted or turns 18. If the court orders guardianship, the dependency will end upon the granting of the permanent guardianship motion.

Permanent Guardianships

A. Overview

A permanent guardianship is one option for providing permanency under ARS § 8-862. The legislature originally enacted the permanent guardianship statute in an attempt to provide some type of permanency to older children who were less likely to be adopted if their parent's rights were severed. The legislature also intended this statute to provide an alternative for permanency when termination of parental rights would not be in the child's best interest.³¹¹ In proceedings for permanent guardianship, the court gives primary consideration to the physical, mental, and emotional needs of the child.³¹²

A permanent guardianship in the Juvenile Court under ARS Title 8 is different from a "Title 14" guardianship in the Probate Court. A Title 14 guardianship is not permanent. Under Title 14, a parent may consent to another person acting temporarily as the child's guardian. However, the consent is revocable at any time.

The Juvenile Court may establish a permanent guardianship for a child if the guardianship would be in the child's best interest and all of the following apply:

1. The child has been adjudicated a dependent child.
2. The child has been in the custody of the prospective guardian for at least nine months as a dependent child.
3. If the child is in the custody of the division or agency, the division or agency has made reasonable efforts to reunite the parent and child and further efforts would be unproductive.
4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interest.³¹³

The court has the discretion to waive the third requirement if it finds reunification is not in the best interest of the child because the parent is unable or unwilling to properly care for the child.³¹⁴

Any adult, including a relative or foster parent, is eligible to be a guardian. If the child is old enough, he or she can nominate a guardian, which the court will honor unless it finds the

³¹¹ **ARS § 8-871(A)(4)**

³¹² **ARS § 8-871(C)**

³¹³ **ARS § 8-871(A)**

³¹⁴ **Id.**

nomination is not in the child's best interest.³¹⁵ Any party to a dependency may file a motion for permanent guardianship.³¹⁶

A court order awarding permanent guardianship to an individual also removes legal custody for the child from the birth or adoptive parents. While this order does not terminate parental rights, it does terminate the parent's authority over the child.

The guardian is generally given the right to the care, custody, control, and education of the minor. The guardian can consent to medical care and can sign school consent forms as well.³¹⁷ While the guardian takes most of the parents' rights, the guardian does not become liable to third parties for the acts of the child.

The child, the parent, or any party to the dependency may file a petition to revoke the guardianship. If the person filing for revocation can prove by clear and convincing evidence that there has been a significant change in the circumstances of the guardianship, the court will revoke the guardianship.³¹⁸ Significant changes in circumstances include the following:

1. The child's parent is able and willing to care for the child.
2. The child's permanent guardian is unable to properly care for the child.³¹⁹

If, at the permanency hearing, the court determines that permanent guardianship is clearly in the child's best interest, the court will order the child's attorney or guardian ad litem to file a motion for permanent guardianship alleging the grounds set out in ARS § 8-871. The court will also set a date, within thirty days of the permanency planning hearing, for an initial hearing on the motion. If the permanent guardianship is contested at the initial hearing, the court shall set a date for a trial on it within ninety days of the permanency hearing.³²⁰

Before a final hearing, the agency or a person designated by the court shall conduct an investigation of the alleged grounds for permanent guardianship, the suitability of the prospective guardians, and the best interests of the child. The investigation must be submitted in writing to the court.³²¹

³¹⁵ **ARS § 8-871(B)**

³¹⁶ **ARS § 8-872**

³¹⁷ **ARS § 8-871(D)** (giving the guardian the same rights and responsibilities as guardians under **ARS § 14-5209**)

³¹⁸ **ARS § 8-873**

³¹⁹ **ARS § 8-873(A)**

³²⁰ **ARS § 8-862(E)**

³²¹ **ARS § 8-872(E)**

B. Advantages and Disadvantages of Permanent Guardianship

1. Advantages

The most important advantage of permanent guardianship is that it can create a permanent placement for the child without having to terminate parental rights.

Permanent guardianship makes sense where:

1. The child wants to live with the guardian but does not want to be severed from his or her parents.
2. The parents need to save face and are willing to consent to a permanent plan one step short of giving up their child.
3. The parents and/or the child want to maintain an ongoing relationship but one in which care-taking responsibility is left to the guardian. Guardianship may be an especially attractive situation where the parent lacks capacity --such as with mental illness or retardation -- but does not lack in love for the child.
4. The child does not want to be adopted.
5. The child wants to stay with the guardian but, for some reason, the guardian is ineligible to adopt or be a foster parent.
6. The parent may be able to regain capacity to parent but it will take a period of years.

Permanent guardianship also has the advantage of allowing for court ordered visitation for parents, siblings, and other relatives.³²²

2. Disadvantages.

Permanent guardianships have one very distinct disadvantage: Unlike adoptions or long term foster care, guardianships have very limited access to financial subsidies. Some subsidies exist, but they are few in number, difficult to obtain and not guaranteed by Federal Law. The permanent guardian must be a person willing to assume full financial responsibility for the child.

The child must be adjudicated a dependent child before guardianship can be ordered. In some situations, the person seeking guardianship has to petition for dependency as well. The extra proceeding can create complications -- not the least of which is a new set of allegations. If a parent might be willing to consent to the guardianship where the grounds are amorphous but might not be willing in a dependency with more specific allegations.

³²² **ARS § 8-872(H)**

3. A Difference That Could Go Either Way

Permanent guardianships can be revoked. Terminations cannot. That simple fact may be critically important in decisions whether to go one way or the other.

The parents have to be aware of the fact. But so do children. Permanent guardianship should not be the plan if it is based on false hope -- *maybe my parents will turn it around and come and get me*. It should be based on the situation as it really is. Maybe the parents need more time but the possibility is there. Maybe a lesser but continuing relationship is a good thing. Be prepared to try to work out these tough questions with your client as best as you can.

The dependency is dismissed upon the entry of an order for permanent guardianship.³²³ The child will no longer be a ward of the court but the court will retain jurisdiction over the guardianship. At the final hearing, the court will set a **guardianship review** approximately one year from the final hearing.

We remain the child's attorney at least through the guardianship review. A guardianship review is much the same as a dependency review –except that a court worker will meet with the family and provide a report to the court. DCS will not be involved nor will the Attorney General. It will just be us, the family, and the court worker.

If all is well after a year, the first guardianship review will be the last hearing for the family. The court will retain jurisdiction over the guardianship but will not schedule any more hearings unless requested to do so by the child, the guardians or the parents.

Severance Proceedings

In Arizona, a proceeding to permanently terminate parental rights is also called a **severance**. The terms “severance” and “termination” are interchangeable. Permanent termination means just that. A parent will no longer have any rights to raise the child³²⁴. Once a severance is complete, the child is free to be adopted.

Because so much is at stake, a parent is entitled to a number of special due process protections.³²⁵ The petitioner must prove grounds for severance by clear and convincing evidence rather than by a preponderance of the evidence³²⁶. A petitioner must also prove that

³²³ **ARS § 8-872(I)**

³²⁴ **ARS § 8-539** “An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other except the right of the child to inherit and support from the parent. This right of inheritance and support shall only be terminated by a final order of adoption.”

³²⁵ Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982)

³²⁶ **ARS §8-537(B)**

severance is in the child's best interests. For an Indian child, the standard is even higher -- that is, proof beyond a reasonable doubt.³²⁷

Thus, severances come in two parts: The first is that one or more grounds for severance must be proven. The second is that severance is in the "best interests" of each child. Since our clients are the children who may be separated from their parents, we tend to focus on their wishes and needs. We know what they want if they are able to tell us. We probably know more about their needs than any other participant. As a result, we tend to focus on the portion of the case addressing their "best interests."

Who may bring a severance?

In most cases a severance is brought by DCS. However, a severance can be brought privately by "Any person or agency that has a legitimate interest in the welfare of a child."³²⁸ There need not be a dependency. But, if there is, the initial procedures are different from a severance where there has been no dependency.

What are the grounds for severance?

There are eleven grounds for severance³²⁹ -- several of which are a bit esoteric.

³²⁷ See section on the Indian Child Welfare Act at page 115 .

³²⁸ **ARS § 8-533**

³²⁹ **ARS § 8-533 states:**

1. That the parent has abandoned the child.
2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.
3. That the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.
4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.
5. That the potential father failed to file a paternity action within thirty days of completion of service of notice as prescribed in section 8-106, subsection G.
6. That the putative father failed to file a notice of claim of paternity as prescribed in section 8-106.01.

7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that one of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to section 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

(b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

(c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to section 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

The most common grounds encountered by the clinic in a DCS initiated severance are:

Subdivision 7 -- relinquishment
Subdivision 8 -- what is called "time in care"
Subdivision 3 -- mental illness and/or substance abuse
Subdivision 4 -- lengthy imprisonment

The most common grounds for private severance are:

Subdivision 1 -- abandonment and
Subdivision 4 -- lengthy imprisonment; and
Subdivision 7 -- relinquishment where the adoption by a specific family is pre-arranged.

In all cases, the petitioner is free to allege multiple grounds. Only one ground needs to be proven.

Relinquishment:

A relinquishment is a **voluntary** decision by the parent to give up all rights to a child. Parents relinquish under a variety of circumstances -- e.g. a very young unwed mother and father who believe it is best to give up their child for adoption; a parent about to go to prison for a very long time; a parent who has problems and is willing to give the child to a relative.

One situation that the Clinic sees fairly frequently is a parent who decides not to contest a severance but wants to "save face" concerning the grounds. In the latter situation, the relinquishment may be voluntary in the same way that a guilty plea is voluntary.

The State routinely opposes changing a "fault" ground for severance to the ground of relinquishment. We think it has a lot to do with ground #10. Ground 10 authorizes severance where:

[T]he parent has had parental rights to another child terminated within the preceding two years **for the same cause** and is currently unable to discharge parental responsibilities due **to the same cause**.

By refusing to accept relinquishments, the State wants to ensure that it does not have to go through with six months of futile and expensive reunification efforts for another child – e.g., for a child that has not yet been born. If another child is born, the state could take custody of that child and attempt to move directly for a severance in order to avoid putting the child, the state, and the family through a reunification effort that is destined to fail – assuming the conditions of paragraph 10 are met.

We generally encourage relinquishments where parents are sincere. Most often, if severance is probable, it is in our client's interests that the matter be disposed of quickly rather than through a four or five month trial process. The adoption process can start sooner. For older kids, the anxiety of a lengthy trial is palpable. And, as harsh as this may sound, we

cannot be concerned for another child who may not yet exist and is not our client, if that concern would negatively impact our current client's interests.³³⁰

The Courts will generally grant a parent's motion to add the grounds of relinquishment over the State's objection. There is a certain amount of situational coercion for both the parent and the state if the Court feels that the relinquishment is in this child's best interests. We may be part of that coercion.

There are two kinds of relinquishments: General and specific. A general relinquishment is a surrender of all parental rights to the State with no promises about what will happen to the child. The child could be adopted by anybody.

A specific relinquishment is conditioned on the child being placed for adoption with a specific family. The birth parent gets to have some say in where the child ends up. There is a certain amount of comfort to the birth parents in knowing that the child will be taken care of by someone they trust. Often that comfort zone is the catalyst for agreeing to relinquish.

DCS is very reluctant to agree to a specific relinquishment. The Agency does not want to be in a situation where parental rights might have to be restored if the adoption with a particular adoptive parent is not completed due to some unforeseeable circumstance. The State will usually only agree to a specific relinquishment if the child has been placed with the proposed adoptive family for a long time and it is a near certainty that the family will adopt.

³³⁰ **E.R. 1.7**

One of the advantages to the parent in a specific relinquishment is the possibility of a post adoption visitation agreement -- i.e. an agreement that is enforceable in court for the birth parent to visit the child after an adoption.³³¹ In practical terms, a post adoption agreement is only possible when the adopting parents are known to the birth parents -- which they would be in a specific relinquishment. A post adoption agreement must be voluntary on the part of the adopting parents; it must be fair; and it must be approved by the Court.

The difficulty with post adoption agreements is that they can be scuttled by the adopting parents at any time when the adoptive parents **subjectively** believe that continued contact is not in the child's best interests.³³²

Time in Care

Subdivision 7 sets out dual grounds referred to as "time in care".³³³ The central theme of subdivision 7 is that it has taken too long for the parents to remedy the problem that caused their child to be removed from the home. The child has been in foster care with no end in sight and it is time to move on and give the child a chance at a new, permanent family.

There are four common elements to time in care:

1. The child is in an out of home placement pursuant to court order.
2. The agency has made diligent efforts to reunify the family.
3. The parent has been not remedied the problem that caused the child to be placed in care.
4. Too much time has passed.

There are two types of time in care grounds. The first is when **nine** months have passed and the parent has **substantially neglected** or **wilfully** refused to correct the underlying problem.³³⁴ Essentially, this ground is for the drop out parents who have not made efforts to get their act together. For some problems, such as substance abuse, that is not much time at all.

The second ground is when **fifteen** months have passed and the parent has been unable for any reason -- regardless of parental efforts -- to remedy the underlying problem **and** it does not look like the parent will be able to come up to speed in "the near future"³³⁵. Essentially this ground says that, even when parents are trying, we are only going to give them fifteen months to become minimally adequate parents.

³³¹ **ARS 8-116.01**

³³² **ARS 8-116.01(C)** C. An agreement entered into pursuant to this section shall state that the adoptive parent may terminate contact between the birth parent and the adoptive child at any time if the adoptive parent believes that this contact is not in the child's best interests.

³³³ **ARS 8-533(7)**

³³⁴ **ARS 8-533(7)(a)**

³³⁵ **ARS 8-533(7)(b)**

The latter grounds may seem unduly harsh -- and from the parent's point of view, it is. Clearly in the latter situation the law has made a policy judgment that parents' rights take second place to the child's need for a permanency.

Proof of time in care is the most complex of all the grounds. It is incumbent upon the Agency to clearly identify why the child was removed in the first place; to chronicle all the efforts made to assist the family in reunification; to demonstrate that those efforts were reasonable and to show that the parent has not resolved the problem. This will usually involve the use of the expert testimony of psychologists and social workers.

Time in care cases often come down to a trial of reasonableness of the Agency's action. Like the situation in a permanency hearing, the Agency may be put on trial.

Mental Illness and Substance Abuse

Subdivision 3 dealing with mental illness, mental deficiency and substance abuse is related to time in care but slightly different in two key respects. First, the state must prove the condition of mental illness, mental deficiency or substance abuse. But rather than dealing with specific time periods, the state need only prove that "reasonable grounds to believe that the condition will continue for a prolonged indeterminate period."³³⁶

Second, even though the statute does not say so explicitly, courts have held that the state must nevertheless prove diligent efforts at reunification in order to establish the grounds. Typically, the state will try to show the efforts it has made to help the parent deal with the mental health or substance problem. Additionally, the availability or lack of availability of treatment is a fair consideration in evaluating whether the condition will continue for a prolonged indeterminate period.

Imprisonment

Lengthy imprisonment is an interesting ground in that it is largely undefined by the statute. The statute merely states that the grounds exist if the prison "sentence of such parent is of such length that the child will be deprived of a normal home for a period of years." How long is that? Well the Courts have never given us a clear answer.

In a recent Supreme Court decision, Matter of Michael J.³³⁷, the Court set out guidelines for determining whether or not the parent's sentence is sufficiently lengthy. The Court stated that the trial court should, at a minimum, look at the following six factors:

- (1) the length and strength of any parent-child relationship existing when incarceration begins,
- (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration,
- (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home,
- (4) the length of the

³³⁶ **ARS § 8-533(3)**

³³⁷ 196 Ariz. 246, 319 Ariz. Adv. Rep. 8 (2000)

sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

We are not sure how much guidance this list of factors will provide. We suspect that more court clarifications may need to follow.

Abandonment

"Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.³³⁸

Essentially if there is a six month period where the parent has not tried to really be a parent, the grounds for severance grounds will be met.

What are the Child's Best Interests?

Regardless of the grounds established, the petitioner must also prove that severance is in the child's best interests.³³⁹ The precise meaning of "best interests" is always a case by case determination. Nevertheless, the Courts have given us some guidance. In determining best interests in a severance, the trial Court

must consider the **benefit** of severance to the child as against the **detriment** should severance be denied. The immediate availability of an adoptive placement obviously weighs in favor of severance, while the improbability of adoption, absent other factors, weighs against it. But the availability of adoption is not the sole criterion. As this case clearly shows, continuation of the parent-child relationship may have such negative consequences for the child that severance is warranted even though an adoptive placement is unavailable³⁴⁰.

The essential question is whether or not there is something to be gained by the child by terminating parental rights or is there something to be lost by the failure to complete the severance. Once those factors are identified, the court must weigh them, along with all others, to see if a best interests test has been met. A further assumption is that a child who is not adoptable may have little to be gained. The flip side is also true. If a child is deemed "adoptable", the default assumption is that severance is in the child's best interests.

³³⁸ **ARS § 8-531.1** see also Matter of Michael J. supra at 995 P.2d 685

³³⁹ **ARS 8-533(B)**

³⁴⁰ Matter of Appeal in Maricopa County Juvenile Action No. JS-500274
167 Ariz. 1, 804 P.2d 730 (1990)

Some courts have taken the position that “adoptability” is all that is necessary to establish that severance is in a child’s best interests. If the child is adoptable, then that is all that needs to be proven to prove that a severance is in a child’s best interests. In a recent trial, the State took the position that all children are adoptable. Presumably, that means that the State’s position is that it is in the best interests of all children to have parental rights severed.

When we consider the best interests of our clients, we need to look at all circumstances from our child’s point of view. What does the child want? What will happen if severance is granted? What will happen if it is denied? What will happen to sibling groups in either case?

Our client’s wishes are paramount. However, for younger children, we may be the only players (besides the judge) who can objectively look out for the child’s best interests. The parents have their own interests. The State has its own interests. The foster families have their own interests. Some or all of these interests might not comport to the child’s interests.

That doesn’t mean that anyone is acting in bad faith or is not concerned with the welfare of the child. Most parties mean well. It just meant that their perceptions, like everyone’s, is colored by their personal or bureaucratic interests. And, while we would be foolish to assume that we don’t have any biases or altered perceptions, at least situationally, we are in the best position to be most objective.

What are the Procedures for a Severance?

Notice and Defaults

If the severance is an outgrowth of a dependency, then the severance is initiated by a simple motion within the dependency³⁴¹. If there is no dependency, a severance is considered a new proceeding and must be initiated by the filing of a petition.³⁴²

There are three major differences between the two procedures. The first is **service of process**. If a **new petition** must be filed then service of process must be made personally on the responding parent. Service must be made just as if this were the initiation of any other civil case.³⁴³ In addition to regular service of process, the Clerk of the Court has to send a special notice by registered mail which includes the warning:

³⁴¹ **ARS § 8-863**

³⁴² **ARS § 8-533**

³⁴³ **ARS § 8-535(A)**

“You have a right to appear as a party in this proceeding. The failure of a parent to appear at the initial hearing, the pretrial conference, the status conference or the termination adjudication hearing may result in an adjudication terminating the parent-child relationship of that parent.”³⁴⁴

Since, 1998, however, if the court orders a plan of severance and adoption after a permanency hearing, DCS [or other petitioner] may commence a severance by filing a simple motion for severance³⁴⁵. A motion need only be served on the parties’ attorneys. There is no requirement that the parent receive any actual personal notice of the hearing. The burden is on the attorney to make sure the parent is aware of the initial severance hearing.

This downgrading of the notice requirement is especially troublesome if, for some reason, the attorney has lost contact with the parent -- a not infrequent occurrence at this stage of the process. The parent is then exposed to a default judgment without ever having received actual notice.

Note, under the Indian Child Welfare Act, the parent of an Indian Child must receive personal notice.

As with a dependency, in a default situation, the Court can rule that the parent has waived his or her rights to a hearing and is deemed to have admitted the allegations in the petition.³⁴⁶ The court can then order the termination of parental rights after assuring itself that a factual basis supports a termination and that it is in the child’s best interests.

Request to Change Judge

The second difference between proceeding by motion and a new proceeding is that under a new proceeding, a parent would be entitled to a different judge. At the very least, the parent could “affidavit” the judge pursuant to Rule 2.³⁴⁷ If the severance is deemed a continuation of the dependency, then the parent is not entitled to such a request as a matter of right. From the parent’s point of view, it is pretty easy to see why the parent would want a change of judge from the Judge who already found that termination is the appropriate plan at a permanency hearing.

Informality of the Trial

The adjudication trial will be similar but perhaps with more formality than other Juvenile Court trials. Obviously the stakes are higher -- although from a practical point of view, the permanency planning process may be more significant. Rule 6 requires

³⁴⁴ **Id.**

³⁴⁵ **ARS§ 8-862**

³⁴⁶ **ARS § 8-863(C) and (D)**

³⁴⁷ **Rule 2 RPJC** See procedure to change Judge *infra*.

“informal” hearings for dependencies applies to severances as well. However, given the constitutional dimensions involved in terminating parental rights, the tendency is to preserve rights and err on the side of formality. The rules of evidence apply even under the formality mandate.

Social Study

In all other respects but one, the procedures are the same for a severance adjudication as for a dependency adjudication. That one difference is that the Court must order a report called the **social study**.³⁴⁸ The social study is a factual report commissioned by the Court showing the “circumstances of the petition, the social history, the present condition of the child and parent, proposed plans for the child, and such other facts as may be pertinent to the parent-child relationship.”³⁴⁹ The social study must include a recommendation about whether or not the parent-child relationship should be terminated.

The social study is usually prepared at the petitioner’s expense. More often than not, therefore, the petitioner will submit a name for the court for its approval. There is certainly the perception of some bias in the fact that one party picks the person or agency making the social study -- although there have been social studies which have recommended against severance.

The social study, as a required report, is admissible without further foundation at trial.³⁵⁰ However, the practice in Pima County is that, prior to the trial, the parties will have the opportunity to object to portions of the social study. The Court will usually sustain objections to unattributed hearsay and to hearsay from persons who will not be present to testify at trial. But for the most part, the study is admissible and greatly influential in the trial process.

What should I be thinking about as the Child’s Attorney?

Your role in a severance is the same as that in the dependency. Help your client make informed decisions and then advocate that position. The big difference is that, in a severance decision, the position may be a forever decision. That places a heavy burden on you as attorney and an even heavier burden on the child.

Adding to the mix is the different view of “best interests” for an older child in a severance. It is one thing for a Judge to place a smaller value on the child’s position in a temporary protective situation like a dependency. It is quite another when the decision may permanently change the life of the child.

The child’s age becomes an important factor because a child over 12 must consent to any adoption. A child who tells us that he or she will not consent to an

³⁴⁸ **ARS § 8-536**

³⁴⁹ **Id.**

³⁵⁰ **ARS § 8-537**

adoption is not an **adoptable** child. Thus, a major factor is the best interests calculus for older children is their willingness to consent to an adoption.

Best interests arguments can be complex. Many of our clients recognize their parents' deficiencies and want, on a day to day basis, to stay with a safe placement. Or they may understand that it just isn't feasible to go home.

On the other hand, these same children may not want to end their relationship with their parents. They value that connection. They may value their time with their parents – even if it is inconsistent.

Complicating matters further, the State may have a significant financial interest in a severance. Adoption subsidies are mostly federal money. Guardianship subsidies come from the State Treasury. Moreover, the State receives financial bonuses for adoptions coming out of dependencies. Thus the State's witnesses' testimony about "best interests" may reflect those built in interests.

It is imperative that you spend extra time and make an extra effort to make sure that your client understands all of the ramifications of severance and that you understand your client's stated and unstated wants and needs. It can be a daunting task. You may need some assistance from the professionals involved in the child's life consistent with keeping the child's secrets. You will certainly need to consult with the other members of the Clinic team to help your client make good choices.

A sample severance petition and final orders are located in the T drive.

ADOPTION

The main reason for severing parental rights is to legally free children for adoption. Thus the next logical step after a severance is to proceed towards adoption. Adoption means that the child another parent or parents will be legally substituted for the child's birth parents. The child's adoptive parents will have the same legal rights and responsibilities as if they had physically conceived and birthed the child. Once the adoption is in completed, the child will have a parent able and willing to care for the child. The dependency will then be dismissed.

Legal substitution can provide permanency and stability for a child. For some children, adoption provides the functional family that the child did not have with the birth parents. For others, adoption may solve some problems but not provide magical cure all for behavioral issues, trauma, and a sense of not belonging that may run deep for a child coming out of a dependency. The legal fix does not necessarily fix the hurt.

While it is not a legal necessity that a particular adoptive home be identified before a severance can be completed, approximately 70 percent of children in Arizona who face termination of parental rights were already placed prospective adoptive relatives or foster families at the time of the severance trial.³⁵¹ For that 70 percent, the road to adoption should be fairly straightforward. DCS will turn the case over to an agency dedicated to adoptions. Currently, that agency is St. Nicholas of Myra Adoption Center located at 899 N. Wilmot Rd., Suite C-4 in Tucson. St. Nicholas can be reached by phone at 520-745-8791 or by fax at 520-745-8609. . Unless there are unexpected events, after about six to eight months of paperwork and reports, the adoption will take place.

When a severance has been granted, the child is still a ward of the state **and still our client until any adoption is final.** We need to make sure our client is doing all right and we are ready to do what we can to facilitate the completion of the adoption or meet any other needs of our client. Potential adoptive families will be vetted during the continuing dependency process. There will probably be at least one dependency review before any adoption is finalized.

Events can happen that “disrupt” a potential adoption as they could with any other placement. Thus, even though the legal issues may be mostly resolved, the need to monitor our child-client’s situation remains high after they are placed in an adoptive home.

For the other 30 percent, the road will be longer and a lot more difficult. The state is obligated to attempt to find a set of parents. Unfortunately, sometimes that is easier said than done. Many of our clients have been through a lot. They have special needs. They may require special care and special parents. They may be challenging behaviorally. The state is not successful at placing about 10% of children who are freed for adoption for up to a year or more.³⁵² Some of our clients are older and may not want to be adopted.

For those children, we need to be available to counsel them about their choices and to monitor their well-being. Our role is not diminished by a severance. While it is not our task to locate potential adoptive families, we can be useful in a number of ways. We can help follow up on leads provided by others. We can make sure that our clients are aware of their alternatives. We can continue to monitor other issues such as school, services, and their temporary placements.

³⁵¹ **Arizona Department of Child Safety Semi-Annual Report On Child Welfare, April 1, 2014 through September 30, 2014, chart 39, page 65**

³⁵² **See Chart 39, Semi-Annual reports for the past years at**

<https://www.azdes.gov/appreports.aspx?Category=57&subcategory=20&menu=154>