

South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases



October 2007

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**SOUTH DAKOTA GUIDELINES FOR JUDICIAL PROCESS
IN CHILD ABUSE AND NEGLECT CASES**

TABLE OF CONTENTS

I. INTRODUCTION	1
INDIAN CHILD WELFARE ACT FLOWCHART	2
II. GENERAL ISSUES	5
A. Definition of Abuse and Neglect	5
B. Other Statutes Relating to Child Abuse	6
III. REPORTING AND INVESTIGATING CHILD ABUSE	8
A. Reporting Statutes and Immunity from Liability	8
B. Taking the Report	9
C. Investigation	11
1. General Objectives	11
2. Roles of Child Protective Services, Law Enforcement and the State’s Attorney	11
D. Joint Investigations	13
E. Suggestions for Investigating Reports of Abuse and Neglect	14
F. Suggestions for Interview of Child	16
G. Suggestions for Interviewing Parents	17
IV. PROTECTIVE CUSTODY	19
A. Introduction	19
1. Assessing Imminent Danger	20
2. Suggestions for Determining Whether a Child Should Be Removed	22
B. Emergency Removal Checklist	24
V. Court Appointed Special Advocates (CASA)	26
A. Introduction	26
B. Appointment and Training	26
C. Appointment to Individual Cases	26
D. Investigation and Reports	27
E. Speaking for the child	27
VI. INTAKE	28
A. Contacting Intake Officer	28
B. Purpose of an Intake Hearing	28
C. Procedure for Holding an Intake Hearing	29
D. Factors to Consider	29
E. Options	31
F. Checklist for End of Intake Hearing	32

VII. 48 HOUR HEARING (TEMPORARY CUSTODY HEARING)	33
A. Temporary Custody Hearing	33
B. Purpose of a 48 Hour Hearing	33
C. Procedure for Holding a 48 Hour Hearing	34
D. Factors to Consider	37
E. Checklist for End of 48 Hour Temporary Custody Hearing	41
F. Expediting Cases	43
G. Participants	44
H. Determine Whether the Indian Child Welfare Act Applies	45
I. Reports Submitted at 48 Hour Hearing	45
J. Matters the Court Should Address	46
VIII. ABUSE & NEGLECT SUMMONS AND PETITION	49
A. Petition	49
B. Filing the Petition	50
C. Summons and Service	50
D. Default	52
E. Pretrial Conferences	52
IX. ADJUDICATION	53
A. Definitions	53
B. Timing	54
C. Notice of Hearing	55
D. Continuances	56
E. Discovery	57
F. Evidence	58
G. Elements	58
H. Evidence	58
I. Defenses	61
J. Findings of Facts and Conclusions of Law	61
K. Notice of Entry	65
L. Role of Child’s Attorney and Court Appointed Advocate	65
M. Adjudication Checklist	67
X. REVIEW HEARINGS	68
A. Introduction	68
B. Timing	69
C. Issues to Be Addressed at Review Hearings	70
D. Key Decisions the Court Must Make at the Review Hearing	70
E. Court Reports	70
F. Findings and Review Hearing Order	71
XI. FINAL DISPOSITION	72
A. Introduction	72
B. Timing	72
C. Decisions the Court Must Make	73

D. Evidence	87
E. Court Reports	87
F. Findings of Fact and Conclusions of Law	88
G. Termination of Parental Rights	89
H. Disposition Checklist	92
XII. POST DISPOSITION HEARINGS AND APPEALS.....	93
A. Appeals	93
B. Post-Termination Review Hearings.....	94
XIII. SUPPLEMENTAL READING MATERIALS	96
XIV. FORMS INDEX.....	98
FORM 1 INITIAL FAMILY ASSESSMENT	99
FORM 2 OBSOLETE.....	105
FORM 3 NOTIFICATION OF REMOVAL OF CHILD	106
FORM 4 TEMPORARY CUSTODY DIRECTIVE	107
FORM 5 REPORT TO THE COURT	108
FORM 6 ICWA AFFIDAVIT	111
FORM 7 TEMPORARY CUSTODY ORDER	113
FORM 8 SUMMONS.....	115
FORM 9 PETITION.....	116
FORM 10 ADJUDICATORY FINDINGS OF FACT AND CONCLUSIONS OF LAW	118
FORM 11 ADJUDICATORY ORDER.....	120
FORM 12 NOTICE OF ENTRY OF ADJUDICATORY ORDER.....	121
FORM 13 REVIEW HEARING ORDER	122
FORM 14 DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW	123
FORM 15 DISPOSITIONAL ORDER	125
FORM 16 NOTICE OF ENTRY OF DISPOSITIONAL ORDER	126
FORM 17 ORDER OF APPOINTMENT OF CASA VOLUNTEER AND OATH OF OFFICE.....	127
FORM 18 ORDER APPOINTING CASA VOLUNTEER AND GRANTING ACCESS TO CHILD(REN)’S RECORDS	129
XV. APPENDICES	131
A. Indian Child Welfare Act of 1978 (25 USC §§1901 to 1963).....	132
B. BIA Guidelines for Indian Child Custody Proceedings.....	139

SOUTH DAKOTA GUIDELINES FOR JUDICIAL PROCESS IN CHILD ABUSE AND NEGLECT CASES

**GOAL: TO REDUCE THE TIME CHILDREN SPEND IN TEMPORARY OUT
OF HOME PLACEMENTS**

I. INTRODUCTION

Victims of child abuse and neglect come before the Court for protection from further harm and for timely decision-making for their future. Courts must make critical decisions and oversee social service efforts to rehabilitate and maintain families or to provide alternate permanent care for children. Unfortunately, many participants in the juvenile Court process have neither the resources nor the expertise to meet the demands that a child abuse and neglect case presents. Participants in the South Dakota juvenile Court system need clear descriptions of ways to fulfill their responsibilities in child abuse and neglect cases. The purpose of these guidelines is to set forth the essential elements of properly conducted abuse and neglect Court proceedings. They are recommended for use by judges, attorneys, family services specialists, law enforcement officers, and related professionals. Readers are urged to use this information to ensure that as many children as possible have stable, caring, and supportive families.

These guidelines set forth the elements of high quality judicial process in child abuse and neglect cases. They specify fair, thorough and speedy Court procedures in cases brought for the protection of abused and neglected children. From referral and investigation until Court involvement has ended, these guidelines outline necessary procedural steps for each phase in the process and the role of each participant.

The basic principle underlying these guidelines is the need for timely action in child abuse and neglect cases. Children have a different sense of time from adults. Delays caused by prolonged litigation can be especially stressful to abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether and when they will go home, and when they might be moved to another home are frightening. Extended periods of uncertainty exacerbate childhood anxiety.

Under federal and state law, a decision concerning the permanent placement of a child is to take place within twelve (12) months of when a child is first placed into foster care. To be able to meet this deadline, the earlier stages of the case must occur in a timely manner. Courts are the gatekeepers of the foster care system and must make timely litigation in child abuse and neglect cases their highest priority. Family services specialists, law enforcement officers, attorneys, CASA volunteers, and other service providers play a critical role in child abuse and neglect cases. For the Court system to function in the best interests of abused and neglected children, it is essential that all these participants take active, affirmative steps to acquire knowledge and expertise in handling these cases and discharge their responsibilities in an effective and responsible manner. Ultimately, however, the Court has the responsibility to hold the entire system accountable.

**FLOW CHART TO DETERMINE
THE APPLICABILITY OF THE
INDIAN CHILD WELFARE ACT OF 1978**

Step 1

IS THE CHILD INVOLVED AN "INDIAN
CHILD WITHIN THE TERMS OF THE ACT?"

A. Is the child under the age of 18?

YES
↓

NO —————→ (STOP) →

ICWA DOES NOT APPLY

B. Is the child unmarried?

YES
↓

NO —————→ (STOP) →

ICWA DOES NOT APPLY

C. Is the child either (1) a member of an Indian tribe, or
(2) eligible for membership in an Indian tribe?

YES
↓

NO —————→ (STOP) →

ICWA DOES NOT APPLY

D. Is the child the biological child of a member of an Indian
tribe?

YES
↓

NO —————→ (STOP) →

ICWA DOES NOT APPLY

**CONTINUE TO
STEP 2**

Note:

Indian tribe means any tribe,
band, nation, or other organized
group or community of Indians
recognized as a tribe by the
Federal Department of the Interior.
[25 U.S.C. § 1903(8)]

Step 2

A. Does the proceeding involve the removal of the child for temporary placement where the parent or Indian custodian cannot have the child returned upon demand?

YES

NO



B. Does the proceeding involve the voluntary or involuntary termination of the parent-child relationship?

YES

NO



C. Does the proceeding involve a preadoptive placement of the child?

YES

NO



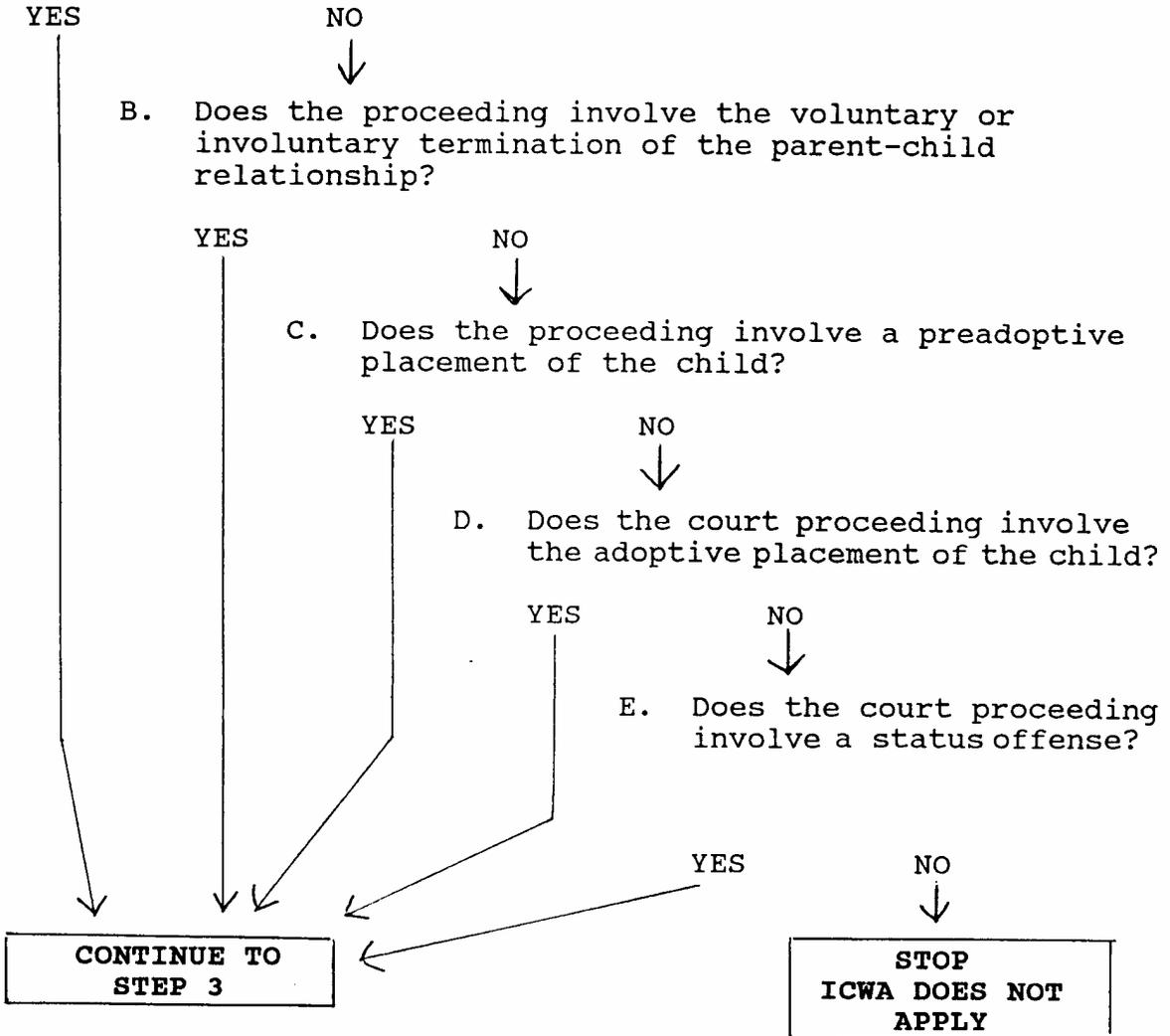
D. Does the court proceeding involve the adoptive placement of the child?

YES

NO



E. Does the court proceeding involve a status offense?



Step 3

DOES STATE COURT HAVE JURISDICTION
OF THE COURT PROCEEDINGS?

A. Is the Indian child domiciled on a reservation?

NO



YES



STATE COURT LACKS
JURISDICTION AND
ICWA DOES NOT APPLY

B. Is the Indian child a ward of a tribal court?

NO



YES



STATE COURT LACKS
JURISDICTION AND
ICWA DOES NOT APPLY

C. Is the custodial parent of the Indian child domiciled on a reservation?

NO



YES



STATE COURT LACKS
JURISDICTION AND
ICWA DOES NOT APPLY

D. Has the state court granted a petition to transfer the proceeding to a tribal court?

NO



YES



STATE COURT LACKS
JURISDICTION AND
ICWA DOES NOT APPLY

**The Indian Child
Welfare Act of
1978 governs the
proceedings.**

This flow chart was created by Larry Plank, Attorney at Law
Rapid City, South Dakota

II. GENERAL ISSUES

People in South Dakota dealing with child abuse and neglect cases should be well versed in the substantive and procedural requirements of the statutory law regarding child abuse and neglect cases. From reporting and investigation, to petition, adjudication and disposition, a thorough knowledge of the law is needed to best serve the client, whether parent or child. In addition to knowledge of the law, participants should understand the function and role of related disciplines involved in this type of litigation. Abuse and neglect cases are not based solely on legal principles, but also depend on psychological, cultural, educational and social-welfare concerns.

The purpose of child abuse and neglect proceedings is to determine whether a particular child is abused or neglected and in need of protection. The culpability of a parent, guardian or custodian is not particularly relevant to these proceedings which should proceed independent of any criminal proceedings. If the matter is also pursued under the criminal statutes, culpability will be an issue.

A. DEFINITION OF ABUSE/NEGLECT

Pursuant to SDCL 26-8A-2, the existence of any one of several conditions constitutes abuse or neglect, so long as that ultimate finding is supported by clear and convincing evidence. An “abused or neglected child” is one:

1. Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse.
2. Who lacks proper parental care through the actions or omissions of child’s parent, guardian, or custodian. A parent’s personal inaction towards protecting a child from abuse/neglect.
3. Whose environment is injurious to the child’s welfare.
4. Whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child’s health, guidance, or well-being.

(NOTE: SDCL 25-7-16 makes such conduct a Class 1 Misdemeanor. If parent leaves the State for more than 30 days during such violation it is a Class 6 felony.)

5. Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian.
6. Who is threatened with substantial harm.
7. Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture.
8. Who is subjected to sexual abuse, sexual molestation, or sexual exploitation by the child's parent, guardian, custodian, or any other person responsible for the child's care.
9. Who was subject to prenatal exposure to abusive use of alcohol or any controlled drug or substance not lawfully prescribed by a practitioner as authorized by chapters 22-42 and 34-20B; or
10. Whose parent, guardian, or custodian knowingly exposes the child to an environment that is being used for the manufacturing of methamphetamines.

Evidence of such condition(s) should be clearly documented in any petition filed.

B. Other Statutes Relating to Child Abuse

SDCL 26-10-1 -- Abuse of or cruelty to a minor is felony.

Any person who abuses, exposes, tortures, torments or cruelly punishes a minor in a manner which does not constitute aggravated assault is guilty of a Class 4 felony.

SDCL 22-18-1.1 -- Aggravated Assault Defined.

SDCL 22-18-1 -- Simple Assault Defined.

SDCL 22-19A-7—Stalking (repeatedly follows or harasses a child 12 or under) is guilty of misdemeanor stalking.

SDCL 22-22-1 -- Rape Defined.

SDCL 22-22-2 -- Sexual Penetration Defined.

SDCL 22-22-7 -- Sexual Contact with Child Under Sixteen -- Felony.

SDCL 22-22-7.1 -- Sexual Contact Defined.

SDCL 23A-42-2 -- Time Parameters for Sexual Contact Reporting Period.

SDCL 22-22-7.3 -- Sexual contact with Child Under Sixteen Years of Age

SDCL 22-22-19.1 -- Incest.

SDCL 22-22-22 -- Sexual exploitation of children prohibited.

SDCL 22-22-23 -- Photographing a child in obscene act is felony.

SDCL 22-22-23.1 -- Possession of child pornography is misdemeanor.

SDCL 22-22-24 -- Sale of obscene pictures of child is felony.

SDCL 22-19-9 -- Kidnapping. A parent who keeps a child from the custody of another parent is guilty of misdemeanor kidnapping.

SDCL 22-19-10 -- A parent who violates 22-19-9 and removes the child from the state is guilty of felony kidnapping.

SDCL 25-7-16 -- Criminal Non-Support. A parent who intentionally omits to furnish necessary support is guilty of misdemeanor. If a parent leaves the state for more than 30 days, non-support is a felony.

SDCL 25-10-1 -- Domestic Abuse. Physical harm or fear of physical injury between family members is grounds for a restraining order.

SDCL 25-10-13 -- Violation of restraining orders is misdemeanor.

SDCL 26-7A-12(4) -- Authority of Law Enforcement to Take a Child into Temporary Custody.

SDCL 26-7A-15 -- Notice to Parents/Children Taken Into Custody.

Notes:

III. REPORTING AND INVESTIGATING CHILD ABUSE AND NEGLECT

A. REPORTING STATUTES AND IMMUNITY FROM LIABILITY

South Dakota's law requires certain professionals to report child abuse or neglect. It also permits others, who are not mandated, to report. SDCL 26-8A-3. Mandated reporters are to report orally and immediately to the State's Attorney, Department of Social Services, or law enforcement. SDCL 26-8A-8. The minimal standard for a report to be made is a reasonable cause¹ to suspect that abuse or neglect has occurred or is occurring.

The following list summarizes the majority of the statutes from SDCL 26-8A related to reporting.

- **Anyone** who suspects that a **child has died** as a result of abuse or neglect must report. SDCL 26-8A-4
- **Hospitals** must have a written policy regarding reporting. **Hospital staff** are required to report to a designated person in the hospital and that person must make a report. The hospital must submit all medical records regarding the child to the states attorney. SDCL 26-8A-6
- **Schools** must have a written policy regarding reporting. When **school personnel** report to the person designated in the policy, that person must report. SDCL 26-8A-7
- A report shall be made **immediately** by telephone or otherwise to the states attorney, to the Department of Social Services, or to law enforcement. The person receiving the report shall ask the reporting party if they would like a written response as to whether the report will be investigated. When the states attorney and law enforcement receive a report, they shall immediately notify the Department of Social Services. SDCL 26-8A-8

¹ Reasonable cause is not defined in the juvenile code but must be based upon specific, articulable facts, which would cause a reasonable person to act in the same circumstances.

- A report of child abuse or neglect shall be **investigated by Department of Social Services** (Office of Child Protection Services²) or **law enforcement. SDCL 26-8A-9**
- Investigating personnel may **interview** a child outside the presence of their parent and without advance notice or parental consent. SDCL 26-8A-9.
- The Department of Social Services is the **Central Registry for child abuse and neglect reports.** SDCL 26-8A-10
- Reports and files regarding child abuse and neglect shall be kept **confidential** and may only be released as provided by law. SDCL 26-8A-13

Individuals who participate in good faith in the reporting, treatment, or investigation of child abuse and neglect are cannot successfully be sued for damages. SDCL 26-8A-14. If you are required to report and do not, you may be held liable for damages or be found guilty of a crime and put in jail.

B. TAKING THE REPORT

When a report is received it should be documented in writing and include standard information related to the child, the parents, the alleged perpetrator, and the allegations. It is important that all relevant, available details be obtained to determine if the child needs any protection and to provide the investigator with the greatest detail possible.

² Child Protection Services-CPS- is the office within the Department of Social Services that responds to reports of child abuse and neglect.

The following is a list of information that should be gathered if possible when taking a report. [An asterisk (*) denotes those items required by 26-8A-10 to be in the report.]

- ___ Name of child(ren).*
- ___ DOB of child(ren).*
- ___ Place of birth of children.*
- ___ Name of parent(s) guardian or custodian or responsible persons.*
- ___ Address of parent(s) guardian or custodian or responsible persons.*
- ___ DOB or age of parent(s)
- ___ Sex of child(ren).
- ___ Family composition.
- ___ Permanent address of child(ren).*
- ___ Present location of child(ren) (if different from above).
- ___ Location where incidents occurred.
- ___ Name of person alleged to be responsible for abuse or neglect.
- ___ Relationship to child(ren) of person alleged to be responsible for abuse.
- ___ Race of child(ren) and parent(s).
- ___ American Indian tribe enrolled in or eligible for enrollment in.
- ___ Primary language of family.
- ___ Ability of parents to converse in English.
- ___ Special physical, mental, or emotional needs of child(ren).
- ___ Nature and extent of abuse/neglect. Describe injury/conditions. *
- ___ Reasons for suspicion of abuse or neglect.
- ___ History of prior injuries.
- ___ Reporter's name.
- ___ Reporter's phone number.
- ___ Reporter's address.
- ___ Date of report.*

**REPORTS
CAN
BE
ANONYMOUS**

C. INVESTIGATION

1. GENERAL OBJECTIVES

The objectives of a child abuse and neglect investigation include:

- a. determining whether a child is at risk,
- b. determining whether a child needs to be removed for protection,
- c. determining whether or not abuse or neglect has occurred
- d. protecting a child who is found to have been abused or neglected,
- e. determining whether a crime has been committed, and
- f. if a crime has been committed, determining the appropriate prosecutorial response to the crime and to the safety concerns for the child.

Each of these objectives is the responsibility of at least three different entities: Child Protective Services, law enforcement, and the states attorney. Achieving each objective may involve input or assistance from any of the other three parties.

2. ROLES OF CHILD PROTECTION SERVICES, LAW ENFORCEMENT, AND STATES ATTORNEY

The following is a basic list of the roles each of the three entities has in meeting the legal mandates and in assuring the protection of an abused or neglected child.

a. Child Protection Services

1. Receive reports of child abuse and neglect.
2. Determine whether the law requires that a report should be investigated. Was the act committed by a parent, guardian, or custodian, or in some cases another person responsible for the child's care, and does the act by definition potentially constitute an act of child abuse and neglect? (26-8A-2).
3. Coordinate investigations with law enforcement.

4. Investigate the abuse and neglect report, including:

- interview children
- contact collaterals
- interview parents
- determine whether the child is an Indian child and if the Indian Child Welfare Act is applicable
- gather information from medical and other providers
- make a finding as to whether abuse or neglect has occurred
- provide intervention to the family when abuse or neglect is a concern
- provide information and make recommendations to law enforcement and the states attorney as to the safety needs of the child
- provide care and supervision to children in need of placement
- except in certain circumstances, provide reasonable efforts to the family to prevent removal (See SDCL 26-8A-21.1 for situations where reasonable efforts are not necessary.)
- except in certain circumstances, provide reasonable efforts to reunify a family (See SDCL 26-8A-21.1 for situations where reasonable efforts are not necessary.)
- provide permanency for children who will not be able to return home
- be a witness in the civil and criminal proceedings.

b. Law Enforcement

1. Receive reports of child abuse and neglect. SDCL 26-8A-8
2. Inform CPS about reports of child abuse and neglect. SDCL 26-8A-8
3. Determine whether a report is by law a report which should be investigated as a report of child abuse or neglect or as a report of

physical or sexual assault. Was the act committed by a parent, guardian, or custodian, and does the act by definition potentially constitute an act of child abuse and neglect? SDCL 26-8A-2.

4. Coordinate investigations with CPS.
5. Investigate abuse and neglect reports, including:
 - interview children
 - contact collaterals
 - interview parents
 - gather information from medical/other providers
 - make a finding as to whether abuse/neglect has occurred
 - provide information and make recommendations to CPS and the states attorney as to the safety needs of the child
 - take protective custody when necessary
 - be a witness in the civil and criminal proceedings.

c. State's Attorney

1. Receive reports of child abuse and neglect. SDCL 26-8A-8
2. Inform CPS about reports of child abuse and neglect. SDCL 26-8A-8
3. Determine whether a petition should be filed in civil Court and/or whether criminal charges should be filed.
4. Represent the Department of Social Services in child abuse and neglect proceedings. SDCL 26-7A-9
5. Notify parties required by ICWA.

D. JOINT INVESTIGATIONS

Whether a child abuse and neglect report will be investigated jointly by law enforcement and CPS is determined by the following considerations:

- Local protocol between Child Protection Services and law enforcement.
- Potential that a child is in imminent danger.
- Potential that a crime has been committed.

The following describes those functions that take place when the investigation is joint between law enforcement and CPS and how they generally might be handled.

Function	Law Enforcement	Child Protection Services	Both
1. Interview Victim			Both are usually involved and CPS often takes the lead.
2. Interview the Parent(s) and/or Alleged Perpetrator			Both are usually involved and law enforcement takes the lead.
3. Collaterals			Either together or each interviews collaterals as agreed upon ahead of time.
4. Assess Need for Removal	Law enforcement has the legal authority to take custody. SDCL 26-7A-12. Should be done with input from CPS.		
5. Contact Intake Officer for Continued Custody.	The law requires law enforcement to contact intake officer. SDCL 26-7A-13.1		
6. Refer case with recommendations to states attorney.	Makes recommendation related to criminal charges and A/N action.	Makes recommendation related to A/N action and may give input regarding criminal.	
7. Family Intervention		This is the role of CPS. In the initial stages when a child is removed law enforcement input should be considered.	
8. Ongoing Services		CPS responsibility.	

E. SUGGESTIONS FOR INVESTIGATING REPORTS OF ABUSE/NEGLECT

At this stage it should have been determined whether both Child Protection Services and law enforcement should team the investigation. All efforts should be made to complete the investigations as soon and as thoroughly as possible.

1. Once at the scene, the investigator(s) should obtain the following information:

- (a) Name, age, sex, permanent address of victim
- (b) Name of person responsible for victim's welfare
- (c) Name and address of suspect(s)
- (d) Nature and extent of suspected abuse/neglect
- (e) Names, addresses, telephone numbers of actual/potential witnesses
- (f) Race of parents and child. Are either child or parents Indian?

2. Photographs and need for medical exam.

(SDCL 26-8A-16 allows photographs/medical exams without parental consent)

- (a) color, using 35mm camera
- (b) record date, time, film type, and camera settings used
- (c) photos of environment, physical condition of the child such as injuries, dirty improperly clothed or unhealthy appearing child or dirty/unsafe home
- (d) later photos may be necessary to show progression of bruises and any new ones
- (e) a medical exam should be considered for the well being of the child and if medical evidence is needed.

3. Interviews - Use appropriate interview guidelines.

- (a) Witnesses, if any
- (b) Victim, if old enough
- (c) Victim's siblings, if any
- (d) Medical people, if necessary
- (e) Law Enforcement Officer's role: establishing what happened and by whom
- (f) Family services specialist's role: establishing why it happened and what can be done now.

4. Determine if emergency temporary custody is warranted (See pp. 22-25) - Use Emergency Removal Checklist page 24.

F. SUGGESTIONS FOR INTERVIEW OF CHILD (Either victim or witness)

Such interviews are never easy - some children fear authorities due to family bias or because the child believes (s)he is in trouble.

1. Use team approach when CPS and law enforcement are both involved.
2. Be careful in use of tape recorder because it
 - (a) may scare child, and
 - (b) one needs to consider evidentiary benefit or problems.
3. Build trust with the child.
4. Conduct interview in private away from suspect- preferably without parents present.
5. Sit next to or near child, not across a desk or table.
6. Explain to child how information they give will be used.
7. Conduct interview in language child understands.
8. Kids are concrete (e.g. Question: "Are you in school?" Answer: "No." Of course not. The child isn't in school *today*; the child is talking to you.).
9. Don't ask leading questions (a question that suggests the answer).
10. Ask open-ended questions.
11. Don't promise results to children.
12. Ask child to clarify words/terms which are not understood.
 - (a) don't assume.
 - (b) don't put words in child's mouth.
13. Explain in a non-threatening comforting way necessity of seeing child's injury.
14. Tell child if any future action will be required.
15. Keep reassuring child that he/she is not in trouble, or at fault.

16. Avoid condemning or running down a parent in front of the child (natural bond between them).
17. Avoid using term “sick” when referring to suspect- sickness spreads, may scare child.
18. Children under seven rarely lie-sometimes parents tell child what to say if asked what happened.
19. Be very patient, calm, soothing, and supportive.
20. Be innovative when child is not very verbal or is young- use tools such as drawings to assist.
21. When interviewing jointly,
 - (a) person with best rapport actually asks questions.
 - (b) If one interviewer is male and the other female, whomever the child is most responsive to should proceed.
 - (c) Family services specialist is usually less threatening and can introduce officer as his/her friend.
 - (d) Joint interviews reduce number of times child has to be put through the process. Whenever possible all parties should be present to avoid having the child repeat his/her story.
 - (e) Remember the officer is preparing a Court case while the family services specialist is preparing for case plan and case management.

G. SUGGESTIONS FOR INTERVIEWING PARENTS

1. Interview promptly, separately, and in a setting which is convenient and most conducive to the objective of the interview.
2. Interview where there are few or no distractions.
3. Parents should be interviewed in great depth, lock them into the accurate story.
4. Miranda Warning is required for custodial interrogations. (A custodial interrogation is when the person is not free to leave or is under arrest.)
5. Different than normal criminal interview because you
 - (a) need to know who’s responsible and
 - (b) why did it happen.
6. Protect the identity of the person who made the referral.

7. Avoid passing judgment or displaying disgust as to what has happened.
8. Listening carefully and sympathetically to obtain more information.
9. Ensure that parents understand what has been reported and what is being said. Parents have strong emotional reactions (fear or anger) to process and might not retain information.
 - (a) Explain officer observations.
 - (b) Explain results of medical exam, if one is done.
10. Ask for explanation, if they have one, of how child was injured.
11. Take notes, as story may change or have contradictions.
12. Be direct, honest and professional at all times.
13. Don't try to "prove" abuse or neglect by accusations or demands.
14. Don't try to blame or make judgments about the parent(s) or child.
15. Try to minimize blame for the offense - everyone is sensitive to charges of child abuse.
16. Remember the importance of a confession - it will usually be the strongest evidence sometimes obtained at last possible moment in interview.
17. Reassuring suspect that you know they did not mean to hurt the child sometimes helps- most physical abuse happens when a loss of control occurs.
18. Miscellaneous Tips:
 - Watch behavioral indicators.
 - Don't be afraid of emotions - reassure and be supportive.

IV. PROTECTIVE CUSTODY

A. INTRODUCTION

In cases of suspected child abuse or neglect, the investigator must realize that the first priority is protection of the child. In the case of clear and present danger, it may be necessary to place the child in protective custody to ensure the child's safety and well-being. SDCL 26-8A-21 mandates that reasonable efforts should first be made to avoid removal by eliminating present/potential threats. Examples of such efforts are: a) removal of perpetrator from the home; b) provision of emergency supplies or services to resolve any immediate threats; and c) any other actions that will reasonably ensure the child's safety for the time being. When such actions are not feasible or possible, removal may be the only safe alternative.

Deciding whether a child is safe in the home may be the most crucial step in the investigation. Information influencing this decision can be gained through a review of past parental behavior, statements, and behaviors during a preliminary investigative interview, or from reports by others who know the family. If the child is in imminent danger, i.e. between now and when the investigation will be completed, the investigator must take whatever steps are necessary to ensure the child's safety before proceeding with the investigation. When the child needs to be removed, the investigation and decision making should be prompt with the intent of establishing permanency for the child as soon as possible. (South Dakota Division of Criminal Investigation Law Enforcement Training Booklet Investigation of Child Abuse.) Whenever possible, the decision to remove should be made jointly by the investigating officer and CPS.

1. ASSESSING IMMINENT DANGER

According to SDCL 26-7A-12(4), when a law enforcement officer reasonably believes

- a. that protective custody is warranted because
 - i. there exists an imminent danger to the child's life or safety
 - ii. and there is no time to apply for a Court order
 - iii. and the parents refuse an oral request for consent to the child's removal from their custody
- b. or if the parents are unavailable, the officer may take the child into temporary custody.

Imminent: "To threaten, ready to take place."

Danger: "Exposure to injury, pain, or harm."

What does all of this mean then, in a practical sense, when you are called on to assess the situation a child is in who has been or may be subjected to abuse? In the most basic of terms there are four types of child abuse: Physical, sexual, neglect and emotional. All of these occur at varying levels of severity. First you will need to assess if any of these types of abuse has occurred. Next, you will need to assess the severity of the abuse to decide what needs to happen next. Some cases will be very clear cut, others will need much deeper consideration. You will have to decide if the child needs to be removed for his/her safety or if other actions can be taken to ensure the safety of the child.

There are two laws that provide you with the ability to complete this part of the assessment phase.

SDCL 26-8A-9 -- INTERVIEWS OF CHILDREN. Upon receipt of a report pursuant to SDCL 26-8A-8, the Department of Social Services or law enforcement officers shall investigate. Investigating personnel may personally interview a child out of the presence of the child's parents, guardian or custodian without advance notice or consent. The investigation does not prohibit any other lawful action. If the investigation and report indicate that child abuse or neglect has occurred, the State's Attorney shall take appropriate action immediately. Even at this early stage, the Court has authority to appoint an attorney, guardian ad litem or special advocate to assist in representing the best interests of the child. Compensation and expense allowances for the child's attorney, guardian ad litem or special advocate shall be determined and paid according to SDCL 26-7A-31.

SDCL 26-8A-16 PHOTOGRAPHS AND MEDICAL EXAMINATIONS. Any person receiving a report under SDCL 26-8A-3 may require that color photographs or videotapes be taken of the areas of visible trauma on a child who is the subject of the report and may require a radiological or other medical examination or testing of the child without the consent of the child's parents, guardian or custodian. All photographs and videotapes taken pursuant to this section shall be taken by law enforcement officials, the Department of Social Services or their designated agents. All photographs, videotapes, x-rays and test results or copies of them, shall be sent to the appropriate law enforcement agency, State's Attorney or to the Department of Social Services.

These two laws provide you with the legal tools you will need to conduct an accurate assessment of victims of child abuse. Remember, your primary goal

is to look at the entire situation accurately so you can reasonably determine what action needs to be taken to ensure the safety of the child.

If you fail to conduct an adequate assessment and do not take the necessary actions to protect a child and the child is subsequently harmed you can be held liable and responsible in part for the harm inflicted on the child. Keep in mind that you must consider all of the four types of abuse (physical, emotional, sexual and neglect) when making this assessment. You must also document in great detail how you made your assessment and why you reached the decisions you did.

2. SUGGESTIONS FOR DETERMINING WHETHER A CHILD SHOULD BE REMOVED

- a. Child Protection, CHINS or Delinquency issue?
 - i) Child protection issues must involve a parent, guardian or custodian perpetrating physical, sexual or emotional abuse or neglect which constitutes imminent danger to a child. (SDCL 26-7A-12(2))
 - ii) CHINS issues involve a child as a status offender SDCL 26-8B-2.
Runaways (SDCL 26-7A-12(3))
Out of parent's control
Truancy
 - iii) Delinquency issues involve a child being arrested for breaking the law. SDCL 26-8C-2. (S)he may be out of control and a danger to himself/herself or others. (SDCL 26-7A-12(1))
- b. Use the Initial Family Assessment (Form 1).
- c. Taking legal custody when child's physical custody remains at home.

In certain situations you may be able to boost the level of protection afforded to the child without actually physically removing the child from the home. Legal custody of the child may be taken to enhance

the legal options available to protective services. In appropriate circumstances, you may consider leaving the child at home if your assessment determines that the child will be protected in the environment. (Remember that perpetrators always return and promises are made to be broken.) Factors you may consider include but are not limited to:

- i) The perpetrator has been removed from the home;
- ii) A non-offending caretaker is available and is able and willing to protect;
- iii) Legal custody will help to enhance the safety of the child and insure the non-offending caretaker follows through with services.

d. Taking legal and physical custody of child.

By state law, family services specialists are not authorized to remove children and place them in protective custody. Only law enforcement officers (and judges) have the legal authority to remove a child. Law enforcement along with the family services specialist should evaluate the degree of risk to a child who appears to be abused, neglected or threatened with substantial harm if the child remains in the home.

- i). Emergency Removal Checklist (page 24) provides suggestions for assessing the need to remove a child from the home.
- ii). Checklist for law enforcement role (SDCL 26-7A-12):
 1. Contact DSS.
 2. Prepare written notification form (Form 3) to give to the parents/guardian at the time of removal. (SDCL 26-7A-15) (see also SDCL 26-7A Appx Form 1 at pp 307-08 vol. 9A 1992 Revision of the SD Codified Laws)
 - Date and time of the 48 hour hearing.
 - Who to contact, including telephone numbers, for more information (social services, states attorney).

- Notice to parents to appear at Court early enough to apply for Court appointed counsel to represent them at the hearing.

e. Intake-proceed **immediately** to intake. SDCL 26-7A-13.1.

Notes:

B. EMERGENCY REMOVAL CHECKLIST

The existence of any of the following conditions could constitute grounds for emergency removal of a child from the home. The existence of such condition(s) should be documented on the removal form.

- The maltreatment in the home, present or potential, is such that a child could suffer permanent damage to body or mind if left there.
- Although a child is in immediate need of medical or psychiatric care, the parents refuse to obtain it. (NOTE: SDCL 26-8A-16 allows photographs/medical exams without parental consent.)
- A child's physical and/or emotional damage is such that the child needs an extremely supportive environment in which to recuperate and the parents are not willing or able to provide it.
- A child's sex, age, physical or mental condition renders the child incapable of self-protection -- or for some reason constitutes a characteristic the parents find completely intolerable.
- The evidence suggests that the parents are torturing the child, or systematically resorting to physical force, which bears no relation to reasonable discipline.
- The physical environment of the home poses an immediate threat to the child and the parents are unwilling or unable to remedy the situation.
- The evidence suggests that parental anger and discomfort with the investigation will be directed toward the child in the form of severe retaliation against him or her.
- The evidence suggests that the parent(s) is/are so out of touch with reality that they cannot provide for the child's basic needs.
- The evidence suggests that the physical condition of the parent(s) poses a threat to the child and there are no available alternatives to assure the child's safety.
- The family has a history of hiding the child from outsiders.
- The family has a history of prior substantiated incidents or allegations of significant abuse or neglect with evidence that the parent's response to intervention was negative.
- The abuse or neglect did occur and the parents are completely unwilling to cooperate in the investigation or to maintain contact with any social agency and may flee from jurisdiction.
- Parent(s) as defined by SDCL 26-8A-2 abandon the child.

- Severe abuse such as life threatening abuse, multiple injuries, extensive burns, head or central nervous system injury, sadistic injury, severe malnutrition with inability to immediately correct the cause, incest, etc.
- Repeated abuse after initial report and intervention.
- Evidence of repeated and frequent abuse from history, physical examination or x-ray.
- Any physical abuse to a child less than one year old, or a child with special needs.
- Child exhibits behavior that is unduly provocative or obnoxious to the parents.
- Adolescent refuses to return home and is beyond the parents' control.
- Non-perpetrator adult is not protective.
- Parents deny diagnosis consistently and/or refuse treatment services (with hostility or passive-aggressiveness or total indifference).
- Parent is dangerous (i.e.; sociopath, psychotic, suicidal or homicidal).
- Parent wants child placed after appropriate counseling.
- Numerous ongoing crises.

This checklist is not intended to be all-inclusive. It is intended only as a suggestion. Other factors may exist to justify removal. If so, such factors should be documented on the removal form.

V. COURT APPOINTED SPECIAL ADVOCATE (CASA)

A. INTRODUCCION

In Spanish, “CASA” means “home.” In today’s juvenile justice system, CASA refers to a Court Appointed Special Advocate—a trained community volunteer appointed by a judge to represent the best interests of abused and neglected children in court. The CASA concept is based on the principle that every child has a right to a safe, permanent, loving home. Courts are faced with large and varied caseloads--each of which demands attention. Yet children who are abused and neglected are in court through no fault of their own. Frequently the parents who would ordinarily look to their best interests are the very reason the children are in court and therefore, they have no one to help them through the process. The complex network of lawyers, family services specialists and judges do not always give the detailed attention to each child who goes through the system. CASA volunteers help fill that gap by advocating for the child.

B. APPOINTMENT AND TRAINING

Before being assigned to any cases, CASA volunteers must pass a background check and receive approximately 30 to 40 hours of training. CASA volunteers are appointed by the judge (see Form 17) and take an oath of office.

C. APPOINTMENT TO INDIVIDUAL CASES

The court enters an order appointing the volunteer to the case and granting the volunteer access to the child’s record. (See Form 18.) After they are appointed, volunteers generally talk to people and review records before court hearings. Volunteers usually work about 10 to 15 hours per month. A typical volunteer works with a child for

about one year, which is the recommended maximum time for a case from beginning to end.

D. INVESTIGATION AND REPORTS

The volunteer investigates the case by reviewing records and talking to people who have information about the child—parents, teachers, neighbors, doctors, school officials and others with information. The CASA volunteer’s most important task is to get to know the child.

The CASA volunteer appointed to a case participates in court hearings and submits a report to the court including a recommendation whether a child should be returned home, placed in foster care or placed for adoption.

E. SPEAKING FOR THE CHILD

The CASA volunteer helps the child understand the confusing court process and answers questions for the child. The volunteer presents the child’s needs and views to the judge. The volunteer helps keep the case moving so the child can get on with life and not languish in foster care. Without individual attention, some children have spent years in foster care waiting for permanency.

VI. INTAKE

A. CONTACTING AN INTAKE OFFICER

A law enforcement officer who removes a child from home shall immediately contact an intake officer³ who shall hold an intake hearing. SDCL 26-7A-13.1. If possible, the family services specialist and law enforcement officer should contact the intake officer together, to obtain approval for an out-of-home placement until a 48 hour hearing is held or the child is released.

The following information should be prepared:

- Available Placement options

It is also recommended that you have a copy of the intake officer's Temporary Custody Directive form (Form 4) so that you can follow along with the intake officer during the hearing. Reviewing the temporary custody form ahead of time will make it easier for you and the intake officer to communicate because you will know what the intake officer is looking for and what will be considered in determining whether to continue your removal of the child from the home.

B. PURPOSE OF AN INTAKE HEARING

The purpose of the intake hearing is to decide whether a child should be held in temporary custody following initial removal by a law enforcement officer and pending further hearings by the court. Intake is an independent judicial review of a law enforcement officer's decision to remove the child and provides due process for the child.

Temporary custody is physical and legal control of a child prior to final disposition.

³ Intake officers are circuit judges or their designees (but not court services officers, law enforcement officers or states's attorneys). SDCL 26-7A-1(20).

SDCL 26-7A-1(27). **Temporary care** is care given to a child in temporary custody.
SDCL 26-7A-1(26).

C. PROCEDURE FOR HOLDING AN INTAKE HEARING

1. **No NOTICE** is necessary. SDCL 26-7A-13.
2. May be **TELEPHONIC** SDCL 26-7A-13 or other appropriate means.
3. **EVIDENCE** SDCL 26-7A-13.
 - a. **Affidavit**.
 - b. **Sworn testimony**. Intake officers can administer oaths SDCL 26-7A-1(20).

oath: SDCL 19-14-3.1

Do you solemnly swear that the evidence you shall give relative to the matter in difference now in hearing before me shall be the truth, the whole truth and nothing but the truth, so help you God.

affirmation in lieu of oath: SDCL 19-14-3.2.

Do you solemnly affirm that the evidence you shall give relative to the matter in difference now in hearing before me shall be the truth, the whole truth and nothing but the truth under the pains and penalties of perjury.

- c. **Rules of evidence do not apply** SDCL 26-7A-56.
4. **Rules of procedure do not apply** SDCL 26-7A-56.
5. **No record** is needed [§17 1991 HB1140 (page 16 line 26) & 1991 Senate Journal p878, lines 40-41].
6. Issue a **written temporary custody directive** SDCL 26-7A-13. (**Form 4**)

D. FACTORS TO CONSIDER Place the child in temporary custody:

1. **If the child is abandoned or seriously endangered by the child's environment,**
OR
2. If there is an **imminent danger** to the child's **life or safety** and **immediate removal** of the child from the child's parents, guardian or custodian appears to be necessary for the protection of the child.

3. REASONABLE EFFORTS do not need to be considered by the intake officer.

However, the family services specialist should be ready to detail reasonable efforts at next hearing, which is the 48 hour hearing, and it is never too early to think about, take and document reasonable efforts. Once a child is removed, the family services specialist shall carefully consider the family's ability to have the child returned back home. If this is at all possible, the family services specialist should immediately begin providing the case services to help the family move in this direction. The family services specialist should be ready to provide the following historical and current information to the Court at the 48 hour hearing:

1. Contacts with the parents since the initial placement.
2. Previous abuse or neglect issues.
3. Current placement information.
4. Notice information regarding parents (including absent parent), Indian custodians, tribes (personal notice, telephone contacts or fax).
5. Relative resource information.
6. Potential tribal eligibility; always ask if this is an Indian child---even if the child doesn't look like an Indian child..

However, under federal and state law, reasonable efforts are not required if a Court has determined that:

1. Committed a crime defined in § 22-16-4, 22-16-7, 22-16-9, 22-16-15, 22-16-20, 22-22-1, 22-22-19.1, 22-22-22, 26-10-1, or subdivision 22-19-1(5), or committed conduct described by any of those statutes that violated the law or ordinance of another jurisdiction having elements similar to an offense described by any of those statutes;
2. Committed a crime defined in § 22-18-1.1 against the child or another child of such parent, or committed conduct described by that section that violated the law or ordinance of another jurisdiction having elements similar to the offense described by that section;
3. Has been determined by a court by clear and convincing evidence to have subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child;

4. Is incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and the child's need for care by an adult;
 5. Has had parental rights to another child involuntarily terminated by a prior legal proceeding;
 6. Has a documented history of abuse and neglect associated with chronic alcohol or drug abuse;
 7. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, and the child or another child has been removed from the parent's custody because the removed child was adjudicated abused and neglected by a court on at least one previous occasion;
 8. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, the child has been removed from the parent's custody on two separate occasions, and the Department of Social Services offered or provided family services on each of the two separate occasions the child was removed; or
 9. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of harm resulting from a crime, act, or omission as specified in subdivision (1), (2), or (3) of this section.
- SDCL 26-8A-21.2;

E. OPTIONS for temporary custody-SDCL 26-7A-14(¶1)

1. Must be **LEAST RESTRICTIVE ALTERNATIVE** SDCL 26-7A-14
2. **RETURN** child(ren) to parents, guardian or custodian
3. **DEPARTMENT OF SOCIAL SERVICES** temporary care
4. **FOSTER CARE**
5. **SHELTER**

Shelter is "staff-secure" not "locked-secure" [a physically unrestricting home or facility for temporary care of a child SDCL 26-7A-1(25)]

If they lock the doors, it is detention and not shelter

6. **DETENTION IS NOT AN OPTION** for abused or neglected children. SDCL 26-7A-26(¶1)

detention is "locked-secure"

7. **JAIL IS NOT AN OPTION** for abused or neglected children SDCL 26-7A-26(¶1)

NOTE: It isn't the intake officer's job to find a placement but to approve a placement proposed by DSS or law enforcement.

AND: The law enforcement officer or family services specialist shall deliver the child to the temporary custody placement approved by the intake officer. SDCL 26-7A-13.2

F. CHECKLIST FOR END OF INTAKE HEARING

INTAKE OFFICER

1. Issue the **Temporary Custody Directive** (Form 4)
2. **Contact** and forward the original of the temporary custody directive to the **state's attorney**.

FAMILY SERVICES SPECIALIST

1. **Notify parents.** Attempt to personally notify parents of the 48 hour hearing. It is extremely important that parents attend the 48 hour hearing and extraordinary efforts should be made to make sure they attend.
2. **Notify non-custodial parents** and also make extraordinary efforts to locate them prior to the hearing. Contact the office of child support, relatives, the office of economic assistance, check the telephone book and make any other efforts that may be appropriate given what is known about that parent.
3. **Contact State's Attorney's Office** regarding the need for a 48 hour hearing and provide reports and information.
4. **Contact tribes** if ICWA applies (by telephone or fax).
5. **Notify Indian custodian** if applicable - (25 USCA 1912 (A)).
6. **Notify CASA** before the 48 Hour Hearing (where CASA is available).
7. **Notify foster parent** or other custodial caretaker as soon as possible.

VII. 48 HOUR HEARING (TEMPORARY CUSTODY HEARING)

INVOLVING AS MANY PARTIES AS POSSIBLE AS EARLY AS POSSIBLE CREATES A LESS ADVERSARIAL PROCESS AND ELIMINATES MANY THINGS THAT CAUSE DELAY.

A. TEMPORARY CUSTODY HEARING

No child may be held in temporary custody longer than forty-eight hours, or twenty-four hours (pursuant to §26-8B-3). If child is to be held in temporary custody for a period longer than forty-eight hours the child must be within the jurisdiction of the court, a petition for temporary custody is filed and the court orders longer custody during a noticed hearing or a telephonic hearing.

B. PURPOSE OF A 48 HOUR HEARING

Pursuant to SDCL 26-7A-18, at the **48 Hour Temporary Custody** Hearing the court shall consider evidence of the need for continued temporary custody of the child. Is not intended to address the merits of the case, but rather to determine whether continued temporary custody outside the home is necessary to protect the child. The purpose is to decide whether the child can be safely returned home and when. The decision should be based on a competent assessment of the risks and dangers to the child. The Court should evaluate the current and future danger to the child and what can be done to eliminate the danger. The purpose is not to adjudicate for or against any particular parent, guardian or custodian of a child. This is not a criminal proceeding and the need to establish blame should be secondary to determining that a child is in need. A relaxed, Family-Court atmosphere can go a long way to promote a spirit of cooperation in the best interest of the child. If the child is in temporary custody of the Department of Social Services and has

not been adjudicated as an abused or neglected child, the court must review the child's temporary custody placement at least once every sixty days. SDCL 26-7A-19(2)

In some cases where there is prior history of abuse and neglect, or circumstances warrant, simply proceed under SDCL 26-8A, 26-8B or 26-8C and file a petition for an abuse and neglect, child in need of supervision, or juvenile delinquency at the time of the 48 hour hearing.

C. PROCEDURE FOR HOLDING A 48 HOUR HEARING

1. The court may **RELEASE** a child at any time without a hearing with or without conditions or on written promise of parent(s) regarding care and protection. SDCL 26-7A-14.
2. **PRIORITY** in scheduling is given to hearings concerning children in temporary custody or removed from home. SDCL 26-7A-33.
3. **HOLD THE HEARING WITHIN 48 HOURS** (excluding Saturdays, Sundays and holidays) SDCL 26-7A-14(¶2).
4. **IT IS A CLOSED HEARING** absent a compelling reason to open it. SDCL 26-7A-36.
5. **IF TEMPORARY CUSTODY IS LONGER THAN 48 HOURS**, SDCL 26-7A-14 or twenty-four (pursuant to §26-8B-3), the child must be within the jurisdiction of the court, a temporary custody petition must be filed and the court must order longer custody during a noticed hearing or a telephonic hearing. Keep in mind that the child can be placed in the temporary custody of the Department of Social Services, even if the child has not been adjudicated as an abused or neglected child. SDCL 26-7A-19(2).
6. **PETITION** SDCL 26-7A-43. If the state's attorney determines there is a need to file a petition, s/he may file a written petition alleging a child to be an abused or neglected child, a child in need of supervision, or a delinquent child. The petition shall include;
 - Child's name, date of birth, and residence;
 - Names and residences of child's parents, guardian, or custodian, or, if not known, of the child's nearest known relatives;
 - Statement of the facts that bring the child within the court's jurisdiction;
 - A request that the court adjudicate the child to be an abused or neglected child, a child in need of supervision or a delinquent child, and that appropriate proceedings be conducted regarding adjudication and

disposition; and

- A statement as to whether or not the Indian Child Welfare Act appears to be applicable.

Two or more children having one or more common parent, guardian or custodian and a common home environment may be included in same petition. The child's parents, guardian, or custodian, as applicable, shall be included as named respondents.

8. **NOTICE REQUIREMENTS** SDCL 26-7A-15.

a. By **law enforcement officer** or **party who takes a child into temporary custody**

- to **state's attorney**-SDCL 26-7A-17
 - location of child-at earliest opportunity
 - written report-promptly
 - facts of removal
 - identity and age of child
 - identity and location of parent(s), guardian or custodian
 - whether the parties were notified
- to **parents**-without unnecessary delay SDCL 26-7A-15
 - child is in temporary custody
 - right to a hearing

b. By **state's attorney** SDCL 26-7A-15

- to **parents**-without unnecessary delay SDCL 26-7A-15
 - Time, date and place of the hearing
 - Failure to notify is not cause to delay the hearing if the child is represented by an attorney at the hearing SDCL 26-7A-15
 - The State's attorney shall promptly notify the court SDCL 26-7A-17

9. May be **TELEPHONIC** SDCL 26-7A-14 & 26-7A-18.

10. **RULES OF EVIDENCE DO NOT APPLY** SDCL 26-7A-56.

Instead the Court may design its own rules of evidence to fully inform the Court.

11. **RULES OF PROCEDURE DO NOT APPLY** SDCL 26-7A-34(2) &

SDCL 26-7A-56. Instead, the Court may design its own rules of procedure to fully inform the Court.

12. A **RECORD** should be made. SDCL 26-7A-35.
13. **CONTINUE (only if necessary)** the hearing for not more than 24 hours if additional information or witnesses are needed but resolve as many issues as possible before continuing the hearing.
14. Issue a **TEMPORARY CUSTODY ORDER** SDCL 26-7A-14. Findings of fact and conclusions of law are not necessary for a temporary custody order SDCL 26-7A-86.

see Form 7

14. Determine whether reasonable efforts may be dispensed with under SDCL 26-8A-21.1.

FACTORS TO CONSIDER

1. **BEST INTERESTS OF THE CHILD** SDCL 26-7A-18. At the temporary custody hearing the court shall consider the evidence of the need for continued temporary custody of the child.
2. **OPTIONS FOR COURT** following temporary custody hearings
 - a. **Abused or neglected child** -SDCL 26-7A-19
 - Order the release of the child either with or without restrictions or condition or upon written promise of child's parents/guardian regarding care and protection or the child; or
 - Continue the temporary custody of the child under conditions for duration and placement that the court requires.
 - If the child is in temporary custody of DSS and has not been adjudicated as an abused or neglected child, the court shall review the child's temporary custody placement at least once every sixty days.
 - b. **Child in need of supervision** – SDCL 26-7A-20
 - After the temporary custody hearing the court shall release the child from temporary custody to parents/guardian with or without restrictions or conditions unless the court finds that the child should continue to be held in temporary custody for any of the following;
 - Child failed to comply with courts services or a court-ordered program;
 - Child is being held for another jurisdiction ;
 - Child has demonstrated propensity to run away;
 - Child is under court-ordered home detention in this jurisdiction;
 - There are specific, articulated circumstances which justify the detention for the protection of child from potentially immediate harm to the child's self or others; or

- Child is a material witness & detention is necessary because of implications of tampering with child and affidavit so stating is filed with court.

- Child in need of supervision may not be placed in detention for longer than 24 hours after the temporary custody hearing unless child has been accused of or has been found in violation of valid court order

c. **Delinquent Child** – SDCL 26-7A-21

- If the child is a delinquent, after the temporary custody hearing the court shall release the child from temporary custody to parents/guardian with or restrictions or conditions and the subsequent appearance of child in court unless the court finds that child should continue to be held in temporary custody for the following;
 - Child is a fugitive from another jurisdiction;
 - Child is charged with a violation of §22-22-7, a crime of violence under subdivision 22-1-2(9) or a property crime, which if committed by an adult, would be a felony;
 - Child is already held in detention or on conditional release in another delinquency proceeding;
 - Child has demonstrable recent record of willful failures to appear at court proceedings;
 - Child has demonstrable recent record of violent conduct;
 - Child has demonstrable recent record of adjudications for serious property offenses;
 - Child is under the influence of alcohol, inhalants or controlled substance;
 - or
 - Child has failed to comply with court service or court ordered program.

2. **REASONABLE EFFORTS** shall be made by DSS prior to the removal of an alleged or adjudicated abused or neglected child to prevent or eliminate the need for removal of the child. 42 USC §671(a)(15) & SDCL 26-8A-21.

If a child has been or is to be removed, the Court shall determine that removal of the child is or was necessary because continued presence in or return to the home would be contrary to the child's welfare and that reasonable efforts have been made by the Department of Social Services to avoid removal or to return the child to the home.

The family services specialist should be ready to detail reasonable efforts at the 48 Hour Hearing. Once a child is removed, the family services specialist shall carefully consider the family's ability to have the child returned back home. If this is at all possible, the family services specialist should immediately begin providing the case services to help the family move in this direction. The family services specialist should be ready to provide the following historical and current information to the Court at the 48 Hour Hearing:

1. Contacts with the parents since the initial placement.
2. Previous abuse or neglect issues.
3. Current placement information.
4. Notice information regarding parents (including absent parent), Indian custodians, tribes (personal notice, telephone contacts or fax).
5. Relative resource information.
6. Potential tribal eligibility; always ask if this is an Indian child---even if the child doesn't look like an Indian child..

See Court Report Form (Form 5) and ICWA Affidavit (Form 6).

REASONABLE EFFORTS. In most cases, federal law requires that “reasonable efforts” be made to prevent or eliminate the need for removal of an abused or neglected child from the child’s home and to reunify the family if the child is removed. 42 USC 671(a)(15) To enforce this provision, the South Dakota legislature has codified at least some of the criteria to be considered to determine whether “reasonable efforts” have been made.

According to SDCL 26-8A-21, “Reasonable efforts” means provision by the Department of Social Services of assistance or services that are:

- appropriate,
 - available,
 - could be made available without undue financial burden on DSS,
 - would have a significant likelihood of protecting the child in the home. In determining the adequacy of reasonable efforts, the Court shall consider the efforts made by the child’s parents to cooperate with the Department and to effectively utilize the assistance or services for the benefit of the child.
- Additionally, in cases under ICWA, the Court must determine whether the agency has made active efforts to preserve the family (25 U.S.C.A 1912 (d)).
- Was there imminent danger to the child?
 - Were there appropriate caretakers available to care for the children to prevent removal?
 - Could the perpetrator have been removed from the home so the child could remain?
 - Was there a non-abusing caretaker with the willingness/ability to protect?
 - Were there any services that could have been used with the family to prevent placement?
 - Were relative resources explored?
 - A foster care placement order under ICWA (25 USC § 1912(e)) must include a determination that continued custody by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the Indian child. An ICWA Affidavit (Form 6) may be sufficient for this purpose at the 48 hour hearing.

OR

NO REASONABLE EFFORTS NECESSARY SDCL 26-8A-21.1

The Court could determine that **NO REASONABLE EFFORTS** are necessary under SDCL 26-8A-21.1. [If the parent has committed murder, manslaughter, rape, incest, sexual exploitation of children or criminal child abuse, felony assault against a child, or the parent has had parental rights to another child terminated by a prior abuse and neglect proceeding or the parent has a documented history of abuse and neglect associated with chronic alcohol abuse or the parent has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody.]

4. Must be **LEAST RESTRICTIVE ALTERNATIVE** SDCL 26-7A-14(¶1)
5. **RETURN** child(ren) to parents, guardian or custodian with or without conditions or on written promise of parent(s) regarding care and protection
6. **DEPARTMENT OF SOCIAL SERVICES.** Even though the child has not been adjudicated as an abused or neglected child, s/he may have been placed in temporary custody with the Department of Social Services. The Department may allow visitation.
7. **FOSTER CARE** (may allow visitation)
8. **SHELTER** (may allow visitation) Shelter is "staff-secure" not "locked-secure" [a physically unrestricting home or facility for temporary care of a child SDCL 26-7A-1(25)] . If they lock the doors, it is detention and not shelter
9. **DETENTION IS NOT AN OPTION** for abused or neglected children. SDCL 26-7A-26(¶1). Detention is "locked-secure."
10. **JAIL IS NOT AN OPTION** for abused or neglected children SDCL 26-7A-26(1)
11. **NOTE:** Failure to hold a 48 hour hearing does not require release of an abused or neglected child who is in temporary custody. SDCL 26-7A-16.
12. If an Indian child is placed out of the home, follow the requirements of the Indian Child Welfare Act:

- a. Requirement of finding that continued custody with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C.A 1912 (e) & (f)).
- b. Requirement of finding active efforts have been made to provide remedial services and rehabilitative programs to prevent the break up of the Indian family and that these efforts have proved unsuccessful (25 U.S.C.A. 912 (d)).
- c. Indian child must be placed in the least restrictive setting with preference given to extended family members, foster home approved by the Tribe, licensed Indian foster home, or Indian approved institution. See, (25 U.S.C.A 1915 (b), 25 U.S.C.A 1903 (2), and 25 U.S.C.A 915 (c)).
- d. Preference may be overcome by a showing of good cause (25 U.S.C.A 1915 (a) and (b)).

D. CHECKLIST FOR END OF 48 HOUR TEMPORARY CUSTODY HEARING

1. Issue the **TEMPORARY CUSTODY ORDER** (Form 7) for temporary custody or return of the child(ren) to parent(s), guardian or custodian.
 - a. If issues can't be resolved by a continuing Temporary Custody Order then a petition beyond the Temporary Custody Petition is needed.

2. APPOINTING AN ATTORNEY

a. Child in need of supervision or delinquent child.

SDCL 26-7A-11. If a petition is filed, the child and the child's parents have the right to representation by an attorney at every stage of the proceedings.

b. Alleged abused or neglected child.

SDCL 26-7A-31. If the child or child's parents requests an attorney in proceeding under 26-8A, 26-8B, or 26-8C and the court finds that the party to be without sufficient financial means the court **shall** appoint an attorney. The court **may** appoint an attorney for any child or any party without request of the party if the court deems representation by an attorney necessary to protect the interests of the party.

SDCL 26-8A-9. The court **may** appoint an attorney, guardian ad litem, or special advocate to assist in representing the best interests of the child.

SDCL 26-8A-18. The court **shall** appoint an attorney for any child alleged to be abused or neglected in any judicial proceeding. The child's attorney cannot be the same as the parent's attorney. The court **may** designate other persons, including a guardian ad litem or special advocate who may or may not be attorneys licensed to practice law, to assist the attorney of the child.

3. ADVISORY HEARING

SDCL 26-7A-30. The court shall advise the parties of their constitutional and statutory rights, including the right to be represented by an attorney, at the first appearance of the parties before the court. The court shall also

advise parties of right to file, at conclusion of the proceedings, a motion for a new hearing the right to appeal

SDCL 26-7A-54. The court **shall** conduct an advisory hearing before the adjudicatory hearing on the petition as follows;

- a. Determine names and relationships and whether any parties need to be joined.
- b. Advise parties of statutory and constitutional rights, the nature of the proceedings and the allegations and the worst thing that could happen (i.e., termination of parental rights).
- c. Advise of right to attorney and requirements for court appointed attorney and give the parties time to talk to their lawyers if they request it (see SDCL 26-7A-31 & SDCL 26-8A-18).
- d. The court shall then receive the answer, response, denial, or admission of the parties. The court may accept admissions if the court is satisfied there is a factual basis for them. If the parties are not ready, enter a denial on their behalf and move on to setting an adjudicatory hearing (see #5 below).

4. **Schedule an Advisory Hearing for any parent, custodian or guardian who is not present.** Never delay an advisory hearing due to the absence of a party. Do advisory hearings for those present and pick up the rest of the parties as they become available or known.
5. **ENTER A DENIAL** for any parent and set an Adjudicatory Hearing. Any parent who wants to change the denial to an admission can do so anytime before the adjudicatory hearing.
6. If an alleged abuse and neglect petition has been filed and termination of parental rights is sought by the state, make an initial determination whether **NO REASONABLE EFFORTS ARE NECESSARY** pending the adjudicatory hearing under SDCL 26-8A-21.1 (i.e., has the parent committed murder, manslaughter, rape, incest, sexual exploitation of children or criminal child abuse, felony assault against a child, or the parent has had parental rights to another child terminated by a prior abuse and neglect proceeding or the parent has a documented history of abuse and neglect associated with chronic alcohol abuse or the parent has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody).
7. Determine whether the **INDIAN CHILD WELFARE ACT [ICWA]** is applicable and accept ICWA Affidavit (Form 6) as expert testimony regarding continued out-of-home placement.
8. A 48 Hour Temporary Custody Hearing involves substantial time and resources. At the conclusion of the hearing, the parties should leave with a

decision from the Court concerning the placement of the child that is based on careful consideration of the circumstances of the case. Due to constraints of time, it might not be possible for the Court to conduct a complete initial custody hearing. In these circumstances, the Court should:

- a. Decide all issues that can be immediately resolved at the current 48 Hour Temporary Custody Hearing;
- b. Provide specific guidance as to the persons who must be present and the issues to be decided if hearing must be continued;
- c. Continue the 48 Hour Temporary Custody Hearing and set the time, date and place of the continued hearing.

9. **Court may set motion and discovery and any other deadlines.**

10. **Family services specialists should begin case service planning and processing.**

11. Enter an order opening the Department of Social Services file to CASA and the attorneys in the case.

E. EXPEDITING CASES

Some **PRINCIPLES** guiding Temporary Custody Hearings are important at this point. If you look at this process from the standpoint of the child, permanency is important. The child needs to get back with the parents or get on with the child's life--the sooner the better. In addition, foster care and other out-of home placement is expensive.. Out-of-home placement is also hard on the child and the family. Quick but thorough resolution saves money and may reduce the emotional harm that a child experiences. Finally, the federal "Adoption and Safe Families Act" requires a permanency determination within 12 months of removal of the child(ren). The purpose of a Temporary Custody Hearing is to decide whether the child can be safely returned home and when. Reasonable efforts must be made by DSS to avoid removal or to return the child. If an abuse and neglect petition has been filed adjudication must occur very promptly to complete cases within 12 months of removal. There is no reason to delay and every reason to move quickly.

THE FIRST PRINCIPLE: If a petition other than a petition for continuing temporary custody and adjudication is necessary. Schedule and complete the adjudication as quickly as possible.

THE SECOND PRINCIPLE: Do not delay the adjudication because CRIMINAL CHARGES ARE PENDING. The child's welfare should come ahead of prosecution interests. Nothing is more important than the child's welfare. SDCL 26-7A-33 specifically gives priority to cases of children in temporary custody or out-of-the-home placement.

THE THIRD PRINCIPLE: Some abuse and neglect cases are obviously headed for a showdown over termination of parental rights. In some of these cases **NO REASONABLE EFFORTS ARE REQUIRED** because the parent(s) has committed a crime against this or other children or has had parental rights to other children involuntarily terminated or has a documented history of abuse and neglect associated with chronic alcohol abuse or has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody. SDCL 26-8A-21.1. In these cases there is even less reason to delay adjudication and more reason to move expeditiously.

If the court determines that no reasonable efforts are necessary at the Temporary Custody Hearing the preferable course to follow is for the State or DSS to seek a separate hearing shortly after a child's removal and early in the termination process on the issue of the necessity of reasonable efforts. Following that hearing and entry of a finding of an aggravated circumstance under SDCL 26-8A-21.2, a permanency hearing should be held

within thirty days pursuant to SDCL 26-8A-21.2. In the Matter of I.H., 2004 SD 7. There is nothing in the statutes, however, that prevents the “no reasonable efforts” hearing and the permanency hearing from being considered the disposition. In the Interest of L.N., 2004 SD 126.

F. PARTICIPANTS

1. **Judge.**
2. **Parent(s)** whose rights have not been terminated, including putative fathers.
 - a. It is critical that all parents involved in the child’s life be made a part of the court case as soon as possible. The family services specialist is often in the best position to notify parents of a 48 Hour Temporary Custody Hearing and should be expected to do so.
 - b. Non-custodial parents and involved putative fathers should be present if possible. Timely resolution of paternity issues is in the best interests of the child, and essential to further case proceedings.
3. **Relatives** with legal standing or other custodial adults. When parents do not have custody, other custodians or guardians must be given notice and opportunity to participate in 48 Hour Hearing. (SDCL 26-7A-15)
4. **Department of Social Services’ caseworker.**
5. **State’s Attorney.**
6. **Attorneys for parent(s).**

Appoint attorneys for parents who appear at a 48 hour Temporary Custody Hearing and who request an attorney.

 - a. **Child in need of supervision or delinquent child.**
SDCL 26-7A-11. If a petition is filed, the child and the child’s parents have the right to representation by an attorney at every stage of the proceedings.
 - b. **Alleged abused or neglected child.**
The Court shall appoint an attorney for any child alleged to be abused or neglected in any judicial proceeding. (SDCL 26-8A-18). The Court may also designate other persons, including a guardian ad litem, or special advocate to assist the attorney in representing the best interests of the child. (SDCL 26-8A-18). (See also, SDCL 26-8A-9, 26-8A-20, 26-7A-30, and 26-7A-31).
7. **ADDITIONAL PARTICIPANTS**
 - a. Age-appropriate children.
 - b. Extended family members.
 - c. Adoptive parents.

- d. Law Enforcement officers.
- e. Foster parents or relatives with whom children are placed
- f. Adult or Juvenile Probation/Parole Officer.
- g. Other witnesses.
 - i.) To ensure careful and informed judicial decisions, the Court should make it possible for witnesses to testify at the 48 Hour Hearing.
 - ii.) Subpoenas often cannot be delivered in time for the hearing. When appropriate, the Court should be prepared to briefly continue the hearing to allow the testimony of witnesses.
 - iii.) As a last resort, written reports prepared for the hearing, business and medical records, or police reports can be made available to the Court. (See SDCL 26-7A-56; 26-7A-34.) Rules of Procedure and Evidence apply only to Adjudicatory Hearings.

G. DETERMINE WHETHER THE INDIAN CHILD WELFARE ACT APPLIES

DETERMINE THE APPLICABILITY OF THE INDIAN CHILD WELFARE ACT OF 1978.

AND IF ICWA APPLIES, THEN GIVE TEN DAYS NOTICE AS FOLLOWS:

1. By registered mail to the Secretary of Interior, BIA Superintendent and the child's tribe (25 USCA 1912 (a)).
2. To additional tribes when the child is enrolled or eligible to be enrolled in more than one tribe (25 USCA 1903(5)).
3. To the Indian child's parents.
4. Notice is not required to a non-marital father who has not acknowledged paternity (25 USCA 1903(9)).
5. To the Indian child's custodian
6. Ten day notice doesn't apply to emergency removal under 25 USCA 1922.

H. REPORTS SUBMITTED AT 48 HOUR HEARING

1. ICWA AFFIDAVIT. Form 6.

An “ICWA Affidavit” from a “qualified expert” 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. (25 USC 1912(e) must be filed at the 48 hour/advisory hearing unless a “qualified ICWA expert” is available to personally testify.

2. OTHER REPORTS.

Reports should be concise and have a summary. The summary should be at the front with the full report attached for reference and specifics. Reports to the Court in abuse and neglect cases should describe the circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent need for removal. See Court Report (Form 5). Reports are very important at this stage because decisions will be made regarding placement of the child(ren) and whether reasonable efforts are being made.

3. TIMING OF REPORTS.

The Court should require submission of agency and/or law enforcement reports as far in advance as possible prior to the 48 Hour Hearing.

I. MATTERS THE COURT SHOULD ADDRESS at the 48 Hour Hearing.

1. Should the child be returned home immediately or placed outside the home pending further proceedings? The Court must consider what is the least restrictive alternative available in the best interest of the child. Pursuant to SDCL 26-7A-19, if the child is an apparent, alleged or adjudicated abused or neglected child, the Court has several options:
 - a. **No legal or physical custody.** Order the release of the child from Temporary Custody, either with or without restrictions or conditions or upon written promise of the child’s parents, guardian or custodian regarding the care and protection of the child.
 - b. **Legal custody without physical custody.** The Department maintains legal custody and returns physical custody with restrictions or conditions placed upon the child’s parents, guardian or custodian regarding the care and protection of the child.
 - c. **Maintain legal and physical custody.** Continue the Temporary Custody of the child under the terms and conditions for duration and placement that the Court requires, including placement of Temporary Custody of the child with the Department of Social Services, and foster care or shelter. If Temporary Custody of the child is continued by the Court, the Court may provide for visitation of the child by the child’s parents, guardian, custodian or family members in keeping with the best interests of the child.

2. What services will allow the child to remain safely at home? Once a child is removed, the family services specialist shall carefully consider the family's ability to have the child returned back into their home. If this is at all possible, the family services specialist should immediately begin providing case services to help the family move in this direction.
3. Will the parties voluntarily agree to participate in such services? At the 48 Hour Hearing, the Court should take steps to eliminate potential sources of delay and litigation. The adversarial nature of court proceedings can aggravate tensions between the parties. The Court should take steps to defuse hostilities, to gain cooperation of the parties and to assist parties in attacking the problem rather than each other.
4. Adjudication of a child as an abused or neglected child is an adjudication of the status or condition of the child who is the subject of the proceedings and is not necessarily an adjudication against or in favor of any particular parent, guardian or custodian of the child. (SDCL 26-8A-1).
5. In an abused or neglected case, has the Department of Social Services made reasonable efforts to avoid protective custody of the child? Pursuant to SDCL 26-8A-21, in most cases, the Department of Social Services must make reasonable efforts prior to the removal of an alleged or adjudicated abused or neglected child from the home of the child's parents, guardian or custodian to prevent or eliminate the need for removal of the child.
6. Are responsible relatives or other responsible adults available?
7. Is the placement proposed by the agency the least restrictive alternative available in the best interests of the child?
8. Whether or not a child advocate/CASA should be appointed to work with the child and monitor the case.
9. Are restraining orders, or orders expelling an allegedly abusive parent or other person from the home appropriate?
10. Are orders needed for examinations, evaluations, or immediate services?
11. What are the terms and conditions for parental visitation?
12. What consideration has been given to financial support of the child/children?
13. Additional matters to be addressed at the 48 Hour Temporary Custody Hearing.

- a. Reviewing notice to missing parties and relative. The Court should inquire as to the name and whereabouts of all possible parents and other relevant parties to the case.
- b. Serving the parties with a copy of a Petition if one has been filed.
 - i.) Service by publication on relevant parties should be given early consideration in order to avoid unnecessary delay in the proceedings.
 - ii.) All efforts to find absent parents should be made within ten days of filing a petition and if unsuccessful, a request for publication be made immediately.
- c. Advising parties of their rights and obligations.
- d. Accepting admissions to allegations of abuse or neglect.
- e. Relevant information should be released to the appropriate parties.
 - i.) Release of confidential information (SDCL 26-8A-13).
 - ii.) Communications not privileged in child abuse or neglect cases (SDCL 26-8A-15).

VIII. ABUSE AND NEGLECT SUMMONS AND PETITION

A. PETITION. SDCL 26-7A-43 (see Form 9)

1. The petition should include
 - a. The child's **name, date of birth and residence**.
 - b. The names and residences of the child's **parents, guardian or custodian**, or if not known, then the child's nearest relatives.
 - c. The **facts**.
 - i). The petition should set a brief and simple statement of facts to support all the statutory allegations that apply to the case.
 - ii). Affidavits may be attached.
 - iii). Although affidavits may be attached, the statement of facts should not just refer to the affidavits. It should contain a brief and simple statement of what is wrong so that the judge and the lawyers and the parties can speak in plain language about the allegations instead of refer to legal conclusions and voluminous affidavits when discussing what is alleged.
 - d. A request for an abuse or neglect adjudication and for appropriate disposition.
 - e. Whether the Indian Child Welfare Act appears to be applicable.
 - f. May cover more than one child of one common parent.
 - g. May be on information and belief.
 - h. Petitions by someone other than the state's attorney must be verified.
 - i. If a child has been in foster care for 15 of the last 22 months, or a Court has determined the child to be an abandoned child, or a parent has been involved in murder, manslaughter or felony assault with serious bodily injury to a child, the petition **must** request termination of parental rights. 42 U.S.C. 675(5)
 - j. The petition should also request a determination that **NO REASONABLE EFFORTS ARE NECESSARY** if the parent has committed murder,

manslaughter, rape, incest, sexual exploitation of children or criminal child abuse, felony assault against a child, or the parent has had parental rights to another child terminated by a prior abuse and neglect proceeding or the parent has a documented history of abuse and neglect associated with chronic alcohol abuse or the parent has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody. SDCL 26-8A-21.1.

2. The intake process should enable the state's attorney to prepare an abuse and neglect Petition. The petition should contain a statement relating to subject matter and personal jurisdiction, venue, basic information about the child, and the child's parents. All parents or Indian custodian shall be named on the petition. When no evidence exists to name a parent as a "Respondent," they shall be named as an "Interested Party." If a father is unknown, list a "John Doe" or "Unknown Father."

B. FILING THE PETITION.

C. SUMMONS AND SERVICE. SDCL 26-7A-44, SDCL 26-7A-47 and SDCL 26-7A-48 (see Form 8).

1. Issued by the Judge **OR** clerk of courts **OR** the prosecuting attorney
2. Time, date and place of the hearing
3. Directed to:
 - a. Parents, guardian or custodian

- b. Unknown parties: to “All Whom It May Concern”
- 4. Require persons to appear at the stated time, date & place to respond **AND**
WARN THAT FAILURE TO APPEAR IS AN ADMISSION
- 5. Advise of right to attorney
- 6. Warn that termination of parental rights is possible
- 7. State whether the Indian Child Welfare Act is applicable and give appropriate notice
- 8. Served – statute requires service 5 days before the adjudicatory hearing (except 10 days notice to parents, Tribe and Indian custodian of an Indian child is required in ICWA cases).
 - a. Personal service-same as any civil summons
 - b. Publication-show by affidavit
 - i). Is or resides out of state, cannot be found, is concealed, location is unknown, mail is returned from last known address or fits “All whom It May Concern” prior to service by publication, the State must exhaust all reasonable means available in an effort to locate interested parties. In the Interest of D.F., 2007 SD 14.
 - ii). Use initials instead of child’s name
 - iii). At least 5 days before hearing

D. DEFAULT

If any party fails to appear pursuant to a Summons or fails to answer or otherwise respond to the Petition, the party shall be deemed by the Court to be in default and the Petition shall be taken as admitted by the party. SDCL 26-7A-53.

E. PRETRIAL CONFERENCES

While a pretrial conference may be considered at this point prior to adjudication, it is more likely that a settlement conference will be helpful prior to disposition.

Therefore, a pretrial conference may be scheduled prior to the adjudicatory hearing.

IX. ADJUDICATION

A. DEFINITIONS

“Adjudication of a child as an abused or neglected child is an adjudication of the status or condition of the child who is the subject of the proceedings and is not necessarily an adjudication against or in favor of any particular parent, guardian or custodian of the child.”⁴ SDCL 26-8A-1. “Adjudicatory hearing” is a hearing to determine whether the allegations of a petition alleging that a child is abused or neglected are supported by clear and convincing evidence. SDCL 26-7A-1(2) If the petition is sustained, the Court may proceed to the disposition hearing and determine who shall have responsibility for the child and under what conditions. Adjudication provides the basis for state intervention into a family, while disposition concerns the nature of such intervention. If the petition is not sustained or it is dismissed by the State, jurisdiction of the court is terminated. *In the Interest of T.G.*, 2001 SD 15.

Adjudicatory hearings are considered adversarial in that the state is in opposition to the custodians (usually one or more parents). A full evidentiary hearing is required if a parent contests the allegations of the petition. This hearing must comply with due process requirements including notice. Rules of evidence and rules of procedure apply. SDCL 26-7A-56. In general, the adjudicatory hearing looks to the past, while the primary focus of the dispositional hearing is the future. *People in Interest of PM*, 299 NW2d 803 (SD 1980). Adjudicatory hearings are confidential, meaning closed to the public unless the Court finds compelling reasons to require otherwise. SDCL 26-7A-36

⁴ Even though the adjudication is as to the status of the child, the rights of both parents need to be addressed and an order should be entered as to the rights of each parent (i.e., mother has abused or neglected or both; father has abused or neglected or both; or perhaps one has and one has not).

B. TIMING

The manner in which adjudication is conducted has important long-term implications for the child and family. Speedy adjudication can reduce the length of time a child spends in foster care. Adjudication should determine the precise nature of the abuse and neglect so that disposition, services provided and later Court review can be focused on the specific facts which resulted in state intervention.

If the parents are present at the 48 hour hearing, a abuse and neglect petition has been filed and attorneys are appointed for the parents and child, advisory hearings should be held at the 48 hour hearing. If the parents are not ready to respond to the petition, then a denial should be entered for them and the adjudicatory hearing set. If the parents later decide to admit, a special hearing can be held to take the admission. Otherwise, the denial is on the record, the parents rights are protected and the case can go forward. If service of the petition cannot be obtained upon the parties prior to or at the 48 hour hearing, the advisory hearing should be held as to any unserved party as soon as possible after service of the petition on that party. Failure of service on one or more parties may require modification or repetition of these time periods as to those parents or custodians who have not been served yet. It is recommended that the action proceed as to those parties who have been served even if some other parties have not been served. Adjudicate as much as you can as soon as you can. Time destroys justice.

Unless there are some unusual circumstances in the case (such as the parents being charged in the death of a sibling) a pretrial conference or staffing is encouraged and may be held prior to the adjudicatory hearing, so that parents, their attorneys, family services specialists, CASA workers and states attorney may attempt to resolve issues

related to the adjudication of the case. It is standard practice in most cases to plan to “return the child.” Through pretrial conferences, parties may establish goals of the case, demands which will be placed on parents and promote cooperation between parents and service providers. **Pretrial conferences should focus on the real dangers of abuse or neglect which necessitated Court intervention and resolving issues relative to disposition. Pretrial conferences should not postpone the adjudicatory hearing or dismissal of allegations.** The judge assigned to the case may participate in pretrial conferences once the parents, guardian or custodian has admitted the abuse or neglect allegations.

C. NOTICE OF HEARING

Prior to the adjudicatory hearing, all parents should be named and noticed with the Petition by either personal service or publication. When parties are provided with timely notice, they may make essential contributions to resolving the case, by giving important information, providing a placement for the child, paying child support, or offering emotional support for the child. When parties are not provided with timely notice, it often prolongs a child’s placement in foster care.

Personal service should be made at the 48 Hour Hearing. If the child is an Indian child, the Indian Child Welfare Act sets specific time frames for notification to the tribe which must be complied with. For example, no proceedings shall be held until at least 10 days after receipt of notice by the parent or Indian custodian, the Tribe, the Secretary of the Interior, and the BIA Area Director; provided that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. 25 USC 1912 (a).

An adjudicatory hearing may proceed in the absence of a parent or interested party, if the party's absence is voluntary. People in Interest of BAR, 344 NW2d 90 (SD 1984). Absence caused by voluntary consumption of alcohol is voluntary. Matter of CJH, 371 NW2d 345 (SD 1985). Parents are not entitled to separate proceedings and all parents should be involved in one proceeding, if possible, so that delays do not occur. However, if one parent has not been served, hearings should proceed even if it results in additional hearings when the other parent is served. Since adjudication is to determine the status of a child, adjudicatory hearings may proceed without the presence of parent(s). Parties may appear by RDTN or teleconference calls at most hearings. Hearings should be scheduled in the presence of all parties. For example, the Adjudicatory Hearing should be set at the 48 Hour Hearing or the Advisory Hearing when the parents and attorneys are already present. Likewise, dispositional hearings should be set at the close of the adjudicatory hearing while all parties are present.

D. CONTINUANCES

When a child has been removed from the home, criminal charges relating to the child may also be filed or pending against the parent. The order and timing of the two proceedings can have implications regarding the parent's Fifth Amendment privilege against self-incrimination. Seeking a continuance of the civil matter until the criminal proceeding is concluded is frequently attempted. However, a request by the parent for a continuance is still entirely within the discretion of the Court. When presented with such a request, the Court should give greater weight to the interest of the child. A Court should not grant a continuance since to do so would be to the detriment of the child. A child has a stronger interest in permanence than a parent's privilege against

incrimination. Therefore the civil abuse and neglect proceedings should still go forward when related criminal proceedings are pending. Delays in adjudication delays progress toward reunification. **In all but extremely special circumstances, the adjudicatory hearing should not be postponed because of criminal proceedings.**

Attorneys should have been appointed at the 48 Hour Hearing or the Advisory Hearing. Continuances because of scheduling conflicts should only be granted upon a showing that it will not be detrimental to the child and then only for a reasonable time period. Although findings of fact may not be necessary, it is recommended that a record be made as to who requested the continuance, and the reasons for the delay. It is recommended that judges assign attorneys and schedule proceedings as early as possible, (soon after the petition is filed). If a scheduling conflict causes a problem for an assigned attorney, then the case needs to be assigned to a different attorney to avoid delays.

E. DISCOVERY

Abuse and neglect cases are civil in nature, therefore, except as otherwise provided in SDCL 26-7A-57 through 81, the Rules of Civil Procedure apply to adjudicatory hearings. (All other hearings shall be conducted under rules prescribed by the Court to enable the Court to determine what is best for the child. SDCL 26-7A-56.) Basically, the rules of discovery permit a party, including the State, to inspect and copy certain documents and records which are material to the preparation of the case, which are in the possession and control of another party or which are intended for use by a party. SDCL 26-7A-60, 61, 68, and 69. Certain documents are privileged or confidential and may not be disclosed. SDCL 26-7A-62, 70. The Court should set Discovery and Motion deadlines at the 48 Hour Hearing or the Advisory Hearing or at

the time that attorneys are appointed. The Court may consider entering a scheduling order, similar to those issued in other civil cases, at the time of the appointment of attorneys, setting forth permitted discovery and incorporating discovery and motion deadlines, to ensure that child abuse and neglect cases proceed efficiently and expeditiously.

F. EVIDENCE

The rules of evidence and the rules of procedure apply at adjudicatory hearings. SDCL 26-7A-56.

G. ELEMENTS

SDCL 26-8A-2 defines the term “abused or neglected child.” The Petition should allege all the subsections that apply to the particular case and the facts which substantiate the specific allegations, in language that the parent should/would understand. The Petition should include an affidavit and may include police reports. (See Form 9)

At the adjudicatory hearing, the State must prove the alleged elements by clear and convincing evidence. People in Interest of S.H., 323 NW2d 851 (SD 1982); Matter of S.W., 428 NW2d 521 (SD 1988); SDCL 26-7A-86; 26-7A-87. This includes Indian Child Welfare Act cases. People in Interest of SR, 323 NW2d 885, 886 (SD 1982); Matter of KABE, 325 NW2d 840, 843 (SD 1982); People in Interest of PB, 371 NW2d 366, 371 (SD 1985).

H. EVIDENCE

Generally, the evidence at an adjudicatory hearing must stick to the allegations stated in the petition. Matter of CJH, 371 NW2d 345 (SD 1985). The Court may, however, consider the circumstances that brought about a previous adjudication of the

same child. In the Interest of S.O.B., 2006 SD 76. In an adjudicatory hearing, the Court may judicially notice an earlier finding of abuse and neglect with respect to a different child and combine this evidence with the parents' failure to admit that they are perpetrators of child abuse to find that the child who is subject of the petition is abused and neglected, without finding any specific instance of abuse or neglect. Matter of JAH, 502 NW 2d 120, 124 (SD 1993). Evidence of occurrences in the home after the child was removed is admissible as "relevant to the question of [the parents'] continuing behavior and attitudes." Matter of CE, 283 NW2d 554, 556 (SD 1979). Matter of NJW, 273 NW2d 134, 138 (SD 1978). If evidence of events after its filing does not relate to the allegations initially alleged in the petition, the Petition should be amended to conform to the evidence. "Evidence that child abuse has occurred is prima facie evidence that the child is an abused or neglected child regardless of allegations contained in the petition and such evidence is sufficient to support an adjudication of the child as an abused or neglected child." SDCL 26-7A-82.

The Rules of Evidence apply to adjudicatory hearings unless otherwise provided in SDCL 26-7A. SDCL 26-7A-34(1); 26-7A-56. SDCL 26-7A-83 allows "written reports and other material and information relating to the child's mental, physical and social history" to be considered by the Court. However, the child or parent may require the person who prepared the report to be present and subject to direct or cross-examination. Reports admissible under the business records exception to the hearsay rule have been allowed at the adjudicatory hearing. People in Interest of TLJ, 303 NW2d 800 (SD 1981). Where reports or other materials come from experts, it is recommended that the expert be present at the hearing. Hearsay statements of a child under the age of 10

may be introduced under SDCL 19-16-39 upon proper notice and if the court finds that the time, content and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability. Children may also be called to testify. In the Matter of S.A., 2005 SD 120.

Probable witnesses at the adjudicatory hearing will be family services specialists involved in the case, police officers, teachers or counselors, medical personnel, or other persons who observed abuse or behaviors leading up to the petition. Witnesses at the disposition hearing may be neighbors or teachers or persons who provided services to or on behalf of the family since the petition or who may testify concerning their observations or relationship with the family.

In cases where ICWA applies, unless the Court has already made such a determination at a prior proceeding, (such as at the 48 Hour Hearing on the basis of an ICWA affidavit), a qualified expert must testify “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.” 25 USC 1912(e). Furthermore, the state must show that active efforts have been made to provide remedial services and those rehabilitative programs designed to prevent the breakup of the Indian family have been unsuccessful. 25 USC 1915(b) Since the rules of evidence apply at Adjudicatory Hearings it is often easier to make a record on these issues at the 48 hour hearing based on an ICWA Affidavit (see Form 6). Placement preferences must also be addressed. 25 USC 1915(b)

Because this is a civil proceeding, parties such as parents and children may be called as witnesses, however the parents may not be forced to testify at the Adjudicatory Hearing. Interviews of parents, by family services specialists or others may be admitted

as evidence as admissions against interest. Hearsay statements made by children may be admitted upon Motion to Offer Hearsay Evidence and after the Court determines whether the child is unavailable as a witness. SDCL 19-16-38. Notice of intention to use hearsay statements must be given sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. Evidence obtained by counselors or physicians that relates to abuse and neglect is not privileged and may be admitted. SDCL 26-8A-15.

I. DEFENSES

One potential defense to an allegation of physical abuse of the child is a parents' administration of corporal punishment under SDCL 22-18-5. The Court has crafted a two-prong inquiry to assess whether a parents' administration of corporal punishment is not abuse as defined under SDCL 26-8-6. The first prong of the inquiry require the trial court to determine whether the restraint or corrective measure utilized was "rendered necessary" by the child's actions. The second prong requires the trial court to determine whether the force used was "reasonable in manner and moderate in degree." In the Interest of C.F., 2005 SD 126.

J. FINDINGS OF FACT AND CONCLUSIONS OF LAW (FORM 10)

Whatever the result of the adjudicatory hearing, the Court must issue written Findings of Fact and Conclusions of Law (Form 10) and an Adjudicatory Order (Form 11) unless waived by all parties. SDCL 26-7A-86, SDCL 26-7A-87.

The Court is encouraged to rule from the bench in abuse and neglect cases whenever possible, or alternatively, issue prompt written decisions when the evidence is fresh in the

mind of the Court. If the allegation(s) are found to be supported by clear and convincing evidence, the Court shall enter an Order of Adjudication and list detailed and specific reasons for its decision in the Court's Adjudicatory Findings of Fact and Conclusions of Law. The successful party must submit proposed findings to the Court **within ten days** of the hearing. The other party then has **five days** to submit objections and proposed findings. SDCL 15-6-52. **The Court must hold the parties to these deadlines to avoid delays.** As a standard, the Court shall issue its final written Findings of Fact and Conclusions of Law and Adjudicatory Order as soon as possible after the Adjudicatory Hearing. A review hearing shall be scheduled as soon as possible after adjudication and should be set at the close of the adjudicatory hearing while all parties are present to avoid delays in service of notice.

Decisions the Court Should Make at the Adjudication.

1. The Court should make a finding that the child is or is not an Indian child.
2. That proper notice has been given to all parties and the tribes, if applicable
3. That jurisdiction and venue is proper.
4. The Court should determine whether there is agreement among all parties concerning paternity. If there is disagreement or the evidence is unclear, the Court may order tests for paternity. Judges need to be exacting concerning the presence of non-custodial parents and putative fathers at the adjudication. When parents are brought into the litigation late, children often remain in foster care longer than necessary.
5. Findings of Fact should state the precise nature of the abuse or neglect so that disposition and later Court review can be focused on the specific facts which resulted in state intervention. The Court's findings at the adjudicatory hearing lay a foundation for subsequent planning. Findings identify the problems that must be corrected to allow the child to be safely returned home. The findings also provide a starting point for determining whether the parents have adequately responded to the problems which caused Court intervention. Because adjudicatory findings are crucial to case planning, the Court must be careful to address all factual allegations set forth in the petition. The findings should be

specific so that, at a later time, there will be a clear basis for refusing to return a child home or terminating parental rights if parents fail to improve. It is also imperative that all parties understand the Court's findings and how they relate to subsequent case planning.

6. **Final decision on whether NO REASONABLE EFFORTS ARE NECESSARY** under the federal Adoption and Safe Families Act and SDCL 26-8A-21 and SDCL 26-8A-21.1. If no reasonable efforts are necessary, then a dispositional hearing should be set as soon as possible on termination of parental rights. There is no reason for delay since no efforts are to be made to return the child(ren).

Reasonable efforts are not required if the Court determines that:

- (1) Committed a crime defined in § 22-16-4, 22-16-7, 22-16-9, 22-16-15, 22-16-20, 22-22-1, 22-22-19.1, 22-22-22, 26-10-1, or subdivision 22-19-1(5), or committed conduct described by any of those statutes that violated the law or ordinance of another jurisdiction having elements similar to an offense described by any of those statutes;
- (2) Committed a crime defined in § 22-18-1.1 against the child or another child of such parent, or committed conduct described by that section that violated the law or ordinance of another jurisdiction having elements similar to the offense described by that section;
- (3) Has been determined by a court by clear and convincing evidence to have subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child;
- (4) Is incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and the child's need for care by an adult;
- (5) Has had parental rights to another child involuntarily terminated by a prior legal proceeding;
- (6) Has a documented history of abuse and neglect associated with chronic alcohol or drug abuse;
- (7) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, and the child or another child has been removed from the parent's custody because the removed child was adjudicated abused and neglected by a court on at least one previous occasion;

- (8) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, the child has been removed from the parent's custody on two separate occasions, and the Department of Social Services offered or provided family services on each of the two separate occasions the child was removed; or
- (9) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of harm resulting from a crime, act, or omission as specified in subdivision (1), (2), or (3) of this section.

It is not required that there be a conviction under 26-8A-21.1 (1)(2), only that there be clear and convincing evidence that such conduct occurred. In the Interest of E.L., 2005 SD 124.

7. **Additional Decisions at the Adjudicatory Hearing.** If the child is to be in foster care prior to disposition, the judge may also need to set terms for support, visitation or other issues critical to preserving and maintaining family relationships during the period of separation.
8. In ICWA cases, the court must also make a finding that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful and that continued custody of the child by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child.
9. An ICWA affidavit is sufficient if filed at the 48 hour hearing and the only time it comes up again is (1) if the next hearing results in the first out of home placement or (2) if it is raised by the parties. An affidavit will not suffice at the adjudicatory hearing and testimony will be necessary because the rules of evidence and the rules of procedure apply at an adjudicatory hearing. SDCL 26-7A-56.
10. **Court Reports.** If there is a Court report, it should be provided at least five days prior to the hearing.

K. NOTICE OF ENTRY (FORM 12)

Notice of Entry (Form 12) of an Adjudicatory Order and Findings of Fact and Conclusions of Law shall be made within 5 days of issuance of the written Adjudicatory Order and served on the child's attorney and the child's guardian ad litem or special advocate, if any, and on all parties in the same manner as service of the summons [**by personal service**]. SDCL 26-8A-28. Once the Notice of Entry of the

Adjudicatory Order is served properly, the time for appeal from the adjudication expires ten days later since it is an intermediate order and subject to intermediate appeal procedure. SDCL 26-7A-87; 15-26A-13. An adjudicatory order may also be appealed thirty days after entry of the final dispositional order. Furthermore, if notice of entry of adjudication is not served, the adjudication may be appealed after the disposition appeal time expired. Therefore, serving Notice of Entry upon the parties is imperative in eliminating later delays.

L. ROLE OF CHILD’S ATTORNEY and COURT APPOINTED ADVOCATE

One of the strengths of the judicial process in child abuse and neglect cases is the requirement that the child be represented by an attorney. SDCL 26-8A-18. Following adjudication, a special advocate is required to be appointed to assist the child’s attorney. SDCL 26-8A-20. When the State’s Attorney and the parents’ attorney are at odds advocating for their respective clients, the child’s attorney and advocate have the function of protecting the child’s best interest. In achieving a speedy resolution to the case, and ensuring that children have stable, caring, and supportive families, the attorney **AND** advocate have the following responsibilities:

- **Make cases involving child abuse and neglect a priority over all other cases.**
- **Meet and continue to communicate with the child** and become familiar with the child’s past either by way of interviews with the child, his parents, family services specialists, counselors, teachers or others familiar with the child.
- If the child is of another culture, acquire knowledge of that culture, including child rearing practices and communication barriers.
- Obtain and review all discovery materials.
- Specifically go to the Department of Social Services to review the file.
- Interview all prospective witnesses prior to hearing.

- **Protect child's best interest** while maintaining due process rights of the parents.
- Advocate for a speedy resolution through adjudication and disposition.
- Protect the child from testifying in Court if proceedings may be a significantly traumatic event that harms the child.
- Take all steps reasonably necessary to ease the effects that testifying may have on the child.
- **Monitor deadlines and notice requirements and advocate for compliance.**
- **Take active role in all proceedings affecting the child including presenting evidence at the adjudicatory hearing. In the Interest of T.A., 2003 SD 56.**
- Recommend removal from the home only upon a showing that there is substantial risk of harm to the child that cannot be eliminated through family strengthening services. Due consideration should be given to the potential for the active intervention of family strengthening services.
- Monitor compliance with the Indian Child Welfare Act (ICWA).

M. ADJUDICATION CHECKLIST

_____ All the parents, including unknown fathers, and/or custodian(s) have been listed on the Petition.

_____ Attorneys were appointed for the child and all the parties who requested.

_____ Proper Notice of the Adjudicatory hearing was provided to all parties.

_____ Parties received actual/personal notice at the Advisory Hearing.

_____ The Parties and the Tribe/BIA received timely written notice.

_____ The Court has made a finding that proper notice has been given to all parties.

_____ The Court has made a finding as to whether the child is Indian.

If the child is Indian, the Court has made a finding that:

_____ Proper written notice has been given to the parties and the Tribe/BIA.

_____ The Court has jurisdiction and venue.

_____ A qualified expert has testified that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child(ren) (if raised, otherwise an ICWA affidavit is on file).

_____ The State has made active efforts to provide remedial services and those rehabilitative programs designed to prevent the breakup of the Indian family have been unsuccessful (if raised, otherwise an ICWA affidavit is on file).

_____ The Court has made findings as to which allegations of the Petition have been proved or admitted, and identified the problems that must be corrected.

_____ The Court has made a finding that reasonable efforts have been made to return the child(ren) or eliminate the reasons for removal and those efforts have failed or are unnecessary pursuant to SDCL 26-8A-21.1.

_____ The Court has made a finding that the least restrictive alternative available in the child(ren)'s best interest and welfare is for the legal and physical custody to remain in DSS. Removal of the child from the home is or was necessary because continued presence of the child in the home would be contrary to the welfare and best interests of the child.

_____ The successful party has submitted written findings of fact and conclusions of law within ten (10) days of the hearing.

_____ The Court has issued written findings and Adjudicatory Order within thirty (30) days of the adjudicatory hearing.

_____ Notice of Entry was filed five (5) days after Adjudicatory Order was issued.

_____ Notice of Entry of Adjudication Order has been properly served on the parties.

X. REVIEW HEARINGS

A. INTRODUCTION

Review Hearings, sometimes referred to as interim dispositional hearings, which take place after adjudication and before final disposition, provide the Court an opportunity to comprehensively review the progress made by the parties since the prior hearing. Federal law contemplates a routine but thorough review of case progress to make sure cases are not neglected and, if necessary, to refine case plans. Specifically, review is:

...to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal custody. 42 USC 675(5)(B).

Review hearings are necessary because continuation of a child in foster care for extended periods of time has a negative affect on a child and family. A child shifted among homes may lose the ability to form strong emotional bonds with a permanent family. Careful decision making concerning permanency is needed as quickly as possible. Regular review hearings ensure that decisions concerning a child's future are made and implemented expeditiously. Review is vital whether or not the child is in placement. The purpose of the review hearing is to make sure that cases keep moving and that children spend as short a time as possible within the Court's jurisdiction. Periodic review is needed to keep cases moving toward successful completion.

Effective review hearings can improve planning for children. Judicial review helps a case move along by requiring the parties to take specific actions, set timetables and make decisions. Review hearings provide a forum for the parents, helping assure that their viewpoint is considered in case planning.

While adjudication determines the specific problems justifying Court involvement, disposition is the plan to address and resolve those problems. If family problems are not yet fully known, the initial plan may include further evaluation rather than setting concrete behavioral goals for parents. If family problems are already clear, it is appropriate for the Court to state in some detail what the parties are expected to accomplish.

B. TIMING

Review hearings are a legally required tool to assist in attaining the goal of permanency for children within one year of removal from the care of their parent, guardian or custodian. Judicial oversight of children in foster care will be achieved through a Court review of children for whom an adoptive placement or Court sanctioned long term foster care placement has not occurred. Timetables for review hearings are governed by both federal and state statute. Federal and state law specifies that review of children in foster care must occur at least once every six months. 42 USC 675(5)(B); SCL 26-8A-24.

C. ISSUES TO BE ADDRESSED AT REVIEW HEARINGS

Review hearings are the forum for the Court, parents, children, attorneys and the agency and the foster parents to:

1. Assess ICWA compliance;
2. Determine the appropriateness of the placement;
3. Evaluate the extent of compliance with the case plan;
4. Evaluate the extent of progress toward remedying those conditions necessitating a foster care placement; and
5. Project a date when a child may be returned home, placed for adoption or placed in long term foster care.
6. Status of contingency planning⁵

D. KEY DECISIONS THE COURT MUST MAKE AT THE REVIEW HEARING

1. Whether there is a need for continued placement of a child.
2. Whether all options for placement with relatives have been pursued and documented.
3. Whether the rights of all parents have been addressed in the proceedings.
4. Whether the Court approved permanent plan remains the best plan in the child's best interests.
5. Whether services and responsibilities outlined in the case plan needs to be modified or clarified.
6. Whether the agency is making reasonable efforts to rehabilitate the family and to eliminate the need for placement.
7. Whether terms of visitation or support need to be modified.
8. Whether the child's current placement is appropriate to meet the child's needs.
9. Whether additional Court Orders are required to move the child closer to permanency.
10. What time frames need to be followed to achieve permanency.

E. COURT REPORTS

Reports from the agency, the guardian ad litem and CASA volunteer make court decisions easier and better. Reports should be received prior to each review hearing. Reports should address each of the issues discussed in section D above. The reports should be

⁵ Contingency planning consists of making reasonable efforts to return a child to the home while also working on out-of-home placements that might be made if parental rights are ultimately terminated. Contingency planning is allowed by state and federal law.

distributed to all the parties at least five days in advance of the hearing. All family service agreements should be attached.

F. FINDINGS AND REVIEW HEARING ORDER (FORM 13)

Written findings should be entered by the Court after the review hearing and should include the date and time of the next hearing. This document must:

1. Set forth the reasons why the children are in continued need of placement.
2. Set forth findings as to whether the agency has made reasonable efforts to eliminate the need for placement delineating the specific actions the agency is taking.
3. Set forth findings and conclusions as to whether the parents are in compliance with the case plan and identify those actions requiring completion by the parents.
4. Set forth orders for the agency to make any additional efforts necessary to meet the needs of the family and move the case toward completion.
5. Approve proposed changes in the case plan and set forth Court ordered modifications needed as a result of the review hearing.
6. Identify an expected date for achievement of a permanent plan for the child.
7. Set date and time of next hearing.

XI. FINAL DISPOSITION

A. INTRODUCTION

Disposition is considered separately from adjudication because bifurcated hearings assure that there will be appropriate focus on dispositional issues. In abuse and neglect proceedings, the dispositional phase is the phase in which the Court makes the determination in regard to the placement and care of the child both in the short-term and ultimately, on a permanent basis. Throughout this phase, there are certain matters that need to be assessed and considered by all parties working in the case, including the family services specialists working with the child and the family and CASA volunteers working with the child, the attorneys (both for the parents and for the children) and the judges who make the decision concerning what placement ultimately is in the best interests of the children. SDCL 26-7A-34 requires a dispositional hearing to be conducted “to inform the court fully of the exact status of the child and to ascertain the history, environment and past and present physical, mental and moral condition of the child and of the child’s parents, guardian or custodian.”

B. TIMING

IN NO EVENT SHALL FINAL DISPOSITION BE MORE THAN 12 MONTHS AFTER REMOVAL.

Disposition should occur quickly, particularly when the child is placed out of the home. Adjudication and disposition should be separate functions, but it may be appropriate to allow the initial review hearing to follow immediately after the adjudication hearing if all the required reports are available and the parties and the judge have had sufficient opportunity to review the reports. Initially, the review determines only the services and assistance to be provided at the early stage of the case.

Dispositional decisions will be revised during subsequent case reviews. Therefore, there is no need to postpone the dispositional hearing in order to resolve every issue..

C. DECISIONS THE COURT MUST MAKE

1. Placement of the child.

The key decision the Court must make at disposition is whether a child must be placed out of the home. If the child is to remain at home, the Court usually needs to impose specific conditions on the parents. In considering conditions to be imposed, the judge should determine what agency supervision will be needed for the child's protection and what services will be provided. Unresolved issues of paternity and child support should be examined and determined. The decisions that were addressed at the 48 Hour Hearing are revisited at the dispositional hearing.

a. Reasonable Efforts.

As far as the legal standards are concerned in most cases of abuse and neglect, the Court must specifically make a finding supported by clear and convincing evidence (in ICWA cases beyond a reasonable doubt) that the Department of Social Services has made reasonable efforts to prevent or eliminate the need for removal of the child prior to the removal of an adjudicated abused or neglected child from the home of the child's parents, guardian or custodian.

Before the child can be removed from the home, the Court must first make a judicial determination that removal of the child from the home is or was necessary because continued presence of the child in the home would

be contrary to the welfare of the child and that reasonable efforts by the Department of Social Services to avoid removal of the child from the home have been made. If the child has been removed from the home and has not been returned to the home, the Court should first make a judicial determination that reasonable efforts have been made by the Department of Social Services to return the child to the home and that the child cannot be returned to the home because it would be contrary to the welfare of the child. SDCL 26-8A-21; 26-8A-25.

It is clear that what constitutes "reasonable efforts" varies greatly and depends upon the facts and circumstances of each individual case, however, it is clear that "reasonable" means "reasonable under the circumstances" and not all possible efforts as sometimes urged by defense attorneys. Matter of R.Z.F., 284 N.W.2d 879 (S.D. 1979); Matter of N.J.W., 273 N.W.2d 134 (S.D. 1978); People in Interest of C.L., 356 N.W.2d 476 (S.D. 1984); Matter of B.E., 287 N.W.2d 91 (S.D. 1979); In Interest of A.D., 416 N.W.2d 264 (S.D. 1987).

The legislature has codified at least some of the criteria to be considered to determine whether "reasonable efforts" have been made. Reasonable efforts by the Department of Social Services includes any assistance or services that:

- i) are appropriate for the child's parents, guardian, custodian or any other caretaker family of the child existing at the time of removal or possible return of the child;
- ii) are available pursuant to the comprehensive plan of preventive services of the Department of Social Services;

- iii) could be made available without undue financial burden on the Department of Social Services; or
- iv) would have a significant likelihood of protecting the child from substantial danger to the child's physical health or from severe emotional damage while enabling the child to remain in the home or to be returned to the home. SDCL 26-8A-21.

In determining the adequacy of reasonable efforts, the Court shall consider the assistance, services and efforts of the Department of Social Services. The Court shall also consider the good faith efforts or the lack of good faith efforts made by the child's parents, guardian, custodian or other caretaker family to cooperate with the Department and to effectively utilize the assistance or services for the benefit and welfare of the child. SDCL 26-8A-21.

If the parents are uncooperative or the services do not work, termination of parental rights is justified. Matter of D.A.B., 313 N.W.2d 787 (S.D. 1981); People in Interest of T.L.J., 303 N.W.2d 800 (S.D. 1981); Matter of A.I., 289 N.W.2d 247 (S.D. 1980); Matter of R.Z.F., 284 N.W.2d 879 (S.D. 1979); Matter of C.E., 283 N.W.2d 554 (S.D. 1979); Matter of M.S.M., 320 N.W.2d 795 (S.D. 1982). Even when the parent has completed or participated in the things that DSS has asked, termination may be justified if the parent has not been open and honest in all areas and has never offered a plausible explanation for how a child's injuries occurred or what could be done to correct the problems. In the Interest of C.W., 2005 SD 54. Just because a parent has completed the objectives of the family service

agreement does not establish that there is no longer a risk to the safety of the children. In the Interest of C.W., 2005 SD 54. If numerous offered services would not reduce the risk of abuse, there may be no less restrictive alternative that would ensure the well-being of the children. In the Matter of S.A., 2005 SD 120. Where there were no services available that had not already been tried and, because of a parent's poor record of supervising the child, someone would have had to be with the parent twenty-four hours a day seven days a week to make sure the child's needs were met, termination would be justified. In the Interest of L.N., Jr., 2004 SD 128.

The state does not have to exhaust every possible form of assistance. People in Interest of C.L., 356 N.W.2d 476 (S.D. 1984). Parental rights can be terminated upon a showing that the services to the family are unavailing. People in Interest of S.M.M., 349 N.W.2d 63 (S.D. 1984); Matter of S.W., 428 N.W.2d 521 (S.D. 1988).

There is no specific statutory requirement that reasonable efforts be made for a particular period of time. There is no minimum or maximum period or time a parent must be provided assistance. Matter of B.E., 287 N.W.2d 91 (S.D. 1979). However, one should also keep in mind that SDCL 26-8A-26 now allows a trial Court to place a child into long-term foster care if the court finds compelling reasons not to terminate, but mandates that no child shall remain in foster care for a period in excess of 12 months without the Court setting forth one of the SDCL 26-8A-26 long-term care options. These options include:

- i) return custody of the child to the child's parents, guardian or custodian with or without supervision;
- ii) continue foster care placement of the child for a specified period of time and, if the child is 16 years of age or older, direct the Department of Social Services to determine the services needed to assist the child to make the transition from foster care to independent living and, if appropriate, provide a plan for independent living for the child;
- iii) if the court finds compelling reasons not to terminate parental rights, place the child in the custody of the Department of Social Services, a child placement agency, foster home or other child care facility for long-term foster care under a Court-approved plan which names a specific foster home for the child, with or without guardianship of the child, and determines visitation rights of the child's parents, guardian or custodian. Under this subdivision, the Court may retain jurisdiction of the action and proceedings for future consideration of termination of parental rights if termination of parental rights is the least restrictive alternative available in keeping with the best interests of the child. SDCL 26-8A-26.

b. Least Restrictive Alternative.

Similarly, whatever disposition the trial Court determines to enter must also be the least restrictive alternative available to the Court in that particular case. The "least restrictive alternative" principle was stated in the case of Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247 (1960):

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Or, as is stated by the South Dakota Supreme Court:

We must determine whether the Court erred in concluding, based on the findings of fact resulting from the dispositional hearing, that there was available no narrower or less restrictive means of providing for the best interests and

welfare of the children than to terminate appellants' parental rights. Matter of N.J.W., 273 N.W.2d 134 (S.D. 1978).

As is the case with "reasonable efforts," what constitutes a "less restrictive alternative" varies from case to case depending on the facts and circumstances of that particular case. The South Dakota Supreme Court, however, has made it very clear that any "less restrictive alternative" available must be commensurate with the best interests of the child. Thus, the least restrictive alternative is viewed from the child's point of view. People in Interest of S.L.H., 342 N.W.2d 672 (S.D. 1983); People in Interest in C.L., 356 N.W.2d 476 (S.D. 1984); In re S.W., 398 N.W.2d 136 (S.D. 1986); People in Interest of E.D.J., 499 N.W.2d 130 (S.D. 1993). The court should weigh the fundamental rights of the parent against the best interest of the child. In the Interest of S.O.B., 2006 SD 76. If preserving parental rights would materially jeopardize the best interests of the child and would compromise the duties and interest of the public to prevent the subjection of the child to future potential harm and detriment, there may be no less restrictive alternative to termination. *Id.*

It should be pointed out at this time that all of these criteria determined by the Court must be supported by evidence that is clear and convincing in all cases other than those cases governed by the Indian Child Welfare Act where the proof at disposition is beyond a reasonable doubt.

In many cases, no less restrictive alternative may be available or feasible other than termination of parental rights. It is often claimed that services are mandatory in each and every case regardless of the

circumstances. Case law, however, supports that at times, the "least restrictive alternative" is termination even though services were not possible or were minimal because of the circumstances of that particular case. These cases may involve parents who are so mentally ill or deficient that they are unable to receive or cooperate with services. They also may involve cases where the parents are incarcerated and unable to care for the child. The Court must consider each case on its own facts and will affirm a termination as the "least restrictive alternative" available despite a lack of showing extensive efforts to rehabilitate the family in cases of "compelling circumstances." People in Interest of T.H., 396 N.W.2d 145 (S.D. 1986); People in Interest of T.L.J., 303 N.W.2d 800 (S.D. 1981); In Interest of A.D., 416 N.W.2d 264 (S.D. 1987); Matter of S.T.B., 499 N.W.2d 903 (S.D. 1993). The determination by the Court of what constitutes the "least restrictive alternative" in any particular case is essentially a factual determination for the trial Court. People in Interest of K.C., 414 N.W.2d 616 (S.D. 1987).

In cases where parental rights are not terminated and the child is not returned to the home (i.e., long-term foster care or relative placement), the court **must** state **compelling reasons** (1) for not terminating parental rights and (2) for continuing services. SDCL 26-8A-22(2) and 26-8A-26(3). The decree shall include one or more of the following provisions which the court finds appropriate as the least restrictive alternative available:

(1) The court may place the child in the custody of one or both of the child's parents, a guardian, a relative of the child or another suitable person,

or a party or agency, with or without protective supervision, or the Department of Social Services, subject to the conditions and the length of time that the court deems necessary or appropriate;

(2) The court after determining that a compelling reason exists to place the child in another planned permanent living arrangement rather than with a relative or with a legal guardian other than the department may place the child in the custody of the department or a child placement agency, with or without guardianship of the child, until the child attains the age of majority or until an earlier date or event as determined by the court;

(3) The court may order that the child be examined or treated by a physician or by a qualified mental health professional or that the child receive other special care and may place the child in a suitable facility for such purposes under conditions that the court deems necessary or appropriate. On completion of the examination, treatment, or hospitalization and on a full report to the court, the court shall conduct a supplemental dispositional hearing or hearings and shall make disposition of the child as otherwise provided in this section or, if the evidence shows need, the court may consider termination of parental rights as an appropriate possible alternative in keeping with the best interests and welfare of the child. 26-8A-22.

c. Best Interests of the Child.

All individuals working in any abuse and neglect case, including family services specialists, CASA volunteers, attorneys and judges must

always look for what is in the best interests of the child. As the Supreme Court of the state of South Dakota pointed out in Matter of L.B., 416 N.W.2d 598 (S.D. 1987):

In recent years there have a multitude of cases before the Court dealing with dependent (now abused) and neglected children and the termination of their parents' parental rights. As a result, we have created a well-established body of law to guide and govern family services specialists, mental health professionals, state's attorneys and other members of the bar and the trial bench in handling these most important cases. We continually reiterate that the interests of the children are paramount. People in Interest of T.H., 396 N.W.2d 145 (S.D. 1986); In re M.C., 391 N.W.2d 674 (S.D. 1986); In re S.M., 384 N.W.2d 670 (S.D. 1986); People in Interest of P.B., 371 N.W.2d 366 (S.D. 1985); People in Interest of J.S.N., 371 N.W.2d 361 (S.D. 1985); People in Interest of C.L., 356 N.W.2d 476 (S.D. 1984); People in Interest of S.L.H., 342 N.W.2d 672 (S.D. 1983); People in Interest of M.S.M., 320 N.W.2d 795 (S.D. 1982).

The rights of the parents must give way to the best interests of the child. Matter of Z.Z., 494 N.W.2d 608 (S.D. 1992); People in Interest of E.D.J., 499 N.W.2d 130 (S.D. 1993). This principle is followed in every abuse and neglect case. Its importance cannot be over-emphasized or stressed enough by all those involved in an abuse and neglect case. However the fact that a substitute parent might provide a child with good care or even better care than its natural parent is not an appropriate standard for determining the best interest of the child. In Interest of J.L., 2002 SD 144.

Long term foster care is generally not in the best interest of a child. In the Interests of J.G.R., 2004 SD 131.

d. The conditions which led to the removal still exist and there is little likelihood that those conditions will be remedied so the child can be returned to the custody of the child's parents.

In order to terminate parental rights SDCL 26-8A-26 requires that the conditions which led to the removal of the child still exist and there be little likelihood that those conditions will be remedied so the child can be returned to the custody of the child's parents. The Court can consider conditions identified after the child is in the state's custody. In the Interest of T.I., 2005 SD 125.

2. Indian Child Welfare Act.

Whether the Indian Child Welfare Act applies to any particular abuse and neglect proceeding is a determination that should be made long before the dispositional phase of the proceedings. The "flow chart" on pages 2-4 shows the questions that should be asked in an abuse and neglect proceeding to determine whether the Indian Child Welfare Act applies and whether state or tribal Courts have jurisdiction to hear the proceedings. Certainly, however, the Indian Child Welfare Act must be reviewed and considered by the family services specialists, CASA volunteers, the attorneys and the judge hearing the evidence at the dispositional hearing. The Indian Child Welfare Act, commonly known as "ICWA," is codified at 25 U.S.C. § 1901-1963. Both ICWA and the BIA guidelines for state Courts in administering ICWA are part of the South Dakota Codified Laws contained within the volume known as Court Rules. If your set of South Dakota Codified Laws includes this soft-bound edition, reference should be made to that volume in order to

review and consider the provisions of this particular Act. If your set of the South Dakota Codified Laws does not contain this particular volume, then the Indian Child Welfare Act can be found in the United States Code. A copy of the Indian Child Welfare Act as well as the BIA guidelines for state Courts are attached hereto as Appendix A and Appendix B. All parties working in this particular field should regularly review the Indian Child Welfare Act and have a copy for ready reference throughout any abuse and neglect proceedings until such time as it has been determined by the Court that the provisions of the Indian Child Welfare Act do not apply.

The South Dakota Supreme Court has determined that ICWA was constitutional on April 9, 1980. Matter of Guardianship of D.L.L. and C.L.L., 291 N.W.2d 278 (S.D. 1980). Our Supreme Court has also determined that ICWA must be complied with in all abuse and neglect cases litigated in the circuit Courts of the state of South Dakota. People in Interest of C.R.M., 307 N.W.2d 131 (S.D. 1981).

ICWA applies when a child is an "Indian child" and "child custody proceedings" are involved. ICWA defines "Indian child" as "any unmarried person who is under the age of 18 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." (emphasis added). 25 U.S.C. § 1903(4).

The ICWA defines "child custody proceedings" as specifically including the following:

- (1) Foster care placement (before termination of parental rights);
- (2) Termination of parental rights proceedings;

- (3) Pre-adoptive placement (after termination of parental rights); or
- (4) Adoptive placement. 25 U.S.C. § 1903(1)(i)-(iv).

The determination of which Court has jurisdiction, that is, either the State Court or the Tribal Court, would have to be determined prior to the dispositional phase. The discussion of those particular issues can be found elsewhere within this volume.

a. Standard of Proof. Anytime the ICWA applies, there is a different standard of proof required in the dispositional phase to support whatever disposition the Court requires. The standard of proof is increased in all ICWA cases to "beyond a reasonable doubt" at disposition. 25 U.S.C. § 1912. The matters which must be proved beyond a reasonable doubt according to the South Dakota Supreme Court are as follows:

- i) Termination of parental rights. Matter of J.L.H., 299 N.W.2d 812 (S.D. 1980).
- ii) That "active efforts" have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(f); People in Interest of S.R., 323 N.W.2d 885 (S.D. 1982). Active efforts are required even if there are aggravated circumstances under SDCL 26-8A-21.
- iii) 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. 25 U.S.C. § 1912(f); People in Interest of P.B., 371 N.W.2d 366 (S.D. 1985).
- iv) The evidence presented to the Court to assist it in determining whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must also be supported by evidence including testimony of a qualified ICWA witness. 25 U.S.C. § 1912(f).

b. Qualified ICWA Witness. There has been much discussion to clarify what constitutes a "qualified ICWA witness." The BIA sets forth guidelines

to help state Courts decide what constitutes a qualified expert witness under ICWA. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for the purposes of Indian child custody proceedings:

- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- (iii) A professional person having substantial education and experience in the area of his or her specialty. *See* Guidelines D.4. (at page 1224 of the Rules Handbook that accompanies the South Dakota Codified Laws).

However, these are merely guidelines and do not have a binding legislative effect on any of the Courts of the state of South Dakota. Matter of S.D., 402 N.W.2d 346, 350 (S.D. 1987). The Courts in the state of South Dakota have indicated that there is already "firm guidance" as to whom shall be considered an expert witness in South Dakota. Matter of K.A.B.E., 325 N.W.2d 840, 843-844 (S.D. 1982). As far as the South Dakota Supreme Court is concerned, an "expert witness" is:

A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify, requires special knowledge, skill, experience or training and that the witness has the requisite special knowledge, skill, experience or training. The qualifications and competency of a witness to give opinion evidence is primarily in the discretion of the trial Court and his ruling in

determining qualifications will not be disturbed unless there is no evidence that the witness had the qualification of an expert or the trial Court has proceeded upon erroneous legal standards. K.A.B.E., at 844.

Whether an expert witness is in fact "qualified" is within the sound discretion of the trial Court. The lower Court's ruling would be disturbed only in the case of clear abuse of discretion. Matter of J.L.H., 316 N.W.2d 650 (S.D. 1982). The South Dakota Supreme Court has, on numerous occasions, accepted family services specialists as experts for purposes of ICWA proceedings, especially when they have had experience working with Indian families and ICWA training. Matter of J.L.H., 316 N.W.2d 650 S.D. 1982); People in Interest of S.R., 323 N.W.2d 885 (S.D. 1982); Matter of K.A.B.E., 325 N.W.2d 840 (S.D. 1982); Matter of S.D., 402 N.W.2d 346 (S.D. 1987); People in Interest of J.J., 454 N.W.2d 317 (S.D. 1990). The family services specialist assigned to a particular case may also be qualified as an ICWA expert for that case.

However, each case is different and each Court is different, but the Courts routinely accept psychologists and psychiatrists as experts as well as other people with some expertise in working with Indian families who are familiar with ICWA. Of course, in addition to all of the criteria that must be additionally met in any case involving ICWA, the usual considerations of an abuse and neglect case discussed elsewhere in this publication must also be considered by the Court.

D. EVIDENCE

Witnesses may be required to address dispositional issues. These witnesses are generally different than those needed at the adjudicatory hearing. The rules of evidence that apply at adjudicatory hearings do not apply at dispositional hearings. SDCL 26-7A-56. Written reports containing hearsay generally can be considered by the Court. It is important that the reports be distributed to the parties sufficiently in advance to allow the parties time to consider proposals for disposition. Parents may be called to testify at dispositional hearings, however parents may not be required to testify regarding matters that would be incriminating and would violate the parents' privilege against self-incrimination. In the Interest of T.I., 2005 SD 125.

E. COURT REPORTS.

In all abuse and neglect cases at the dispositional phase, a number of factors should be considered by family services specialists, CASA volunteers, attorneys as well as the judge in determining the appropriate interim and final disposition that should be made in any particular case. All of these factors should be covered by the family services specialist in the report to the Court, by the CASA volunteer in the CASA report to the Court, by the attorneys in preparing to present a case on behalf of the state or defend a case on behalf of the parents or the child as well as the judge who is going to ultimately determine what disposition should be made.

Among other things the report should include a statement of family changes that are needed to correct the problems necessitating intervention, with timetables for accomplishing them, a description of services provided to assist the family, and a description of actions to be taken by the parents to correct the identified problems. When the agency recommends foster placement a description of the efforts made by the agency to avoid the need for

placement and an explanation of why they were not successful, an explanation why the child cannot be protected from the identified problems in the home, and identification of relatives who have been contacted about providing a placement for the child should be made. Other information that should be included are a description of the placement, proposed arrangements for visitation, placement of siblings, and, if they are to be apart, proposed arrangements for visitation, an appropriate long-term permanent plan; and proposed child support.

F. FINDINGS OF FACT AND CONCLUSIONS OF LAW (FORM 14)

The successful party must propose Findings of Fact and Conclusions of Law and a Proposed Dispositional Order to the Court **within ten days** of the hearing. The other party then has **five days** to submit objections and proposed findings. SDCL 15-6-52.

The Court must hold the parties to these deadlines to avoid delays.

Detailed written findings help to structure decision making, and establish a more complete record. If the Court reports are well prepared and supported, the Court may repeat, or refer to portions of the reports in its findings. When a child is placed outside the home, findings should address the feasibility of in-home services as an alternative to removal. In addition, the Court's findings should include at least the following:

- (1) A determination of the legal disposition of the case, including the custody of the child, based upon the statutory options provided under state law and federal law.
- (2) The long-term plan should be stated for the child (for example - maintenance of the child in the home of a parent, reunification with a parent or relative, permanent placement of a child with a relative, placement of the child in a permanent adoptive home).
- (3) When applicable, it should be specified why continuation of the child in the home would be contrary to the child's welfare and best interests.
- (4) A determination of whether there is a plan for monitoring the implementation of the service plan and assuming the child's continued well-being.
- (5) When placement or services are ordered that were not agreed upon by the parties, the evidence or legal basis upon which the order is made should be specified.

- (6) Specify the terms of parental visitation, if any.
- (7) Specify parental responsibilities for child support.
- (8) If parental rights are not terminated and the child is placed in long term foster care, there should be a finding that there are compelling reasons not to pursue termination of parental rights.
- (9) All of these findings and conclusions should be written in easily understandable language so that parents and all parties fully understand the Court's order.
- (10) Set date and time of next hearing.

If the termination of rights is ordered, the Court should also include within its findings of fact and conclusions of law the following:

- (1) Indicate whether or not termination of parental rights is granted.
- (2) Address whether the grounds for termination were satisfied and if so, whether termination was in the best interests of the child.
- (3) Be sufficient for the purpose of appellate review.
- (4) Set schedule for subsequent judicial review.

G. TERMINATION OF PARENTAL RIGHTS

While termination of parental rights is usually begun by a petition to terminate rights filed by the State's Attorney, it is not the only way a disposition of termination may occur. In *Re J.H.*, 1999 SD 36. The Child's Attorney may also ask for termination. *Id.* If an adjudicated abused or neglected child has been in the custody of the agency and it appears at a dispositional or review hearing that all reasonable efforts have been made to rehabilitate the family, that the conditions which led to the removal of the child still exist and there is little likelihood that those conditions will be remedied so the child can return home, the Court shall affirmatively find that good cause exists for termination of parental rights. SDCL 26-8A-26 In addition, the Court may find that good cause exists for termination of parental rights of a parent who has committed murder, manslaughter, rape, incest, sexual exploitation of children or criminal child abuse, felony assault against a child, or who has had parental rights to another child terminated by a prior abuse and neglect proceeding, or who has a documented history of abuse and neglect associated with chronic alcohol

abuse or who has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent's custody. SDCL 26-8A-21.1 & 26-8A-26. The court can also terminate if the child has been abandoned by the parent(s) for more than 6 months. SDCL 26-8A-27. Finally, a father of an illegitimate child has no right to service of process in termination of parental rights proceedings unless he is known and identified by the mother or unless he has acknowledged the child as his own by affirmatively asserting paternity, within sixty (60) days after the birth of the child. SDCL 25-6-1.1; Matter of Baby Boy K, 1996 SD 33, 546 NW2d 86.

Termination of parental rights is not appropriate in cases where intensive services or rehabilitative measures can be attempted and results assessed within a reasonable period of time. But termination of parental rights may be the only appropriate response in cases in which services cannot be provided or prove unsuccessful. Whenever child abuse or neglect is serious enough to require the removal of a child from home, there is a possibility that the problems necessitating removal will not be curable within a reasonable period of time, and it will be necessary to make an alternative permanent plan, such as adoption.

In deciding whether a parent's rights should be terminated, the Court considers the behavior and condition of the parent. Typical grounds for termination of parental rights include extreme parental disinterest in the child (e.g., desertion or abandonment), parental failure to improve in spite of reasonable efforts by the agency to help, parental inability to care for the child (e.g., mental or emotional incapacity and uncontrollable substance dependency), prolonged imprisonment of the parent, extreme or repeated abuse of the child,

and in some cases where return of the child would be harmful because of the special needs or condition of the child.

In deciding whether termination is in the best interest of the child, the Court typically considers what alternatives are available and whether they can provide a better permanent home for the child. It is evident in child development research and appellate Court decisions that an adoptive family does not have to be identified in order for a child to be “adoptable.” The fact that an adoptive family has not been identified should not deter a Court from terminating parental rights when it is in the child’s best interests not to be with biological caretakers.

The Court must prepare findings of fact and conclusions of law whether or not termination of parental rights is granted. The findings must address whether the grounds for termination were satisfied and if so whether termination was in the best interest of the child. Because a large proportion of termination cases are appealed, findings must be sufficient for the purpose of appellate review.

H. DISPOSITION CHECKLIST

- All the parents, including unknown fathers, and/or custodians(s) have been listed on the petition and were offered an opportunity to participate in the proceedings.
- The final dispositional hearing was held within 12 months of the 48 hour hearing.
- The Court has made a finding that proper notice has been given to all Parties.
- The Court has made a finding regarding the appropriate disposition of the case and long term plan for the child.
- The Court has made a finding that the proposed case service plan reasonably addresses the problems and needs of the child(ren) and parent(s).
- The Court has made a finding that reasonable efforts have been made to return the child(ren) or eliminate the reasons for removal and those efforts have failed or are unnecessary pursuant to SDCL 26-8A-21.1.
- The Court has made a finding that removal of the child from the home is or was necessary because continued presence of the child in the home would be contrary to the welfare and best interests of the child and that the least restrictive alternative available in the child(ren)'s best interests is for the legal and physical custody to remain in DSS.
- If the child(ren) is Indian, the Court has made a finding supported by evidence beyond a reasonable doubt that:
 - Proper written notice has been given to the Parties and the Tribe/BIA.
 - The Court has jurisdiction and venue.
 - A qualified expert has testified that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child(ren).
 - The State has made active efforts to provide remedial services and those rehabilitative programs designed to prevent the breakup of the Indian family have been unsuccessful.
- Notice of Entry of Final Dispositional Order has been properly served on the parties and filed within 5 days of entry of the order.
- If reasonable efforts to finalize the permanent plan are not made every 12 months then the child loses IV-E eligibility.

XII. POST DISPOSITIONAL HEARINGS AND APPEALS

A. APPEALS

An appeal from a final order in an abuse or neglect case must be taken within thirty days after written notice of entry is given to the adverse party. SDCL 15-26A-6. The Supreme Court has also shortened briefing schedules from 45 days to 25 days for appellant's and appellee's briefs. (Reply briefs are still due within 15 days.) SDCL 15-26A-75. Intermediate appeals, from other orders in abuse and neglect cases, may be sought by filing a petition for permission to appeal, within ten days after notice of entry is served upon the party appealing. SDCL 15-26A-13. The Notice of Appeal and Docketing Statement is filed directly with the Clerk of the South Dakota Supreme Court and served upon counsel for each party SDCL 15-26A-4(3) and the attorney general SDCL 26-7A-112. Documents and briefs in appeals involving juveniles must identify the children and family members by initials only. SDCL 15-26A-4(1) and 15-26A-63.1. The rules of appellate procedure for civil appeals are set forth at SDCL 15-26A. **Additionally, the appellant Parent must sign the brief pursuant to SDCL 15 26A-60. A parent's attorney may submit a Korth brief if the attorney identifies no "arguably meritorious issues for appeal." In the Interest of A.D., 2004 SD 39.**

If you want help doing an appeal, get a copy of Joan Baker's book The Abuse and Neglect Handbook- A Practical Guide for the Preparation of the Appellee's Brief Regarding The Termination of Parental Rights, 1997. (Call 605 773-3305 or write to Department of Social Services, 700 Governor's Drive, Pierre SD 57501-5070.)

B. POST-TERMINATION REVIEW HEARINGS

The case is not over when parental rights are terminated. Post-termination review hearings should be held until adoption or long term foster care placement is made. Upon termination of parental rights, custody and guardianship of the children mandatorily vests with the Department of Social Services for the purpose of placing the child for adoption. SDCL 26-8A-27. Without judicial oversight, children can remain in foster care long after being legally freed for adoption. It is important for the Court who hears the termination of parental rights to continue to be responsible for the case through the adoption or until the jurisdiction is transferred to another Court for the finalization of the adoption. SDCL 26-8A-29. There should be periodic reviews to assure that reasonable efforts continue to be made to place the child following the termination of parental rights. Many of the previously discussed guidelines in relation to disposition and review hearings also apply to case review hearings after termination of parental rights. But there are some important differences. Most obviously, the parents are no longer parties after termination of parental rights. This makes it particularly important that the child have effective, independent representation. The Court shall appoint an attorney or continue the appointment of the child's attorney until the child is adopted or placed in long term foster care.

A separate set of issues applies in post-termination review hearings. The purpose of the review is to make sure that all is being done to place the child for adoption, to initiate adoption proceedings and to make sure the needs of the child are being met. When children have special needs, a major concern at post-termination reviews should be whether an appropriate adoption subsidy is available to prospective parents.

Except under circumstances where placement was with another relative of the child, any relative who has been denied adoptive placement by the Department of Social Services may request a hearing to determine if the placement was an abuse of discretion. The request shall be filed with the circuit court having jurisdiction pursuant to § 26-8A-29 and shall be filed within thirty days of written notification from the department by regular mail to the relative's last known address. The hearing shall be held within thirty days of the filing of the request for hearing and may be continued for not more than thirty days upon good cause shown. The relative shall be granted limited intervention only for the purpose of the placement review hearing. 26-8A-29.1

No intervention may be allowed in a proceeding involving an apparent, alleged, or adjudicated abused or neglected child, including an adoption or guardianship proceeding for a child placed in the custody of the Department of Social Services pursuant to § 26-8A-27.

XIII. SUPPLEMENTAL READING MATERIALS

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XIV. FORMS

Form 1 Initial Family Assessment.....	99-104
Form 2 Obsolete	105
Form 3 Notification of Removal of Child	106
Form 4 Temporary Custody Directive.....	107
Form 5 Report to the Court	108-110
Form 6 ICWA Affidavit	111-112
Form 7 Temporary Custody Order	113-114
Form 8 Summons	115
Form 9 Petition.....	116-117
Form 10 Adjudicatory Findings of Fact and Conclusions of Law	118-119
Form 11 Adjudicatory Order	120
Form 12 Notice of Entry of Adjudicatory Order	121
Form 13 Review Hearing Order	122
Form 14 Dispositional Findings of Fact and Conclusions of Law	123-124
Form 15 Dispositional Order	125
Form 16 Notice of Entry of Dispositional Order	126
Form 17 Order of Appointment of CASA Volunteer and Oath of Office.....	127-128
Form 18 Order Appointing CASA Volunteer and Granting Access to Child(ren)'s Records.....	129-130

**INITIAL FAMILY ASSESSMENT AND SAFETY EVALUATION
Worksheet and Conclusion**

Family: _____ RFS ID: _____

RFS Date: _____ Date Assigned: _____

Response Time Indicated: Immediate

Date of Initial Contact With Child: _____ Date IFA Completed: _____

Initial Contact:

1. Was initial contact made with the child according to the response time indicated on the Screening Guideline and Response Decision?

Yes No If no, **document explanation.**

Composition: (Name, date of birth, age and role in family)

Address: _____

Phone: _____

Family Services Specialist: _____

Supervisor: _____

Initial Family Assessment Contacts/Process: Record the initial family assessment process, identifying dates, times, sources of information, other important specifics and general information which is deemed important. Other information should go in narrative. If IFA interview protocol is not followed, document and justify.

1. Maltreatment: What is the extent of the maltreatment and your finding?

Finding:

Substantiation is based upon the following sections of SDCL 26-8A-2. (If the decision is to substantiate, the worker leaves those definitions that relate to the reason for substantiation and deletes those definitions that are not relevant to the substantiation. If

the decision is to unsubstantiate, the worker deletes all of the definitions below for SDCL 26-8A-2.)

26-8A-2. Abused or Neglected child means a child:

1. Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
2. Who lacks proper parental care through the actions or omissions of the parent, guardian, or custodian;
3. Whose environment is injurious to the child's welfare;
4. Whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance, or well-being;
5. Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian or custodian.
6. Who is threatened with substantial harm.
7. Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture.
8. Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care,
9. Who was subject to prenatal exposure to abusive use of alcohol or any controlled drug or substance not lawfully prescribed by a practitioner as authorized by chapters 22-42 and 34-20B.
10. Whose parent, guardian or custodian knowingly exposes the child to an environment that is being used for the manufacture, use, or distribution of methamphetamines or any other unlawfully manufactured controlled drug or substance.

2. Nature: What surrounding circumstances accompany the maltreatment?

CONCLUSION

Safety Evaluation

- One or both parents intend(ed) to hurt child and do not show remorse.**
- Parents' whereabouts are unknown.**
- Living arrangements seriously endanger the physical health of the child.**
- Both parents cannot/do not explain injuries and/or conditions.**
- Maltreating parent exhibits no remorse or guilt.**

Note: This should always include the parents' explanation of circumstances even if the finding is no maltreatment.

3. Child Functioning: How does the child function on a daily basis? Include pervasive behaviors, feelings, intellect, physical capacity and temperament.

Child # _____ Name _____

CONCLUSION
Safety Evaluation

- Child shows effects of maltreatment, such as serious emotional symptoms and lack of behavioral control.**
- Child is fearful of home situation.**
- Child shows effects of maltreatment such as serious physical symptoms.**

4. Parenting – Discipline: What are the disciplinary approaches used by the parent, and under what circumstances?

Parent 1:

Parent 2:

Consider the Safety Influences in Parenting --General

5. Parenting – General: What are the overall, typical, pervasive parenting practices used by the parent? (Do not include discipline.)

Parent 1:

Parent 2:

CONCLUSION
Safety Evaluation

- Child has exceptional needs which parent cannot/will not meet.**
- No adult in the home will perform parental duties and responsibilities.**
- One or both parents fear they will maltreat child and/or request placement.**

- One or both parents lack knowledge, skill, and motivation in parenting which affects the child's safety.
- Child is perceived in extremely negative terms by one or both of the parents.
- Parents do not have resources to meet basic needs.
- Child is seen by either parent as responsible for the parents' problems.

6. Adult Functioning: How does the adult function with respect to daily life management and general adaptation? What mental health functioning and or substance use is apparent on a daily basis?

Parent 1:

Parent 2:

CONCLUSION

Safety Evaluation

- One or both parents cannot control behavior and/or are violent.
- There is some indication parents may flee.
- One or both parents have failed to benefit from previous professional help.
- One or both parents overtly reject intervention.

Assessment and Safety Evaluation Conclusion:

A. Safety Influence Summary: Answer the following based on the safety influences identified and proceed as instructed.

1. One or more safety influences are identified. Yes No
2. In No to the above, proceed to D below.
3. If Yes to the above, proceed to B below.

B. Vulnerability Determination: Indicate child vulnerability based on current and foreseeable danger to child(ren) in the home. (All children age 6 and under must be determined to be vulnerable.)

Is there a vulnerable child(ren) in the home? Yes No
If yes, proceed to C below.

If no, justify below and proceed to D below.

If your conclusion is that the child(ren) is (are) not vulnerable in the home, provide information that supports this fact and demonstrates the child(ren)'s invulnerability. **The child(ren)'s age may not be used as justification for a finding of invulnerability. You**

must include your justification regarding the child(ren)'s ability to self protect in the home environment. Include specific examples that demonstrate the child(ren)'s ability to self protect in regards to the specific safety influences identified.

C. Protective Capacity Evaluation of Non-Maltreatment Caregiver: Indicate below whether or not the non-maltreating parent or other adults residing in the home can/will protect the child or if the maltreating parent will leave the residence.

Cannot/Will Not
(Complete D and proceed to Safety Evaluation/Analysis Plan)

Can/Will
(Provide justification below, proceed to D.)

N/A
(Complete D and then proceed to Safety Evaluation/Analysis Plan)

If your conclusion is that a nonmaltreating parent (adult caretaker) can/will protect the child, **state the basis for your professional judgment.** Provide information and an illustration that demonstrates they protected the child(ren) in the past.

Maltreating Parent voluntarily agrees to live away from home or has been removed by legal means.

If your conclusion is that the maltreating parent will live away from the home, **provide information that supports this fact** and demonstrates the nonmaltreating parent's commitment to this plan.

D. Case Opening or Closing: Is the case going to be opened for ongoing services?

Yes

No

Already opened

If "yes," complete elements 7-9.

If the case is not opened for ongoing services, indicate reasons below. If any immediate needs were addressed and/or referrals made for the family at assessment, document them and family's response.

7. Adult Childhood History: (Include any adult history information which is relevant for ongoing services and which has not been recorded or reflected elsewhere.)

8. Family Functioning: (Include information relevant to ongoing services related to family functioning, communication and interaction.)

9. Family Support Network: (Include information regarding supports both positive and negative that could be relevant for future kinship placements or in-home safety plan participation.)

Signature and Approval

Family Services Specialist,

Date

Supervisor,

Date

(Obsolete) Form 2

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
TEMPORARY CUSTODY DIRECTIVE

NAME: _____

ADDRESS: _____

MOTHER: _____ FATHER: _____

Other custodian or guardian information: _____

AGE: _____ DOB: ____/____/____ SEX: M ____ F ____ RACE: Wh ____ Ind ____ Other ____

DATE: ____/____/____ TIME _____ COUNTY: _____

CALLER: _____ AGENCY: _____ TITLE: _____ PHONE: _____

Mother Available: Yes ____ No ____ Suitable: Yes ____ No ____

Father Available: Yes ____ No ____ Suitable: Yes ____ No ____

ALLEGATION(S): _____

CONSIDERATIONS (check as appropriate):

Apparent, alleged or adjudicated

ABUSED OR NEGLECTED CHILD

- child is abandoned or is seriously endangered by the child's environment; or
there exists imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian or custodian appears to be necessary for the protection of the child.

CHILD IN NEED OF SUPERVISION - CHINS

- the child has failed to comply with court services or a court-ordered Department of Corrections program;
the child is being held for another jurisdiction as a parole or probation violator, as a violator, as a runaway or as a person under court-ordered detention;
the child has a demonstrated propensity to run away from the child's home, from court-ordered placement outside the child's home or from agencies charged with providing temporary care for the child;
the child is under court-ordered home detention in this jurisdiction; there are specific, articulated circumstances which justify the detention for the protection of the child from potentially immediate harm to the child or others; or
the child is accused of or has been found in violation of a valid court order.

DELINQUENT CHILD

- the child has failed to comply with court services or a court-ordered Department of Corrections program;
the child is a fugitive from another jurisdiction;
the child is charged with sexual contact (22-22-7), a crime of violence (22-2-2(9)) or a serious property crime (felony); or
the child is already held in detention or on conditional release in connection with another juvenile delinquency proceeding.

The child has a demonstrable recent record of:

- willful failures to appear for juvenile court;
of violent conduct;
adjudications for serious property offenses; or
the child is under the influence and detention is the least restrictive alternative in view of the gravity of the alleged offense and is necessary for the physical safety of the child, public or others.

DECISION

(Least restrictive alternative)

- Release to:
Parent:
Other:
Restrictions:

- Bond: \$
Dept. of Soc. Serv. Custody (A & N only)
Foster Care at:
Shelter at:

(Abused or neglected children may not be detained or jailed.)
(CHINS may NOT be held more than 24 hours in secure detention but may be placed in shelter longer than 24 hours. CHINS who have violated a valid court order may be held longer if a temporary custody hearing is held by a circuit judge within 24 hours.)
Detain at

(Jail may ONLY be used for children who have been transferred to adult court and who are 15, 16 or 17 AND if the offense is sexual contact or a crime of violence.)

COMMENTS:

SIGNED:

INTAKE OFFICER

* A child who has violated a valid court order may be placed in temporary custody even if a parent is available and suitable but a temporary custody hearing must be held within 24 hours if detention is to be continued.

Court File # _____

Form 5

REPORT TO THE COURT

Concerning: Child(ren) (DOB:)

Mother: (DOB:)
Address:

Father or (father to _____): (DOB:)
Address:

Tribal Affiliation:
Intervening Tribe:

Submitted by: _____, Family Services Specialist
SD Department of Social Services

Date Report was Prepared:

Date of Current Hearing:

BACKGROUND INFORMATION

List prior hearings; date and type

Current Hearing: Type

For 48 hour hearing, summarize previous CPS history.

CURRENT SITUATION

Be as concise as possible.

Refer to what was ordered at the last hearing.

List parental response to what was ordered. (List or bullet format preferred)

Summary of each parent since the last hearing, regarding reasonable efforts. Refer to Family Service Agreement objectives and tasks. (List or bullet format preferred)

Parenting Summary (if attending parenting classes).

Summary of each child related to age, length of time in care, type of placement, number of placements, behavioral information, treatment issues and special needs.

FOR ADJUDICATORY HEARINGS

Should include a thorough narrative of contacts regarding reasonable efforts and particularly regarding the incident resulting in placement.

FOR FINAL DISPOSITIONAL HEARINGS

Additional information that would be helpful:

Reasonable Efforts Summary:

List all the services offered and provided and whether parents used them.

Visitation Summary:

List how many visits were offered and how many were attended.

Should include a thorough narrative of contacts related to provision of reasonable efforts.

RELATIVE SEARCHES/CONCURRENT PLANNING

Brief summary of how many relatives we have pursued as potential placement options and the status.

Statement about whether the parents are cooperating with providing information.

Any other concurrent planning information.

Update this information with each report.

SUMMARY AND RECOMMENDATIONS

State what you are asking the parents to do and why.

(Example; Parent needs to go to treatment because:

- 1. Child was placed due to parent being too intoxicated to care for child.
- 2. Parent continues to drink as witnessed.
- 3. CD evaluation indicates dependency and recommends in-patient treatment.

If this is a case that falls under the Adoption and Safe Families Act (ASFA) regarding not providing reasonable efforts or fast tracking cases, and the consensus is to pursue termination of parental rights based on ASFA, present your grounds for that consideration.

If recommending a Final Disposition for termination of parental rights, state reasons you feel you have grounds for termination.

If recommending a Final Disposition for long term foster care, state compelling reasons for not recommending termination of parental rights.

Therefore, the Department of Social Services respectfully recommends the following: (some suggested options listed below)

That the Court grants the Department of Social Services ___ days legal and physical custody of ___.

Or;

That the Court grants the Department of Social Services legal and physical custody during the pendency of the proceedings.

That the Court finds that the Department of Social Services has made reasonable efforts to.....

That the Court finds that the least restrictive alternative available and in the best interest of ___ is.....

That the Court finds that returning ___ to their/his/her parents would be injurious to their/his/her welfare at this time.

That ___ be ordered to ___. (Family Service Agreement tasks/objectives)

That the Court makes a finding regarding the Adoption and Safe Families Act (ASFA) and continued reasonable efforts.

, Family Services Specialist

ATTACHMENTS

You **should** attach the Family Service Agreements to each court report.

You may attach narratives to support your summaries.

Other suggested attachments:

Note: (As these reports are confidential, consult with your Judge or State's Attorney about who should receive these attachments).

- Psychological evaluations
- Chemical Dependency Evaluations
- AA verification
- Therapy progress notes
- Police reports
- Other supporting documents

If this is an ICWA case remember to do an ICWA Affidavit for the 48 Hour Hearing.

The Court further finds (if applicable):

___ The Indian Child Welfare Act is applicable to this matter⁶.

___ That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful⁷.

___ That continued custody of the child by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child⁸.

___ [any additional findings] _____

The court hereby ORDERS the following:

___ Release to ___ Parent(s) _____
 ___ Other _____
 ___ Restrictions _____

___ Department of Social Services custody

___ Foster care _____

___ Shelter at _____

ABUSED OR NEGLECTED CHILDREN MAY NOT BE PLACED IN DETENTION OR JAIL

The Department of Social Services is hereby authorized to release all information available pertaining to this matter to any Court Appointed Special Advocate (CASA) assigned to the case, to the attorneys for the parents and the child and any other attorneys representing a party in this case and to the Tribe(s) in which the children are enrolled or are eligible for enrollment, if applicable.

The Court further ORDERS [list any additional Court rulings and the date for the next hearing]

Dated: nunc pro tunc,

BY THE COURT:

Circuit Judge

ATTEST:
/s/ _____
Clerk of Courts
BY _____
Deputy

⁶ In ICWA cases, if the child(ren) remain in foster care, these additional findings must be added to avoid a challenge of the validity of the foster care placement.

⁷ 25 USC 1912(d).

⁸ 25 USC 1912(e).

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT
_____ JUDICIAL CIRCUIT

IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
_____,)
Respondent(s).)
)

No. _____

PETITION

TO: Judge of the Circuit Court, _____Judicial Circuit, State of South Dakota, in and for
_____County, South Dakota.

Petitioner alleges as follows:

1. The above named child(ren) is/are located or residing in _____County, South Dakota, and is/are alleged to be an abused or neglected child(ren) as defined by SDCL 26-7A and SDCL 26-8A.
2. This action is brought by the State on behalf of the South Dakota Department of Social Services.
3. The name(s), date(s) of birth and residence of the child(ren) are as follows:

Name	Date of Birth	Residence
------	---------------	-----------
4. The names and residence of the parents, guardian or custodian of the child(ren) are as follows:

Names	Residence
-------	-----------
5. The facts which bring the child(ren) within the Court’s jurisdiction are as follows:

Affidavits of _____, dated _____ attached hereto, is/are incorporated by this reference as part of this Petition.

6. It is in the best interests of the child(ren) and the State that the child(ren) be adjudicated to be abused or neglected child(ren).
7. It appears that the Indian Child Welfare Act (is not) (is) applicable for the following reasons:
8. No reasonable efforts should be required because
____ the parent has committed certain crimes (murder, manslaughter, rape, incest, sexual exploitation of children, or criminal child abuse);
____ the parent has committed felony assault against a child;
____ the parent has had parental rights to another child terminated by a prior abuse and neglect proceeding.
____ the parent has a documented history of abuse and neglect associated with chronic alcohol abuse
____ the parent has demonstrated inability to protect the child from substantial harm or risk of substantial harm and the child has been adjudicated abused and neglected on at least one previous occasion and removed from the parent’s custody

WHEREFORE, Petitioner requests the Court to issue Summons requiring the appropriate parties to appear and answer to the Petition, to schedule hearing on this Petition and to conduct adjudication and dispositional proceedings according to law.

Dated this _____ day of _____, 19____.

Petitioner¹⁰

¹⁰ If someone other than the State's Attorney signs the Petition, Verification must be added pursuant to SDCL 26-7A-43.

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT
_____ JUDICIAL CIRCUIT

)
IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
)
_____,)
Respondent(s).)
)

No. _____

ADJUDICATORY
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Pursuant to a Petition alleging abuse or neglect under SDCL 26-8A-2, an adjudicatory hearing was held on _____, 19____. The State of South Dakota was represented by the _____ County State’s Attorney, _____; [state whether parent(s) appeared in person and with or without or through counsel]; _____; [state whether the child(ren) appeared in person and with or without or through counsel]; _____ appeared on behalf of the South Dakota Department of Social Services and _____ [state whether anyone else appeared in person or through counsel].

The Court heard the evidence and the arguments of counsel and reviewed the files and records and makes and enters the following by clear and convincing evidence:

FINDINGS OF FACT

1. _____, whose birth date is _____, 19____, [and list other children and their birth dates], (is/are) a minor child(ren), who (was a/were) domiciled and/or resident(s) of _____ County at the commencement of these proceedings.

2. The minor child(ren) (is/are) (not) (an) Indian child(ren) as defined by the Indian Child Welfare Act. [If the child(ren) is/are Indian, the Court finds that proper written notice has been given to the parties/Indian Custodian(s) and the Indian Tribe or BIA, the Court has jurisdiction and venue (that the child(ren) were not domiciled or residing on the Reservation or wards of the tribal Court), that a qualified expert has testified that continued custody of the child(ren) by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child(ren), and that the State has made active efforts to provide remedial services and those rehabilitative programs designed to prevent the breakup of the Indian family have been unsuccessful.]

3. The biological mother of the minor child(ren) is _____. She has received full and legal notice of these proceedings. She has been fully apprised of her rights and obligations in these proceedings. She has been fully advised that the termination of her parental rights is a possible outcome of these proceedings.

4. The alleged/biological/legal father of the minor child(ren) is _____. He has received full and legal notice of these proceedings. He has been fully apprised of his rights and obligations in these

proceedings. He has been fully advised that the termination of his parental rights is a possible outcome of these proceedings. [If there is more than one father, do a paragraph as to each one.]

5. The above-named minor child(ren) (is an/are) abused and neglected through the actions or omissions of _____ (mother/father/parents/custodians) within the meaning of SDCL 26-8A-2 based on the following: [list specific facts that prove criteria]

6. The South Dakota Department of Social Services has made reasonable efforts to return legal and physical custody of the minor child(ren) to the Respondent parent(s) including by not limited to the following: [list specific efforts]

7. The least restrictive alternative available in the minor child(ren)'s best interests is for the legal and physical custody of the minor child(ren) to remain in DSS [or whatever Court orders], it being contrary to the minor child(ren)'s best interests and welfare to be returned to the Respondent parent(s)' custody.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction and personal jurisdiction of the parties.
2. The allegations contained in the Petition are supported by clear and convincing evidence within the meaning of SDCL 26-8A-2.
3. Reasonable efforts were made to return the child(ren) but, despite such efforts, return of the child(ren) at this time would not be in (his/her/their) best interest or reasonable efforts were not necessary pursuant to SDCL 26-8A-21.
4. The Court fully incorporates, by this reference, its [oral Findings of Fact/ Memorandum Decision] and all Orders previously entered in this case.
5. Any Conclusion of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.

LET THE ORDER OF ADJUDICATION BE ENTERED ACCORDINGLY.

Dated:

BY THE COURT:

Circuit Judge

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT

_____ JUDICIAL CIRCUIT

IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
_____,)
Respondent(s).)
)

No. _____

ADJUDICATORY ORDER

Pursuant to a Petition alleging abuse or neglect under SDCL 26-8A-2, an adjudicatory hearing was held on _____, 19____. The State of South Dakota was represented by the _____ County State’s Attorney, _____; [state whether parent(s) appeared in person and with or without or through counsel]; _____; [state whether the child(ren) appeared in person and with or without or through counsel]; _____ appeared on behalf of the South Dakota Department of Social Services and _____ [state whether anyone else appeared in person or through counsel].

The Court heard the evidence and the arguments of counsel and reviewed the files and records and made and entered its findings of fact and conclusions of law, and, therefore, it is:

ORDERED, ADJUDGED AND DECREED, that the above-named minor child(ren) is/are abused and neglected within the meaning of SDCL 26-8A-2 due to the acts and omissions of _____; and it is further

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that , that the South Dakota Department of Social Services has made and shall continue to make reasonable efforts to return the child(ren) to the Respondent parents; and it is further

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that , that legal (and/or) physical custody of the child(ren) shall [describe custody arrangements ordered], this being the least restrictive alternative available in the child(ren)’s best interests, [it being contrary to the child(ren)’s best interests and welfare to return to the Respondent parent(s) at this time]; and it is further

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that , [list any additional Court rulings and the date for the first review hearing or the final dispositional hearing].

Dated:

BY THE COURT:

Circuit Judge

STATE OF SOUTH DAKOTA)
) SS
 COUNTY OF _____)
)
 IN THE INTERESTS OF,)
)
 _____,)
 Minor Child(ren))
)
 and concerning)
)
 _____, and)
)
 _____,)
 Respondent(s).)
)

IN CIRCUIT COURT
 _____ JUDICIAL CIRCUIT

No. _____

NOTICE OF ENTRY
 OF
 ADJUDICATORY ORDER

TO: [Name all parents—including putative fathers, include “JOHN DOE”, if unknown]

PLEASE TAKE NOTICE that an [the attached] Adjudicatory Order, and Adjudicatory Findings of Fact and Conclusions of Law, affecting your parental rights in the above entitled matter, has been entered and filed on the _____ day of _____, 199___. This is an intermediate order which is subject to intermediate appeal with the permission of the Court according to the rules of procedure governing civil appeals.

Dated:

 State’s Attorney

NOTE: A copy of this notice must be personally served upon the parents. “Personally” means in the manner of a Summons, including Admission of Service and/or service by publication under SDCL 26-7A-48, 26-8A-28 and 26-7A-91, if necessary.

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT
_____ JUDICIAL CIRCUIT

)
IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
_____,)
Respondent(s).)
)

No. _____

REVIEW HEARING ORDER

A review hearing was held on _____, 19____. The State of South Dakota was represented by the _____ County State's Attorney, _____; [state whether parent(s) appeared in person and with or without or through counsel]; _____; [state whether the child(ren) appeared in person and with or without or through counsel]; _____ appeared on behalf of the South Dakota Department of Social Services and _____ [state whether anyone else appeared in person or through counsel].

The Court heard the evidence and the arguments of counsel and reviewed the files and records and, it is:

ORDERED, that the family service agreement dated _____ be implemented and monitored; and it is further

ORDERED, that the legal (and/or) physical custody of the child(ren) shall be [describe custody arrangements ordered], this being the least restrictive alternative available in the child(ren)'s best interests, [it being contrary to the child(ren)'s best interests and welfare to return to the parent(s) at this time]; and it is further

ORDERED, [list any additional Court rulings and the date for the next hearing].

Dated:

BY THE COURT:

Circuit Judge

Based upon the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court has personal and subject matter jurisdiction.
2. Reasonable efforts were made to return the child(ren) but, despite such efforts, return of the child(ren) at this time would not be in his/her/their best interest or pursuant to SDCL 26-8A-21.1 were unnecessary.
3. The long-term plan for the child(ren) is (maintenance of the child in the home of a parent; reunification with a parent or relative; placement of child in a permanent home).
4. It is in the best interest of the child(ren) that the proposed family service agreement be implemented and monitored.
5. The Court fully incorporates, by this reference, its oral Findings of Fact and all Orders previously entered in this case.
6. Any Conclusions of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or conclusions of Law as the case may be.

LET THE ORDER OF DISPOSITION BE ENTERED ACCORDINGLY.

Dated:

BY THE COURT:

Circuit Judge

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT

_____ JUDICIAL CIRCUIT

IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
_____,)
Respondent(s).)
)

No. _____

NOTICE OF ENTRY
OF
DISPOSITIONAL ORDER

TO: [Name all parents, including putative fathers, include "John Doe" if unknown]

PLEASE TAKE NOTICE that a [the attached] Dispositional Order, and Dispositional Findings of Fact and Conclusions of Law, affecting your parental rights in the above entitled matter, has been entered and filed on the _____ day of _____, 19_____. This order is subject to appeal according to the rules of procedure governing civil appeals.

Dated:

State's Attorney

Note: A copy of this notice must be personally served upon the parents. SDCL 15-6-4 "Personally" means in the manner of a Summons, including Admission of Service and/or service by publication under SDCL 26-7A-48, 26-8A-28 and 26-7A-91, if necessary. The child's attorney and the child's guardian ad litem or special advocate, if any, must also be notified. SDCL 26-8A-28

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

IN CIRCUIT COURT

_____ JUDICIAL CIRCUIT

)
IN THE INTERESTS OF,)
)
_____,)
Minor Child(ren))
)
and concerning)
)
_____, and)
_____,)
Respondent(s).)
)

No. _____

**ORDER OF APPOINTMENT
OF CASA VOLUNTEER
AND
OATH OF OFFICE**

ORDER OF APPOINTMENT

Pursuant to SDCL 26-8A-20, it is hereby

ORDERED that _____ is appointed as a Court
Appointed Special Advocate (CASA) to serve without compensation at the pleasure of
the Court, and

IT IS FURTHER ORDERED that, as an officer of the Court for the purpose of
representing the child’s best interests, the CASA shall receive all reports respecting the
child and may cause the case to be reviewed by the Court pursuant to SDCL 26-8A-24.

DATED:

BY THE COURT

CIRCUIT JUDGE

ATTEST:

CLERK OF COURTS

By: _____
Deputy Clerk

(SEAL)

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF _____)

OATH OF OFFICE

I, _____, do solemnly swear or affirm that I will support the Constitution and laws of the United States and the Constitution and laws of the State of South Dakota and that I will faithfully discharge the duties of the office of Court Appointed Special Advocate (CASA).

CASA Volunteer

Person Administering Oath and Title

DATED:

BY THE COURT

CIRCUIT JUDGE

ATTEST:

CLERK OF COURTS

By: _____
Deputy Clerk

(SEAL)

XV. APPENDICES

- A. Indian Child Welfare Act Of 1978 (25 USC 1901 to 1963)**
- B. BIA Guidelines for State Courts (in Indian Child Custody Proceedings)**

APPENDIX A
Indian Child Welfare Act of 1978
(25 U.S.C. §§ 1901-63)

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

1. that clause 3, section 8, article I of the United States Constitution provides that ``The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes₁ and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
2. that 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;
3. that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
4. that an 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; and
5. that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. (Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.) Short Title Section 1 of Pub. L. 95-608 provided: ``That this Act [enacting this chapter] may be cited as the `Indian Child Welfare Act of 1978'."

§ 1902. Congressional declaration of policy

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. (Pub. L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

1. "child custody proceeding" shall mean and include--
 - i. "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
 - ii. "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
 - iii. "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
 - iv. "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.
2. "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;
3. "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

4. "Indian child" means 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;
5. "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;
6. "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
7. "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
8. "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;
9. "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;
10. "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;
11. "Secretary" means the Secretary of the Interior; and (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (Pub. L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.) Section Referred to in Other Sections This section is referred to in sections 1727, 3202, 3653, 4302 of this title; title 12 section 4702; title 26 section 168.

§ 1911. *Indian tribe jurisdiction over Indian child custody proceedings*

a. Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

b. Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

c. State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

d. Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (Pub. L. 95-608, title I, § 101, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1918, 1923 of this title.

§ 1912. *Pending court proceedings*

a. Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

b. Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

c. Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

d. Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

e. Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

f. Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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. (Pub. L. 95-608, title I, § 102, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1916 of this title.

§ 1913. Parental rights; voluntary termination

a. Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

b. Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

c. Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

d. Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law. (Pub. L. 95-608, title I, § 103, Nov. 8, 1978, 92 Stat. 3072.) Section Referred to in Other Sections This section is referred to in section 1914 of this title.

§ 1914. *Petition to court of competent jurisdiction to invalidate action upon showing of certain violations*

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title. (Pub. L. 95-608, title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. *Placement of Indian children*

a. Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

b. Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

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

c. Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

d. Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. (e) Record of placement; availability A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe. (Pub. L. 95-608, title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. *Return of custody*

a. Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

- b. Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. (Pub. L. 95-608, title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. (Pub. L. 95-608, title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

- a. Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

- b. Criteria applicable to consideration by Secretary; partial retrocession

1. In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:
 - i. whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
 - ii. the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
 - iii. the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.
2. In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

- c. Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

d. Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title. (Pub. L. 95-608, title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

References in Text

Act of August 15, 1953, referred to in sub§ (a), is act Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, which enacted section 1162 of Title 18, Crimes and Criminal Procedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under section 1360 of Title 28. For complete classification of this Act to the Code, see Tables.

Section Referred to in Other Sections

This section is referred to in sections 1727, 1923 of this title.

§ 1919. *Agreements between States and Indian tribes*

a. Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

b. Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. (Pub. L. 95-608, title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

Section Referred to in Other Sections

This section is referred to in sections 1918, 1923 of this title.

§ 1920. *Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception*

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. *Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child*

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. *Emergency removal or placement of child; termination; appropriate action*

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. *Effective date*

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8,

1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1951. *Information availability to and disclosure by Secretary*

a. Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

1. the name and tribal affiliation of the child;
2. the names and addresses of the biological parents;
3. the names and addresses of the adoptive parents; and
4. the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

b. Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment.

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

APPENDIX B

BIA GUIDELINES FOR STATE COURTS (In Indian Child Custody Proceedings)

Introduction

Although the rulemaking procedures of the Administration Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*, 432 U.S. 416, 424-425 (1977)

In other words, when the Department writes rules needed to carry out responsibilities congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act.

Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complication in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribe with such agreements. The Department hopes to have those materials available later to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in the area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure of exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Guidelines for State Courts

- A. Policy
- B. Pre-trial requirements
 1. Determination that child is an Indian
 2. Determination of Indian child's tribe
 1. Determination that placement is covered by the Act
 2. determination of jurisdiction

3. Notice requirements
 4. Time limits and extensions
 5. Emergency removal of an Indian child
 6. Improper removal from custody
- A. Requests for transfer to tribal court
 1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding
 2. Criteria and procedures for ruling on 25 U.S.C. § 1911(b) transfer petitions
 3. Determination of good cause to the contrary
 4. Tribal court declination of transfer
 - A. Adjudication of involuntary placements, adoptions or terminations of parental rights
 1. Access to reports
 2. Efforts to alleviate need to remove child from parents or Indian custodians
 3. Standards of evidence
 4. Qualified expert witnesses
 - A. Voluntary proceedings
 1. Execution of consent
 2. Content of consent document
 3. Withdrawal of consent to placement
 4. Withdrawal of consent to adoption
 - A. Dispositions
 1. Adoptive placements
 2. Foster care or pre-adoptive placements
 3. Good cause to modify preferences
 - A. Post-trial rights
 1. Petition to vacate adoptions
 2. Adult adoptee rights
 3. Notice of change in child's status
 4. Maintenance of records
 - A. Policy
 1. Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgement on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

2. In any child custody proceedings where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purposes. The three major purposes are derived from a reading to the Act itself. In order to fully implement the congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a). When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b) (i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

- i. Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.
 - a. Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:
 - i. Any party to the case, Indian tribe Indian organization or public or private agency informs the court that the child is and Indian child.
 - ii. Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
 - iii. The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
 - iv. The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
 - v. An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria. *Cohen, Handbook of Federal Indian Law 133* (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of

purposes, its determinations are also entitled to great deference. *See, e.g., United States v Sandoval*, 231, U.S.28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. The most common voluntary placement involves a newborn infant.

Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Brocheau*, 597 F. 2nd 1260, 1263 (9th Cir. 1979)

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

- a. Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.
- b. The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.
- c. In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:
 - i. length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
 - ii. child's participation in activities of each tribe;
 - iii. child's fluency in the language of each tribe;
 - iv. whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
 - v. residence on or near one of the tribe's reservation by the child's relatives;
 - vi. tribal membership of custodial parent or Indian custodian;
 - vii. interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and
 - viii. the child's self identification.
- a. The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.
- b. If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's

tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that the "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of *the* Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determination of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A difference determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

- a. Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.
- b. Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.
- c. Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child-whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes *placements* based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (See *e.g.* Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

- a. In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.
- b. If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Sections B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

- a. In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.
- b. In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:
 - i. The name of the Indian child.
 - ii. His or her tribal affiliation.

- iii. A copy of the petition, complaint or other document by which the proceeding was initiated.
 - iv. The name of the petitioner and the name and address of the petitioner's attorney.
 - v. A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
 - vi. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.
 - vii. A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.
 - viii. The location, mailing address and telephone number of the court.
 - ix. A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.
 - x. The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.
 - xi. A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.
- a. The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.
 - b. The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.
 - c. Notice may be personally served on any person entitled to receive notice in lieu of mail service.
 - d. If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.
 - e. If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to section B.1. and B.2. of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain-especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case.

In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, non-custodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notices does not involve any assertion of jurisdiction over the person served, personal notices may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

- a. A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.
 - b. The proceeding may not begin until all of the following dates have passed:
 - (i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;
 - (ii) ten days after the parent or Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;
 - i. thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and
 - ii. Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.
- a. The time limits listed in this section are minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved-the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

- a. Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.
- b. When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:
 - (i) The name, age and last known address of the Indian child.

- i. The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.
 - i. Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.
 - ii. The tribal affiliation of the child and of the parents and/or Indian custodians.
 - iii. A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.
 - iv. If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.
 - v. A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.
- a. If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case-whichever is earlier.
 - b. Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

B.7 Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

- a. If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the

custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

- b. If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on his merits.

A. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in this title of this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S. C. § 1911(b) Transfer Petitions

- a. Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

- b. If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.

C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

- a. Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
- b. Good cause not to transfer this proceeding may exist if any of the following circumstances exists:
 - (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
 - i. The Indian child is over twelve years of age and objects to the transfer.
 - ii. The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
 - iii. The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
- a. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.
- b. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian are no more nor less in need of the Act's protections than other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potwatomies of the Hannahville Indian Community v. Houston*, 397 F. Supp. 719 (W.D. Mich. 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even though the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by family services specialists. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto-over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1., is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. The rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

- a. A tribal court to which transfer is requested may decline to accept such transfer.
- b. Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed

transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

- c. Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.
- d. If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

A. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress - that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of the statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

- a. The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child/s continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.
- b. The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- c. Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and family services specialists making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

- a. Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.
- b. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
 - (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
 - i. Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
 - i. A professional person having substantial education and experience in the area of his or her specialty.
- a. The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4. Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two

questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by non-experts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior – which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

A. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

- a. The consent document shall contain the name and birthday of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.
- b. A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through who the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.
- c. A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

A. Dispositions

F.1. Adoptive Placements

- a. In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:
 - a. A member of the Indian child's extended family;
 - i. Other members of the Indian child's tribe; or
 - ii. Other Indian families, including families of single parents.
- a. The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.
- b. Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in culture among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agenda make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

- a. The child must be placed in the least restrictive setting which
 - a. (i) most approximates a family;
 - b. (ii) in which his or her special needs may be met; and
 - (iii) which is in reasonable proximity to his or her home
- a. Preference must be given in the following order, absent good cause to the contrary, to placement with:
 - (i) A member of the Indian child's extended family;

- (ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
 - (iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - (iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
- b. The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provision of the Act.

F.3. Good Cause To Modify Preferences

- a. For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:
- a. The request of the biological parents or the child when the child is of sufficient age.
 - (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
 - (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
- a. The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (I) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving an exception is necessary.

A. Post-Trial Rights

G.1. Petition To Vacate Adoption

- a. Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent

to termination of parental rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such content was obtained by fraud or duress.

- b. Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

- a. Upon application by an Indian individual who has reached the age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.
- b. The section applies regardless of whether or not the original adoption was subject to the provision of the Act.
- c. Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentiality whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

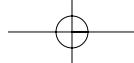
G.3. Notice of Change in Child's Status

- a. Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.
- b. A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act – which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental



rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S. C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

