

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



ACKNOWLEDGMENTS

These guidelines were developed by the South Dakota Unified Judicial System, Court Improvement Program Committee, pursuant to a grant from the US Department of Health and Human Services for reforming the handling of child abuse and neglect court cases in South Dakota. A project of this magnitude requires the dedication and commitment of numerous people in a variety of capacities. The core of this manual was developed and revised by a group of talented and dedicated people throughout the state who gave generously of their time, knowledge, and experience. The practicality of this manual is due in large measure to the contributions of the following individuals:

1999 CIP Committee	2014 CIP Committee	2019 CIP Committee
<p>Hon. Max A. Gors, Chairperson Circuit Judge, Sixth Judicial Circuit</p> <p>J Jay Alderman Pennington County Deputy State's Attorney</p> <p>Joan Baker Assistant Attorney General</p> <p>Jean Cline Attorney, Rapid City</p> <p>Joyce Country Department of Social Services</p> <p>Cheryl Schrempp DuPris Assistant U.S. Attorney</p> <p>Hon. John E. Fitzgerald Circuit Judge, Seventh Judicial Circuit</p> <p>Patrick M. Ginsbach Fall River County State's Attorney</p> <p>Dwight Hall Pennington County Sheriff's Office</p> <p>Judy Hines Department of Social Services</p> <p>Liza Kaiser Court Appointed Special Advocate, Sioux Falls</p> <p>Sharon Kallemeyn Victims Assistance Director, Pennington County</p> <p>Hon. John K. Konenkamp South Dakota Supreme Court</p> <p>Lynn M. McLane Pennington County Sheriff's Office</p> <p>John Murphy Attorney, Rapid City</p> <p>Robert Pasqualucci Staff Judge Advocate, SD Army National Guard</p> <p>Michael Shad Pennington County Deputy State's Attorney</p> <p>Sheila Troxel Seventh Circuit CASA Rapid City</p> <p>LuAnn Van Hunnik Child Protection Services Regional Manager, Rapid City</p> <p>Jim Waggoner Attorney, Rapid City</p> <p>Merlin Weyer Department of Social Services</p> <p>Hon. Marshall Young United States Magistrate Judge</p>	<p>Hon. Jeff W. Davis, Chairperson Presiding Judge, Seventh Judicial Circuit</p> <p>Amy Benda Sioux Falls Area CASA Sioux Falls</p> <p>Tony Benning Community Representative, Madison</p> <p>Corey Brubakken Captain, Pennington County Sheriff's Office</p> <p>Vicki Burger Department of Social Services, CPS, Regional Manager, Sioux Falls</p> <p>Susan Compaan Fifth Judicial Circuit, Court Administrator</p> <p>Roxie Erickson Pennington County, Deputy State's Attorney</p> <p>Hon. Timothy Johns Retired Circuit Judge, Fourth Judicial Circuit Representative, District 31</p> <p>Sharon Kallemeyn Victims Assistance Director, Pennington County</p> <p>Sara Kelly CIP Coordinator, Unified Judicial System</p> <p>Hon. Scott Myren Circuit Judge, Fifth Judicial Circuit</p> <p>Becky Morlock-Reeves Attorney, Watertown</p> <p>Todd Schlekeway Community Representative, Sioux Falls</p> <p>Dr. Melody Schopp Secretary of Education</p> <p>Dave Valandra ICWA Director, Crow Creek Tribe</p> <p>LuAnn Van Hunnik Department of Social Services, CPS, Regional Manager, Rapid City</p> <p>Virgena Wieseler Department of Social Services, CPS, Division Director</p>	<p>Hon. Scott Myren, Chairperson Presiding Judge, Fifth Judicial Circuit</p> <p>Hon. Michelle Comer Circuit Judge, Fourth Circuit</p> <p>Hon. Kent Shelton Circuit Judge Third Judicial Circuit</p> <p>Hon. Timothy Johns Retired Circuit Judge, Fourth Judicial Circuit Representative, District 31</p> <p>Susan Compaan Circuit Administrator, Fifth Judicial Circuit</p> <p>Roxie Erickson Pennington County, Deputy State's Attorney</p> <p>Virgena Wieseler Department of Social Services, CPS, Division Director</p> <p>Pamela Bennett Department of Social Services, CPS, Deputy Division Director</p> <p>Vicki Burger Department of Social Services, CPS, Regional Manager</p> <p>Lisa Fleming Department of Social Services, CPS, Regional Manager</p> <p>Corey Brubakken Captain, Pennington County Sheriff's Office</p> <p>Kate Kelley Director, Northern Hills CASA Spearfish</p> <p>Dr. Becky Guffin Superintendent, Aberdeen School District</p> <p>Carrie Sanderson Director Center for the Prevention of Child Maltreatment Sioux Falls</p> <p>Dave Vallandra Tribal Representative</p> <p>Sara Kelly CIP Coordinator Unified Judicial System</p>

The South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases are an overview of the process and is intended to be used as a reference tool. They are not binding legal authority. The United States Code, South Dakota Codified Laws, and case law govern.

These guidelines were developed by the South Dakota Unified Judicial System in conjunction with the Court Improvement Program Grant received from the U.S. Department of Health and Human Services, Administration for Children and Families.

The original guidelines were developed in 1999 and updated in 2007, 2014 and 2019

300 copies were printed at a cost of \$18.57 per copy.

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

TABLE OF CONTENTS

Table of Contents

I. INTRODUCTION.....	1
II. GENERAL ISSUES	3
A. DEFINITION OF ABUSE/NEGLECT	3
B. OTHER STATUTES RELATING TO CHILD ABUSE INCLUDING BUT NOT LIMITED TO:.....	5
C. REPORTING STATUTES AND IMMUNITY FROM LIABILITY	7
D. ROLE OF CHILD’S ATTORNEY.....	9
E. ROLE OF COURT APPOINTED SPECIAL ADVOCATE (CASA)	10
III. INDIAN CHILD WELFARE ACT (ICWA).....	12
A. QUALIFIED EXPERT WITNESS FOR ICWA CASES	13
B. FLOW CHART TO DETERMINE THE APPLICABILITY OF THE INDIAN CHILD WELFARE ACT OF 1978 15	
IV. PROTECTIVE CUSTODY/INTAKE	18
A. WHEN LAW ENFORCEMENT TAKES CUSTODY.....	18
B. COURT ORDERED PLACEMENT WITH NOTICED HEARING:.....	18
C. AUTHORITY FOR A PICK UP AND PLACE ORDER WITHOUT NOTICED HEARING:	18
D. CONTACTING AN INTAKE OFFICER	19
E. PURPOSE OF AN INTAKE HEARING	19
F. PROCEDURES FOR AN INTAKE HEARING	19
G. OPTIONS FOR TEMPORARY CUSTODY	20
H. NOTICE	20
V. TEMPORARY CUSTODY HEARING (48-HOUR HEARING).....	21
A. TEMPORARY CUSTODY HEARING (48-HOUR HEARING	21
B. PROCEDURES FOR THE TEMPORARY CUSTODY HEARING (48 HOUR HEARING)	22
C. NOTICE:	23
VI. ADVISORY HEARING.....	25
A. PURPOSE	25
B. NOTICE:	25
VII. ADJUDICATION HEARING	27
A. TIMING AND PURPOSE OF ADJUDICATORY HEARINGS	27
B. DISCOVERY	28

C. ELEMENTS	28
D. EVIDENCE	28
E. DEFENSES	30
F. FINDINGS OF FACT CONCLUSIONS OF LAW	30
G. NOTICE:	31
H. NOTICE OF ENTRY	31
VIII. HEARINGS	32
A. REVIEW HEARING (AKA: STATUS HEARING)	32
B. PERMANENCY HEARING (26-8A-21.2)	33
C. PLACEMENT HEARING	34
D. ADOPTION SAFE FAMILIES ACT (ASFA) HEARING	36
E. MOTION/EVIDENTIARY HEARING	36
IX. FINAL DISPOSITION	37
A. KEY DECISIONS THE COURT MUST MAKE:	37
1. Placement and Care	37
2. Reasonable Efforts. SDCL 26-8A-21.	38
3. Active Efforts – BIA Guides https://www.bia.gov/bia/ois/dhs/icwa	39
4. Least Restrictive Alternative.	41
5. Best Interests of the Child	41
6. Conditions for removal still exist	42
7. Compelling reasons to extend services over 1 year	42
B. EVIDENCE	42
C. FINDINGS OF FACT AND CONCLUSIONS OF LAW	42
D. NOTICE	43
X. POST-DISPOSITION/PERMANENCY HEARING	44
XI. APPEALS	45
XII. FORMS	46
XIII. SUPPLEMENTAL RESOURCE INFORMATION	48

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.

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

“Reasonable efforts” are a determination the court must make at every hearing.

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” 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 child’s 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 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, marijuana, 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 manufacture, use, or distribution of methamphetamines or any other unlawfully manufactured controlled drug or substance.

B. OTHER STATUTES RELATING TO CHILD ABUSE INCLUDING BUT NOT LIMITED TO:

SDCL 22-18-1.1 -- AGGRAVATED ASSAULT DEFINED.

SDCL 22-18-1 -- SIMPLE ASSAULT DEFINED.

SDCL 22-19-9 – VIOLATION OF CUSTODY ORDER BY PARENT. A PARENT WHO TAKES, ENTICES AWAY, OR KEEPS A CHILD FROM THE CUSTODY OR VISITATION OF ANOTHER PARENT IS GUILTY OF A MISDEMEANOR.

SDCL 22-19-10 – REMOVAL OF CHILD FROM STATE. A PARENT WHO VIOLATES 22-19-9 AND REMOVES THE CHILD FROM THE STATE IS GUILTY OF A CLASS 5 FELONY.

SDCL 22-19A-7 – STALKING A CHILD TWELVE OR YOUNGER (WILLFULLY, MALICIOUSLY AND REPEATEDLY FOLLOWS OR HARASSES A CHILD 12 OR YOUNGER) IS GUILTY OF FELONY STALKING.

SDCL 22-22-1 -- RAPE DEFINED.

SDCL 22-22-2 -- SEXUAL PENETRATION DEFINED.

SDCL 26-7A-17-- NOTICE TO STATE'S ATTORNEY OF CHILD TAKEN INTO TEMPORARY CUSTODY—WRITTEN REPORT--NOTICE TO COURT.

SDCL 26-7A-18 -- TEMPORARY CUSTODY HEARING –BEST INTERESTS OF CHILD— CONDUCTED TELEPHONICALLY.

SDCL 26-7A-19 -- OPTIONS OF COURT FOLLOWING TEMPORARY CUSTODY HEARING FOR ABUSED OR NEGLECTED CHILD.

SDCL 26-7A-19.1 -- PREFERENCE FOR PLACEMENT OF ABUSED OR NEGLECTED CHILD WITH RELATIVES AFTER HEARING.

SDCL 26-7A-27-- POLICE RECORDS OF CHILDREN TAKEN INTO TEMPORARY CUSTODY—CONFIDENTIALITY.

SDCL 26-7A-30 -- DUTY OF COURT TO ADVISE CHILD, PARENTS, GUARDIAN, OR CUSTODIAN OF RIGHTS--REPRESENTATION BY ATTORNEY—MOTION FOR NEW HEARING.

SDCL 26-10-1 -- ABUSE OF OR CRUELTY TO A MINOR IS A FELONY.

SDCL 26-10-30 -- PERMITTING PHYSICAL OR SEXUAL ABUSE OF CHILD AS A FELONY.
SDCL 26-10-31-- CAUSING CHILD TO BE PRESENT WHERE METHAMPHETAMINES USED, DISTRIBUTED, OR MANUFACTURED AS A MISDEMEANOR.

SDCL 22-22-7 -- SEXUAL CONTACT WITH CHILD UNDER SIXTEEN -- FELONY OR MISDEMEANOR.

SDCL 22-22-7.1 -- SEXUAL CONTACT DEFINED.

SDCL 22-22-7.3 -- SEXUAL CONTACT WITH PERSON UNDER SIXTEEN BY A PERSON UNDER SIXTEEN—MISDEMEANOR.

SDCL 22-22-24.3 -- SEXUAL EXPLOITATION OF MINOR.

SDCL 22-23-2 -- PROMOTING PROSTITUTION—FELONY.

SDCL 22-24A-1 -- SALE OF CHILD PORNOGRAPHY – FELONY.

SDCL 22-24A-3 -- POSSESSING, MANUFACTURING, OR DISTRIBUTING CHILD PORNOGRAPHY – FELONIES.

SDCL 22-24A-5 -- SOLICITATION OF MINOR –FELONY.

SDCL 23A-42-2 -- SEVEN-YEAR LIMITATIONS PERIOD FOR OTHER PROSECUTIONS.

SDCL 25-5A-18 – ORDER TERMINATING PARENTAL RIGHTS.

SDCL 25-6-1.1 – FATHER OF ILLEGITIMATE CHILD NOT ENTITLED TO NOTICE OF ADOPTION UNLESS ACKNOWLEDGED.

SDCL 25-7-16 -- CRIMINAL NONSUPPORT. A PARENT WHO INTENTIONALLY OMITS TO FURNISH NECESSARY SUPPORT IS GUILTY OF MISDEMEANOR. IF A PARENT LEAVES THE STATE FOR MORE THAN 30 DAYS DURING A VIOLATION, NONSUPPORT IS A FELONY.

SDCL 25-10-1 -- DOMESTIC ABUSE— DEFINITIONS.

SDCL 25-10-13 -- VIOLATION OF PROTECTION ORDER OR NO CONTACT ORDER AS MISDEMEANOR OR FELONY.

SDCL 26-7A-12 -- TEMPORARY CUSTODY BY LAW ENFORCEMENT OFFICER OR COURT SERVICES OFFICER WITHOUT COURT ORDER.

SDCL 26-7A-13 -- COURT-ORDERED TEMPORARY CUSTODY—NOTICED HEARING—WITHOUT NOTICED HEARING.

SDCL 26-7A-15 -- NOTICE TO PARENTS, GUARDIAN, OR CUSTODIAN OF CHILD TAKEN INTO TEMPORARY CUSTODY –NOTICE OF HEARING—INFORMATION TO INDIAN CUSTODIAN OR DESIGNATED TRIBAL AGENT.

SDCL 26-7A-15.1 -- PROCEEDINGS UNDER CERTAIN CHAPTERS TO WHICH ICWA APPLIES – PROCEDURES.

SDCL 26-7A-15.2 -- FORM OF NOTICE TO PARENT, CUSTODIAN, OR INDIAN TRIBE OF CHILD CUSTODY PROCEEDING.

SDCL 26-8A-27— TERMINATION OF PARENTAL RIGHTS.

C. REPORTING STATUTES AND IMMUNITY FROM LIABILITY

South Dakota law requires that certain professionals report child abuse or neglect. It also permits others, who are not mandated, to report. SDCL 26-8A-3. Mandatory reporters are to report orally and immediately by telephone or otherwise to the state's attorney of the county in which the child resides or is present, to the Department of Social Services (DSS), or to law enforcement officers. SDCL 26-8A-8. A mandatory reporter who has reasonable cause to suspect that a child under the age of eighteen has been abused or neglected as defined in SDCL 26-8A-2 shall report that information. Any person who knows or has reason to suspect that a child has been abused or neglected as defined in SDCL 26-8A-2 may report that information as provided in SDCL 26-8A-8.

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

- Any person who has reasonable cause to suspect that a child has died as a result of child abuse or neglect shall report that information to the medical examiner or coroner. SDCL 26-8A-4.
- Hospitals must have a written policy regarding reporting. Staff of a hospital or similar institution shall immediately notify the person in charge of the institution or his designee of suspected abuse or neglect and that person must make a report. The person required to report

shall promptly submit all medical examination, treatment, and hospital records regarding the child to the state's attorney. SDCL 26-8A-6.

- Schools (public or private, whether accredited or unaccredited) shall have a written policy regarding reporting of child abuse and neglect. When any person who has contact with a child through the performance of services in any school shall notify the school principal or school superintendent or designee of suspected abuse or neglect. The superintendent or school principal shall make a report. SDCL 26-8A-7.
- 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 state's attorney and law enforcement receive a report, they shall immediately notify DSS. SDCL 26-8A-8.
- A report of child abuse or neglect shall be investigated by the DSS or law enforcement officers. SDCL 26-8A-9.
- Investigating personnel may personally interview a child outside the presence of the child's parent, guardian, or custodian without advanced notice or consent. SDCL 26-8A-9.
- DSS is the central registry for child abuse and neglect reports. SDCL 26-8A-10.
- All investigative case records and files relating to reports of child abuse or neglect are confidential and no disclosure of any such records, files, or other information may be made except as authorized by law. SDCL 26-8A-13.
- DSS may release information as authorized by SDCL 26-8A-13.
- Any person or party participating in good faith in the making of a report, or the submitting of copies of medical examination, treatment, or hospitalization records is immune from any liability, civil or criminal. SDCL 26-8A-14. Intentional failure of a mandatory reporter to make a required report under SDCL 26-8A-8 could result in charges of a Class 1 misdemeanor.

D. ROLE OF CHILD'S ATTORNEY

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. A special advocate may be appointed to represent the best interest of the child and to assist the child's attorney. SDCL 26-8A-20. 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 has 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/her 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.
- 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 S.D. 56, ¶ 18, 663 N.W.2d 225, 232-33.

- 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).

***According to Presiding Judge Policy 3-PJ-5 “An attorney appointed to represent abused and neglected children, including those appointed as guardian ad litem, shall certify that they have viewed and completed the abuse and neglect attorney training developed by the South Dakota Unified Judicial System” <http://ujsatv.sd.gov/>**

E. ROLE OF COURT APPOINTED SPECIAL ADVOCATE (CASA)

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.

TRAINING:

Before being assigned to any cases, CASA volunteers must pass a background check and receive a minimum of 30 hours of training, along with 12 hours of annual continuing education training. CASA volunteers are appointed by the judge and take an oath of office.

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.

REPORTS:

The volunteer manages 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 regarding placement.

SPEAKING FOR THE CHILD:

The CASA volunteer helps the child understand the 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 towards a permanent outcome.

ASSIGNMENT OF A CASA:

In most counties, the local CASA office will generate the petition and order appointing a CASA to a case.

III. INDIAN CHILD WELFARE ACT (ICWA)

The Indian Child Welfare Act, commonly known as "ICWA," is codified at 25 U.S.C. § 1901-1963. Both ICWA and the Bureau of Indian Affairs (BIA) provide guidelines for state courts in administering ICWA cases.

The South Dakota Supreme Court has also determined that ICWA must be complied with in all abuse and neglect cases involving an Indian child litigated in the Circuit Courts of the state of South Dakota. *People in Interest of C.R.M.*, 307 N.W.2d 131, 132 (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." 25 U.S.C. § 1903(4).

ICWA and the BIA Guidelines define "child custody proceedings" as specifically including the following:

1. Foster care placement, which is any action removing an Indian child from his or her 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;
2. Termination of parental rights, which is any action resulting in the termination of a parent-child relationship;
3. Pre-adoptive placement, which is 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; or
4. Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. 25 U.S.C. § 1903(1)(i)-(iv), BIA Guidelines § 23.2.

The standard of proof is increased in all ICWA cases to "beyond a reasonable doubt" at disposition. 25 U.S.C. § 1912(f). The matters which must be proved beyond a reasonable doubt and supported by the testimony of a qualified expert witness according to the South Dakota Supreme Court are as follows:

1. Whether termination of parental rights is the least restrictive alternative and in the best interest of the child. SDCL 26-8A-27; *Matter of J.L.H.*, 299 N.W.2d 812, 814 (S.D. 1980).
2. 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(d); *People in Interest of S.R.*, 323 N.W.2d 885, 887-88 (S.D. 1982). Active efforts are required even if there are aggravated circumstances present pursuant to SDCL 26-8A-21.

3. 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. 25 U.S.C. § 1912(f); *People in Interest of P.B.*, 371 N.W.2d 366, 372 (S.D. 1985).
4. That 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).

A. QUALIFIED EXPERT WITNESS FOR ICWA CASES

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 (QEW) under ICWA. Persons with the following characteristics are most likely to meet the requirements for a QEW for the purposes of Indian child custody proceedings:

1. 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;
2. A member of another tribe who is recognized to be a QEW by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe;
3. A lay person who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe;
4. A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe. *People ex rel. A.B.*, 2016 S.D. 44, ¶ 18, 880 N.W.2d 95, 102.

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:

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, 651-52 (S.D. 1982).

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

STEP 1

- A. Is the child involved an Indian child within the terms of the act? No → STOP → ICWA does not apply
Yes
↓
- B. Is the child under the age of 18? No → STOP → ICWA does not apply
Yes
↓
- C. Is the child unmarried? No → STOP → ICWA does not apply
Yes
↓
- D. Is the child either (1) a member of an Indian tribe, or (2) eligible for enrollment in an Indian tribe? No → STOP → ICWA does not apply
Yes
↓
Continue to STEP 2

Note: 34 U.S. Code § 12133 - "Indian tribe" defined

"Indian tribe" means a tribe, band, pueblo, nation, or other organized group or community of Indians, including an Alaska Native village (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) [1] that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

**ICWA Determination
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 —————> Continue to STEP 3

No



STOP ICWA Does Not Apply

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

Yes —————> Continue to STEP 3

No



STOP ICWA Does Not Apply

- C. Does the proceeding involve a pre-adoptive placement of the child?

Yes —————> Continue to STEP 3

No



STOP ICWA Does Not Apply

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

Yes —————> Continue to STEP 3

No



STOP ICWA Does Not Apply

- E. Does the court proceeding involve a status offense?

Yes —————> Continue to STEP 3

No



STOP ICWA Does Not Apply

ICWA Determination
STEP 3

Does the State have jurisdiction of the court proceedings?

- A. Is the Indian child domiciled on a reservation? No → ICWA governs proceedings
Yes → STOP → Exclusive jurisdiction – case transfers to the tribe

- B. Is the Indian child a ward of a trial court? No → ICWA governs the proceedings
Yes → STOP → Exclusive jurisdiction – case transfers to the tribe

- C. Has the state court granted a petition to transfer the proceeding to a tribal court? No ICWA governs the proceedings
Yes → STOP → Case transfers to the tribe

IV. PROTECTIVE CUSTODY/INTAKE

In cases of suspected child abuse or neglect, the investigator must realize that the priority is protection of the child. If the law enforcement officer believes the conditions under SDCL 26-7A-12(2) or (4) exist, or if the court believes that any of the conditions under SDCL 26-7A-13 exist, it may be necessary to place the child in temporary custody to ensure the child's safety and well-being.

A. WHEN LAW ENFORCEMENT TAKES CUSTODY

If the child is abandoned or seriously endangered in the child's surroundings or is seriously endangering others and immediate removal of the child appears to be necessary for the child's protection or for the protection of others. SDCL 26-7A-12(2).

If the officer reasonably believes that temporary custody is warranted because there exists an imminent danger to the child's life or safety and there is no time to apply for a court order and the child's parents, guardian, or custodian refuse an oral request for consent to the child's removal from their custody or the child's parents, guardian, or custodian are unavailable. SDCL 26-7A-12(4).

When law enforcement takes custody, the officer must fill out a temporary custody directive and serve it on the parents when possible.

B. COURT ORDERED PLACEMENT WITH NOTICED HEARING:

The court may order temporary custody of a child within the jurisdiction of the court during any noticed hearing. SDCL 26-7A-13.

C. AUTHORITY FOR A PICK UP AND PLACE ORDER WITHOUT NOTICED HEARING:

Without noticed hearing, the court or an intake officer may immediately issue a written temporary custody directive in the following instances on receipt of an affidavit or, in the absence of a written affidavit when circumstances make it reasonable, on receipt of sworn oral testimony communicated by telephone or other appropriate means:

- (1) An application by a state's attorney, social worker of DSS, or law enforcement officer stating good cause to believe as follows:
 - (a) The child is abandoned or is seriously endangered by the child's environment; or
 - (b) There exists 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

The court should enter a written order under SDCL 26-7A-13 authorizing the child's placement into the custody of DSS and that order should be provided to the parents as notice that the child has been placed into the temporary custody of DSS.

D. CONTACTING AN INTAKE OFFICER

A law enforcement officer who removes a child from home shall immediately contact an intake officer who shall hold an intake hearing. SDCL 26-7A-13.1. Intake officers are circuit judges or their designees, but not court services officers, law enforcement officers, or state's attorneys. SDCL 26-7A-1(20). 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 temporary custody (48 hour) hearing is held if the child is not released from custody. Available placement options should be prepared.

Temporary custody directive form is available to follow along with the intake officer during the hearing. Reviewing the temporary custody directive form ahead of time is recommended. This will help in knowing what the intake officer is looking for and what will be considered in determining whether to continue the removal of the child from the home.

E. PURPOSE OF AN INTAKE HEARING

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.

No child may be held in temporary custody longer than forty-eight (48) hours excluding Saturdays, Sundays, and court holidays unless a temporary custody petition or other petition has been filed, the child is within the jurisdiction of the court, and the court orders longer custody during a noticed hearing or a telephonic hearing. SDCL 26-7A-14; *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69 ¶¶ 13-14, 822 N.W.2d 62, 66.

F. PROCEDURES FOR AN INTAKE HEARING

1. May be telephonic or other appropriate means. SDCL 26-7A-13.
2. Rules of evidence do not apply. SDCL 26-7A-56.
3. Rules of procedure do not apply. SDCL 26-7A-56.
4. No record is needed.
5. May immediately issue a written temporary custody directive. SDCL 26-7A-13.

G. OPTIONS FOR TEMPORARY CUSTODY

1. The child may be placed in the temporary care of the DSS, foster care, or shelter care as designated by the court to be the least restrictive alternative. SDCL 26-7A-14, -16.
2. The court may at any time order the release of the child from temporary custody without holding a hearing (return child to parents, guardian, or custodian)
3. Detention is not an option for abused or neglected children. SDCL 26-7A-26.
4. Jail is not an option for abused or neglected children. SDCL 26-7A-26(¶1).

H. NOTICE

1. Immediate notice to parents, guardian, or custodian of child taken into temporary custody. SDCL 26-7A-15.
2. Notice to state's attorney at the earliest opportunity. SDCL 26-7A-17.

V. TEMPORARY CUSTODY HEARING (48-HOUR HEARING)

A. TEMPORARY CUSTODY HEARING (48-HOUR HEARING)

The temporary custody hearing (48-hour hearing) is the initial stage of the formal court process. SDCL 26-7A-15 requires that a hearing be held within 48 hours of the child being placed in the emergency temporary custody of DSS. The state's attorney's office is required to provide notice, without unnecessary delay, of the date, time, and place of the hearing to the parents, guardian, or custodian. If the temporary custody hearing concerns an apparent abused or neglected Indian child, the state's attorney or DSS shall make reasonable efforts to inform the Indian custodian and the designated tribal agent for the Indian child's tribe, if known, of the date, time, and place of the hearing. Failure to notify the child's parents, guardian, or custodian, or to inform the Indian custodian or the designated tribal agent, of the temporary custody hearing is not cause for delay of the hearing if the child is represented by an attorney. At the temporary custody hearing the court has the following options available:

1. Order the release of the child from temporary custody, either with or without restriction or condition or upon written promise of the child's parents, guardian, or custodian regarding the care and protection of the child;
2. Transfer the case to the child's tribe (either exclusive or concurrent jurisdiction);
3. Transfer the case to another venue (case is proper wherever the child and mother are domiciled); or
4. Continue 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 DSS, in foster care, or shelter. The court and DSS shall give placement preference to a relative, custodian, or an individual, not related by birth, adoption, or marriage, but with an emotionally significant relationship with the child, who is available, qualified, and provided that the placement with that relative, custodian, or individual is in the best interest of the child. SDCL 26-7A-19.

If the temporary custody of the child is continued, the court may provide the visitation of the child by the child's parents, guardian, or family members in keeping with the best interests of the child. 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 60 days.

At the temporary custody (48 hour) hearing the court will consider information as to why the children were removed, this information includes police reports, DSS reports, a statement from the state's attorney's office, and any other information necessary for

the court to decide as to which option is in the best for the child. The court may also appoint attorneys at this stage if it's clear the case will move on to the next stage of the proceedings.

Pursuant to SDCL 26-7A-18, at the temporary custody (48 hour) hearing the court shall consider evidence of the need for continued temporary custody of the child in keeping with the best interests of the child. It 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. If ICWA applies, the court must address the question as to whether continued custody is necessary to prevent imminent physical damage or harm to the minor child. SDCL 26-7A-19 gives the options for the court regarding placement of the child following the temporary custody hearing.

1. **HOLD THE HEARING WITHIN 48 HOURS** (excluding Saturdays, Sundays and holidays) SDCL 26-7A-14.
2. **IT IS A CLOSED HEARING** absent a compelling reason to open it. SDCL 26-7A-36.
3. **MAY BE TELEPHONIC.** SDCL 26-7A-18.
4. **BEST INTERESTS OF THE CHILD** At the temporary custody hearing the court shall consider the evidence of the need for continued temporary custody of the child in keeping with the best interests of the child. SDCL 26-7A-18.
5. **RULES OF EVIDENCE DO NOT APPLY** Instead, the court may design its own rules of evidence and procedure to fully inform the court of the exact status of the child. SDCL 26-7A-32(2), -56.
6. **A VERBATIM RECORD SHALL BE TAKEN OF ALL HEARINGS**, except telephonic temporary custody hearings held pursuant to SDCL 26-7A-13, -35.
7. **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.
8. **ISSUE A TEMPORARY CUSTODY ORDER**
9. **SCHEDULE ADVISORY HEARING**

B. PROCEDURES FOR THE TEMPORARY CUSTODY HEARING (48 HOUR HEARING)

1. PETITION FOR TEMPORARY CUSTODY
2. PETITION FOR ABUSE OR NEGLECT
3. SUMMONS FOR ABUSE OR NEGLECT
4. INDIAN CHILD WELFARE ACT (ICWA) AFFIDAVIT
5. PROOF OF SERVICE OF PETITION AND SUMMONS
6. TEMPORARY CUSTODY HEARING (48 HOUR HEARING) ORDER

If a child has been or is to be removed, the court shall determine the 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 DSS to avoid removal or to return the child to the home. If ICWA applies the court must inquire and address whether the continued custody of the Indian child is necessary to prevent imminent physical damage or harm to the minor child.

C. NOTICE:

All parents should be named and given notice with the petition by either personal service or publication.

- **Military Status:** Timely notification should be given to parents serving in the armed forces. An Affidavit of Non-Military Status should be on record prior to adjudication. 50 USCS § 3931.
- **ICWA Notice Requirements:** No proceedings shall be held until at least ten (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 (20) additional days to prepare for such proceeding. 25 USC 1912(a).
- **Lack of Service:** Failure of service on one or more parties may require modification or repetition of the time periods as to those parents or custodians who have not been served.

The action can proceed as to those parties who have been served, even if some other parties have not been served.

Prior to the advisory hearing the following notices are required:

IN NON-ICWA CASES:

1. All Parties need to be provided with the petition and summons not less than five (5) days before the date of the advisory hearing. Proof of service shall be filed with the court before commencement of the hearing on the petition. Notice can be through personal service or by publication. SDCL 26-7A-47, -48.

IN ICWA CASES: <https://www.bia.gov/bia/ois/dhs/icwa>

1. All parties need to be provided with clear and understandable notice by registered or certified mail, return receipts requested, of the involuntary proceeding, and maintain proof that the notice was given. The court will not hold a foster-care placement or termination of parental rights proceeding until at least ten (10) days after the receipt of the notice of the particular proceeding (with extensions allowed at the option of the parent or tribe).

2. Notice must be provided to the Department of Interior and the BIA and the Indian child's tribe(s) through certified or registered mail.
3. Notice must also be provided to counsel for the parties and the tribes.

VI. ADVISORY HEARING

A. PURPOSE

SDCL 26-7A-54 mandates that an advisory hearing must be held before an adjudicatory hearing. The advisory hearing is oftentimes the first time the parents appear before the court. The court will inquire as to whether the parents have received a copy of the petition and summons (if not, they may be served in court at the advisory hearing).

The court shall:

1. Advise the parents of their right to have an attorney;
2. Their right to continue the proceedings to another date;
3. The nature of the proceedings;
4. The allegations in the petition;
5. The burden of proof that is on the state; and
6. Their constitutional and statutory rights.

The following may occur at the advisory hearing:

1. If the parents request an attorney, the parent may enter a denial to the allegations in the petitions and the matter will be continued to a future date.
2. If a parent has notice and does not appear, the court may enter a default adjudication. The petition is admitted to in its entirety by the parent who does not appear in court. SDCL 26-7A-53.
3. Parents who appear in court for the advisory hearing have the option to admit to the petition, they can admit to a portion of the petition or to the entire petition. SDCL 26-7A-55.
4. After a default ruling or an admission, the court will enter oral findings of fact and conclusions of law for adjudication and make a specific finding that the children are abused or neglected.
5. The tribe can intervene and/or move to transfer the case to tribal court. If neither parent objects to the transfer and the case transfers to tribal court the case is then closed in state court and state court jurisdiction ends.

B. NOTICE:

If proper notice was not provided to any party, tribe, BIA, or Department of Interior the advisory hearing should be continued until all parties are noticed.

Prior to the adjudicatory hearing the following notices are required:

IN NON-ICWA CASES:

1. All parties need to be provided with the notice of hearing within five (5) working days of the adjudicatory hearing. Notice can be through personal service or by publication. SDCL 26-7A-47, -48.
2. Notice must also be provided to counsel for the parties

IN ICWA CASES: <https://www.bia.gov/bia/ois/dhs/icwa>

1. The party seeking 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 or certified mail with return receipt requested, of the pending proceedings and of their right to intervention. No foster care placement or termination of parental rights proceeding shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary.
2. Notice must be provided to the Indian child's tribe(s) through certified or registered mail.
3. Notice must also be provided to counsel for the parties and the tribes.

VII. ADJUDICATION HEARING

“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.

A. TIMING AND PURPOSE OF ADJUDICATORY HEARINGS

Timing: Speedy adjudication can reduce the length of time a child spends in foster care. The court should reduce delay while using due diligence to protect the rights of the parents and child and to determine the best interests of the child.

1. Criminal Proceedings: In all but extremely special circumstances, the adjudicatory hearing should not be postponed because of criminal proceedings. The order and timing of both criminal and civil proceedings relating to the child can have implications regarding the parent’s Fifth Amendment privilege against self-incrimination. *People in the Interest of D.A.J.*, 2008 S.D. 92 ¶ 12, 757 N.W.2d 70, 74.
2. The court should give greater weight to the interest of the child and a court should not grant a continuance if it would be in the detriment of the child.
3. Scheduling Conflicts: Continuances because of scheduling conflicts should only be granted upon a showing that a continuance will not be detrimental to the child and then only for a reasonable time-period.

Purpose: The 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). In general, the adjudicatory hearing looks to the past, while the primary focus of the dispositional hearing is in the future. *People in Interest of P.M.*, 299 N.W.2d 803, 806 (S.D. 1980).

Confidentiality: Adjudicatory hearings are confidential and closed to the public unless the court finds compelling reasons to require otherwise. SDCL 26-7A-36.

Findings of facts and conclusions of law: Regardless of the outcome of the case, findings of fact and conclusions of law must be entered as to the result of the case. SDCL 26-7A-86, -87. 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).

Petition denied: If the petition is not sustained to all parties/respondents or it is dismissed by the State, jurisdiction of the court is terminated. *In the Interest of T.G.*, 2001 S.D. 15, ¶¶ 7-8, 621 N.W.2d 608, 610.

B. DISCOVERY

Abuse and neglect cases are civil in nature, therefore, except as otherwise provided in SDCL 26-7A-57 to -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, -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 temporary custody (48 hour) hearing or the advisory hearing or at the time that attorneys are appointed. The court may consider entering a scheduling order, like 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.

C. ELEMENTS

SDCL 26-8A-2 defines the term “abused or neglected child.” The petition should allege all the subsections that apply to the case and the facts which substantiate the specific allegations, in language that the parent would understand.

At the adjudicatory hearing, the state must prove the alleged elements by clear and convincing evidence. *Matter of S.W.*, 428 N.W.2d 521, 523-24 (S.D. 1988); SDCL 26-7A-86, -87. This includes Indian Child Welfare Act cases. *People in Interest of S.R.*, 323 N.W.2d 885, 886 (S.D. 1982); *Matter of K.A.B.E.*, 325 N.W.2d 840, 843 (S.D. 1982); *People in Interest of P.B.*, 371 N.W.2d 366, 371 (S.D. 1985).

D. EVIDENCE

Generally, the evidence at an adjudicatory hearing must relate to the allegations stated in the petition. *Matter of C.J.H.*, 371 N.W.2d 345, 350 (S.D. 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 S.D. 76, ¶¶ 28-29, 721 N.W.2d 83, 91-92. 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 J.A.H.*, 502 N.W.2d 120, 124 (S.D. 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 C.E.*, 283 N.W.2d 554, 556 (S.D. 1979); *Matter of N.J.W.*, 273 N.W.2d 134, 138 (S.D. 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 chapter 26-7A. SDCL 26-7A-34(1), -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 T.L.J.*, 303 N.W.2d 800, 807 (S.D. 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 13 may be introduced under SDCL 19-19-806.1 and -806.2 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.

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. Children may also be called to testify. *In the Matter of S.A.*, 2005 S.D. 120, ¶ 19, 708 N.W.2d 673, 679-80. However, requiring a child to testify against a parent may retraumatize the child. "The child's interest should be protected throughout the proceedings and the child's attorney is specifically charged with that duty." *In the Interest of T.A.*, 2003 S.D. 56, ¶ 18, 663 N.W.2d 225, 232. The child's attorney should request a motion hearing to state on the record any objection for the child to testify in court.

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. SDCL 19-19-806.1, -806.2. 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.

In cases where ICWA applies, qualified expert testimony must establish by clear and convincing evidence "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), 1912(d). Placement preferences must also be addressed. 25 USC § 1915(b).

E. 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 26-8A-2. The first prong of the inquiry requires 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 S.D. 126, ¶ 19, 708 N.W.2d 313, 317.

F. FINDINGS OF FACT CONCLUSIONS OF LAW

Whatever the result of the adjudicatory hearing, the court must issue written findings of fact and conclusions of law and an adjudicatory order. SDCL 26-7A-86, -87.

G. NOTICE:

Notice of entry of adjudicatory orders are required SDCL 26-8A-28. The notice of entry may be served as authorized by the rules of civil procedure to include service on counsel.

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. 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 should be set at the close of the adjudicatory hearing while all parties are present to avoid delays in service of notice. SDCL 26-8A-24.

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. It is important to ascertain who the parents are as soon as possible. When parents are brought into the litigation late, children often remain in foster care longer than necessary;
5. If the child is to remain 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; and
6. If the allegations are not supported by evidence the court shall enter additional findings and conclusions and final order. SDCL 26-7A-86.

H. NOTICE OF ENTRY

Notice of entry, certificate of service of an adjudicatory order, and findings of fact and conclusions of law shall be made within five (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. 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 (10) 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 (30) after entry of the final dispositional order. Appeal time does not begin until notice of entry of adjudication has been served. Therefore, serving notice of entry upon the parties is imperative in eliminating later delays.

VIII. HEARINGS

Hearings are important for case flow management. It's important for each type of hearing order to reflect such in the order title/heading, for example: permanency hearing order or review hearing order.

A. REVIEW HEARING (AKA: STATUS HEARING)

Review hearings, sometimes referred to as interim dispositional hearings, which take place after adjudication and before final disposition, provide the court an opportunity to review the progress made by the parties since the prior hearing. Federal law contemplates a routine but thorough review of case progress.

Specifically, review is:

To determine the safety of the child, 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 and safely maintained in the home or placed for adoption or legal guardianship. 42 USC § 675(5)(B).

Review hearings assist in attaining the goal of permanency for children within one (1) 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 (6) months. 42 USC § 675(5)(B); SDCL 26-8A-24.

Items to be addressed at the review hearing:

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

- a. Assess ICWA compliance;
- b. Determine the appropriateness of the placement;
- c. Evaluate the extent of compliance with the case plan;
- d. Evaluate the extent of progress toward remedying those conditions necessitating a foster care placement;
- e. Project a date when a child may be returned home, placed for adoption, or placed in long term foster care; and
- f. Status of the concurrent plan.

Reports from the agency, the guardian ad litem, and CASA help inform the court of issues that may need to be addressed at the review hearing. Reports should be received prior to each review hearing. Reports should address each of the issues discussed at the review hearing. The reports and attachments should be distributed in accordance with local court practices. Best practice is to have the report to all the parties at least five (5) days in advance of the hearing.

Key decisions the court must make at the review hearing: (SDCL 26-8A-25)

- a. Whether there is a need for continued placement of a child.
- b. Whether all options for placement with relatives have been pursued and documented.
- c. Whether the rights of all parents have been addressed in the proceedings.
- d. Whether the permanent plan remains in the child's best interests.
- e. Whether services and responsibilities outlined in the case plan needs to be modified or clarified.
- f. Whether the agency is making reasonable efforts to rehabilitate the family and to eliminate the need for placement.
- g. Whether terms of visitation or support need to be modified.
- h. Whether the child's current placement is appropriate to meet the child's needs.
- i. Whether additional court orders are required to move the child closer to permanency.

B. PERMANENCY HEARING (26-8A-21.2)

Permanency hearings are required every twelve (12) months until the permanent plan is achieved, and the case is closed. Permanency hearings may be held in conjunction with review hearings.

In cases where parental rights are not terminated, and the child is not returned to the home the court **must** state **compelling reasons** (1) for not terminating parental rights and (2) for continuing services. SDCL 26-8A-22(2), -26(3).

The purpose of this permanency hearing is to make sure that there is an appropriate permanency goal for each child, that everyone is doing their part to achieve the goal, that the right steps are being taken to achieve the goal as quickly as possible, and if not, what changes are necessary. The questions asked of the family services specialist at the permanency hearing are designed to maintain a sense of urgency in moving the child towards achieving permanency while at the same time examine whether the needs of the child, and of the family, are being met in a way that will promote permanency. They are also meant to give greater consistency to the process so that everyone knows what to expect at each permanency hearing. The goal in developing these questions is that every hearing will be substantive as well as efficient. For sample questions, refer to the form on page 193.

C. PLACEMENT HEARING

If a party objects to the placement of a child in their current placement or proposed placement, judges may allow testimony to be presented as to alternative placements. If the party does not have a proposed alternative placement no hearing is necessary.

An Indian child must be placed according to the ICWA placement preferences, unless the tribe has established by a resolution a different order of preference, then the tribe's placement preference controls. The order of adoptive placement preference under ICWA is:

1. A member of the child's extended family;
2. Other members of the Indian child's tribe; or
3. Other Indian families. 25 UCS § 1915.

The order of foster care or pre-adoptive placement preference is:

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. 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. 25 UCS § 1915.

The court must, when appropriate, consider the placement preference of the Indian child or the Indian child's parent.

If a child is placed outside of the ICWA placement preferences, the court must hold a hearing to determine if there was "good cause" to place the Indian child outside of the placement preferences. The party seeking a departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from placement preferences. A court's determination of good cause to depart from placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
2. The request of the child, if the child is of sufficient age and capacity to under the decision that is being made;
3. The presence of a sibling attachment that can be maintained only through a particular placement;
4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable

in the community where families who meet the placement preferences live;

5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, by none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

D. ADOPTION SAFE FAMILIES ACT (ASFA) HEARING

SDCL 26-8A-21 mandates DSS to provide reasonable efforts to the family for reunification of the children and parents. SDCL 26-8A-21.1 sets forth the exceptions to providing reasonable efforts (this **does not** apply to ICWA cases). The state must provide notice of its intent to seek a ruling under the Adoption Safe Families Act (ASFA).

ASFA allows the State to seek final disposition sooner than the one year allowed in most cases for permanency. Petitioner should:

1. Add a paragraph to the petition for abuse or neglect with supporting facts pursuant to SDCL 26-8A-21.1 or file a separate petition for ASFA;
2. Provide notice to the parties that the state intends to seek a ruling that ASFA applies;
3. After the adjudicatory hearing request that a no further reasonable efforts hearing be scheduled;
4. At the ASFA hearing present certified copies of supporting documents, those documents could include:
 - a. Adjudicatory findings of fact and conclusions of law from a prior abuse and neglect proceeding;
 - b. Final dispositional findings of fact and conclusions of law for termination of parental rights in a prior abuse and neglect proceeding; or
 - c. Certified copies of a judgement of conviction in a criminal case pursuant to the list of crimes in 26-8A-21.1.
5. The worker should testify as to the previous removals of the child or siblings, the efforts DSS has provided in the previous cases, as well as in the open case and why the same conditions exist that should authorize DSS to stop providing efforts for reunification in the open case;
6. Once the court determines that ASFA applies request a final dispositional hearing;
7. The permanency hearing must be set within 30 days. SDCL 26-8A-21.2; and
8. Prepare the ASFA findings of fact conclusions of law and order.

E. MOTION/EVIDENTIARY HEARING

If a Motion is filed by any party the court shall hold a hearing to address the motion filed. This can be done at the adjudicatory hearing or in a separate hearing.

IX. FINAL DISPOSITION

In abuse and neglect proceedings, the dispositional phase is the phase in which the court makes the determination regarding the placement and care of the child both in the short-term and ultimately, on a permanent basis. 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, past and present physical, mental and moral condition of the child and of the child’s parents, guardian, or custodian.”

Disposition should occur quickly, particularly when the child is placed out of the home. Dispositional hearings may be held in conjunction with review hearings if the parties and the judge have had sufficient opportunity to review the reports. Dispositional decisions will be revised during subsequent case reviews. Therefore, there is no need to postpone the dispositional hearing to resolve every issue.

Final Disposition: Final disposition must occur within 12 months. SDCL 26-8A-22. There are times when good cause may exist to extend the case beyond 12 months.

A. KEY DECISIONS THE COURT MUST MAKE:

1. Placement and Care

The court will make the determination of the placement and care of the child placed out of the home. If the child is to remain at home or returned home, the court may 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.

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 S.D. 36, ¶ 23, 590 N.W.2d 473, 477. The child’s attorney may also ask for termination. *Id.*

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 those alternatives can provide a better permanent home for the child. 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 appellate review. SDCL 26-8A-26, -26.1, -27.

Guardianship of a child in DSS custody or for whom DSS has placement responsibility shall be initiated by a petition on behalf of the person for whom guardianship is sought. Caregivers assume legal guardianship of a child in out-of-home care without termination of parental rights, as is required for an adoption. The person(s) appointed as guardian of the child has the custody, care, and supervision of the child until the age of majority. The court shall set a date for a hearing and determine how legal noticed is to be assured. The court appoints a guardian by letter of guardianship and the guardian accepts by oath of guardianship.

Another Planned Permanent Living Arrangement (APPLA) is a term created by ASFA to replace the term "Long-term Foster Care". With APPLA, DSS maintains care and custody of the child and arranges a living situation in which the child is expected to remain until the child reaches the age of majority (18 years of age). APPLA is a permanent placement option when reunification, adoption, or legal guardianship has been ruled out.

2. Reasonable Efforts. SDCL 26-8A-21.

What constitutes "reasonable efforts" varies greatly and depends upon the facts and circumstances of each individual case. "Reasonable" means "reasonable under the circumstances" and not "on exhaustion of every possible form of assistance" as sometimes urged by defense attorneys. *People in Interest of C.L.*, 356 N.W.2d 476, 478 (S.D. 1984). (see also, *Matter of R.Z.F.*, 284 N.W.2d 879, 882 (S.D. 1979) (the best interest of the child trumps the reasonable efforts to aid parents); *Matter of B.E.*, 287 N.W.2d 91, 95 (S.D. 1979) (the best interests of the child remain the paramount consideration in these proceedings).

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, 788 (S.D. 1981); *People in Interest of T.L.J.*, 303 N.W.2d 800, 806-07 (S.D. 1981); *Matter of A.I.*, 289 N.W.2d 247, 249 (S.D. 1980); *Matter of R.Z.F.*, 284 N.W.2d 879, 882 (S.D. 1979); *Matter of C.E.*, 283 N.W.2d 554, 556 (S.D. 1979); *Matter of M.S.M.*, 320 N.W.2d 795, 799 (S.D. 1982).

Even when the parent has completed or participated in the items identified in the case plan, 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 S.D. 54, ¶ 20, 697 N.W.2d 18, 23. Termination of parental rights may be justified regardless of parent participation in the protective capacity assessment case plan if the children remain in danger. *Id.* Termination of parental rights may be the least restrictive alternative to ensure the well-being of the children. *In the Matter of S.A.*, 2005 S.D. 120, ¶ 25, 708 N.W.2d 673, 682-83.

The state does not have to exhaust every possible form of assistance. *People in Interest of C.L.*, 356 N.W.2d 476, 478 (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, 65 (S.D. 1984); *Matter of S.W.*, 428 N.W.2d 521, 525 (S.D. 1988).

There is no minimum or maximum period a parent must be provided reasonable efforts. *Matter of B.E.*, 287 N.W.2d 91, 97 (S.D. 1979). However, SDCL 26-8A-26 mandates that no child remains in 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 options.

3. Active Efforts – BIA Guides <https://www.bia.gov/bia/ois/dhs/icwa>

“Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. ICWA requires the use of active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. The active efforts requirement helps ensure that parents receive the services they need so that they can be safely reunited with their children. ICWA requires active efforts prior to foster-care placement or termination of parental rights to an Indian child, regardless of whether the agency is receiving Federal funding. What constitutes active efforts will vary from case-to-case, and courts have the discretion to consider the facts and circumstances of the particular case when determining whether the definition of active efforts is met. For example:

- (a) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (b) Identifying appropriate services and helping and parents to overcome barriers, including actively assisting the parents in obtaining such services;

- (c) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with the extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- (d) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe;
- (e) Taking steps to keep siblings together whenever possible;
- (f) Supporting regular visits with the parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (g) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (h) Monitoring progress and participation in services;
- (i) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- (j) Providing post-reunification services and monitoring.

4. Least Restrictive Alternative.

The court's final disposition must be the least restrictive alternative available to the court in that case. The determination by the court of what constitutes the "least restrictive alternative" in any case is essentially a factual determination for the trial court. *People in Interest of K.C.*, 414 N.W.2d 616, 620 (S.D. 1987); *Matter of N.J.W.*, 273 N.W.2d 134, 140 (S.D. 1978).

What constitutes a least restrictive alternative varies from case to case depending on the facts and circumstances of that case. Any least restrictive alternative available must be commensurate with the best interests of the child. SDCL 26-8A-27. 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, 680 (S.D. 1983); *People in Interest in C.L.*, 356 N.W.2d 476, 479 (S.D. 1984); *In re S.W.*, 398 N.W.2d 136, 139 (S.D. 1986); *People in Interest of E.D.J.*, 499 N.W.2d 130, 135 (S.D. 1993).

The court should weigh the fundamental rights of the parent against the best interest of the child. *In the Interest of L.S.*, 2006 S.D. 76, ¶ 37, 721 N.W.2d 83, 94. 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.*

In many cases, no less restrictive alternative may be available or feasible other than termination of parental rights. At times, the "least restrictive alternative" is termination even though services were not possible or were minimal because of the circumstances of that case. These cases may involve parents who are 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, 148 (S.D. 1986); *People in Interest of T.L.J.*, 303 N.W.2d 800, 806 (S.D. 1981); *In Interest of A.D.*, 416 N.W.2d 264, 268 (S.D. 1987); *Matter of S.T.B.*, 499 N.W.2d 903, 905 (S.D. 1993).

5. 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, 599 (S.D. 1987).

The rights of the parents must give way to the best interests of the child. *Matter of Z.Z.*, 494 N.W.2d 608, 609 (S.D. 1992); *People in Interest of E.D.J.*, 499 N.W.2d 130, 135 (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 S.D. 144, ¶ 21, 654 N.W.2d 786, 792. Long term foster care is generally not in the best interest of a child. *In the Interests of J.G.R.*, 2004 S.D. 131, ¶ 22, 691 N.W.2d 586, 592.

6. Conditions for removal still exist

To terminate parental rights SDCL 26-8A-26 requires 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 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 S.D. 125, ¶ 24, 707 N.W.2d 826, 836. If the conditions that led to the removal cease to exist, the court may consider returning the child.

7. Compelling reasons to extend services over 1 year

In cases where parental rights are not terminated, and the child is not returned to the home (i.e., APPLA 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), -26(3).

B. 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. SDCL 26-7A-90. 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 S.D. 125, ¶ 38, 707 N.W.2d 826, 840.

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a matter of practice, the state's attorney submits the findings of fact and conclusions of law and a proposed dispositional order to the court within ten (10) days

of the hearing. SDCL 15-6-52(a). The other party then has five (5) days to submit objections and proposed findings. SDCL 15-6-52(a). Final order must address child support arrearages. SDCL 25-5A-18; 26-8A-27.

D. NOTICE

Notice of entry of final dispositional orders are required SDCL 26-8A-28. The notice of entry may be served as authorized by the rules of civil procedure to include service on counsel.

X. POST-DISPOSITION/PERMANENCY HEARING

Permanency hearings are required every 12 months until the permanent plan is achieved, and the case is closed. SDCL 26-8A-22(3). Permanency hearings may be held in conjunction with review hearings. The purpose of these hearings is to review the child's placement after the final dispositional hearing. The case is not over when parental rights are terminated. Post-dispositional review hearings should be held until adoption or permanency for the child is achieved. Upon termination of parental rights, custody and guardianship of the children mandatorily vests with DSS. SDCL 26-8A-27. 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 efforts are made to place the child in a permanent placement following 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.

Except under circumstances where placement was with another relative of the child, any relative who has been denied adoptive placement by DSS 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 SDCL 26-8A-29 and shall be filed within thirty (30) days of written notification from the department by regular mail to the relative's last known address. The hearing shall be held within 30 days of the filing of the request for hearing and may be continued for not more than 30 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 DSS pursuant to § 26-8A-27

XI. APPEALS

An appeal from a final order in an abuse or neglect case must be taken within 30 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. 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); SDCL 15-26A-63.1. The rules of appellate procedure for civil appeals are set forth at SDCL chapter 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 S.D. 39, ¶ 8, 678 N.W.2d 594, 597. Discretionary appeals may be filed intermittently 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

XII. FORMS

The following forms are examples and may be used and customized at your discretion.

FORM
<u>TEMPORARY CUSTODY DIRECTIVE</u>
<u>STATE’S AFFIDAVIT OF ABUSE OR NEGLECT</u>
<u>PICK UP AND PLACE ORDER FOR ABUSE OR NEGLECT</u>
<u>PETITION FOR TEMPORARY CUSTODY FOR ABUSE OR NEGLECT</u>
<u>48 HOUR HEARING ORDER FOR ABUSE OR NEGLECT</u>
<u>INDIAN CHILD WELFARE ACT (ICWA) AFFIDAVIT</u>
<u>PETITION FOR DECLARATION OF ABUSE OR NEGLECT</u>
<u>SUMMONS FOR ABUSE AND NEGLECT</u>
<u>ADVISORY HEARING ORDER (ICWA)</u>
<u>ADVISORY HEARING ORDER (NON-ICWA)</u>
<u>STATE’S PROPOSED ADJUDICATORY FINDINGS OF FACT AND CONCLUSIONS OF LAW (ICWA)</u>
<u>STATE’S PROPOSED ADJUDICATORY ORDER (ICWA)</u>
<u>STATE’S PROPOSED ADJUDICATORY FINDINGS OF FACT AND CONCLUSIONS OF LAW (NON-ICWA)</u>
<u>STATE’S PROPOSED ADJUDICATORY ORDER (NON-ICWA)</u>
<u>STATE’S PROPOSED ADOPTION AND SAFE FAMILIES ACT FINDINGS OF FACT AND CONCLUSIONS OF LAW (NON-ICWA)</u>
<u>STATE’S PROPOSED ADOPTION AND SAFE FAMILIES ACT ORDER (NON-ICWA)</u>
<u>REVIEW HEARING ORDER (ICWA)</u>
<u>REVIEW HEARING ORDER (NON-ICWA)</u>
<u>PERMANENCY HEARING ORDER (ICWA)</u>
<u>PERMANENCY HEARING ORDER (NON-ICWA)</u>
<u>PETITION FOR TERMINATION OF PARENTAL RIGHTS FOR ABUSE OR NEGLECT</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL ORDER (ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (NON-ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL ORDER (NON-ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (ASFA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (RETURN TO PARENTS—ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (RETURN TO PARENT—NON-ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL ORDER (NON-ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (COMPELLING REASONS NOT TO TERMINATE PARENTAL RIGHTS—ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (GUARDIANSHIP—ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL ORDER (GUARDIANSHIP—ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (APPLA—NON-ICWA)</u>
<u>STATE’S PROPOSED FINAL DISPOSITIONAL ORDER (APPLA—NON-ICWA)</u>

FORM
<u>GOOD CAUSE FINDINGS OF FACT AND CONCLUSIONS OF LAW (ICWA)</u>
<u>GOOD CAUSE ORDER (ICWA)</u>
<u>FINAL DISPOSITIONAL ORDER RE: CHILD SUPPORT</u>
<u>FAMILY SERVICES SPECIALIST SAMPLE QUESTIONS</u>

XIII. SUPPLEMENTAL RESOURCE INFORMATION

WEBSITE LINKS:

https://sdlegislature.gov/Statutes/Codified_Laws/default.aspx

<http://uis.sd.gov/>

<http://uisatv.sd.gov/>

<http://dss.sd.gov/>

<https://www.americanbar.org/>

https://www.americanbar.org/groups/child_law/

<https://www.americanbar.org/content/dam/aba/uncategorized/child-safety-guide.authcheckdam.pdf>

<https://www.nicwa.org/about-icwa/>

<https://www.bia.gov/bia/ois/dhs/icwa>

<https://www.americanbar.org/>