CALIFORNIA JUDGES BENCHGUIDES

Benchguide 104

JUVENILE DEPENDENCY SELECTION AND IMPLEMENTATION HEARING

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JUVENILE DEPENDENCY SELECTION AND IMPLEMENTATION HEARING

I. [§104.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of dependency hearings held generally under Welf & I C §366.26 and Cal Rules of Ct 5.725. The benchguide covers the setting and conduct of the hearing and possible findings and orders. It contains a number of procedural checklists, a brief summary of the applicable law, and scripts.

The hearing that is the subject of this benchguide is one that is designed to result in a permanent plan for a child who is a dependent of the juvenile court. Although appellate courts often refer to this hearing as a "selection and implementation" hearing (see discussion in §104.8), judicial officers typically call it a ".26 hearing," because it is held under Welf & I C §366.26. Throughout this benchguide, this hearing will be referred to as a ".26 hearing."

II. PROCEDURAL CHECKLISTS

A. [§104.2] General Conduct of Hearing

(1) *Attorneys or referees serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 2.816.* See discussion in §104.32.

(2) *Call the case.* In many counties, the social worker serving as court officer or deputy county counsel calls the case and announces the appearances. Otherwise, the judicial officer should call the case and ask counsel to announce their appearances. Some judicial officers will first call the entire calendar to determine which cases are ready and in what order to take them.

(3) *Determine the identity of those present and each person's interest in the case before the court*. Welf & I C §§346, 349; Cal Rules of Ct 5.530(b); see discussion in §104.33.

- Exclude all persons from the court except parents (including alleged fathers), guardians, anyone granted status as a de facto parent, counsel, or anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court, including a court-appointed special advocate (CASA) and, in some cases, relatives. Welf & I C §§345, 346.
- Permit the child to attend if the child or his or her counsel requested the child's attendance or if the child's presence would be helpful to the court. See Welf & I C §366.26(h)(2).
- If the child is present, permit the child's participation if he or she desires it. Welf & I C §349(a), (c). If the child is 10 years of age or older and not present, determine whether the child was properly notified of the right to attend the hearing and inquire whether he or

she was given an opportunity to attend. See Welf & I C §§349(d), 366.26(h)(2). If the child was not properly notified or wished to be present and was not given an opportunity to be present, the court must continue the hearing but only for that period of time necessary to provide notice and secure the child's presence, unless the court finds that it is not in the best interest of the child to grant a continuance. Welf & I C §349(d).

(4) *If this is a first appearance for parents or guardians, ask them to designate a mailing address for the court and remind them that the designated mailing address will be used by the court and the social services agency for notification purposes until the parent or guardian provides a new address in writing to the court or social services agency*. Welf & I C §316.1(a); Cal Rules of Ct 5.534(i). Judicial Council form Notification of Mailing Address (JV-140) must be completed by the parent or guardian and filed with the court. Parents are no longer entitled to notice of subsequent hearings once parental rights have been terminated. Welf & I C §§295(b), 366.3(a); Cal Rules of Ct 5.740(a)(5).

(5) *If no parent (including an alleged father) or guardian is present:*

- Determine whether the parent received actual notice of the hearing. See Welf & I C §294; Cal Rules of Ct 5.725(b).

Note: Parties should have received actual notice if they were present at a previous hearing at which the .26 hearing was set and were ordered to appear at the .26 hearing. See Welf & I C §294(f)(1). If there was actual notice, the court should make such a finding on the record and also direct that the parents receive further notice by first-class mail or by electronic service to the address the parents have provided. See Welf & I C §§212.5, 294(f)(1).

- If the parties have not received actual notice, determine whether service and notification were properly accomplished. See §§104.23–104.28 for types of notification and permissible means of service.
- If notice requirements have not been met, continue the case for a reasonable time in order to permit service.

(6) *Make a finding that notice requirements have or have not been met.* Cal Rules of Ct 5.534(h). See discussion in §104.20.

(7) *If a parent is present for the first time, inquire whether he or she has any information that the child may be an Indian child and, if so, take steps to ensure that proper notice is given and provisions of the Indian Child Welfare Act (ICWA) are followed.* See Welf & I C §§224.2(a), 224.3(a); 25 USC §§1901–1963; Cal Rules of Ct 5.480–5.488. Determine whether this inquiry has already been made by the social worker.

Note: Steps (8)–(10) below concerning notice and appointment of counsel will usually have been taken at earlier hearings and will therefore generally not have to be repeated at this hearing.

(8) *Advise any parent or legal guardian who appears without counsel of the right to retain counsel and the right to appointed counsel if the parent or guardian cannot afford to retain one.* See Welf & I C §366.26(f)(2).

☛ JUDICIAL TIP: If counsel has been previously retained or appointed to represent more than one parent or legal guardian, the judge should examine the parties to determine if a present or potential conflict exists. If there has been no prior resolution of this issue and therefore no conflict of interest statement on file, the judge should obtain a written personal waiver of conflict of interest from each of the affected parties and take steps to ensure that the rights of all parties are protected. The judge should appoint counsel for incarcerated or institutionalized parents.

(9) *If the child, minor, or nonminor dependent has not previously been represented by counsel, appoint counsel for the child, minor, or nonminor dependent unless he or she would not benefit from the appointment.* The court must state on the record the reasons for any finding that the child, minor, or nonminor dependent would not benefit from counsel. Welf & I C §317(c); Cal Rules of Ct 5.534(c)–(d), 5.906(e). See §104.34. For a definition and general provisions governing a "nonminor dependent," see Welf & I C §11400(v) and Cal Rules of Ct 5.900. See also California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.18 (Cal CJER).

☛ JUDICIAL TIP: The court should consider appointing independent counsel for each sibling or group of siblings when the siblings or groups might have different interests, such as different adoptive placements or different permanent plans. See Cal Rules of Ct 5.660(c); *In re Cliffton B*. (2000) 81 CA4th 415, 428. The substantial interference with a sibling relationship exception to the termination of parental rights increases the potential for conflicts between siblings or groups of siblings at the .26 hearing. See Welf & I C §366.26(c)(1)(B)(v). Courts need to be sensitive to and alert for such conflicts. See *Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, holding that an attorney may not continue to represent multiple children if an actual conflict of interest exists or if there is a reasonable likelihood an actual conflict may arise, and if one attorney is appointed and a conflict arises later, the court must relieve the attorney from representation of any of the children.

(10) *If appointing new counsel, consider continuing the proceeding for up to 30 days as necessary to allow counsel to become acquainted with the case.* Welf & I C §366.26(g).

(11) *Advise the parties of their hearing rights as specified in Cal Rules of Ct 5.534(g), by either:*

- Obtaining a personal waiver from this advisement requirement. The judge should ask the attorneys if they have explained these rights to their respective clients and should then ask the parties to confirm that their attorneys have explained these rights to them, that they understand these rights, and that they waive formal advisement of them; or
- Reading these rights to the parties and confirming that they understand their rights.

(12) *Receive the report from the Department of Social Services (DSS) containing an assessment of the child and of any prospective adoptive parents, as well as the report of any CASA volunteer or caregiver and the case plan submitted for the hearing (see Cal Rules of Ct 5.725(c)):*

- Before the hearing, read and consider the reports prepared by DSS, including attachments to the reports and recommendations for court orders made by DSS that are contained in the reports. See Welf & I C §§361.5(g)(1), 366.21(i), 366.22(c)(1), and 366.25(b)(1) (contents of assessments).
- State on the record that the reports have been read and considered. Welf & I C §366.26(b); Cal Rules of Ct 5.725(d).

(13) *If necessary to ascertain the wishes of the child, arrange for the child's testimony to be taken.* The judge should question the child's attorney about his or her efforts to determine the child's wishes. Often, a child who is under 10 years of age is not present at the .26 hearing. See Welf & I C §366.26(h)(2). Evidence of the child's wishes may be presented in the social worker's assessment, through the statements of the child's counsel, or by other means by which the court may gain information about the child's understanding of and feelings about the termination of parental rights. The court may request the testimony of the child if other sources of the information are not provided or are insufficient.

However, because the court must consider the child's wishes and best interest, testimony of the child may be valuable. See Welf & I C §366.26(h)(1). Under certain circumstances, the child's testimony may be taken in chambers. See Welf & I C §366.26(h)(3)(A); discussion in §104.42.

(14) *Receive other evidence, including testimony from the parents, guardians, social worker, CASA, and others with pertinent knowledge, as appropriate.* See Welf & I C §366.26(b); Cal Rules of Ct 5.725(d).

(15) *Make one or more of the following findings, as appropriate:*

☛ JUDICIAL TIP: Judicial Council form JV-320 contains the findings and orders that judicial officers must make at a .26 hearing.

- The child is likely to be adopted (clear and convincing evidence). Welf & I C §366.26(c)(1).

☛ JUDICIAL TIP: If there is an impediment to termination, but there is clear and convincing evidence that the child is likely to be adopted, the court must make the adoptability finding even though it may not terminate parental rights. The court cannot base its conclusion that the child is *not* likely to be adopted on the fact that the child has not yet been placed in a preadoptive home or with a relative or foster parent who is willing to adopt the child. Welf & I C §366.26(c)(1).

- Adoption is the permanent placement goal because termination of parental rights is desirable and would not be detrimental under Welf & I C §366.26(c)(1) and there is a probability that the child is likely to be adopted, but the child is difficult to place and there is no identified or available prospective adoptive parent because of sibling considerations or other reasons. Welf & I C §366.26(c)(3). The child may be found difficult to place for adoption if there is no identified or available prospective adoptive parent because (Welf & I C §366.26(c)(3)):
  - The child is a member of a sibling group that should stay together;
  - The child has a diagnosed medical, mental, or physical handicap; or
  - The child is 7 years of age or older.
- Termination of parental rights would be detrimental to the child because of one of the following (preponderance of evidence; Welf & I C §366.26(c)(1)(B); *In re J.C.* (2014) 226 CA4th 503, 529):
  - The parents have maintained regular visitation and contact with the child and the child would benefit from a continuation of that contact. Welf & I C §366.26(c)(1)(B)(i).
  - A child who is 12 years of age or older objects to the termination of parental rights. Welf & I C §366.26(c)(1)(B)(ii).

- The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child is released from residential care. Welf & I C §366.26(c)(1)(B)(iii).
- The child is living with a foster parent or Indian custodian (see 25 USC §1903(2)) who is unwilling to adopt, but is willing to accept legal or financial responsibility for the child and to provide a stable home for the child, and removal from that placement would be emotionally detrimental to the child. Welf & I C §366.26(c)(1)(B)(iv). This exception does not apply to a child under 6 years of age or to a child who is part of a sibling group which should stay together in which at least one child is under 6 years of age. Welf & I C §366.26(c)(1)(B)(iv).
- There will be substantial interference with the relationship between the child and his or her siblings. Welf & I C §366.26(c)(1)(B)(v).
- The child is an Indian child and there is a compelling reason that termination of parental rights would not be in his or her best interest, including that (1) termination of parental rights would substantially interfere with the child's connection with the tribal community or the child's tribal membership rights, (2) the tribe has identified tribal customary adoption or some other planned permanent living arrangement for the child, such as guardianship, or (3) the child is a nonminor dependent, and the nonminor and the nonminor's tribe have identified tribal customary adoption for the nonminor. Welf & I C §366.26(c)(1)(B)(vi), (c)(1)(C); see Welf & I C §366.24.

Note: If the court finds that termination is detrimental as noted above, it must state its reasons in writing or on the record. Welf & I C §366.26(c)(1)(D). The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 5.725(d)(2).

[*In all cases in which adoption is the permanent plan*]

- In at least one prior hearing at which the court was required to consider reasonable services, the court found that reasonable efforts were made or that reasonable services were offered or provided. See Welf & I C §366.26(c)(2)(A); Cal Rules of Ct 5.725(e)(1).

[*In the case of an Indian child*]

- At the hearing terminating parental rights, the court finds that active efforts were made as required by Welf & I C §361.7 and further finds beyond a reasonable doubt, supported by expert testimony, that continued custody by the parent is likely to result in serious emotional or physical damage. See Welf & I C §§224.6, 366.26(c)(2)(B).

[*If placement with a foster family or legal guardianship is the permanent plan*]

- Visitation with the parents or guardians [*would/would not*] be detrimental to the physical or emotional well-being of the child (preponderance of evidence). Welf & I C §366.26(c)(4)(C).

(16) *Make one or more of the following orders as appropriate:*

[*If adoption is the permanent plan*]

- The parental rights of [*mother/father/alleged fathers*] shall be terminated and [*name of child*] shall be placed for adoption. Welf & I C §366.26(b)(1).
- Adoption or tribal customary adoption is identified as a permanent goal without permanently terminating parental rights. Efforts shall be made to locate an appropriate adoptive family within 180 days. Welf & I C §366.26(b)(4).

Note: Before considering adoption as a future goal, the court must order relative guardianship if appropriate under Welf & I C §366.26(b)(3).

[*If placement with a foster family or legal guardianship is the permanent plan*]

- [*Name*], who is a relative, is appointed as legal guardian for the child, and letters of guardianship shall issue. Welf & I C §366.26(b)(3).
- [*Name*] is appointed as nonrelative legal guardian for the child, and letters of guardianship shall issue. Welf & I C §366.26(b)(5).
- The child shall be permanently placed with a fit and willing relative, subject to juvenile court review. Welf & I C §366.26(b)(6).

[*Or*]

- The child shall remain in foster care subject to juvenile court review. Welf & I C §366.26(b)(7).

☛ JUDICIAL TIP: Although California statutes continue to refer to foster care as a permanent plan, such a reference does not comply with federal law. To provide the specificity needed to ensure that later reviews are meaningful, instead of foster care placement, the court should designate placement with a fit and willing relative or, if that is not possible, identify the placement by name and specify the goal of the placement.

[*And/Or*]

- If no adult is available to be a legal guardian, placement with a fit and willing relative is not appropriate as of the hearing date, and there is no suitable foster home, the court may order the child's custody transferred to a licensed foster family agency, subject to further orders. Welf & I C §366.26(c)(5).

[*And/Or*]

- Visitation with the parents shall be _____. See Welf & I C §366.26(c)(4)(C); Cal Rules of Ct 5.735(c)(2).

Note: visitation must be ordered unless the court makes a detriment finding. Welf & I C §366.26(c)(4)(C); Cal Rules of Ct 5.735(c)(2).

[*If legal guardianship is the permanent plan*]

- Dependency shall be [*continued/dismissed*]. See Welf & I C §366.3.

(17) *Rule on any additional requests, including requests for restraining orders under Welf & I C §340.5, as may be appropriate.*

(18) *Schedule future hearings as necessary.*

- Review hearing in 6 months or earlier if (Welf & I C §366.3(a), (c)–(d), (j); Cal Rules of Ct 5.740(a)–(c))
  - — The child or nonminor dependent is in foster care,
  - — Legal guardianship or adoption has been ordered but not completed or legal guardianship has been established but dependency has been continued, or
  - — The court has ordered a plan of tribal customary adoption for an Indian child.

- Schedule an adoptive placement hearing if the court has ordered that efforts be made to locate a prospective adoptive family within 180 days. Welf & I C §366.26(c)(3).

B. [§104.3] Setting Hearing at Disposition

(1) *Once the petition has been sustained, declare dependency and review the disposition recommendations.* See Welf & I C §360(d); Cal Rules of Ct 5.695.

(2) *Find that either reasonable efforts had or had not been made.* Welf & I C §361(e); Cal Rules of Ct 5.695(d). See Welf & I C §366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts or services, court found that reasonable efforts were made or that reasonable services were offered or provided, which may have been at detention hearing). See discussion in §104.11.

(3) *Make findings required for the setting of a .26 hearing*:

- The child should be removed from parental custody (clear and convincing evidence). Welf & I C §361(c); Cal Rules of Ct 5.695(c)(1). Reasons should be stated on the record.

Note: The court cannot order a dependent removed from the physical custody of a parent with whom the child did not reside at the time the petition was initiated unless the court makes both of the findings in Welf & I C §361(d) (substantial danger to child and no reasonable means to protect child without removal) by clear and convincing evidence. Cal Rules of Ct 5.695(c)(2). Reasons should be stated on the record.

- No reunification services should be provided because of clear and convincing evidence of one or more of the circumstances set out in Welf & I C §361.5(b). See §104.11.
- The parent or guardian is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to his or her country of origin and the court determines by clear and convincing evidence that reunification services will be detrimental to the child. Welf & I C §361.5(e)(1).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.725(a)(1), (f).

(4) *If no reunification services have been ordered under Welf & I C §361.5, order a .26 hearing to be held within 120 days, unless there is an order that services to the other parent or guardian are to be provided.* See Welf & I C §361.5(f); Cal Rules of Ct 5.695(g)(5). Although reunification services will not be ordered if the parents' whereabouts are unknown (see Welf & I C §361.5(b)(1)), a .26 hearing may not be set if this is the only

basis for denial of services. See Welf & I C §361.5(d); Cal Rules of Ct 5.695(g)(5).

☛ JUDICIAL TIP: Some courts set a hearing between 45 and 90 days before the scheduled .26 hearing to ascertain whether service of notice was sufficient. If service is found to be lacking, there will often be time to remedy this within the 120-day period.

(5) *Order an assessment under Welf & I C §361.5(g)(1) containing:*

- Current search efforts for absent parents and notification of noncustodial parent.
- Review of amount of and nature of contact between the child and the parents and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or guardian, including a criminal check, a check for prior child abuse or neglect, and an assessment of the person's ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective guardians, their motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Analysis of likelihood of adoption if parental rights are terminated.
- Assessment of the likelihood an Indian child will be adopted when, in consultation with the child's tribe, a tribal customary adoption is recommended.

(6) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council forms Notice of Intent to File Writ Petition and Request for Record (JV-820) and Petition for Extraordinary Writ (JV-825) are presented to any parent or guardian who is present, and should order that the forms be mailed immediately to those not present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590, 5.695(g)(6)–(10). The court must advise parties who are present that they must file this notice of intent within 7 days. See Cal Rules of Ct 8.450(e)(4)(A). For parties who are notified by mail, the time for filing this notice will vary depending on whether they are within or outside the state or the country and whether the order was made by a referee not acting as a

temporary judge. See Cal Rules of Ct 8.450(e)(4)(B)–(E). See discussion in §104.19. See also Cal Rules of Ct 8.452(h)(1), requiring the appellate court to resolve these writ petitions on their merits, and Cal Rules of Ct 8.450(h)–(i), requiring the juvenile court clerk to obtain the reporter's transcript of the juvenile court hearing within 12 calendar days, prepare the clerk's transcript within 20 days, and then transmit them to the reviewing court as expeditiously as possible.

(7) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child; state what that detriment would be.* See Welf & I C §361.5(f).

C. [§104.4] Setting Hearing at 6-Month Review

(1) *Terminate reunification services and make the following findings:*

- Continued removal is necessary because return would create a substantial risk of detriment to the child. Welf & I C §366.21(e); Cal Rules of Ct 5.710(a)(1). It is advisable to state on the record the factual basis for this conclusion. See Welf & I C §366.21(e)(2).
- "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- Reasonable efforts or services have been offered or provided. See Welf & I C §366.21(e); Cal Rules of Ct 5.708(d). See also Welf & I C §§366.21(g)(4), 366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts or services, court found that reasonable efforts were made or that reasonable services were offered or provided; .26 hearing may not be ordered at 6-month review if court finds that reasonable services have not been provided or offered). Evidence of any of the following does not in and of itself imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have been provided concurrent with reunification services. Welf & I C §366.21(*l*). In the case of an Indian child, the court must find that active efforts have been made. Welf & I C §366.26(c)(2)(B). When the parent is a minor or a nonminor dependent, or has been incarcerated, institutionalized, detained, or deported, the court must consider barriers to accessing services or to maintaining contact with the child. Welf & I C §366.21(e).

- One or more of the following applies by clear and convincing evidence:
  - — Parents' whereabouts are still unknown and the basis for removal was Welf & I C §300(g) (child left without provision for care and parents' whereabouts unknown). Welf & I C §366.21(e)(5); Cal Rules of Ct 5.710(b)(1).
  - — Parent has not had contact with the child. Welf & I C §366.21(e)(5); Cal Rules of Ct 5.710(b)(1).
  - — Parent has been convicted of a felony indicating parental unfitness. See Welf & I C §366.21(e)(5); Cal Rules of Ct 5.710(b)(1).
  - — Parent is deceased. Cal Rules of Ct 5.710(b)(1).
  - — The child was under 3 years of age when removed or was a member of a sibling group in which one member was under 3 at the time of removal and the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan. Welf & I C §366.21(e)(3); Cal Rules of Ct 5.710(b)(1). The court must not set a .26 hearing in this situation if it finds that reasonable services were not offered or provided or that there is a substantial probability of return within 6 months or within 12 months of the date the child entered foster care, whichever is sooner. See Welf & I C §§361.49, 366.21(e)(3), (g)(1); Cal Rules of Ct 5.710(b)(1), 5.502(9). See Welf & I C §366.21(g)(1)–(3) for criteria relating to a substantial probability of return and Welf & I C §366.21(e) for factors to consider in setting a .26 hearing as to some or all members of a sibling group.

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. Cal Rules of Ct 5.705, 5.708(i), 5.725(a)(1), (f). No .26 hearing may be ordered if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.21(g)(4).

(2) *Order a .26 hearing to be held within 120 days.* See Welf & I C §366.21(e), (h); Cal Rules of Ct 5.705, 5.708(i)–(k), 5.710(b).

☛ JUDICIAL TIPS:

- If the parents have had notice, the judge may set the .26 hearing early in the 120-day period, subject to the time requirements of Welf & I C §294(c)(1) (notice must be completed at least 45 days

before hearing) and the need for DSS to prepare a full report. If a contested hearing is expected, the scheduling should permit time for it.

- If the parents are present in court at the review hearing, they should be ordered back for the .26 hearing, with written notice to follow, sent by first-class mail or electronic service to the address that has been provided. See Welf & I C §294(f)(1). If a parent is absent and cannot be located, the judge may inquire whether DSS has used due diligence in attempting to locate the parent. Once there is a finding of due diligence, DSS must serve notice on the parent's attorney or submit an order for publication. See Welf & I C §294(a)(9), (f)(7), (g).
- Some judges set a hearing 30 or more days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be lacking, there may be time to remedy this within the 120-day period.

(3) *Order an assessment under Welf & I C §366.21(i), containing the following:*

- Current search efforts for absent parents or legal guardians.
- Review of amount and nature of contact between the child and the parents, legal guardians, and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parents (including prospective tribal customary adoptive parents in case of an Indian child—see Welf & I C §366.24) or prospective legal guardians to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Description of efforts made to identify prospective adoptive parents or legal guardians.
- Relationship of the child to prospective adoptive parents or prospective legal guardians, the degree of attachment of the child to the prospective relative guardians or adoptive parents, the relatives' or adoptive parents' strong commitment to caring permanently for the child, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.

- Analysis of likelihood of adoption if parental rights are terminated.
- In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian.

(4) *Advise all parties of their right to seek review by extraordinary writ and advise that failure to do so will waive their right to raise issues in a subsequent appeal*. The judge should ensure that Judicial Council forms JV-820 and JV-825 are presented to any parent or guardian who is present, and should order that the forms be sent immediately to those not present. See Welf & I C §§212.5, 366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b), 8.450, 8.452.

(5) *Continue to permit the parent or legal guardian to visit the child pending the hearing unless visitation would be detrimental to the child and make other orders as appropriate to facilitate the child's relationships with others, other than siblings, who are important in his or her life.* See Welf & I C §366.21(h). Modify terms of visitation from previous levels as necessary to meet current needs.

D. [§104.5] Setting Hearing at 12-Month Permanency Hearing

(1) *Terminate reunification services and make the following findings:*

- Continued removal is necessary because return would create a substantial risk of detriment to the child. Welf & I C §366.21(f), (g). It is advisable to state on the record the factual basis for this conclusion. Welf & I C §366.21(f)(2).
- "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- Reasonable efforts or services have been offered or provided. Welf & I C §366.21(g)(4); Cal Rules of Ct 5.708(d). See Welf & I C §366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find only that in at least one hearing at which court was required to consider reasonable efforts or services court found that reasonable efforts were made or that reasonable services were offered or provided; .26 hearing may not be ordered at 12-month review if court finds that reasonable services have not been provided or offered). Evidence of any of the following does not in and of itself imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have

been provided concurrent with reunification services. Welf & I C §366.21(*l*). In the case of an Indian child, the court must find that active efforts have been made. Welf & I C §366.26(c)(2)(B). When the parent is a minor or a nonminor dependent, or has been incarcerated, institutionalized, detained, or deported, the court must consider barriers to accessing services or to maintaining contact with the child. Welf & I C §366.21(f)(1)(C). Under Welf & I C §366.21(g), a finding of a substantial probability that the child will be returned to the physical custody of the parent or guardian is a compelling reason not to set a .26 hearing.

- There is no substantial probability of return within 18 months from initial removal. Welf & I C §366.21(g)(1)–(3).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. See Cal Rules of Ct 5.705, 5.708(i), 5.725(a)(1), (f). Moreover, if at this or any subsequent review hearing the court finds by clear and convincing evidence that the child is not likely to be adopted and that there is no one willing to assume legal guardianship, it must order that the child be placed in foster care and, if the child is 10 years of age or older, determine whether DSS has made reasonable efforts to maintain the child's relationships with people who are important to the child. See, *e.g.*, Welf & I C §366.21(g)(5). See also Welf & I C §366.3(e) (periodic hearings).

(2) *Order a .26 hearing to be held within 120 days if there is clear and convincing evidence that reasonable services have been offered or provided.* See Welf & I C §366.21(g)(4); Cal Rules of Ct 5.708(d), (i)–(k), 5.715(b)(1). The court may not order a .26 hearing if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.21(g)(4).

(3) *Order an assessment under Welf & I C §366.21(i), containing:*

- Current search efforts for absent parents and legal guardians.
- Review of amount of and nature of contact between the child and the parents and other members of the extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parents (including prospective tribal customary adoptive parents in case of an Indian child—see Welf & I C §366.24) or prospective legal guardians to include a criminal

check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.

- Relationship of the child to prospective adoptive parents or prospective legal guardians, the degree of attachment of the child to the prospective relative guardians or adoptive parents, the relatives' or adoptive parents' strong commitment to caring permanently for the child, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Description of efforts made to identify prospective adoptive parents or legal guardians.
- Analysis of likelihood of adoption if parental rights are terminated.
- In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian.

(4) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council forms JV-820 and JV-825 are presented to any parent or guardian who is present, and should order that the forms be sent immediately to those not present. See Welf & I C §§212.5, 366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b), 8.450, 8.452.

(5) *Continue to permit the parent or legal guardian to visit the child pending the hearing unless visitation would be detrimental to the child, and make other orders as appropriate to facilitate the child's relationships with people, other than siblings, who are important to the child.* See Welf & I C §366.21(h). Modify terms of visitation from previous levels as necessary to meet current needs.

E. [§104.6] Setting Hearing at 18-Month Permanency Review Hearing

(1) *Make the following findings:*

- Continued removal is necessary because return would create substantial risk of detriment to the child. Welf & I C §366.22(a)(1). The court must state on the record the factual basis for this conclusion. See Welf & I C §366.22(a)(2). "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- Reasonable services have been offered or provided. Welf & I C §366.22(a)(3); Cal Rules of Ct 5.708(d). But see Welf & I C

§366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts or services court found that reasonable efforts were made or that reasonable services were offered or provided). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided concurrent with reunification services. Welf & I C §366.22(a)(3). In the case of an Indian child, the court must find that active efforts have been made. Welf & I C §366.26(c)(2)(B). When the parent is a minor or a nonminor dependent, or has been incarcerated, institutionalized, detained, or deported, the court must consider barriers to accessing services or to maintaining contact with the child. Welf & I C §366.22(a)(1).

Note: A .26 hearing cannot be set to terminate the parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.708(i), 5.725(a)(1), (f). And no .26 hearing may be ordered if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.22(a)(3).

(2) *Terminate reunification services and order a .26 hearing to be held within 120 days*. See Welf & I C §366.22(a)(3).

Note: If reunification services are terminated and the court finds by clear and convincing evidence that the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption, and that there is no one willing to assume legal guardianship as of the hearing date, it may order that the child be placed in foster care with a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older or is a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement. Welf & I C §366.22(a)(3).

(3) *Order an assessment under Welf & I C §366.22(c)*. The assessment under Welf & I C §366.22(c) is essentially the same as that required when setting the .26 hearing at disposition or at the 6- or 12-month review hearings.

(4) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council forms JV-820 and JV-825 are presented to any parent or guardian who is present, and should order that the form be sent immediately to those not present. Welf & I C §§212.5, 366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b), 8.450, 8.452.

(5) *Continue to permit the parent or legal guardian to visit the child pending the hearing unless visitation would be detrimental to the child*. See Welf & I C §366.22(a)(3). Modify terms of visitation from previous levels as necessary to meet current needs.

F. [§104.7] Setting Hearing at 24-Month Subsequent Permanency Review Hearing

(1) *Make the following findings:*

- Continued removal is necessary because return would create a substantial risk of detriment. Welf & I C §366.25(a). The court must state on the record that: "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- Reasonable services have been offered or provided. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.708(d). But see Welf & I C §366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts court found that reasonable efforts were made or that reasonable services were offered or provided). Evidence of any of the following does not in and of itself imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or has been placed in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided, concurrent with reunification services. Welf & I C §366.25(a)(3).

Note: A .26 hearing cannot be set to terminate the parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.708(i), 5.725(a)(1), (f). And no .26 hearing may be ordered if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.25(a)(3).

(2) *Terminate reunification services and order a .26 hearing to be held within 120 days*. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.708(i)–(k).

Note: If reunification services are terminated and the court finds by clear and convincing evidence that the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption, and that there is no one willing to assume legal guardianship as of the hearing date, it may order that the child remain in foster care with a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older or is a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement. If a child 10 years of age or older is ordered to remain in foster care, the determine whether DSS has made reasonable efforts to maintain the child's relationships with persons other than the child's siblings who are important to the child and may make any appropriate order to ensure those relationships are maintained. Welf & I C §366.25(a)(3).

(3) *Order an assessment under Welf & I C §366.25(b)(1)*. The assessment under Welf & I C §366.25(b)(1) is essentially the same as that required when setting the .26 hearing at disposition or at a prior review hearing.

(4) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal.* The judge should ensure that Judicial Council forms JV-820 and JV-825 are given to any parent or guardian who is present and should order that the form be sent immediately to those not present. Welf & I C §§212.5, 366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b), 8.450, 8.452.

(5) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child.* Welf & I C §366.25(a)(3). Modify terms of visitation from previous levels as necessary to meet current needs.

III. APPLICABLE LAW

A. [§104.8] General Background

Welfare and Institutions Code §366.26 provides the exclusive procedures for selecting and implementing a permanent plan, including the termination of parental rights, adoption, establishment of a legal guardianship, or placement with a foster family, or for a child who is adjudged dependent, removed from the home of the parents, and for whom reunification efforts are deemed futile from the outset (Welf & I C

§361.5(b)) or proved to be futile. Welf & I C §366.26(a)–(b); Fam C §7808(a).

The statutory scheme contemplates that before reaching the .26 hearing stage the juvenile court will have conducted several hearings and made a number of findings that returning the child to parental custody would be detrimental. *In re Vanessa W.* (1993) 17 CA4th 800, 806–807; *In re Brittany M.* (1993) 19 CA4th 1396, 1404 (no denial of equal protection to parents whose rights are terminated under Welf & I C §366.26). It is not a denial of due process that some of these findings are made by only a preponderance of the evidence. This is because the dependency process has so many safeguards built into it, by the time the .26 hearing stage is reached, the evidence in favor of termination is already clear and convincing. To require more at the .26 hearing stage would prejudice the interest of the adoptable child. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 256; *In re Cristella C.* (1992) 6 CA4th 1363, 1372 (California statutes provide safeguards at every stage, including initial removal by clear and convincing evidence, presumption of return to parents at each judicial review, and provision of reunification services). Return of the child at the .26 hearing is not an issue before the court, and no evidence to support a request for return may be received. See *In re Marilyn H.* (1993) 5 C4th 295, 309–310.

The hearing held under Welf & I C §366.26 is called a "selection and implementation" hearing, rather than a "termination" hearing, because it is the hearing at which the court determines the future disposition of a child who cannot be returned to the parents' home even when parental rights are not terminated. *In re Amanda B.* (1992) 3 CA4th 935, 938. In other words, at the Welf & I C §366.26 hearing the court "selects" a permanent plan of adoption, legal guardianship, or foster care, and at the same time "implements" that plan by terminating parental rights, appointing legal guardians, or ordering foster care, as appropriate under the statutory provisions of that section. The main thrust of this hearing is no longer the success or failure of the parent's activities and efforts; it is the child's need for stability. See *In re Marilyn H., supra,* 5 C4th at 309.

☛ JUDICIAL TIP: Although California statutes continue to refer to foster care as a permanent plan, such a reference does not meet the requirements of federal Title IV-E regulations. To ensure that later reviews are meaningful, instead of foster care placement, the court should designate placement with a fit and willing relative or, if that is not possible, identify the placement by name and specify the goal of the placement.

The court may not designate two long-term permanent plans for a child. Therefore, if a guardianship is not working, the court must terminate it before selecting a different permanent plan. *In re Carrie W.* (2003) 110 CA4th 746, 760.

B. [§104.9] Purpose of .26 Hearing

The purpose of a .26 hearing is to select and implement a permanent plan of adoption, tribal customary adoption in the case of an Indian child, legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement for a child who cannot be returned home. Welf & I C §§294(e)(6), 366.26(b); see *In re Marilyn H.* (1993) 5 C4th 295, 304; *In re Heather B.* (1992) 9 CA4th 535, 546.

The court may not necessarily terminate parental rights at this hearing; although adoption is the favored option, there are certain circumstances in which termination may be precluded. Welf & I C §366.26(c)(1)(B); see, *e.g., In re Brandon C.* (1999) 71 CA4th 1530, 1537 (mother made great improvement in rehabilitating herself and securing stable living situation; considerable bond developed with children that would benefit them if relationship were allowed to continue).

The options that a court may choose at a .26 hearing are (in order of preference):

- Termination of parental rights and adoption. Welf & I C §366.26(b)(1), (c)(1) (court must find by clear and convincing evidence that child is likely to be adopted).
- In consultation with the child's tribe, a plan of tribal customary adoption under Welf & I C §366.24 without termination of parental rights. Welf & I C §366.26(b)(2); see Cal Rules of Ct 5.725(d)(1).
- Relative guardianship. Welf & I C §366.26(b)(3) (court must appoint guardian at this hearing).
- Adoption or tribal customary adoption is identified as the permanent placement goal, but the child is difficult to place. Welf & I C §366.26(b)(4), (c)(3) (court must order that efforts be made to identify prospective adoptive parents within 180 days).
- Guardianship by a nonrelative. Welf & I C §366.26(b)(5) (court must appoint guardian at this hearing).
- Permanent placement with a fit and willing relative. Welf & I C §366.26(b)(6).
- Foster care. Welf & I C §366.26(b)(7).

☛ JUDICIAL TIP: To comply with the specificity required by federal law (and to aid in later reviewing the placement—see §104.7), the court should enter a placement order without calling it "long-term foster care," identify the placement by name, and provide the goal of the placement.

By the time the .26 hearing is held, it has already been determined that the parent will not have custody of the child. The remaining important issue is whether the child can and should be adopted. *In re Andrew S.* (1994) 27

CA4th 541, 548–549. Therefore, return of the child to the parents is not an option at this hearing. *In re Marilyn H.*, *supra*. Parents who seek to reinstate reunification services and make return home an option must seek modification under Welf & I C §388 of the order terminating reunification services before the .26 hearing. *In re Marilyn H.*, *supra,* 5 C4th at 309.

C. Setting the Hearing

1. [§104.10] In General

Once reunification services have been terminated, the focus shifts to the child's needs for stability and a permanent arrangement. *In re Marilyn H.* (1993) 5 C4th 295, 309. After services have been terminated at any stage, the child is entitled to the holding of a .26 hearing unless there are exceptional circumstances that justify the court's exercise of discretion to order foster care (*i.e.,* court finds by clear and convincing evidence that child is not proper subject for adoption and no one is willing to assume legal guardianship—see, *e.g.,* Welf & I C §366.22(a)(3)). *In re John F.* (1994) 27 CA4th 1365, 1374–1375 (child filed petition for modification under Welf & I C §388 requesting setting of .26 hearing). When the court knows that more permanent options, such as adoption, are not foreclosed, it does not have discretion to maintain the child in the uncertainty of foster care and deny the .26 hearing. 27 CA4th at 1376–1377. See also *In re Johnny M.* (1991) 229 CA3d 181, 190–191 (parents entitled to contested permanency planning hearing before permanent plan is determined by court). Moreover, because the hearing at which the .26 hearing is set is so crucial, it may be an abuse of discretion to deny a parent a contested hearing at *that* hearing. See *Ingrid E. v Superior Court* (1999) 75 CA4th 751, 759 (parent notified court of new evidence she had wanted to present at 18-month permanency hearing).

In certain circumstances, a parent must make an offer of proof as a prerequisite to a contested hearing. For example, a presumed father, whose children have been in long-term foster care and who are now being considered for adoption, must make an offer of proof before being entitled to a contested .26 hearing. *M.T. v Superior Court* (2009) 178 CA4th 1170, 1180–1181.

Although the .26 hearing can be scheduled at the disposition hearing (see §104.11) or any of the review hearings (see §§104.13–104.16), a court may also set a .26 hearing when it grants a petition under Welf & I C §387, removing a child from parental custody, if the parent has received at least 12 months of reasonable services (presumably 6 months for child under 3). *Carolyn R. v Superior Court* (1995) 41 CA4th 159, 164. However, a substantial portion of those services must have been "time-limited" in nature, and if the child has been a dependent but never removed from parental custody, the disposition orders after a sustained Welf & I C §387

petition may not include the setting of a .26 hearing. See *In re Joel T.* (1999) 70 CA4th 263, 268.

In ruling on a supplemental Welf & I C §387 petition, the court may not rely on Welf & I C §360(a) and appoint a relative to be the child's legal guardian, but must instead hold a .26 hearing as required by Cal Rules of Ct 5.565(f). *In re G.W.* (2009) 173 CA4th 1428, 1439.

A .26 hearing may also be scheduled when the court grants a petition under Welf & I C §388, changing a disposition order for services to an order for no services. *Sheila S. v Superior Court* (2000) 84 CA4th 872, 877, 881; see Welf & I C §388(c). Services are not reasonable if a formerly incarcerated parent is deported before being able to use them. See *In re Maria S.* (2000) 82 CA4th 1032, 1040.

Once a guardianship has been established, no statute or court rule requires the court to make a judicial finding of changed circumstances at a separate Welf & I C §388 hearing before holding a .26 hearing. *In re Andrea R.* (1999) 75 CA4th 1093, 1105–1106.

Whenever the court terminates reunification services and sets a .26 hearing, it must advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b). The court must advise all parties that they must file this notice of intent within 7 days. See Cal Rules of Ct 8.450(e)(4)(A). This time requirement will be lengthened for parties who are notified by mail or in situations in which the order was made by a referee not acting as a temporary judge. See Cal Rules of Ct 8.450(e)(4)(B)–(E). See discussion in §104.19. When the court fails to advise the parent of the writ petition requirement when setting a .26 hearing, the parent may challenge the original order. *In re Athena P.* (2002) 103 CA4th 617, 625 (dispositional order was appealable).

The court may not hold a .26 hearing for a child who is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. See Welf & I C §§366.21(g)(4), 366.22(a)(3), 366.25(a)(3), 366.3(i). For the definition of a "nonminor dependent," see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.18 (Cal CJER).

Orders, such as visitation orders, that are made contemporaneously with orders setting a .26 hearing are also only reviewable by writ. *In re Tabitha W.* (2006) 143 CA4th 811, 817.

a. At Disposition Hearing

(1) [§104.11] Denial of Reunification Services

Subject to the exceptions noted below in §104.12, the court must set a .26 hearing at the disposition hearing if both parents and any guardian are

denied reunification services and the court makes the following findings (see Welf & I C §361.5(f); Cal Rules of Ct 5.695(g)(5)):

(1) *The child should be removed from parental custody on statutory grounds found by clear and convincing evidence.* See Welf & I C §361(c); Cal Rules of Ct 5.695(c)(1).

Note: The court cannot order a dependent removed from the physical custody of a parent with whom the child did not reside at the time the petition was initiated unless the court makes both of the findings in Welf & I C §361(d) (substantial danger to child and no reasonable means to protect child without removal) by clear and convincing evidence. Cal Rules of Ct 5.695(c)(2).

(2) *Reasonable efforts were made to prevent or eliminate the need for removing the child from the home.* Welf & I C §361(e); Cal Rules of Ct 5.695(d).

☛ JUDICIAL TIPS:

- For a county to be eligible for Title IV-E federal foster care funding, the judge must have made specified reasonable efforts findings. See 45 CFR §1356.21(b)(2)(ii). If the court determines that DSS's concern for the child's safety was a valid basis for not providing services to prevent or eliminate the need for removal, it may find that the level of effort was reasonable, and should thus make a finding that reasonable efforts were made.
- Although this finding need only be made by a preponderance of evidence, many judges recommend using a clear and convincing standard, if warranted, when setting a .26 hearing.

(3) *No reunification services are to be ordered under Welf & I C §361.5(b)(2)–(17) or (e)(1) because one of the following has been found by clear and convincing evidence:*

- The parent or guardian has a mental disability described by Fam C §§7826 and 7827 that renders the parent or guardian incapable of using reunification services. Welf & I C §361.5(b)(2).
- The child had previously been removed because of physical or sexual abuse under Welf & I C §361 and had been returned home without termination of jurisdiction, and is again being removed due to abuse under Welf & I C §361. Welf & I C §361.5(b)(3).
- The child's parent or guardian has caused the death of another child through abuse or neglect. Welf & I C §361.5(b)(4). A judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273a), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing

the death of another child through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778 (decided under former version of Welf & I C §361.5(b)(4)).

- The court has jurisdiction because of Welf & I C §300(e) (severe physical abuse under age of 5) based on parent's or guardian's conduct. Welf & I C §361.5(b)(5).
- The child has been adjudged a dependent because of severe physical or sexual harm suffered by the child or a sibling or half sibling, and the court makes a factual finding that it would not benefit the child to pursue reunification with the offending parent or guardian. Welf & I C §361.5(b)(6). The court must consider the factors set forth in Welf & I C §361.5(i) in determining whether reunification will benefit the child. See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §102.80 (Cal CJER).
- The parent is not receiving services for a sibling or half sibling because of acts specified by Welf & I C §361.5(b)(3), (5), or (6). Welf & I C §361.5(b)(7). The court must consider the factors set forth in Welf & I C §361.5(i) in determining whether reunification would benefit the child who would otherwise be denied services under Welf & I C §361.5(b)(7). See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §102.80 (Cal CJER).
- The child was conceived as a result of the parent's committing an act of child sexual abuse as described by Pen C §288 or §288.5 or an equivalent act in another state. Welf & I C §361.5(b)(8).
- The child has been found to be described by Welf & I C §300(g) and the abandonment was willful, constituting serious danger for the child, or the child was voluntarily surrendered under Health & S C §1255.7. Welf & I C §361.5(b)(9).
- The court had ordered termination of reunification services for siblings or half siblings who had been removed under Welf & I C §361 because reunification services had failed, and the court finds that the parent or guardian has not made reasonable efforts to treat the problem that caused the removal. Welf & I C §361.5(b)(10); *In re B.H.* (2016) 234 CA4th 729, 738–739 (statute applies to both custodial and noncustodial parents). *Note*: This does not apply if the only time the court ordered termination of reunification services for any sibing or half sibling was when the parent was a minor parent, nonminor dependent parent, or a ward of the juvenile court. Welf & I C §§361.5(b)(10), 16002.5.

- Parental rights had been terminated with respect to siblings or half siblings, and the parent or guardian has subsequently not made reasonable efforts to treat the problem. Welf & I C §361.5(b)(11). *Note*: This does not apply if the only time the court ordered termination of reunification services for any sibing or half sibling was when the parent was a minor parent, nonminor dependent parent, or a ward of the juvenile court. Welf & I C §§361.5(b)(11), 16002.5.
- The parent or guardian was convicted of a violent felony (see Pen C §667.5(c)). Welf & I C §361.5(b)(12).
- The parent or guardian has severe drug or alcohol problems and has either resisted treatment during the previous 3 years, or has failed or refused to comply with a court ordered substance abuse treatment program as part of a dependency reunification plan on at least two prior occasions. Welf & I C §361.5(b)(13). "Resisted" means the parent or guardian refused to participate meaningfully in a prior court-ordered drug or alcohol treatment program. Welf & I C §361.5(b)(13); see *In re B.E.* (2020) 46 CA5th 932, 941 (distinguishes between active resistance and passive resistance).
- The parent or guardian has advised the court that he or she is not interested in receiving reunification or family maintenance services or having the child returned, is represented by counsel, has completed the Judicial Council's form for waiver of services, and has been found by the court to have knowingly and intelligently waived the right to services. Welf & I C §361.5(b)(14).
- The parent or guardian has on one or more occasions willfully abducted the child or a sibling or half sibling from a placement and refused to disclose the child's whereabouts or return the child. Welf & I C §361.5(b)(15).
- The parent or guardian has been required by the court to be registered on a sex offender registry under the federal Adam Walsh Child Protection and Safety Act (42 USC §20913(a)). Welf & I C §361.5(b)(16); see 42 USC §5106a(b)(2)(B)(xvi)(VI).
- The parent or guardian knowingly participated in, or permitted, the sexual exploitation of the child. See Welf & I C §11165.1(c), (d); Pen C §236.1(c). This does not include instances in which the parent or guardian demonstrated by a preponderance of the evidence that he or she was coerced into permitting, or participating in, the sexual exploitation of the child. Welf & I C §361.5(b)(17).
- The parent or guardian is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to his or her country of origin, and the provision of

reunification services would be detrimental to the child. Welf & I C §361.5(e)(1).

Under Welf & I C §361.5(b)(10) and (11), prior termination of parental rights of a man who was an alleged or biological father of a sibling of the child who is the subject of the newest petition may serve as the basis for denying reunification services even if the man is the *presumed* father of that child. *Francisco G. v Superior Court* (2001) 91 CA4th 586, 599.

See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §§102.77–102.85 (Cal CJER).

(2) [§104.12] Exceptions to Denial of Reunification Services

If findings are made based on Welf & I C §361.5(b)(5), the court may order reunification services (and therefore not schedule a .26 hearing) if it makes one of the following findings by a preponderance of the evidence (Welf & I C §361.5(c)(3)):

(1) *Services are likely to prevent reabuse or continued neglect of the child, or*

(2) *Failure to attempt reunification will be detrimental to the child.*

If findings are made based on Welf & I C §361.5(b)(3), (4), and (6)–(17), the court may order reunification services (and therefore not schedule a .26 hearing) if it finds by clear and convincing evidence that reunification would be in the child's best interest. Welf & I C §361.5(c)(2).

If the parent has a mental illness described by Fam C §§7826 and 7827, the court must still order reunification services unless competent evidence from at least two mental health professionals establishes, by clear and convincing evidence, that the parent would be unable to care for the child within the next 12 months. See Welf & I C §361.5(c)(1). In assessing the effect of a mental disability on entitlement to reunification services, the court should first determine whether the parent suffers a mental disability as described in Fam C §§7820–7827. If so, and the disability renders the parent incapable of using reunification services, reunification may be denied under Welf & I C §361.5(b)(2). If not, but the parent is unlikely to be capable of using services so as to be able to care for the child within 12 months, reunification may be denied under Welf & I C §361.5(c). *In re Rebecca H.* (1991) 227 CA3d 825, 843.

b. [§104.13] At 6-Month Review Hearing

To set a .26 hearing at the 6-month review hearing, the court must make the following findings by a preponderance of the evidence:

(1) *That continued removal is required because return would create a substantial risk of detriment.* Welf & I C §366.21(e); Cal Rules of Ct 5.710(a)(1). It is advisable to state on the record the factual basis for this conclusion.

☛ JUDICIAL TIP: Federal audit mandates require the court to find that the "child's placement is necessary and appropriate." See 42 USC §675(5)(B). Acceptable alternative language might be "out of home placement is necessary and the child's placement is appropriate."

(2) *That reasonable services were offered or provided. See Welf & I C §366.21(e), (l); Cal Rules of Ct 5.707(c)(1)(F).* But see Welf & I C §366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts or services court found that reasonable efforts were made or reasonable services were offered or provided). At the 6-month review, if the court finds that reasonable efforts were not provided or offered, however, it may not set a .26 hearing for a child who was under 3 at removal. Welf & I C §366.21(e)(3).

☛ JUDICIAL TIPS:

- Although both these findings need only be made by a preponderance of evidence, many judges recommend using a clear and convincing standard (when evidence warrants) when setting a .26 hearing. It is advisable to state on the record the factual basis for these conclusions.
- In the case of an Indian child, the court must find that active efforts were made. Welf & I C §366.26(c)(2)(B). The "active efforts" standard of ICWA must be met by clear and convincing evidence, not evidence beyond a reasonable doubt. *Adoption of Hannah S.* (2006) 142 CA4th 988, 997.

(3) *That one or more of the following has been shown by clear and convincing evidence (Welf & I C §366.21(e)(5); Cal Rules of Ct 5.710(b)(1)):*

- The child was removed initially under Welf & I C §300(g), and the whereabouts of the parent are still unknown.
- The parent has failed to contact and visit the child.
- The parent has been convicted of a felony indicating parental unfitness. In this regard, a judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273a), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child

through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778.

☛ JUDICIAL TIP: A .26 hearing may be set at the 6-month review or at any other time only if it is set to consider termination of parental rights of both parents and any guardian. See Cal Rules of Ct 5.705, 5.708(i), 5.725(a)(1). If either parent or a guardian is still receiving services, the court may not proceed to a .26 hearing. Nor may a .26 hearing be set at a 6-month review if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.21(g)(4).

- The parent is deceased.
- The child was under three years of age when removed, or is a member of a sibling group one of whom was under three at removal, and the parent has failed to participate regularly and make substantial progress in the treatment plan, unless the court finds that there is a substantial probability that the child will be returned within 6 months or within 12 months of the date the child entered foster care, whichever is sooner, or finds that reasonable services have not been provided. Welf & I C §§361.49, 366.21(e)(3); Cal Rules of Ct 5.710(b)(1), 5.502(9). To find such a probability the court may consider whether (1) the parent or guardian has regularly visited and contacted the child (taking into account barriers to maintaining contact with child), (2) the parent or guardian has made significant progress in curing the conditions that led to removal, and (3) the parent or guardian has demonstrated ability to complete the treatment plan and to provide for the child's protection and needs. See Welf & I C §366.21(g)(1), (g)(3).

A court may set a selection and implementation hearing at the 6-month review when the parent has failed to contact and visit the child; there is nothing to be gained in continuing to offer services where the parent has made no effort to reunify with the child for 6 months, and there are no extenuating circumstances. *In re Monique S.* (1993) 21 CA4th 677, 682. A brief casual or chance meeting with the child will not be sufficient to count as contact in determining whether to continue reunification services. *In re Tameka M.* (1995) 33 CA4th 1747, 1754.

The setting of a .26 hearing for a child under 3 years of age after just 6 months of reunification services when the father failed to engage in age-appropriate activity with the child, continued to stay with the mother who had serious mental problems (necessitating monitored visitation), and failed to reunify with the child's siblings after 18 months of reunification services

was upheld on appeal in *Armando D. v Superior Court* (1999) 71 CA4th 1011, 1018, 1022–1023.

In determining whether to deny visitation to the parents when setting a .26 hearing at any review hearing (see Welf & I C §§366(a)(1), 366.21(h), 366.22(a)(3)), the court must use a "preponderance of the evidence" standard of proof in finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762.

☛ JUDICIAL TIPS:

- In setting a .26 hearing based on the fact that there has been no contact for 6 months, it is generally believed that it is the last 6 months that counts; however, initiation of some token contact as the hearing date approaches will not, by itself, defeat the setting of the .26 hearing.
- Many judges would be reluctant to set a .26 hearing at this stage if the parents have unsuccessfully attempted to contact the child by leaving messages, speaking with the foster parents, or making some other efforts. If possible, judicial officers should assess the sincerity and quality of these attempts.

c. [§104.14] At 12-Month Permanency Hearing

To set a .26 hearing at the 12-month permanency hearing, the court must make the following findings:

(1) *Continued removal is required because return would create a substantial risk of detriment by a preponderance of the evidence.* Welf & I C §366.21(f). It is advisable to state the factual basis for this conclusion on the record.

☛ JUDICIAL TIP: Federal audit mandates require the court to find that the "child's placement is necessary and appropriate." See 42 USC §675(5)(B). Acceptable alternative language might be "out of home placement is necessary and the child's placement is appropriate."

(2) *There is no substantial probability of return to the parents within 18 months from detention/removal.* Welf & I C §366.21(g)(1)–(3).

(3) *Reasonable services were offered or provided, taking into account any barriers to accessing services faced by minor parents, nonminor dependent parents, or parents or legal guardians who are incarcerated, institutionalized, detained, or deported.* Welf & I C §366.21(f); Cal Rules of Ct 5.708(d). This finding must be made by clear and convincing evidence. Welf & I C §366.21(g)(4). But see Welf & I C §366.26(c)(2)(A) (to terminate parental rights at .26 hearing, court must find that in at least one hearing at which court was required to consider reasonable efforts or

services, court found that reasonable efforts were made or reasonable services were offered or provided). In the case of an Indian child, the court must find that active efforts were made by clear and convincing evidence. Welf & I C §366.26(c)(2)(B); *Adoption of Hannah S.* (2006) 142 CA4th 988, 997.

The court may not order a .26 hearing at a 12-month review hearing if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.21(g)(4).

d. [§104.15] At 18-Month Permanency Review Hearing

If the child is not returned home at the 18-month review, services must be terminated and a .26 hearing set unless the court makes one of two findings by clear and convincing evidence:

(1) *That the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption (see Welf & I C §366.24), and has no one willing to accept legal guardianship as of the hearing date, in which case, it may order foster care with a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate, or another planned permanent living arrangement if the child is 16 years of age or older or is a nonminor dependent and no other permanent plan is appropriate (Welf & I C §366.22(a)(3)); or*

(2) *The best interest of the child would be met by providing additional services to a parent or guardian who is making significant and consistent progress in a court-ordered residential substance abuse treatment program, or who was either a minor parent or a nonminor dependent parent at the time of the initial hearing or who had been recently discharged from incarceration or institutionalization and is making significant and consistent progress in establishing a safe home for the child (Welf & I C §366.22(b)).*

Therefore, at the 18-month hearing, there are only four alternatives: (1) the child is returned home, (2) services are terminated and a .26 hearing is set, (3) the case is continued for up to 6 months more of services for a parent who had been incarcerated or institutionalized or in a drug treatment program (see §104.14), or (4) services are terminated and the court orders foster care after finding by clear and convincing evidence that the child is not a proper subject for adoption or another planned permanent living arrangement if the child is 16 years of age or older or is a nonminor dependent and no other permanent plan is appropriate. See Welf & I C §366.22(a)(3). The court may not order a .26 hearing, however, if the child is a nonminor dependent unless the nonminor dependent is an Indian child

and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.22(a)(3).

Even when the court learns at the 18-month hearing that the parents have made substantial efforts toward compliance with the reunification plan, it may set a .26 hearing when the parents have not alleviated the conditions that caused the court to remove the child from the home in the first place. See *In re Dustin R.* (1997) 54 CA4th 1131, 1142.

☛ JUDICIAL TIP: To comply with the specificity required by federal law (and to aid in later reviewing the placement—see §104.7), the court should enter a placement order, identify the placement by name, and specify the goal of the placement, without calling it "long-term foster care."

An exception to this four-part scheme is when the court finds that adequate services have not been offered or provided. In this situation, the judge must exercise discretion whether to terminate services and select one of the three alternatives specified above or to continue reunification services beyond 18 months. See *In re Dino E.* (1992) 6 CA4th 1768, 1779 (no reunification plan had been developed). See also *In re Daniel G.* (1994) 25 CA4th 1205, 1209 (some reunification services had been provided but court still should have exercised discretion in deciding whether to extend services when it found previous services to be inadequate) and *In re Elizabeth R.* (1995) 35 CA4th 1774, 1792–1799 (parent was hospitalized for mental illness during most of reunification period, did not miss any visits, and made many attempts to augment visitation; court should have used Welf & I C §352 to continue 18-month hearing). Distinguishing factors in these cases are either that services were inadequate or that some "external factor" prevented the parent from participating in the services. See *Andrea L. v Superior Court* (1998) 64 CA4th 1377, 1389. The extension must be supported by substantial evidence that is reasonable in nature, credible, and of solid value. *In re Brequia Y.* (1997) 57 CA4th 1060, 1068–1069. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.35 (Cal CJER).

☛ JUDICIAL TIP: As with the other review hearings, federal audit mandates require the court to find that the "child's placement is necessary and appropriate." See 42 USC §675(5)(B). Acceptable alternative language might be "out of home placement is necessary and the child's placement is appropriate."

e. [§104.16] At 24-Month Subsequent Permanency Review Hearing

If the child is not returned home at the 24-month hearing, the court must order a .26 hearing to be held within 120 days to determine whether the most appropriate plan for the child is adoption, guardianship, foster care,

tribal customary adoption in the case of an Indian child, or another planned permanent living arrangement if the child is 16 years of age or older when no other permanent plan is appropriate. Welf & I C §366.25(a)(3). An exception to this requirement is if the court finds by clear and convincing evidence that a .26 hearing would not be in the best interest of the child because the child is not a proper subject for adoption or tribal customary adoption and has no one willing to accept legal guardianship. Welf & I C §366.25(a)(3). Moreover, the court may not order a .26 hearing if the child is a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.25(a)(3).

When setting a .26 hearing at the 24-month review hearing, the court must:

- Determine whether reasonable services have been offered or provided (Welf & I C §366.25(a)(3)).
- Continue to permit visitation unless visitation would be detrimental to the child (Welf & I C §366.25(a)(3)).
- Order an assessment (Welf & I C §366.25(b)(1)).
- Specify the factual basis for its conclusion, whether or not the child is returned home (Welf & I C §366.25(a)(2)).
- Make factual findings identifying any barriers to achieving the permanent plan as of the hearing date (Welf & I C §366.25(a)(3)).

2. [§104.17] Ordering an Assessment

Whenever the court terminates or denies reunification services and orders a .26 hearing, it must concurrently order the preparation of an assessment. See, *e.g.,* Welf & I C §366.21(i). When the .26 hearing is set at disposition, the court must direct DSS (and county adoption agency, if separate from DSS) to prepare an assessment that includes (Welf & I C §361.5(g)(1)):

- Current search efforts for absent parents and notification of the noncustodial parent.
- Review of amount of and nature of contact between the child and the parents and other members of his or her extended family since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status. The evaluation must include a copy of the complete health and education summary required by Welf & I C §16010, including the name and contact information of the person currently holding the right to make educational decisions. If disclosure of the educational rights holder poses a threat to that

person, the contact information must be redacted or withheld from the evaluation.

- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or prospective guardian, including a prospective tribal customary adoptive parent, to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective guardians, including prospective tribal customary adoptive parents, the duration and character of the relationship, the degree of attachment of the child to the prospective relative guardian or adoptive parent, the relative's or adoptive parent's strong commitment to caring permanently for the child, the motivation for seeking adoption or guardianship, and whether the child over 12 years of age has been consulted about the proposed relative guardianship arrangements unless the child's age or condition precludes a meaningful response, and if so, a description of the condition.
- Description of efforts made to identify prospective adoptive parents or legal guardians.
- Analysis of likelihood of adoption if parental rights are terminated.
- In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian.

Similarly, at a 6-, 12-, or 18-month or subsequent hearing, when the court terminates or denies reunification services and orders that a .26 hearing be held, it must direct DSS to prepare an assessment. Welf & I C §§366.21(i), 366.22(c)(1), 366.25(b)(1). The assessment must contain the same factors specified above.

3. [§104.18] Other Orders/Advisements

When the court sets the .26 hearing, it must advise the parent or guardian of the right to seek review by extraordinary writ and that failure to seek writ review will waive the right to raise issues in a subsequent appeal. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b). See discussion in §104.19. The court must also advise the parents either in statutory language (see Welf & I C §294(e)(6)) or in a functional equivalent that at the *next* hearing it is required to select and implement a permanent plan, which may be a plan of adoption, guardianship, or foster care. *In re Anna M.* (1997) 54 CA4th 463, 468 (termination of parental rights was reversed because court had emphasized guardianship as likely plan).

In addition, the court must continue to permit the parent to visit the child pending the hearing unless it finds that visitation would be detrimental to the child (see, *e.g.,* Welf & I C §366.21(h)), but terms of the visitation may be modified from previous levels to meet current needs. The court must also make orders to enable the child to maintain relationships with those people, other than siblings, who are important in the child's life, consistent with the child's best interest. Welf & I C §366.21(h). If denying visitation when setting a .26 hearing, the court must use a "preponderance of the evidence" standard of proof when finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762.

4. [§104.19] Right to Appeal Setting of .26 Hearing

The order setting a .26 hearing is not appealable at the time it is made. See Welf & I C §366.26(*l*); Cal Rules of Ct 5.590(b); *In re Charmice G.* (1998) 66 CA4th 659, 668. Nor is any order, regardless of its nature, that has been made at the hearing at which a .26 hearing is set. *In re Anthony B.* (1999) 72 CA4th 1017, 1023 (order denying reinstatement of supervised visitation).

The order setting the .26 hearing is also not appealable at the conclusion of the .26 hearing unless all the following conditions apply (Welf & I C §366.26(*l*)(1)):

- A petition for an extraordinary writ (JV-825) was filed in a timely manner,
- The writ petition substantively addressed the issues to be challenged on appeal and supported that challenge with an adequate record, and
- The writ petition was summarily denied or otherwise not decided on the merits.

Failure to file a petition for extraordinary writ review under Welf & I C §366.26(*l*) and Cal Rules of Ct 8.450 and 8.452 precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405.

When the court has ordered a .26 hearing, it must orally advise all parties present, and notify absent parties by first-class mail, that any party who desires to preserve the right to appeal must file a petition for extraordinary writ. See Welf & I C §366.26(*l*)(3); Cal Rules of Ct 5.590(b). The notice of intent to file the writ petition (form JV-820) must be filed within 7 days when the parties are present at the hearing. When the parties are notified by mail or when the order was made by a referee not acting as a temporary judge, the time for filing this notice will be longer, depending on where the parties are located. See Cal Rules of Ct 8.450(e)(4). Copies of the Judicial Council form petition and notice of intent (forms JV-825 and JV-820) must be available in the courtroom and must accompany all mailed

notices of the advice. Cal Rules of Ct 5.590(b)(4). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties within 24 hours. Cal Rules of Ct 5.590(b)(2); *In re Cathina W.* (1998) 68 CA4th 716, 721–724. Once the notice of intent to file a writ petition has been filed, the clerk must serve the people listed in Welf & I C §294. Cal Rules of Ct 8.450(g).

☛ JUDICIAL TIP: With heavy workloads, court clerks may easily miss this deadline. Judicial officers may therefore need to remind court personnel to mail the required notices within the 24-hour time limit.

The deadline for filing a writ petition is mandatory. *Roxanne H. v Superior Court* (1995) 35 CA4th 1008, 1012; see also *Jonathan M. v Superior Court* (1995) 39 CA4th 1826, 1830.

A petition for a writ requires a client's consent. *Guillermo G. v Superior Court* (1995) 33 CA4th 1168, 1173. A parent's stated desire to appeal any future unfavorable decision is not sufficient to infer consent when that parent did not appear at the hearing in which the .26 hearing was set and did not sign the writ petition, despite the attorney's warnings. *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788. An attorney who represents a parent who has not communicated with the attorney or appeared at the hearings is under no professional duty to file a writ petition without the client's authorization. *Janice J. v Superior Court* (1997) 55 CA4th 690, 692.

With the client's authorization, however, if a parent is incarcerated or otherwise not present at the hearing at which the .26 hearing is set, counsel may complete the notice of intent to file a writ and file it on behalf of the client. *Jonathan M. v Superior Court, supra*.

One remedy for the failure of the juvenile court to advise a parent of writ procedures when setting a .26 hearing is for the appellate court to treat the invalid appeal as if it were a writ petition. *Jennifer T. v Superior Court* (2007) 159 CA4th 254, 260.

The court may not stay any order or judgment pending an appeal unless it makes provisions for the maintenance, custody, and care of the child. Cal Rules of Ct 5.595.

D. Notice Requirements

1. [§104.20] Who Is Entitled to Notice

Notice must be given to the following people (Welf & I C §§294(a), (i), 224.3):

- The mother.
- Any presumed and alleged fathers.

- Child (if 10 years of age or older). Notice to children's attorney of .26 hearing may be sufficient to notify the children. *In re Desiree M.* (2010) 181 CA4th 329, 335.
- Any known sibling if 10 years of age or older, the sibling's caregiver, and the sibling's attorney if the sibling is the subject of a dependency proceeding or has been adjudged a dependent child unless that child's case is scheduled for the same court on the same day; if the sibling is under 10 years of age, then only the caregiver and attorney must be notified.
- The grandparents of the child, if their address is known and if the parent's whereabouts are unknown.
- To any unknown parent by publication, if ordered by the court (see Welf & I C §294(g)(2)).
- All counsel of record.
- The child's current caregiver, including foster parents, relative caregivers, preadoptive parents, nonrelative extended family members, or resource family.
- Indian custodian and tribe if the court has reason to know that an Indian child is involved; if the custodian or tribe cannot be identified or located, notice must be given to the Secretary of the Interior's designated agent (see also Welf & I C §224.3; 25 USC §1912(a); Cal Rules of Ct 5.481).

Notice must not be given to (Welf & I C §294(b)):

- A parent whose rights have been terminated.
- A parent who has relinquished his or her child for adoption to a county adoption agency, licensed adoption agency, or DSS, and the relinquishment has been accepted.
- Any unknown parent by publication if DSS recommends adoption, and the court determines that publication would not be likely to lead to actual notice (see Welf & I C §294(g)(2)).
- An alleged father who has denied paternity and waived notice of further hearings on Judicial Council form JV-505.

☛ JUDICIAL TIP: Notice can be a major issue in the .26 hearing. Before the hearing begins, the court should examine the file, determine who has been notified, and determine whether the notice (including that done by publication) was proper. If all is in order, the court should find, at the hearing, that all parties were properly noticed.

It is essential for all those claiming to be fathers to be notified because a court may not terminate the parental rights of only one parent unless that

parent is the sole surviving parent or the other parent had his or her rights terminated or had relinquished custody to DSS. Cal Rules of Ct 5.725(a)(1), (f). See also Cal Rules of Ct 5.705, 5.708(i) (.26 hearing may not be set to consider termination of parental rights of only one parent).

Failure to provide a parent with statutorily required notice of a .26 hearing is a defect requiring automatic reversal. *In re Jasmine G.* (2005) 127 CA4th 1109, 1116. But see *In re A.D.* (2011) 196 CA4th 1319, 1328 (notice defect was harmless error where it was not cause of mother's tardy appearance).

2. [§104.21] Time Limitations

Notice must be completed at least 45 days before the hearing; service is deemed complete either at the time of personal delivery, 10 days after placed in the mail or sent by electronic mail, or at the end of the time prescribed by the order of publication (see Welf & I C §294(f)(7)(A)). Welf & I C §294(c)(1). When publication is ordered, service of notice must be completed at least 30 days before the hearing. Welf & I C §294(c)(2).

☛ JUDICIAL TIP: Some courts set a hearing at least 30 days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be deficient, there will often be time to remedy this within the 120-day period (see, *e.g.,* Welf & I C §366.21(e)) so that the .26 hearing may be held on time.

A court may not sanction DSS for failing to provide timely notice by publication (see Welf & I C §294(f)(7)(A)) by refusing to consider adoption as recommended by DSS. *In re Christiano S.* (1997) 58 CA4th 1424, 1433.

When an Indian child is involved, notice to the Indian custodian and tribe must be completed at least 10 days before the hearing. Welf & I C §224.3(d). Under ICWA, even when the child's status as an Indian child is not conclusive, a .26 hearing may not be held until at least 10 days after receipt of notice. *In re Jonathan D.* (2001) 92 CA4th 105, 110–111. These notice requirements apply even with a previous determination that the siblings were not Indian children; determination of tribal membership is made on an individual basis. 92 CA4th at 111. Once the court has complied with ICWA notice requirements at the outset of the juvenile proceedings, however, a parent's assertion of membership in a particular tribe will not retrigger the ICWA notice requirements at the .26 hearing. *In re Joseph P.* (2006) 140 CA4th 1524, 1531 (here, Bureau of Indian Affairs had denied applicability of ICWA; in other cases prior ICWA determination may be undone by means of petition under Welf & I C §388). The court's exhortations at each hearing for the parents to disclose membership in an Indian tribe, particularly when the parents never objected to statements in the social worker's reports that ICWA did not apply, satisfies the court's

initial and continuing duty of inquiry. *In re E.H.* (2006) 141 CA4th 1330, 1335; see Cal Rules of Ct 5.481(a).

Procedures for giving notice are found in Cal Rules of Ct 5.481 and Welf & I C §224.3. For discussion of ICWA notice requirements, see *The Indian Child Welfare Act Bench Handbook*, chap 2 (Cal CJER) (*note*: this Bench Handbook was last revised in 2013 and thus does not include 2016 federal ICWA regulations, statutory amendments made in 2018 by AB 3176, and rule and form changes since 2013.)

3. [§104.22] Contents of Notice

The notice must inform those receiving it of the time and place of the hearing and must advise them of their right to appear. Welf & I C §294(e)(1), (2). The notice must also advise the child and parents of the right to counsel, the nature of the proceedings, the recommendation of DSS, and of the fact that at the hearing the court will be selecting and implementing a permanent plan of adoption, legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, for the child. Welf & I C §294(e)(3)–(6). If an Indian child is involved, the notice must contain a statement including the following (Welf & I C §224.3(a)(5)(H)):

- The name of the petitioner and the name and address of the petitioner's attorney;
- The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court;
- The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians;
- That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to 25 USC §1912;
- That the information contained in the notice, petition, pleading, and other court documents is confidential (see Welf & I C §827) and any person or entity notified must maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal that information to anyone who does not need the information in order to exercise the tribe's rights under the federal Indian Child Welfare Act of 1978; and
- That the parent or Indian custodian and the tribe may intervene at any point and that they may have up to an additional 20 days for preparation.

When the parents are present at the hearing at which the .26 hearing is scheduled and the court advises them about the date, time, and place of the .26 hearing, the court must also advise them of the right to counsel, the nature of the proceedings, and of the fact that at the hearing the court will be selecting and implementing a permanent plan of adoption, legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, for the child. Welf & I C §294(f)(1).

4. [§104.23] Type of Notification

The type of notice will depend on whether the parents were present when the .26 hearing was scheduled. Notice to all counsel must always be by first-class mail or by electronic service. See Welf & I C §§212.5, 294(h).

Whatever the required method of notification, once the court has found initially that notice was properly given to the parents and others entitled to notice, notice for any continuation of the hearing may be by first-class mail to the last known address, by an order given in court under Welf & I C §296 to a child, parent or guardian, or Indian custodian, by electronic service, or by any other means calculated to provide notice, unless the recommendation for the permanent plan has changed. Welf & I C §§212.5, 294(d). If the recommendation has changed, notice must be provided according to §§104.24–104.26 below.

Notice can be a problem when the parent is homeless. The court should ask the parent to give a *permanent* mailing address at the earliest opportunity to the court, as well as to the attorney and social worker, in order to be in compliance with Welf & I C §316.1 and Cal Rules of Ct 5.534(i). See *In re Rashad B.* (1999) 76 CA4th 442, 449–450 (failure to file writ petition was excused because of lack of notice to homeless parent). A permanent mailing address does not have to be where the parent is actually residing. 76 CA4th at 450.

When an Indian child is involved, notice to the tribe must be by registered or certified mail, return receipt requested. Welf & I C §§224.3(a), 294(i).

a. [§104.24] Parents or Attorney Present When .26 Hearing Set

If the parents are present at the hearing at which the .26 hearing is scheduled, the court must advise them of the time and place of the hearing, order them to appear, and direct that they receive notice of this hearing by first-class mail or by electronic service. Welf & I C §§212.5, 294(f)(1). If the *attorney* is present at the time the .26 hearing is scheduled, no further notice is required. If the attorney of record is present when the court schedules a .26 hearing, and the parents' whereabouts are unknown, service

must be to the attorney by certified mail, return receipt requested (see Welf & I C §294(f)(7)(A)). Welf & I C §294(j).

b. [§104.25] Parents Not Present When .26 Hearing Set

If the parents are not present at the hearing at which the .26 hearing is scheduled, notice to the parents must be given in one of the following ways (Welf & I C §§212.5, 294(f)(2)–(6)):

- By certified mail, return receipt requested; this notice will be sufficient if DSS receives a signed return receipt.
- By personal service.
- By delivery to a competent person who is 18 years of age or older at the parents' usual residence or business address, followed by a first-class mail or electronic service notice to the parent at the same address.
- If the parent resides outside the state, by personal service or delivery to a person 18 years of age or older at the parent's address, or by certified mail, return receipt requested.
- By first-class mail or electronic service to the usual residence or business address if the recommendation is for legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, or in the case of an Indian child, tribal customary adoption.

c. [§104.26] When Parents Cannot Be Found

If the parent's identity is known, but his or her whereabouts are unknown, and the parent therefore cannot with reasonable diligence be served as specified above, DSS must file an affidavit at least 75 days before the hearing is scheduled, stating the parent's name and describing efforts made to locate and serve the parent. Welf & I C §294(f)(7).

If the court determines that DSS used due diligence (see discussion in §104.27) in attempting to locate the parent and adoption is recommended, service must be to the attorney of record by certified mail, return receipt requested. Welf & I C §294(f)(7)(A). If there is no attorney of record, the court must order service by publication in which a citation requiring the parent to appear is published once a week for 4 consecutive weeks in the newspaper most likely to be seen by the parent. Welf & I C §294(f)(7)(A). Whether service is to the attorney or by publication, the court must also order that notice by first-class mail or electronic service be given to the grandparents if their identities and addresses are known. Welf & I C §§212.5, 294(f)(7)(A).

If the court determines that DSS used due diligence in attempting to locate the parent, and legal guardianship, placement with a fit and willing

relative, or another planned permanent living arrangement is recommended, no further notice to the parent is required, but the court must order that notice be given by first-class mail or electronic service to the grandparents if their identities and addresses are known. Welf & I C §§212.5, 294(f)(7)(B). When the parent's residence becomes known, notice must be immediately served as provided in Welf & I C §294(f)(2)–(6). Welf & I C §294(f)(7)(C).

If the names or identities of one or both parents or alleged parents is unknown or uncertain, the court must issue an order (consistent with Fam C §§7665 and 7666) dispensing with notice if, after inquiry and a determination that there has been due diligence in attempting to identify any possible natural parents, the court is unable to identify any such parent, and no person has appeared who claims to be a parent. Welf & I C §294(g)(1). After determining that DSS has used due diligence in attempting to identify an unknown parent under Welf & I C §294(g)(1), if DSS recommends adoption, the court must determine whether notice by publication might be likely to lead to actual notice to the unknown parent. Welf & I C §294(g)(2). If so, the court may order notice by publication to be directed to either or both parents and to all who claim to be parents; the notice must name and otherwise describe the child. Welf & I C §294(g)(2). The notice must require the unknown parent to appear as stated in the citation, and the publication must be made once a week for 4 consecutive weeks. Welf & I C §294(g)(2).

If the court determines that there has been due diligence in attempting to identify one or both of the parents, or alleged parents, of the child and the probation officer or social worker recommends legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, no further notice to the parent shall be required. Welf & I C §294(g)(3).

d. [§104.27] Locating Parents

In locating a parent for purposes of notification, DSS should make use of the information it has available. When it ignores the most likely means of finding a parent, reasonable diligence in locating the parent cannot be shown, and substituted service will not be sufficient. *David B. v Superior Court* (1994) 21 CA4th 1010, 1016 (DSS failed to inquire about father's whereabouts in armed services although his name and fact that he was in Marines was on child's birth certificate). DSS must not ignore the most likely means of finding the parent. *In re Arlyne A.* (2000) 85 CA4th 591, 599 (due diligence declaration appeared valid on its face, but DSS had failed to check directory assistance for town of father's residence when informed that father lived there).

Termination of parental rights may be reversed when DSS demonstrates great ineptitude in locating the father, together with a failure to make a thorough, systematic investigation and a failure to conduct an inquiry in good faith. *In re Megan P.* (2002) 102 CA4th 480, 482, 489–490 (father had been in same location for years and wanted to find children, but DSS looked in wrong state for person with misspelled name and failed to check obvious sources, *e.g.*, Child Support Services' Parent Locator Clerk).

A father is not entitled to a stay under the Soldiers' and Sailors' Civil Relief Act (now the Servicemembers Civil Relief Act) even though he was in the Navy and away at sea at the time the .26 hearing was set, because he did not demonstrate that he was actually unavailable to participate in the hearing, and because he had never shown an interest in parenting the child. *Christine M. v Superior Court* (1999) 69 CA4th 1233, 1244. But see *In re A.R.* (2009) 170 CA4th 733, 741–745 (upon application, military servicemember who is party to civil action is entitled to stay of proceedings for at least 90 days pursuant to former 50 USC App §522(b)(1), now 50 USC §3932; disposition order removing child from father's custody reversed).

5. [§104.28] Notification of Incarcerated Parent

The court has a mandatory duty under Pen C §2625 to notify an incarcerated parent of a hearing at which termination of parental rights are sought; however, when some other outcome such as guardianship is recommended, the court has discretion over whether to require notice and may deny the parent's request to attend the hearing. *In re Barry W.* (1993) 21 CA4th 358, 364, 369–371. Once an incarcerated parent appears and participates, the parent may not complain on appeal that he or she was denied the right to have been transported to an earlier hearing under Pen C §2625. *In re Gilberto M.* (1992) 6 CA4th 1194, 1200 n7. But see *In re Laura H.* (1992) 8 CA4th 1689, 1695 n7 (disagreeing with *In re Gilberto M.* to extent it infers silence of party can effect waiver of right to counsel).

E. [§104.29] Scheduling the Hearing

The hearing must be scheduled within 120 days of the date that reunification services are denied or ordered to be terminated, whether at disposition (see Welf & I C §361.5(f)) or at a review hearing (see Welf & I C §§366.21(e), (g)(4), 366.22(a)(3)).

☛ JUDICIAL TIP: Some judges recommend setting the hearing well before the 120 days, unless the notice requirements will take that long to fulfill or unless the entire time is needed to complete the assessment.

In general, there may be tension between the timely resolution of dependency cases and the thoughtful exercise of judicial discretion. *In re Sean E.* (1992) 3 CA4th 1594, 1599. Delay or a change in course may become necessary, although this is a rare occurrence. For example, if a court grants a Welf & I C §388 petition showing changed circumstances, including a possibility that the parent would be able to care for the child, it must not then proceed to a .26 hearing and terminate parental rights. *In re Sean E., supra.* When a parent makes a showing of being able to reunify with the child, it may be a denial of due process for a court to deny a petition for modification, even when the 12-month hearing has been held and services terminated. *In re Jeremy W.* (1992) 3 CA4th 1407, 1416.

The judge has a dilemma when the parent is able to show a change of circumstances but still no ability to reunify. In this case, there should be a delay, during which time the parent has a hearing on the Welf & I C §388 petition, but no change in course from the original plan to proceed to a .26 hearing if the change in circumstances is insufficient to permit reunification. When the person seeking modification makes a prima facie case that there has been a change in circumstances, it is a denial of due process to proceed with the .26 hearing without hearing evidence on the petition for modification. *In re Lesly G.* (2008) 162 CA4th 904, 914–915.

The .26 hearing may begin during the pendency of a writ proceeding (see discussion in §104.19) because it is not a foregone conclusion that a stay will be granted. *In re Brandy R.* (2007) 150 CA4th 607, 610; see Cal Rules of Ct 8.452(f).

1. [§104.30] Continuances

The court may continue the proceeding for up to 30 days to appoint counsel and permit counsel to become acquainted with the case. Welf & I C §366.26(g). In addition, a continuance may be granted on request of counsel for the parent, child, or petitioning agency if it would not be contrary to the child's best interest. Welf & I C §352. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.42 (Cal CJER). In any event, a continuance should last only for the period of time shown necessary by the evidence. Welf & I C §352(a)(2). See also *In re Emily L.* (1989) 212 CA3d 734, 742–743 (pauses in proceedings prolong uncertainty for child and make it more difficult for prospective adoptive parents to make commitment to child).

If a continuance is sought to fulfill the notice requirements of Welf & I C §294, the court must state reasons on the record why good cause exists to grant the continuance. Welf & I C §294(*l*).

If the child was not properly notified of the right to be present at the .26 hearing or was not given an opportunity to attend the hearing, the court may be required to continue the hearing to allow for the child's presence.

Welf & I C §349(d). Parents who fail to appear at a regularly scheduled .26 hearing must be renotified of any continued hearing. *In re Phillip F.* (2000) 78 CA4th 250, 258. If they have been properly noticed under former Welf & I C §366.23 (now Welf & I C §294), however, the renotification does not need to comply with all the requirements of that section; instead, notice by counsel, the clerk of the court, or some other means will suffice. 78 CA4th at 258–259.

2. [§104.31] Determination of Whether to Grant or Deny

One reason to grant a continuance might be that the reunification services could not be completed during the time allotted. See *In re Michael R.* (1992) 5 CA4th 687, 695 (.26 hearing was set at 12 months and mother filed motion for continuance under Welf & I C §352). The court cannot summarily deny a motion for continuance. It must exercise discretion. 5 CA4th at 692–695.

☛ JUDICIAL TIP: Although it is tempting to be skeptical of a parent's claim that there was inadequate time in which to complete reunification plans, it is important to take the time to provide (on the record) the reasons why reunification could have been completed during the allotted time and any further justification for denial of a continuance.

A court may deny a request for a continuance if the request was made to permit the parents time to review an assessment that was provided just before the hearing. *In re Gerald J.* (1991) 1 CA4th 1180, 1187 (parents had notice of hearing and were unable to see assessment only because they failed to appear). A court may also deny a request for a continuance for paternity testing when an alleged father had neither attempted contact with the child during the reunification period nor sought earlier testing. *In re Ninfa S.* (1998) 62 CA4th 808, 810–811. Because genetic testing of an alleged father is irrelevant to the likelihood of adoption or to any of the exceptions set out in Welf & I C §366.26(c)(1)(B) at the .26 hearing, a continuance would not be helpful and would interfere with the prompt resolution of the child's status and the child's right to a permanent placement. 62 CA4th at 811.

☛ JUDICIAL TIP: The court may also make a parentage finding at the .26 hearing and then terminate parental rights if it is clear that the father could have become involved earlier and chose not to.

In any case, chronic court congestion in the juvenile court is not good cause for continuing a hearing; dependency cases demand priority. See, *e.g., Jeff M. v Superior Court* (1997) 56 CA4th 1238, 1242–1243.

F. [§104.32] Conduct of Hearing

As with any juvenile court hearing, a .26 hearing must be conducted in a nonadversarial manner, unless there is a contested issue of law or fact (see Welf & I C §350(a)(1)), and the court must control the proceedings with a view to expeditious determination of the facts and of all information related to the present circumstances and welfare of the child (Welf & I C §350(a)(1)). The .26 hearing must be closed to the public and heard at a special or separate session of court. See Welf & I C §§345–346.

The court must advise the child, parent, and guardian of any right to assert the privilege against self-incrimination, as well as the following rights to (Cal Rules of Ct 5.534(g)):

- Confront and cross-examine the preparers of reports and any witnesses called against them;
- Use the court's process to bring witnesses to court, including the witnesses whose hearsay statements are contained in the social worker's reports (see Welf & I C §366.26(b), (d), and (e)); and
- Present evidence to the court.

The hearing must be recorded by a court reporter or by means of any other authorized procedure if the hearing is conducted by a judge or by a referee, commissioner, or attorney acting as a temporary judge. Welf & I C §347; Cal Rules of Ct 5.532(a). If the hearing is before a referee or commissioner assigned as a referee who is not acting as a temporary judge, the juvenile court judge may nevertheless direct that the proceedings be recorded. Cal Rules of Ct 5.532(b).

Hearings held under Welf & I C §366.26 may be conducted by referees or by superior court commissioners assigned as referees. See Cal Rules of Ct 5.536. A referee may obtain a stipulation to act as a temporary judge. Cal Rules of Ct 2.816, 5.536(b). A stipulation to a commissioner acting as a temporary judge need not be in writing or express; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–1228. If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final 10 calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. Welf & I C §252; *In re Clifford C.* (1997) 15 C4th 1085, 1093.

When the parties refuse to enter into a stipulation, the referee may nonetheless conduct juvenile proceedings; a stipulation is necessary to give the court's acts finality (unless there is a rehearing), but the absence of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551. Despite Welf & I C §366.26(i)(1) (court has no power to change or set aside termination order), if the order had been made by a referee without a stipulation, the parties may seek a rehearing

within 10 days under Welf & I C §252. 14 CA4th at 1553. If no rehearing is sought, a termination order will become final when issued by a referee in the absence of a stipulation 10 days after service of the order. *In re Roderick U., supra.*

For more in-depth discussion of the conduct of dependency proceedings generally, see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.19 (judicial officers), §§103.25–103.33 (conduct of proceeding including duty of advisement of rights and receipt of evidence), and §103.44 (rehearings when original hearing was before referee) (Cal CJER).

1. [§104.33] Who May Be Present

Often, a child who is under 10 years of age will not attend a .26 hearing unless the child or the child's counsel has requested his or her attendance or the court requires the child to attend. See Welf & I C §366.26(h)(2). If the child is present, the court must inform the child that he or she has the right to address the court and participate in the hearing, and must permit the child's participation if he or she desires it. Welf & I C §349(a), (c). If the child is 10 years of age or older and not present, the court must determine whether the child was properly notified of the right to attend the hearing and inquire whether he or she was given an opportunity to attend. Welf & I C §§349(d), 366.26(h)(2). If the child was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court must continue the hearing only for that period of time necessary to provide notice and secure the child's presence, unless the court finds that it is in the best interest of the child not to grant a continuance. The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend. Welf & I C §349(d).

A nonminor dependent may also attend. Cal Rules of Ct 5.530(b)(1).

The child's attorney is entitled to be present and should be present. Welf & I C §349(b). In addition, Cal Rules of Ct 5.530(b) permits the following persons to be present:

- Parents, de facto parents, Indian custodian, or guardians, or if none can be found or none reside within the state, any adult relative residing within the county, or if none, the adult relative residing nearest the court;
- Counsel for parent, guardian, de facto parent, adult relative, or Indian custodian or tribe;
- Attorney for the petitioning agency (see Cal Rules of Ct 5.530(d));
- Social worker;
- Court clerk;
- Any court-appointed special advocate;

- A representative of the child's Indian tribe;
- The official court reporter;
- Bailiff, at the court's discretion; and
- Anyone else entitled to notice of the hearing under Welf & I C §§290.1 and 290.2.

A sibling may attend if he or she is 10 years of age or older, as well as the sibling's caregiver and attorney if the sibling is the subject of a dependency proceeding or has been adjudged a dependent child. See Welf & I C §294(a)(6). See discussion in §104.20. The court may also permit any of the child's relatives to be present at the .26 hearing on a sufficient showing and may receive information from relatives on Judicial Council form JV-285. See Cal Rules of Ct 5.534(b). See also Welf & I C §§100–110, 356.5 (setting forth requirements governing appointment and duties of CASA volunteer); Cal Rules of Ct 5.655 (program guidelines for CASAs).

All others must be excluded from the courtroom, unless a parent or guardian requests that the public be admitted and this request is consented to or made by the child. Welf & I C §346. The court may also admit anyone who it determines has a direct and legitimate interest in the case or in the work of the court. Welf & I C §346. In any case, no person on trial, accused of a crime, or awaiting trial may be permitted to attend juvenile court proceedings except when testifying as a witness, unless that person is the parent, de facto parent, guardian, or relative of the minor. Welf & I C §345; Cal Rules of Ct 5.530(a). A stepparent or friend of the parent who is accused of a crime must be excluded from the proceedings unless the court makes a finding under Welf & I C §346 permitting attendance.

A parent's waiver of appearance for one hearing does not extend to other hearings unless the parent was present at the hearing at which the later hearings are scheduled. See *In re Julian L.* (1998) 67 CA4th 204, 208, citing *In re Malcolm D.* (1996) 42 CA4th 904, 913.

2. [§104.34] Appointment of Counsel

Very often, parties will have had counsel retained or appointed before the .26 hearing. When appointing counsel for the first time at the .26 hearing, however, the court may continue the proceeding for up to 30 days to appoint counsel and permit counsel to become acquainted with the case. Welf & I C §366.26(g).

For a more thorough discussion of appointment of counsel, see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §§100.16–100.23 (Cal CJER).

a. [§104.35] Relieving Counsel

Once counsel has been appointed, that attorney must represent the client in all proceedings (see Welf & I C §317(d)) including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1402, 1404–1405). A juvenile court policy memorandum providing that attorneys appointed to represent indigent parents are to be relieved once a permanent plan is implemented unless good cause is shown is inconsistent with Welf & I C §317(d). *In re Tanya H.* (1993) 17 CA4th 825, 832–833.

In general, a court should not relieve a parent's attorney without a showing of good cause or substitution of another attorney. *In re Julian L.* (1998) 67 CA4th 204, 207–208. When counsel seeks to withdraw, the court must require an explanation for the record why he or she cannot proceed; if the attorney has been unable to contact the parent, counsel must inform the court how this lack of contact has an adverse impact on the client's representation. *In re Malcolm D.* (1996) 42 CA4th 904, 915. Before counsel may be relieved, the court must conduct a hearing with notice to the concerned parents. *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1066.

The court must investigate circumstances fairly and impartially before it relieves parent's counsel and goes on to terminate parental rights. See *Katheryn S. v Superior Court* (2000) 82 CA4th 958, 972–975 (court erroneously relieved public defender when mother had removed child from jurisdiction). Once there has been such an investigation, however, it may be proper to relieve a child's counsel if the court determines the child can no longer benefit from the appointment of counsel such as at the postpermanency planning stage when adoption is imminent and there are no longer legal issues to be resolved. See *In re Jesse C.* (1999) 71 CA4th 1481, 1490–1491.

In dependency cases, the *Marsden* procedure for discharging counsel and appointing new counsel is not applicable to retained counsel. *In re V.V.* (2010) 188 CA4th 392, 398. The court need not grant a lengthy continuance to permit an attorney with no dependency experience to prepare for a .26 hearing. 188 CA4th at 399.

b. [§104.36] Competency

All parties who are entitled to counsel, including the child who is the subject of the proceedings, are entitled to competent counsel. Welf & I C §317.5. To raise the level of competency of counsel appearing in juvenile court, the presiding judge of the juvenile court has an obligation to encourage local attorneys to practice in juvenile court over a substantial period of time, to raise the status of public attorneys who practice in juvenile court, and to establish minimum standards of practice for court-appointed attorneys who practice in juvenile court. Cal Rules of Ct, Standards of J

Admin 5.40(c). The judge should also institute and encourage training programs for lawyers who serve as court-appointed attorneys in juvenile court, as well as set minimum training and continuing legal education standards. Cal Rules of Ct, Standards of J Admin 5.40(d). See Cal Rules of Ct 5.660(d) for rules governing competency.

c. [§104.37] Attorneys' Fees

A court cannot arbitrarily cut the fees submitted by an attorney for representing a child. *Trask v Superior Court* (1994) 22 CA4th 346, 353 (wardship proceeding). To encourage high quality of legal representation of children as required by Cal Rules of Ct, Standards of J Admin 5.40, a court should not reduce the fees submitted by appointed counsel without a statement of reasons for the reduction. *Trask v Superior Court, supra.* However, when the court is responsible for setting fees for panel attorneys, it may change the method of compensation from hourly to flat fee to be applied prospectively to services rendered after the effective date of the new policy. *Amarawansa v Superior Court* (1996) 49 CA4th 1251, 1257–1261.

3. Receipt of Evidence

a. [§104.38] Generally

At the hearing, the court must review and consider the social worker's report containing an assessment of the child and of prospective adoptive parents, if any, as well as the report of any CASA volunteer, the case plan submitted for the hearing, and the report submitted by the caregiver under Welf & I C §366.21(d). Welf & I C §§366.23, 366.26(b); Cal Rules of Ct 5.725(d). See also Welf & I C §§361.5(g), 366.21(i), 366.22(c)(1), 366.25(b)(1) (specifying contents of report). This report must be provided to the parties and all counsel at least 10 days before the hearing and must provide a summary of recommendations to the child's present custodians, any CASA, and an Indian child's tribe. Cal Rules of Ct 5.725(c). In addition, any person notified, such as the current caregiver, may submit information to the court in writing. Welf & I C §294(a)(10).

If an assessment is incomplete, significantly failing to comply with the requirements of Welf & I C §366.21(i), the court may not use it as the basis of its findings. See *In re Valerie W.* (2008) 162 CA4th 1, 13–15.

The child must have been asked for a statement regarding his or her permanent placement plan, and the case plan must contain the social worker's assessment of this statement. Welf & I C §16501.1(g)(15)(A). At the hearing, the court must consider the case plan and permanent placement plan and must find that the child was or was not actively involved in developing these plans. Cal Rules of Ct 5.708(f)(3)–(4). If it finds that the child was not actively involved, it must order DSS to involve him or her

unless the court finds that the child is unable, unwilling, or unavailable to participate. Cal Rules of Ct 5.708(f)(4).

In the case of an Indian child, the court must review the case plan and find (Cal Rules of Ct 5.708(f)(7)–(8)):

- DSS consulted with the child's tribe and the tribe was actively involved in the development of the case plan and permanent placement plan, including consideration of whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful; or
- DSS did not consult with the child's tribe. In this case, the court must order DSS to consult with the tribe, unless the court finds that the tribe is unable, unavailable, or unwilling to participate.

If the child is 12 years of age or older and in a permanent placement, the court must consider the case plan and find either that the child was given the opportunity to review, sign, and receive a copy or was not given the opportunity; if the court found that the child did not have this opportunity, it must order DSS to provide the child with such an opportunity. Cal Rules of Ct 5.708(f)(9)–(10); see also Welf & I C §16501.1(g)(13).

Social workers' reports containing hearsay are admissible at .26 hearings. See Welf & I C §366.26(b); *In re Keyonie R.* (1996) 42 CA4th 1569, 1572–1573. The admissibility of the social worker's report at the .26 hearing is not expressly conditioned on the social worker being available for cross-examination. *In re Jeanette V.* (1998) 68 CA4th 811, 816; see Welf & I C §366.26(b); Cal Rules of Ct 5.725(c), (d). If termination of parental rights is the recommendation, it must be clearly stated in the report that there is sufficient evidence that the child is likely to be adopted. A "fragmentary and ambiguous" assessment is not acceptable and will not meet the agency's burden to prove adoptability. *In re Brian P.* (2002) 99 CA4th 616, 625.

The parents are entitled to present evidence at a .26 hearing as at any dependency proceeding. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1085. They have a due process right to question DSS on the issue of adoptability. *In re Thomas R.* (2006) 145 CA4th 726, 734. But once the court determines that the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the exceptions listed in Welf & I C §366.26(c)(1)(B). *In re Zachary G.* (1999) 77 CA4th 799, 809.

b. [§104.39] Relevance

A .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents. *In re Scott M.* (1993) 13 CA4th 839, 844. Therefore, deficiencies in the assessment report prepared for the hearing, such as failure to check on prospective adoptive parents' criminal history, do not ordinarily deprive the parents of procedural due process. *In*

re Crystal J. (1993) 12 CA4th 407, 413. See discussion in §§104.54–104.57 on determining adoptability.

Also not relevant is whether the DSS decision on adoptive placement is the best one because the DSS or a licensed adoption agency has the exclusive care and control of the child and the court may not substitute its judgment for the agency's unless the DSS decision was clearly absurd. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734. The court's review is limited to whether DSS has abused its discretion. *Los Angeles County Dep't of Children & Family Servs. v Superior Court* (1998) 62 CA4th 1, 10.

Evidence of the racial or ethnic match between the child and prospective adoptive parents is not relevant at a .26 hearing. See *In re Tracy X.* (1993) 18 CA4th 1460, 1464–1465. Because courts are required to engage in concurrent planning (see Welf & I C §§358.1(b), 16501.1(g)(10)), however, it may be a good idea to actively address religious considerations in placement at the earliest possible stages. See Fam C §§7950, 8708, 8709 (although discrimination based on race, color, or national origin in adoptive placement is not permissible, consideration can be given to religion); see also discussion in Seiser & Kumli, Seiser & Kumli on California Juvenile Courts Practice and Procedure §2.12[6] (Matthew Bender 2019) and in §104.55.

The parents' current circumstances are not relevant to the issue of adoptability which is the focus of the hearing. *In re Edward R.* (1993) 12 CA4th 116, 126. Current parental circumstances, however, may be relevant in resolving whether the parents have maintained regular contact with the child and whether the child would benefit from continuing this relationship under Welf & I C §366.26(c)(1)(B)(i). 12 CA4th at 127.

The court need not let a parent present evidence on detriment (see Welf & I C §366.26(c)(1)(B)) when the court had previously found "no detriment" at an earlier .26 hearing (which had been continued to give DSS time to locate prospective adoptive homes). *In re A.G.* (2008) 161 CA4th 664, 671.

4. Testimony of Child

a. Consideration of Child's Wishes

(1) [§104.40] Generally

Welfare and Institutions Code §366.26(h)(1) imposes a mandatory duty on the court to consider the child's wishes to the extent that those wishes are ascertainable. If the child is present at the hearing, the court must inform the child that he or she has the right, and allow the child, if he or she so desires, to address the court and participate in the hearing. Welf & I C §349(c). If a child who is 10 years of age or older is not present, the court must determine whether the child was properly notified of the hearing and

given an opportunity to attend; if the child was not properly notified and he or she wishes to attend, the court must continue the hearing to secure the child's presence, unless a continuance would not be in the best interest of the child. Welf & I C §349(d).

If the child does not address the court, the social worker's report should address the child's wishes, and the judge may augment this report by questioning the child's counsel and the CASA, if any. Unsworn statements of counsel, the CASA, or anyone else, however, are not evidence. See *In re Heather H.* (1988) 200 CA3d 91, 95–96. See also Cal Rules of Prof Cond 3.4(g) (attorney shall not "assert personal knowledge of the facts in issue except when testifying as a witness").

A court need not consider the child's express wishes, however, when the child is not capable of adequately expressing those wishes by virtue of being too young or frail to communicate or to understand the nature of the proceedings. *In re Juan H.* (1992) 11 CA4th 169, 173 (child was under 4 years of age; court could properly determine his wishes from reports of his behavior in mother's presence).

The court may terminate parental rights even when the child has expressed views to the contrary when the court finds that the child would derive no benefit through continued regular contact with the parents. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088.

(2) [§104.41] How to Determine Child's Wishes

A court may reasonably infer a young child's preference from his or her conduct. *In re Leo M.* (1993) 19 CA4th 1583, 1594. Most courts that have considered the issue have held that a court need not receive direct evidence of the child's wishes, either at the hearing or through out-of-court statements reflecting the fact that the child is aware of the nature of the hearing. See, *e.g.,* 19 CA4th at 1592–1593; *In re Amanda D*. (1997) 55 CA4th 813, 820 (in considering child's wishes under Welf & I C §366.26(h), court need not hear direct testimony but may rely on evidence of child's wishes found in DSS report). See also *In re Jesse B.* (1992) 8 CA4th 845, 853 (substantial compliance with Welf & I C §366.26(h) may be achieved when child has independent counsel who has interviewed child to determine his or her wishes as required by Welf & I C §317(e)).

Consideration of the child's wishes under Welf & I C §366.26(h) may require the court to explore the child's feelings regarding possible custodians so that it can infer his or her wishes concerning the permanent plan. *In re Julian L*. (1998) 67 CA4th 204, 208–209. A child's statements that the child liked living with foster parents, referred to their house as "my home," and was apathetic about visits with the biological father was held to be sufficient evidence for the court to assess the child's wishes. *In re Amanda D.*, *supra*, 55 CA4th at 820–821.

Despite the holding in *Leo M.* that the court need not determine that the child specifically understands that the proceeding is one for termination of parental rights (*In re Leo M., supra*, 19 CA4th at 1593), one case held that if the court does not receive direct evidence of the child's wishes at the .26 hearing, it must receive an out-of-court statement reflecting that the child is aware that termination of parental rights is at issue. *In re Diana G.* (1992) 10 CA4th 1468, 1480.

b. [§104.42] Taking Testimony in Chambers

The child's testimony may be taken in chambers outside the presence of the parents if the parents are represented by counsel, the counsel is present, and any one of the following applies (Welf & I C §366.26(h)(3)(A)):

- The court determines that it is necessary to take testimony in chambers to ensure truthful testimony,
- The child is likely to be intimidated by a formal courtroom setting, or
- The child is frightened to testify in front of the parents.

The court may also permit the child's testimony to be taken in chambers outside the presence of the guardians under the same circumstances as those governing the taking of testimony outside the parents' presence. Welf & I C §366.26(h)(3)(C).

The presence of parents' counsel is essential; it may be prejudicial error for the court to question the child in chambers with only a reporter present. See *In re Laura H.* (1992) 8 CA4th 1689, 1697. Although *In re Laura H., supra,* held that acquiescence by the parent to such a procedure might not constitute a waiver (8 CA4th at 1695), the court in *In re Jamie R.* (2001) 90 CA4th 766, 771, held that a parent who keeps silent and otherwise acquiesces to the child's being questioned in chambers outside the presence of counsel waives the statutory right to have counsel at the in-chambers proceeding (.26 hearing).

The parents may elect to have the court reporter read back the in-chambers testimony or may elect to have it summarized by counsel. Welf & I C §366.26(h)(3)(B).

c. [§104.43] Other Alternatives

In addition to in-chambers testimony, the court may make other arrangements to accommodate the child witness. See, *e.g., In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, which held that the court had inherent power to use both in-chambers testimony and closed circuit television to ensure truthfulness (jurisdiction hearing).

Moreover, the court may elect not to have the child testify at all in an appropriate case. *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088 (child did not testify although testimony would have been relevant and child was competent and available). Although the court must consider the child's wishes, it may exclude the child's testimony to prevent psychological damage even when the case does not fall under Evid C §765(b) (child under 14 was victim of crimes). 8 CA4th at 1088–1089. The court may refuse to issue process requiring the attendance and testimony of the child after weighing all the interests if the child's wishes can be presented without live testimony and psychological damage would result from such testimony. *In re Jennifer J., supra.*

Statements by a child who is not competent to testify (or one for whom testimony might cause psychological damage as in the *Jennifer J.* case) may be admissible under a "child dependency hearsay exception" when there are indicia of reliability. See *In re Cindy L.* (1997) 17 C4th 15, 23–25, 28. Also in the context of a jurisdiction hearing, the Supreme Court decided *In re Lucero L.* (2000) 22 C4th 1227, 1242–1243, which held that a child's out-of-court statements may be admissible even if they do not meet the requirements of the child dependency hearsay exception and even if the child is incompetent to testify.

Although these cases arose out of jurisdiction hearings and would be more likely to be applicable to a situation in which abuse is the central issue, there may be instances in which out-of-court statements of a very young child might be relevant at a .26 hearing (*e.g.,* relevant to issue of child's benefiting from parents' continuing visitation and contact; see Welf & I C §366.26(c)(1)(B)(i)).

G. [§104.44] Findings and Orders

At a .26 hearing, the court may choose to: (1) terminate parental rights and order the child placed for adoption, (2) identify adoption or tribal customary adoption as the goal without terminating parental rights and begin to locate appropriate adoptive parents, (3) appoint a relative or nonrelative guardian for the child, (4) order a plan of tribal customary adoption without termination of parental rights, (5) permanently place the child with a fit and willing relative, or (6) place the child in foster care. Welf & I C §366.26(b). Returning the child to the parents is not an option at the .26 hearing, but due process is satisfied because the parent can bring a petition under Welf & I C §388 for modification or termination of jurisdiction based on changed circumstances. *In re Marilyn H.* (1993) 5 C4th 295, 310.

The court need not specify the grounds for its decision at the .26 hearing; the finding or its equivalent will have been made when the court scheduled the .26 hearing. *In re Janee J.* (1999) 74 CA4th 198, 213. The only findings required to terminate parental rights are that the child is likely

to be adopted and that there had been a prior decision to deny or terminate reunification services. 74 CA4th at 214.

Adoption, as the permanent plan when a child cannot be returned to the parent's custody, is preferred over guardianship. *In re Heraclio A.* (1996) 42 CA4th 569, 578. Adoption is preferable because it places children in the most permanent and secure alternative. *In re Lukas B.* (2000) 79 CA4th 1145, 1156. An order for adoption will be fairly automatic if the child is a proper subject for adoption and none of the circumstances listed in Welf & I C §366.26(c)(1)(B) are present. *In re Jose V.* (1996) 50 CA4th 1792, 1798 (both parents' counsel and child's counsel had argued for guardianship). If the relative caretaker is willing to adopt, his or her preference for guardianship would not preclude adoption under Welf & I C §366.26(c)(1)(B). *In re Xavier G.* (2007) 157 CA4th 208, 213–214. Nevertheless, under Welf & I C §366.26(b)(3), relative guardianship is preferable to choosing adoption as a *future* goal under Welf & I C §366.26(b)(4).

Because adoption is preferred over guardianship, the strength and quality of a child's relationship with a parent must outweigh the benefits of a permanent home to justify a guardianship order when the child is otherwise a proper subject of adoption. *In re Teneka W.* (1995) 37 CA4th 721, 728–729 (children would suffer detriment from loss of relationship with father, but it was permanently scarred by father's murder of mother). But when the child is living with a relative who is willing to accept legal guardianship but unable or unwilling to adopt (but not because of unwillingness to accept legal or financial responsibility), the court must select guardianship if removing that child from the relative's home would be detrimental. Welf & I C §366.26(c)(1)(A). See discussion in §§104.46–104.51 of circumstances in which termination of parental rights is precluded.

☛ JUDICIAL TIP: It is recommended that Title IV-E findings required for postpermanency hearings under Welf & I C §366.3(e) (see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §§103.6, 103.9 (Cal CJER)) be made at the .26 hearing insofar as they are relevant at this stage. These may include:

- DSS has complied with the case plan by making reasonable efforts to finalize the permanent plan.
- The permanent plan of adoption is appropriate and is ordered as the permanent plan.
- The permanent plan of legal guardianship with a specific goal of [*dismissal of dependency or adoption*] is appropriate and is ordered as the permanent plan.

- The permanent plan of permanent placement with [*name*], a fit and willing relative with a specific goal of [*kinship adoption, guardianship, transition to independent living, tribal customary adoption, etc.*] is appropriate and is adopted as the permanent plan.
- The permanent plan of placement with [*name*], with a specific goal of [*return home, adoption, guardianship, relative placement, less restrictive foster care setting, etc.*] is appropriate and is adopted as the permanent plan.
- The likely date by which child may be returned home or placed for adoption, legal guardianship, or another planned permanent living arrangement, such as tribal customary adoption in the case of an Indian child is [*month/day/year*].
- The services needed for a child 14 years of age or older to transition to successful adulthood are [*list services*].

1. Termination of Parental Rights

a. [§104.45] In General

To terminate parental rights, the court must find by clear and convincing evidence that it is likely that the child will be adopted. Welf & I C §366.26(c)(1). The purpose of termination of parental rights is to free the dependent child for adoption. Cal Rules of Ct 5.725(f). Indeed, the likelihood of adoption is the pivotal question. *In re Heather B.* (1992) 9 CA4th 535, 547. See discussion in §104.54. If the court makes that finding, one of the following findings (made at an earlier hearing) generally will provide a sufficient basis for termination (Welf & I C §366.26(c)(1)):

- Reunification services were not offered under Welf & I C §361.5(b) (parents' whereabouts unknown, parent mentally disabled, child reabused, parent convicted of causing another child's death, or for a number of other reasons) or under §361.5(e)(1) (parent institutionalized, incarcerated, detained by United States Department of Homeland Security, or deported).
- Parents' whereabouts are unknown, parent has failed to contact the child for 6 months, or parent has been convicted of felony indicating parental unfitness under Welf & I C §366.21(e).
- Child cannot or should not be returned to parent or guardian under Welf & I C §366.21, §366.22, or §366.25.

Because the purpose of termination is adoption, the rights of the mother and any alleged, presumed, known, and unknown fathers must be terminated in order for the child to be adopted. Cal Rules of Ct 5.725(f). The court may not terminate the rights of only one parent unless that parent

is the only surviving parent, the rights of the other parent have been terminated, or the other parent has relinquished custody of the child to the county welfare department. Cal Rules of Ct 5.725(a)(1), (f). Despite the requirement that the court may not terminate parental rights of one parent only, when both parents' rights are terminated, one parent appeals and that parent's rights are reinstated for failure to provide proper notice of the .26 hearing, the other parent's rights cannot also be restored without the filing of a timely appeal under Welf & I C §366.26(i)(1). *Los Angeles County Dep't of Children & Family Servs. v Superior Court* (2000) 83 CA4th 947, 949. If both parents appeal, however, and the termination of parental rights is reversed as to one parent, it may be in the child's best interest to restore the other parent's rights also, even in the absence of error as to the second parent. *In re DeJohn B.* (2000) 84 CA4th 100, 110 (both parents appealed; judgment as to mother reversed due to lack of notice, so no reason to deprive child of whatever benefits might be gained through father's family); *In re Mary G.* (2007) 151 CA4th 184, 205–208 (both parents appealed, and father's parental rights reinstated; mother's rights also reinstated despite mother's failure to make prima facie showing of changed circumstances to justify her petition for modification).

A court cannot terminate the parental rights of a presumed father without a finding that he is unfit and that placing the child in his custody would result in detriment to the child. *In re G.S.R.* (2008) 159 CA4th 1202, 1211–1212. And detriment may not be based solely on having insufficient funds to obtain adequate housing. 159 CA4th at 1214. Nor may it be based on a lack of appropriate housing. *In re P.C.* (2008) 165 CA4th 98, 105.

The question of whether to accord presumed father status to a man who has not been involved early in the dependency process is a troubling one. Thus one court has held that when an unwed father comes forward as soon as he learns of the baby's existence (8 months into dependency process) and demonstrates a full commitment to financial, emotional, and other kinds of support, he is entitled to presumed father status, and DSS must prove he is an unfit parent before his parental rights may be terminated. *In re Baby Boy V.* (2006) 140 CA4th 1108, 1117–1118. Disagreeing with *In re Baby Boy V.*, another court has held that a biological father who waited until 8 months after the dependency process had begun before even inquiring whether his sexual encounters with the mother ended in pregnancy must not automatically be accorded presumed father status. *In re Vincent M.* (2008) 161 CA4th 943, 959–960.

The finding that a child is adoptable, however, will not of itself support an order terminating parental rights; the court must also have made any one of the findings listed in Welf & I C §366.26(c)(1) at a prior hearing. *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113. For example, all that may be required for termination of parental rights is a finding at the .26 hearing that the child is adoptable, together with the previous finding at the jurisdictional

and dispositional hearings that the parents' whereabouts were unknown and therefore reunification services were not required. *In re Baby Boy L.* (1994) 24 CA4th 596, 605–606. Once these findings have been made, in the absence of evidence that termination would be detrimental to the child under one of the six exceptions (Welf & I C §366.26(c)(1)(B)), the court *must* terminate parental rights. *In re Andrea R.* (1999) 75 CA4th 1093, 1108.

After parental rights have been terminated, the parents are no longer entitled to notice of any subsequent hearings (Welf & I C §366.3(a)), nor are they entitled to visitation with the child. *In re Diana G.* (1992) 10 CA4th 1468, 1482–1483. Moreover, once parental rights have been terminated, a former parent may not be ordered to pay child support. *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1123.

b. When Precluded

(1) [§104.46] General Requirements

Parental rights may not be terminated if, at each hearing at which the court was required to make findings concerning reasonable efforts or services, the court found that reasonable efforts were not made or that reasonable services were not offered or provided. Welf & I C §366.26(c)(2)(A). When the child is an Indian child, the court must find that active efforts have been made by clear and convincing evidence. Welf & I C §366.26(c)(2)(B); *Adoption of Hannah S.* (2006) 142 CA4th 988, 997.

When there has been a failure to provide reunification services, termination of parental rights is improper and the court must order an additional 6 months of services at the review hearing at which setting a .26 hearing is contemplated. *In re David D.* (1994) 28 CA4th 941, 954–956. See also *In re Precious J.* (1996) 42 CA4th 1463, 1479–1480, holding that services are not reasonable for an incarcerated parent when DSS failed to arrange any visits or establish a visitation schedule despite court orders directing it to do so. It was also error to terminate parental rights without ever having either offered reunification services or having determined that services should be declined even though the mother's whereabouts were originally unknown and she lived in a locked psychiatric facility. *In re T.M.* (2009) 175 CA4th 1166, 1171–1173; Welf & I C §366.26(c)(2)(A).

In addition, the court may not terminate the parental rights of only one parent unless that parent is the sole parent because the other parent has died, has had his or her rights terminated, or has relinquished custody to DSS. Cal Rules of Ct 5.725(a)(1), (f). Under Cal Rules of Ct 5.725(a), it is error for a court to terminate parental rights at two separate hearings, one for each parent. *In re Vincent S.* (2001) 92 CA4th 1090, 1093.

Termination of parental rights is also improper when parents have voluntarily relinquished their parental rights under Welf & I C §361(b); in this situation, the juvenile court may not then terminate parental rights under

Welf & I C §366.26, nor may it place the children for adoption under this section. *In re R.S.* (2009) 179 CA4th 1137, 1152–1153. Adoption after a voluntary relinquishment is overseen by the DSS or county adoption agency under Fam C §8704(a).

Finally, even if the child is a proper subject for adoption and reunification services were not offered or have been terminated, the court may still decide not to terminate parental rights if to do so would be detrimental to the child because of one of the following circumstances:

(1) *The child is living with a relative who is willing to accept legal guardianship but unable or unwilling to adopt (although not because of unwillingness to accept legal or financial responsibility), and it would be detrimental to the emotional well-being of the child to be removed from that relative's custody.* Welf & I C §366.26(c)(1)(A). In the case of an Indian child, "relative" includes "extended family member." Welf & I C §366.26(c)(1)(A); 25 USC §1903(2).

(2) *The parents have maintained continuing visitation and contact with the child, and the child would benefit from a continuation of the relationship.* Welf & I C §366.26(c)(1)(B)(i).

(3) *A child who is 12 years of age or older objects to the termination of parental rights.* Welf & I C §366.26(c)(1)(B)(ii). A statement of preference is not necessarily an objection, precluding termination of parental rights. See *In re Christopher L.* (2006) 143 CA4th 1326, 1335. In this case, an adolescent child's statement to the court that he wanted to be adopted by his aunt and uncle, but wanted to continue visiting with his mother, did not act as a barrier to termination of parental rights under Welf & I C §366.26(c)(1)(B)(ii) (child-objection exception), but rather as a statement of preference.

(4) *The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child no longer needs residential care.* Welf & I C §366.26(c)(1)(B)(iii). A child whose prospective adoptive parents operate a special needs (residential treatment) home in which the child's developmentally delayed brother lives, however, is not thereby precluded from adoption because of Welf & I C §366.26(c)(1)(B)(iii). *In re Jeremy S.* (2001) 89 CA4th 514, 527–528, disapproved on other grounds in 31 C4th at 413–414.

(5) *The child is living with a foster parent or Indian custodian who is unwilling to adopt, but is willing to accept legal or financial responsibility for the child and to provide a stable home, and removal from that placement would be emotionally detrimental to the child.* Welf & I C §366.26(c)(1)(B)(iv).

(6) *There will be substantial interference with the relationship between the child and his or her siblings.* Welf & I C §366.26(c)(1)(B)(v). This exception may not be applied retroactively. *In re Raymond E.* (2002) 97 CA4th 613, 618. A parent has standing to raise this exception (*In re L.Y.L.* (2002) 101 CA4th 942, 951) but not for the first time on appeal (*In re Erik P.* (2002) 104 CA4th 395, 403). See discussion of procedure in §104.50.

☛ JUDICIAL TIP: In determining whether termination will cause substantial interference with sibling relationships, judges should view the situation from the perspective of the child.

(7) *The child is an Indian child and there is a compelling reason that termination of parental rights would not be in his or her best interest, including that (1) termination of parental rights would substantially interfere with his or her tribal connection, (2) the tribe has identified tribal customary adoption or another planned permanent living arrangement for the child, such as guardianship, or (3) the child is a nonminor dependent, and the nonminor and the nonminor's tribe have identified tribal customary adoption for the nonminor.* Welf & I C §366.26(c)(1)(B)(vi), (c)(1)(C).

These criteria are the *only* bases for concluding that adoption or termination of parental rights is not in the child's best interest when the situation would otherwise warrant termination and subsequent adoption. Welf & I C §366.26(c)(1)(B), (c)(4). There is no "best interest of the child" exception to adoption in addition to the six enumerated exceptions contained in Welf & I C §366.26(c)(1)(B). *In re Jessie G.* (1997) 58 CA4th 1, 8; *In re Josue G.* (2003) 106 CA4th 725, 734 (no best-interest exception to preference for termination of parental rights and adoption).

The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 5.725(d)(2). The court also need not make an express finding that there was no exception to termination of parental rights under Welf & I C §366.26(c)(1)(B) (in this case, relating to Indian child exception under Welf & I C §366.26(c)(1)(B)(vi)). *In re A.A.* (2008) 167 CA4th 1292, 1321–1323.

Termination of parental rights of a gravely disabled parent, however, is *not* precluded by the Americans with Disabilities Act (ADA). *In re Anthony P.* (2000) 84 CA4th 1112, 1116. See also *In re Diamond H.* (2000) 82 CA4th 1127, 1139, disapproved on other grounds in 26 C4th at 748 n6 (ADA does not directly apply to juvenile dependency proceedings and cannot be used as defense).

(2) [§104.47] Benefit From Continuing Contact

Termination of parental rights under Welf & I C §366.26(c)(1)(B)(i) is precluded when the benefit from continuing the parent/child relationship outweighs the security and sense of belonging that a new family would

confer. *In re Lukas B.* (2000) 79 CA4th 1145, 1155. In deciding whether termination is precluded because of the potential benefit of this continuing contact, the court should balance whether the strength and quality of the parent/child relationship outweighs the well-being that the child would gain from having a permanent adoptive home, together with the security and sense of belonging that a new adoptive family would confer. *In re Autumn H.* (1994) 27 CA4th 567, 575.

Termination is not automatically justified either because the parent is not ready to resume custody at the time of the .26 hearing or because there is a suitable adoptive parent. *In re Amber M.* (2002) 103 CA4th 681, 690 (children had strong bond with mother who visited as often as possible during reunification period and acted in loving, parental way, and mother did everything that was asked of her to regain custody). Similarly, a court must not automatically reject the "benefit from continuing contact" exception even when (1) the biological parent does not have day-to-day contact with the child, (2) there is a prospective adoptive parent with whom the child has a primary attachment and who has promised to permit visits with the biological parent, and (3) time might eventually ameliorate the child's loss of that parent. *In re S.B.* (2008) 164 CA4th 289, 299–300. But see *In re C.F.* (2011) 193 CA4th 549, 558–559 (result in *In re S.B.* does not support proposition that parent may establish beneficial relationship exception merely by showing child derives "some measure of benefit" from maintaining parental contact).

The exception applies only when the continuing contact results in positive emotional attachment between parent and child and not just mere incidental benefit. *In re Autumn H., supra*, 27 CA4th at 575 (father had "friendly visitor" relationship with child). In other words, the exception applies only when:

- Parents have had regular visitation and contact,
- The relationship is a parent-child relationship, not a friendship or visitor relationship, and
- The benefit to the child of maintaining that relationship outweighs the benefits of adoption to such a degree that termination of parental rights would "greatly harm" the child.

See *In re Brittany C.* (1999) 76 CA4th 847, 853–854; Welf & I C §366.26(c)(1)(B)(i). See, *e.g.*, *In re C.F., supra,* 193 CA4th at 555–557 (no bonding study or other evidence showed mother occupied parental role, children would suffer any actual detriment from termination of parental rights, or benefits of continuing parental relationship outweighed benefits of permanent placement with family members who were ready to give them permanent home).

Moreover, a biological father who failed to reunify during the course of the dependency process may not derail adoption proceedings merely because the child might gain some benefit from friendly visits. *In re Jason J.* (2009) 175 CA4th 922, 937. Such friendly visits by a biological father may not be the basis for an exception to termination of parental rights when the child had never lived with the father and the father never went beyond supervised visitation. 175 CA4th at 938. And a grandfather cannot assert the "beneficial relationship" exception to termination of parental rights based on status as presumed father where he was not entitled to obtain that status. *In re Jose C.* (2010) 188 CA4th 147, 161–163.

Courts should consider these general factors in determining whether Welf & I C §366.26(c)(1)(B)(i) applies (*In re Angel B.* (2002) 97 CA4th 454, 467):

- Child's age,
- Percentage of the child's life spent with the parent,
- Effect of interaction between the parent and child, and
- Child's particular needs.

Even with a number of years of loving parenting, the beneficial relationship exception of Welf & I C §366.26(c)(1)(B)(i) will not overcome an autistic child's long-term needs for the stability, predictability, and highly competent care that a special needs adoptive home would provide. *In re Dakota H.* (2005) 132 CA4th 212, 229–230.

(a) [§104.48] Termination of Parental Rights Proper—No Parental Role

To preclude termination of parental rights under Welf & I C §366.26(c)(1)(B)(i), the parent must have occupied a parental role in the child's life. *In re Andrea R.* (1999) 75 CA4th 1093, 1108. Examples in which parents were not found to have performed such a role include:

- *In re Beatrice M.* (1994) 29 CA4th 1411, 1418–1420 (although children might have benefited from continuing contact with natural parents and adoptive parent maintained and encouraged continuing contact with natural parents, natural parents did not have parental relationship with children);
- *In re Elizabeth M.* (1997) 52 CA4th 318, 324 (when visits with parent were not always consistent and when parent did not occupy parental role during those visits, parent-child relationship, no matter how positive, was not sufficient to overcome statutory preference for adoption);
- *In re Brittany C.* (1999) 76 CA4th 847, 853–854 (parent must show relationship with child is parent-child relationship rather than

friendship; relationship must be more than pleasant—it must resemble consistent, daily nurturing that marks parental relationship);

- *In re Derek W.* (1999) 73 CA4th 823, 827 (child had lived with prospective adoptive parents, who alone provided child with food, shelter, protection, and guidance on daily basis, from time he was 9 days old);
- *In re Zachary G.* (1999) 77 CA4th 799, 811–812 (strong bond with mother did not rise to level of exception listed in Welf & I C §366.26(c)(1)(B)(i) when child turned to prospective adoptive parents, rather than mother, when he was hungry, tired, or in need of affection or attention);
- *In re Angel B.* (2002) 97 CA4th 454, 468 (although mother acted lovingly and appropriately with child during visits, there was no evidence mother-child relationship was so significant that its termination would cause child any detriment);
- *In re Bailey J.* (2010) 189 CA4th 1308, 1316 (even with regular and upbeat supervised visits with mother who lost custody of child when he was 2 days old, visits amounted to little more than play dates with loving adult).

In an unusual case, however, the court terminated parental rights despite the fact that the father occupied a parental role and the child loved him. *In re Cliffton B.* (2000) 81 CA4th 415, 423–425. The court balanced the strength and quality of the natural parent-child relationship in a tenuous home situation against the security and sense of belonging the new family would confer. The court considered the facts that the father had once again relapsed from a drug treatment program after a lengthy period of sobriety and that the foster family was willing to adopt the child and provide a stable home. *In re Cliffton B., supra* (case characterized as very close case).

(b) [§104.49] No Termination of Parental Rights—Parental Role Found

The nature of the relationship must be examined in determining whether it would be detrimental to terminate parental rights under the "beneficial contact" exception. In a case in which a 9-year-old had lived with the mother for 6 and 1/2 years and wished to live with her again, the juvenile court's order to terminate parental rights was reversed based on evidence that there was positive interaction between the child and the mother and on the court's own observation that their relationship was "parental." *In re Jerome D.* (2000) 84 CA4th 1200, 1207–1208. A decision not to terminate parental rights under this beneficial contact exception was also proper when the mother visited regularly and made great progress

toward rehabilitation and a stable living situation, and when a significant and close bond developed between her and the children which would benefit the children if the relationship continued. *In re Brandon C.* (1999) 71 CA4th 1530, 1537.

Moreover, termination of parental rights should be precluded based on the parent-child exception of Welf & I C §366.26(c)(1)(B)(i) in the following circumstances: (1) the child had lived with his mother until nearly 9 years of age, (2) there were weekly visits with the mother after removal that were very important to the child, and (3) the child's emotional security was dependent on continuing to have a relationship with the mother. *In re Scott B*. (2010) 188 CA4th 452, 470–472.

More recently, in *In re E.T.* (2018) 31 CA5th 68, the juvenile court found that the beneficial relationship exception did not apply where mother visited her children as often as permitted, she made efforts toward reunification, the children loved her, and the children had lived with her for about half their lives. As the juvenile court also found the children were thriving with their godparents, it held it would not be in the children's best interest to be returned to mother and terminated parental rights. 31 CA5th at 74–75. The appellate court reversed, stating this was a "rare case where the juvenile court erred," and held that the standard is whether the children benefit from the mother's presence, not whether they could eventually be happy without her. 31 CA5th at 70, 76.

Reversing the appellate court, the California Supreme Court held that where terminating a child's substantial, positive attachment to a parent would, on balance, be detrimental to the child, that is a compelling reason not to terminate parental rights. *In re Caden C.* (2021) 11 C5th 614, 1109. Parents need not show that they are actively involved in maintaining their sobriety or complying substantially with their case plan to establish the parental-benefit exception. 11 C5th at 1110. If termination of parental rights would be detrimental to the child, when weighed against the offsetting benefits of an adoptive home, the court should not terminate parental rights even if the parent has not demonstrated a likelihood that he or she will ever be able to regain custody. 11 C5th at 1111. *Note*: In *In re Caden C*. the Supreme Court notes it understands *In re E.T., supra,* and any other opinions treating the "compelling reason" language as not adding any further or heightened requirement to be consistent with its decision. *In re Caden C., supra*, 11 C5th at 1109 n5.

Once the court finds that the parent and child had a beneficial relationship, it may not terminate parental rights and order adoption based on the unenforceable promise of prospective adoptive parents that they would allow visitation with the biological parents. *In re C.B*. (2010) 190 CA4th 102, 128–129.

(c) [§104.50] Procedure

The court may require an offer of proof before setting a contested hearing sought by a parent on an exception to termination of parental rights. *In re Tamika T.* (2002) 97 CA4th 1114, 1121. An offer of proof may be necessary to clearly identify the contested issues. *In re Earl L.* (2004) 121 CA4th 1050, 1053.

The court does not have a sua sponte duty to ascertain whether an exception to adoption applies; the burden is on the party seeking an exception by preponderance of the evidence (*In re Rachel M.* (2003) 113 CA4th 1289, 1295; see Cal Rules of Ct 5.725(d)(2)), including the sibling exception. *In re Daisy D.* (2006) 144 CA4th 287, 292.

To preclude termination of parental rights under Welf & I C §366.26(c)(1)(B)(i), the parent has the burden of showing that (1) continuation of the relationship will outweigh the benefits to the child of living with an adoptive family, or (2) termination of parental rights would be detrimental to the child. *In re Angel B.* (2002) 97 CA4th 454, 466. The court must weigh the benefit of continuing the relationship against the benefit to the child that adoption would provide. 97 CA4th at 466–469; see also *In re L.Y.L.* (2002) 101 CA4th 942, 952–953 (sibling exception).

If the court finds that termination would be detrimental, it must state its reasons in writing or on the record. Welf & I C §366.26(c)(1)(D). Thus, after DSS reports on the nature of the contact between the child and biological relatives, the burden falls on the parent to produce evidence that the child would benefit from continuing the relationship so much that termination of parental rights would be inappropriate. *In re Urayna L.* (1999) 75 CA4th 883, 887.

The court may admit a bonding study commissioned by a parent to show that the exception of Welf & I C §366.26(c)(1)(B)(i) applies without violating the psychotherapist-patient privilege because the parent was not acting as a patient in that instance. *In re Tabatha G.* (1996) 45 CA4th 1159, 1168. However, the court need not order a bonding study to show the benefit of continuing contact under Welf & I C §366.26(c)(1)(B)(i) as a condition for ordering termination of parental rights because the kind of parent-child bond that may preclude termination of parental rights does not arise in the short period between the termination of services and the .26 hearing. *In re Richard C.* (1998) 68 CA4th 1191, 1196 (nature and extent of relationship should become clear during 12 months that services are provided).

(3) [§104.51] Interference With Sibling Relationship

In considering the exception to adoption and termination of parental rights because of interference with a sibling relationship under Welf & I C §366.26(c)(1)(B)(v), the court's concern must be the best interest of the child being considered for adoption, not the interest of that child's siblings.

In re Hector A. (2005) 125 CA4th 783, 791. The court may reject adoption only if it finds that adoption would be detrimental to the child, not to a sibling. *In re Celine R*. (2003) 31 C4th 45, 49–50. The testimony of siblings, however, may be indirectly relevant to the issue of the effect that adoption would have on the child in question. *In re Naomi P*. (2005) 132 CA4th 808, 823.

The sibling-relationship exception to termination of parental rights was not designed to apply to those who were removed from home as newborns, but rather to preserve long-standing relationships among siblings that serve as anchors for children whose lives are in turmoil. *In re Erik P.* (2002) 104 CA4th 395, 404. The exception may well apply when a child had lived in the grandmother's home with his siblings his entire life and was completely bonded to his siblings. *In re Fernando M.* (2006) 138 CA4th 529, 536–538. A half sibling may be considered to be a sibling under this exception to termination of parental rights. *In re Valerie A.* (2006) 139 CA4th 1519, 1524.

Even substantial sibling bonds and the corresponding detriment should they be broken may be outweighed by the benefits of adoption, particularly when it is possible that the sibling connections will continue after termination of parental rights. *In re Jacob S.* (2002) 104 CA4th 1011, 1018–1019, disapproved on other grounds in 46 C4th at 537 n5. For example, when interaction between siblings or half siblings occurred when the children were infants or toddlers, separate adoption may better serve the children's long-term emotional needs than would continued sibling contact. *In re Valerie A.* (2007) 152 CA4th 987, 1013. And because opponents of termination of parental rights must show that termination would substantially interfere with the sibling relationship, evidence that sibling contact would continue after adoption would render the exception inapplicable. *In re Megan S.* (2002) 104 CA4th 247, 254.

For the sibling exception to apply, a party must show evidence, such as a psychological study, showing detriment to the child should parental rights be terminated. 104 CA4th at 252. There may be instances in which nothing more than a child's sadness at the idea of separation from siblings may satisfy the substantial detriment test of Welf & I C §366.26(c)(1)(B)(v). *In re Jacob S., supra,* 104 CA4th at 1017.

c. [§104.52] Findings

To terminate parental rights, the court must have previously made any one of the findings listed in Welf & I C §366.26(c)(1):

- Reunification services must not be offered;
- Parent's whereabouts unknown for 6 months;
- Parent failed to contact or visit child for 6 months;

- Parent convicted of a felony indicating parental unfitness; or
- Court continued to remove child and terminated reunification services.

The court must also find by clear and convincing evidence that the child is likely to be adopted. However, parental rights cannot be terminated on likelihood of adoption and a ground not listed in Welf & I C §366.26(c)(1). *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113–1114. *Note*: when *DeLonnie S.* was decided, Welf & I C §366.26(c)(1) did not include denial of services under Welf & I C §361.5(e)(1), but now it includes denial of services under both Welf & I C §361.5(b) and Welf & I C §361.5(e)(1).

It is not a condition precedent to the termination of parental rights at a .26 hearing that the court find the following on the record:

- It would be detrimental to the child to continue in the parental relationship. *In re Jesse B.* (1992) 8 CA4th 845, 851.
- Termination is in best interest of child. *In re Jennifer J.* (1992) 8 CA4th 1080, 1089.
- Parent was unfit. *In re Cody W.* (1994) 31 CA4th 221, 225; *In re A.S.* (2009) 180 CA4th 351, 360–361.
- Reunification efforts were sufficient. See *In re Michelle M.* (1992) 4 CA4th 1024, 1034.
- Termination is the least detrimental alternative. In re Cody W., supra, 31 CA4th at 230–231.

Although the court need not find generally that termination is in the child's best interest, it must make factual findings in Welf & I C §366.26(c)(1)(B) and weigh all factors when one of them applies. *In re Jennifer J., supra,* 8 CA4th at 1091.

CAUTION: A court may not terminate a nonoffending, noncustodial mother's or presumed father's parental rights without finding by clear and convincing evidence that awarding custody to the parent would be detrimental to the child's best interest. *In re T.G.* (2013) 215 CA4th 1, 20; see *Santosky v Kramer* (1982) 455 US 745, 747–748, 753, 71 L Ed2d 599, 102 S Ct 1388.

d. [§104.53] Parents' Conduct and Current Circumstances

The natural parents' current conduct and circumstances are not the focus of the .26 hearing. The purpose of .26 hearings is not to punish parents, although parental conduct may be a factor in the outcome. *In re Heather B.* (1992) 9 CA4th 535, 556.

There is no burden on DSS at this hearing to show that the parents are at fault. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 254. Nor is termination precluded because the parents have improved their lives and are

ready to provide a stable home for the child. In a case involving a pre-1989 dependency, the Supreme Court held that a court may find the child's interest in stability outweighs the parent's interest in the care and custody of the child after 18 months of out-of-home placement. *In re Jasmon O.* (1994) 8 C4th 398, 421 (DSS failed to disclose to parents or court that mother's social worker's sister was foster mother, but there appeared to be no connection between that conflict of interest and failure of attempted reunification).

However, the parents' circumstances are relevant at the time of the .26 hearing, for example, to show that they have maintained regular contact with the child, that the child benefits from maintaining that contact, and that therefore parental rights should not be terminated. Welf & I C §366.26(c)(1)(B)(i); *In re Edward R.* (1993) 12 CA4th 116, 127. If parents can show that the lack of relationship has resulted from a failure of reunification services (*i.e.,* court had earlier terminated visitation without making finding under Welf & I C §366.21(h) that visitation would be detrimental to children), termination of parental rights may be improper. *In re David D.* (1994) 28 CA4th 941, 954–956.

It is error for a court to terminate parental rights of a father under Fam C §7825 because of felony convictions when the convictions were for burglary and possession. *In re Baby Girl M.* (2006) 135 CA4th 1528, 1542–1544.

e. [§104.54] General Adoptability vs. Specific Adoptability of the Child

"There is a difference between a child who is generally adoptable (where the focus is on the child) and a child who is specifically adoptable (where the focus is on the specific caregiver who is willing to adopt)." *In re J.W.* (2018) 26 CA5th 263, 267. "A child who is happy, healthy and young, with no discernable developmental problems, can be found to be generally adoptable" even with no prospective adoptive family "waiting in the wings." *In re B.D.* (2019) 35 CA5th 803, 817.

In re J.W. discusses general adoptability vs. specific adoptability. With general adoptability, the child has general qualities that make people want to adopt; with specific adoptability, there is more focus on the adoptive parents. *In re J.W., supra*, 26 CA5th at 267–268. When looking at specific adoptability, the criteria are (1) whether there is a legal impediment to adoption and (2) can the caretakers meet the child's special needs. Just because a child has special needs does not mean the child is not adoptable. 26 CA5th at 268.

A child who has none of the characteristics listed in Welf & I C §366.26(c)(3) and has been determined by DSS to be adoptable is generally considered likely to be adopted. See *In re Baby Boy L.* (1994) 24 CA4th

596, 610–611 (only impediment was statement by prospective adoptive parents that it might be risky to become attached to child who had not yet been freed for adoption). The issue of adoptability focuses on the child, including the child's age, physical condition, and emotional state, and other factors that would make it difficult for the child to be adopted. *In re Sarah M.* (1994) 22 CA4th 1642, 1649. The court has no sua sponte duty to evaluate whether there are impediments to adoption by prospective adoptive parents. *In re G.M.* (2010) 181 CA4th 552, 564. But see *In re Brandon T.* (2008) 164 CA4th 1400, 1410 (when child is adoptable only because particular family is willing to adopt, court must consider whether that family has any legal impediments to adoption).

Although the fact that a prospective adoptive parent has not been identified is not a basis to conclude that the child is not a probable subject for adoption, when a child might be difficult to place because of membership in a sibling group, because of diagnosis of a medical, physical, or mental disability, or because the child is 7 years of age or older, a finding of adoptability may need to include the identification of a prospective adoptive parent. See Welf & I C §366.26(c)(3). Siblings may be considered difficult to place under Welf & I C §366.26(c)(3) when they are considered a "sibling group," because of being full siblings and having lived together, even when they constantly fight with each other. *In re Gabriel G.* (2005) 134 CA4th 1428, 1438.

The issue of whether a prospective adoptive family exists may be relevant because it provides evidence that the child is adoptable and therefore likely to be adopted within a reasonable time by this family or some other. *In re Sarah M., supra,* 22 CA4th at 1650. If prospective adoptive parents exist, the child may be considered a proper subject for adoption, even if there are some problems with the proposed adoption. See 22 CA4th at 1650–1651. A child may be found adoptable based solely on a caretaker's willingness to adopt if there is no legal impediment and the caretaker is able to meet the child's needs. *In re Helen W.* (2007) 150 CA4th 71, 80.

On the other hand, it may be an abuse of discretion for a court to find that a medically fragile child is adoptable, particularly when the child has special needs, engages in such difficult behaviors that even a foster parent experienced in dealing with special needs children needs respite care, and there is a lack of solid evidence indicating probability of adoption by family members. *In re Ramone R.* (2005) 132 CA4th 1339, 1351–1352.

A court should not use an assessment report that is incomplete and fails to comply with the requirements of Welf & I C §366.21(i) in supporting a finding of adoptability. *In re Valerie W.* (2008) 162 CA4th 1, 13–15.

(1) [§104.55] Suitability of Prospective Adoptive Parents

If the child is considered generally adoptable, the suitability of prospective adoptive parents is generally irrelevant to the issue of whether the child is likely to be adopted. *In re Carl R.* (2005) 128 CA4th 1051, 1061. When a child is generally adoptable, the court need not determine whether there are any impediments to adoption by current caretakers. *In re R.C.* (2008) 169 CA4th 486, 494.

A .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents. *In re Scott M.* (1993) 13 CA4th 839, 844. Generally, the suitability of a potential adoptive parent is an issue for the adoption hearing and not for the .26 hearing. *In re T.S.* (2003) 113 CA4th 1323, 1329.

Nevertheless, the court may permit questioning of a social worker concerning impediments to adoption by prospective adoptive parents if the child's age, physical condition, or mental stability otherwise renders adoption questionable (*In re Sarah M.* (1994) 22 CA4th 1642, 1649) and may also require, as part of an adoptability assessment for a disabled child who requires total care for life, an evaluation of whether the prospective adoptive parents can meet that child's needs (*In re Carl R.*, *supra*, 128 CA4th at 1062). Moreover, if the only person willing to adopt is unsuitable because that person has a history of abuse or for some other reason, the .26 hearing may be the correct forum to hear evidence on the appropriateness of the prospective adoptive parent. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206 (finding of adoptability by clear and convincing evidence may be precluded in this situation).

Prospective adoptive parents are not unsuitable by virtue of the fact that they intend to home school a severely disabled child; this intent should not be an impediment to termination of parental rights and adoption. *In re Carl R., supra,* 128 CA4th at 1065–1067.

A child need not be likely to be adopted by the public at large but only by a particular family, and when assessment of that family is delayed because it is time-consuming, the goal of the dependency system (prompt resolution of custody status and stable home environment) is thwarted. *In re John F.* (1994) 27 CA4th 1365, 1377 (case based on failure to set .26 hearing at 18-month review hearing).

(2) [§104.56] When Adoption Likely

At least one court has held that there is clear and convincing evidence that a child is likely to be adopted when the child communicated the wish to be adopted by the foster parents and the foster parents were clear that they wanted to adopt the child. *In re Michelle M.* (1992) 4 CA4th 1024, 1035. Even when a child is at risk for hereditary neurological and developmental problems, the child may nevertheless be likely to be adopted

when the problems do not appear to interfere with the child's acquisition of developmental skills and when a number of prospective adoptive parents had expressed interest. *In re Jennilee T.* (1992) 3 CA4th 212, 224–225. If a child is happy, healthy, and thriving, he or she may be adoptable even with in-utero drug exposure, speech delays, and no identified father. *In re R.C.* (2008) 169 CA4th 486, 492.

In *In re L.Y.L.* (2002) 101 CA4th 942, 952, 956, the court of appeal approved the juvenile court's determination that the child was adoptable based on evidence that the child was in good health, was developing normally, and had a sociable personality, coupled with the facts that the foster parents were willing to adopt and there were six other families willing to adopt a child with her characteristics, despite the child's sadness at the separation from a sibling. A court may find that a child is likely to be adopted, even before an adoption home study of the prospective adoptive parents has been completed, when the child is happy, healthy, and apparently normal. *In re Marina S.* (2005) 132 CA4th 158, 165–166. Similarly, a young child in good physical and emotional health, who has shown intellectual growth and the ability to develop interpersonal relationships, has many attributes indicating adoptability. *In re Gregory A.* (2005) 126 CA4th 1554, 1562.

The case for adoptability is strengthened by the fact that a prospective adoptive parent has expressed interest in adopting the child. See *In re Gregory A.*, *supra*. And the case for adoptability is not diminished by the mere possibility that the child may react badly to adoption once he or she realizes that there will be no more contact with the mother or grandfather. *In re Jose C.* (2010) 188 CA4th 147, 158–159.

If there is a prospective adoptive parent, a child with a difficult medical condition may be likely to be adopted even if the severity of the condition is not yet fully known. See *In re Helen W.* (2007) 150 CA4th 71, 79–804. And the fact that foster parents wish to adopt the child may be evidence for the child's adoptability despite various behavior and emotional problems. *In re I.W.* (2009) 180 CA4th 1517, 1526–1527.

(3) [§104.57] When Adoption Not Likely or Evidence Is Insufficient

When DSS has looked for an adoptive family for over 10 months, it is reasonable to conclude that the child is not a proper subject for adoption and to order guardianship without termination of parental rights. *In re Tamneisha S.* (1997) 58 CA4th 798, 806–807. Although a child who has medical or other problems does not need to be in a pre-adoptive home to be considered likely to be adopted, there must be more than an expression of casual interest. See *In re Amelia S.* (1991) 229 CA3d 1060, 1065. In *Amelia S.,* the fact that a few of the foster parents who had taken in nine siblings said that they might consider adoption does not constitute clear and

convincing evidence of adoptability. 229 CA3d at 1065 (children had various emotional, physical, and developmental problems).

Another example of insufficient evidence of adoptability is *In re Brian P.* (2002) 99 CA4th 616, 624–625, in which there was only a statement that chances of adoption were "very good." There was no adoption assessment report mentioning facts about the child, and there was evidence that the child was somewhat developmentally delayed.

Moreover, when the only prospective adoptive parent has a criminal history involving family violence, this may lead to a finding that the child is not adoptable. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206. And multiple siblings are not adoptable when the one family who expressed an interest did not know the children and were legally impeded because they had not yet acquired a foster care license or had not been assessed. *In re B.D.* (2008) 159 CA4th 1218, 1233–1234. On the other hand, the lack of a home study is not an impediment to adoption when the family who is interested in adopting the child has been caring for the child for some time and had been assessed for criminal background, for the ability to meet the child's needs, and for understanding of an adoptive parent's obligations. *In re Brandon T.* (2008) 164 CA4th 1400, 1410–1411.

The fact that the children have behavioral problems does not make them unadoptable; even if possible adoptions do not occur, there is no risk of the children becoming legal orphans because the reinstatement of parental rights is possible under Welf & I C §366.26(i)(3). *In re I.I.* (2008) 168 CA4th 857, 870–871.

f. [§104.58] Indian Child

In cases involving an Indian child, courts must seek to promote stability and security of Indian tribes and families, comply with the Indian Child Welfare Act (ICWA), and seek to protect the best interest of the child. Welf & I C §224(b). Courts must encourage and protect the child's membership or citizenship in the tribe and his or her connection to the tribal community. Welf & I C §224(a)(2). ICWA must be applied once the tribe determines that the child is either a member or citizen of a tribe, or is eligible for membership or citizenship in the tribe and is a biological child of a tribe member or citizen. Welf & I C §224(c). In terminating the parental rights of the parents of an Indian child, the court must follow the procedures in Cal Rules of Ct 5.725 and 5.486. Cal Rules of Ct 5.725(a)(3). *Note*: Effective January 1, 2020, Cal Rules of Ct 5.485 was renumbered to 5.486. Although Cal Rules of Ct 5.725 was also amended, 5.725(a)(3) still refers to the former rule 5.485.

Under Welf & I C §366.24, in consultation with the child's tribe, the court may designate tribal customary adoption as the permanent plan without terminating parental rights. Welf & I C §366.26(b)(2); Cal Rules of

Ct 5.725(d)(1), (e)(2). This is done through tribal customs, traditions, or law. Welf & I C §366.26(b)(2). If the court has chosen a permanent plan of tribal customary adoption, it must give this tribal order full faith and credit. Welf & I C §366.26(e)(2). The prospective tribal customary adoptive parents must appear before the court in a finalization hearing. Welf & I C §366.26(e)(2).

The court may later set aside a tribal customary adoption order when the child later shows a developmental disability or mental disorder of which the adoptive parents were unaware. See procedures in Welf & I C §366.26(e)(3).

If tribal customary adoption is ordered under Welf & I C §366.24, the court may continue the hearing for up to 120 days to permit the tribe to complete the adoption process. Welf & I C §366.24(c)(6). The court has the discretion to grant an additional continuance not exceeding 60 days. Welf & I C §366.24(c)(6). The tribe must file with the court a completed tribal customary adoption order no less than 20 days before the date of the continued hearing. If the tribe fails to file the order within this time period, the court must make new findings and orders under Welf & I C §366.26(b) and select a new permanent plan for the child. Welf & I C §366.24(c)(6).

(1) [§104.59] Findings

Under ICWA, a court may not terminate parental rights unless it finds that active efforts have been made to provide services designed to prevent the breakup of the Indian family and that these services have been unsuccessful. Welf & I C §§361.7(a), 366.26(c)(2)(B)(i); 25 USC §1912(d). Active efforts must be documented in detail in the record. Welf & I C §361.7(a). The standard of proof for this finding is "clear and convincing" (*In re Michael G.* (1998) 63 CA4th 700, 712), not "beyond a reasonable doubt." (*Adoption of Hannah S.* (2006) 142 CA4th 988, 997). When the parent of an Indian child did not appear until after the reunification period had ended, despite adequate notification (and court learned that child had Indian heritage only after this period had ended), the many attempts to notify the parent constituted active efforts under ICWA. *In re William G.* (2001) 89 CA4th 423, 428.

Active efforts must use the resources of the tribe and extended family, and the finding of active efforts must take into account prevailing cultural and social norms. Welf & I C §361.7(b).

☛ JUDICIAL TIP: This finding normally should have been made at the time reunification services were denied or terminated and the .26 hearing was scheduled. Presumably, it would need to be made at the .26 hearing only if it had not been made earlier. See *In re Michael G.*, *supra*, 63 CA4th at 712 n9 (dicta).

To terminate parental rights for an Indian child, a judge must also find by proof beyond a reasonable doubt at the .26 hearing that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. Welf & I C §366.26(c)(2)(B)(ii); 25 USC §1912(f); Cal Rules of Ct 5.486(a)(2). This stringent burden of proof will be met when the evidence shows that the parent's parenting skills are inadequate because of the child's serious behavioral and psychiatric dysfunction, and the inadequacy was caused largely by the parent's schizophrenia and drug abuse. See *In re Krystle D.* (1994) 30 CA4th 1778, 1798–1801. The Indian Child Welfare Act is applicable to a petition by an Indian child's non-Indian mother to terminate the parental rights of the child's Indian father. *In re Crystal K.* (1990) 226 CA3d 655, 665 (decided under former CC §232). Like the active efforts finding, the detriment finding required by ICWA will normally be made at the time reunification services are denied or terminated and, if so, need not be made again at the .26 hearing; if not, it should be made at the .26 hearing. *In re Matthew Z.* (2000) 80 CA4th 545, 553–555.

The ICWA detriment finding (continuing parental custody would bring risk of detriment beyond reasonable doubt) under 25 USC §1912(f) does not necessarily need to be renewed at a .26 hearing even if it had been made, for example, as much as 12 months earlier at a review hearing. *In re Barbara R.* (2006) 137 CA4th 941, 952. But see *In re A.L.* (2015) 243 CA4th 628, 641 (given plain language of Welf & I C §366.26(c)(2)(B)(i), court erred in precluding evidence regarding active efforts at .26 hearing).

When ordering a tribal customary adoption, required findings are set out in Welf & I C §366.24.

(2) [§104.60] Evidence

Evidence regarding detriment for termination must be supported by the testimony of a qualified expert witness. Welf & I C §§366.26(c)(2)(B)(ii), 224.6; 25 USC §1912(f); Cal Rules of Ct 5.486(a)(2). Federal guidelines call for the expert to be a member of the Indian child's tribe; a lay expert witness with substantial experience in delivery of services, customs, standards, and practices; or a person with substantial education and experience in the area of specialty. See *In re Krystle D.* (1994) 30 CA4th 1778, 1801–1802; 81 Fed Reg 38829–38832 (June 14, 2016). The fact that a witness does not have demonstrated cross-cultural experience in Indian matters will not preclude the testimony of that witness. 30 CA4th at 1802.

2. [§104.61] Adoption/Adoptive Placement

If the court orders that parental rights be terminated, it must order at the same time that the child be referred to the DSS, county adoption agency, or a licensed adoption agency for placement. See Welf & I C §366.26(b)(1),

(j). The prospective adoptive parents may have their petition heard in juvenile court or in any other court permitted by law. Welf & I C §366.26(e)(1). The clerk must open a confidential adoption file for each child; this file must be separate and apart from the dependency file, with a number different from the dependency case number. Cal Rules of Ct 5.730(a)(4). The use of postadoption contact agreements under Fam C §8616.5 is also applicable and available to dependent children if the agreement was entered into voluntarily by all parties. Welf & I C §366.26(a); Cal Rules of Ct 5.451(b).

☛ JUDICIAL TIP: Some judges set a monthly adoptions calendar to review any cases in which parental rights have been terminated and in which adoption has not yet taken place.

If a petition for adoption is filed in the juvenile court, the court must order a hearing on that petition to take place in juvenile court once the natural parents' appellate rights have been exhausted. Welf & I C §366.26(b)(1), (e). A report required by Fam C §8715 must be read and considered by the court before the adoption; the preparer of the report may be examined by any party to the adoption proceeding. Welf & I C §366.26(e)(1).

On granting an adoption petition and issuing an adoption order for a dependent child, jurisdiction with respect to dependency must be terminated. Welf & I C §366.29(c). If there is a postadoption contact agreement, however, the adoption court must maintain jurisdiction over the child for enforcement of the agreement. Welf & I C §366.29(c).

a. [§104.62] Identifying Adoption as the Plan Without Termination of Parental Rights

The court may also identify adoption or tribal customary adoption as the permanent placement goal without terminating parental rights and order that the agency responsible for seeking adoptive parents make efforts to locate an appropriate adoptive family within 180 days. Welf & I C §366.26(b)(4). This interim order is appropriate only when the child is difficult to place for adoption because of the child's membership in a sibling group or the diagnosis of a medical, physical, or mental disability or because the child is 7 years of age or older. Welf & I C §366.26(c)(3). The court must not base a finding that the child is not likely to be adopted on the fact that the child is not currently placed in a pre-adoptive home or that there is no relative or foster family willing to adopt. Welf & I C §366.26(c)(1).

Once an order is made identifying adoptive placement within 180 days as a goal, the court must hold another hearing at the expiration of that period. Welf & I C §366.26(c)(3). At this hearing, the court must proceed with termination of parental rights and with the permanent plan of adoption (if court can find that child is likely to be adopted) or with legal

guardianship or foster care (if such a finding cannot be made). See Welf & I C §366.26(c)(1), (c)(4)(A)–(B). *In re Ramone R.* (2005) 132 CA4th 1339, 1349–1351, and *In re Gabriel G.* (2005) 134 CA4th 1428, 1436–1438, interpreted Welf & I C §366.26(c)(3) as limiting the options for the court at the continued .26 hearing to only termination of parental rights or the appointment of a guardian, and barring consideration of continued foster care at the hearing.

Because the *probability* of adoption is not the same as *likelihood* of adoption, when the court has found a probability of adoption and continued the case for 180 days in order to identify adoptive parents, the mother may challenge a termination order on the basis that adoption is not likely. *In re Y.R.* (2007) 152 CA4th 99, 110–111, disapproved on other grounds in 46 C4th at 536–537.

An order identifying adoption as the eventual goal and requiring that DSS search for an appropriate adoptive family under Welf & I C §366.26(b)(4), (c)(3) is appealable. *In re S.B*. (2009) 46 C4th 529, 537.

b. [§104.63] Placement of Child

If the child has substantial ties to the foster parent or relative caretaker and that person wishes to adopt the child, that person will be given preference over other prospective adoptive parents if the agency placing the child determines that the child has such substantial emotional ties to that person that removal from that caretaker's custody would be seriously detrimental to the child's well-being. Welf & I C §366.26(k)(1). "Preference" means that person's application will be processed and the family study completed before the application of any other prospective adoptive parent is processed. Welf & I C §366.26(k)(2). It does not create an evidentiary presumption, but merely places the foster parent or relative caretaker at the head of the line. See *In re Sarah S.* (1996) 43 CA4th 274, 286 (relative caretaker).

It is DSS, and not the court, that must determine both prongs of Welf & I C §366.26(k) (that child has substantial ties to foster parent or relative caretaker *and* that removal would be seriously detrimental). *In re Lauren R.* (2007) 148 CA4th 841, 859.

The preference for placement with a relative, however, may be outweighed by the child's best interest even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321 (placement decision made under Welf & I C §361.3 but made after .26 hearing). Moreover, although relative placement has priority in the early stages of proceedings, an ongoing caretaker should receive preferential consideration later on. *In re Daniel D.* (1994) 24 CA4th 1823, 1834. Because the preference for placement with relatives under Welf & I C §361.3 applies only before the termination of reunification services, once a permanent plan is being considered, this preference switches to relative

caretakers under Welf & I C §366.26(k). *In re Sarah S., supra,* 43 CA4th at 285–286. And once adoption has been made the permanent plan, the "caretaker preference" applies both before and after termination of parental rights. See *In re Lauren R., supra,* 148 CA4th at 855–856.

The Welf & I C §361.3(a) statutory directive to give preferential consideration to relative placement does not apply to post-permanency, even if social services agency did not properly consider placement request during reunification period. *In re Maria Q.* (2018) 28 CA5th 577, 596.

The Department of Social Services must consider all options and apprise the court of them so that the court is not misled into ordering foster care when adoption or guardianship might be possible. *In re John F.* (1994) 27 CA4th 1365, 1377–1378. In any event, guardianship should always be considered before foster care. 27 CA4th at 1379; Welf & I C §366.26(c)(4)(A).

Neither the court nor parents' counsel are required to advise parents of the availability of a postadoption agreement before parental rights are terminated. *In re Kimberly S.* (1999) 71 CA4th 405, 415–416. Nor must the court order DSS to provide the parents with the opportunity to negotiate such an agreement. *In re Zachary D.* (1999) 70 CA4th 1392, 1397.

c. [§104.64] Placement of Indian Child

The preference order for adoptive placement of an Indian child is for the child to be placed with (Welf & I C §361.31(c); 25 USC §1915(a); see Cal Rules of Ct 5.485(b)):

- A member of the child's extended family,
- Other members of the child's tribe,
- Other Indian families, and
- A non-Indian home only if the court finds that a diligent search has failed to discover a suitable Indian home.

All placements of an Indian child must be in the least restrictive setting that most approximates a family situation and in which the child's special needs, if any, may be met. Cal Rules of Ct 5.485(b)(1).

The preference order may be modified only for good cause (see Welf & I C §361.31(h)–(j); 25 USC §1915(a); Cal Rules of Ct 5.485(b)(3)), except that the tribe may establish a different preference order (Welf & I C §361.31(d); 25 USC §1915(c); Cal Rules of Ct 5.485(b)(6)).

The test to apply when determining whether there is good cause to overcome ICWA's placement preference in 25 USC §1915(a), (b) is a "substantial evidence" test, rather than one based on "abuse of discretion." *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 645. In this case, the appellate court held that it was preferable to keep a traumatized Indian child in a stable non-Indian

placement with a sibling rather than to move the child to a suitable Indian foster family.

A placement cannot depart from the preferences based on the socioeconomic status of any placement relative to another placement, or based solely on ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of ICWA. Welf & I C §361.31(k), (*l*).

A tribal policy against adoption of dependent children is not entitled to full faith and credit under ICWA in light of the state's compelling interest in providing stable permanent homes for children who are not able to reunify with their parents, particularly when the tribe has neither intervened nor petitioned the court for transfer to tribal jurisdiction. *In re Laura F.* (2000) 83 CA4th 583, 594–595.

For a discussion of tribal customary adoption, see §104.58.

d. [§104.65] Designating Prospective Adoptive Parents

At the .26 hearing or at a later time, the court may designate a current caretaker as a prospective adoptive parent when the child has lived with that caretaker for at least 6 months, the caretaker has made a commitment to adopt the child, and the caretaker has taken at least one step to facilitate that process. Welf & I C §366.26(n)(1). In making this designation, the court may consider whether the caretaker is listed in the Welf & I C §366.21(i) assessment and may consider the recommendation of the DSS, county adoption agency, or licensed adoption agency. Welf & I C §366.26(n)(1). A designation as a prospective adoptive parent under Welf & I C §366.26(n) does not make the caretaker a party to a dependency proceeding. Welf & I C §366.26(n)(3)(C).

Procedures for removal from the home of a prospective adoptive parent are set out in Welf & I C §366.26(n)(3) and (n)(4). Prospective adoptive parents do not have a due process right to appointed counsel. *R.H. v Superior Court* (2012) 209 CA4th 364, 373.

When an Indian child is removed from the home of a prospective adoptive parent, the placement preferences contained in Welf & I C §361.31 (removal of Indian child from custody of parents or Indian guardian) and ICWA apply to the subsequent placement of the child. Welf & I C §366.26(n)(7).

e. [§104.66] Process After Parental Rights Have Been Terminated

If parental rights are terminated or an Indian child is declared eligible for tribal customary adoption, the court must order the child referred to the DSS, county adoption agency, or a licensed adoption agency for adoptive placement. Welf & I C §366.26(j). The DSS, county adoption agency, or

licensed adoption agency will be responsible for custody and supervision of the child until the adoption is granted. Welf & I C §366.26(j). With the agency's consent, the court may appoint a guardian to serve until the child is adopted. Welf & I C §366.26(j).

☛ JUDICIAL TIP: If adoption does not occur but parental rights have been terminated, the court must set a hearing to select a new permanent plan of either placement with a foster family or guardianship.

After 3 years have passed (or even earlier on stipulation of child and DSS that child is not likely to be adopted), the court may hold a hearing to determine if parental rights should be reinstated. Welf & I C §366.26(i)(3). See discussion in §104.78.

Because DSS or the adoption agency has the exclusive care and control of the child under Welf & I C §366.26(j) from the time adoption is selected as the permanent plan until the child is adopted, a court may not order the child placed in a foster home different from that selected by DSS unless the DSS decision was clearly absurd or not in the child's best interest. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734. Generally, the court may not substitute its independent judgment for that of DSS unless DSS has abused its discretion. *In re Hanna S.* (2004) 118 CA4th 1087, 1092.

Because an order terminating parental rights extinguishes the rights of any known or unknown person claiming to be the father, the court lacks jurisdiction to modify the final termination order to grant presumed father status to an interested party. *In re Jerred H.* (2004) 121 CA4th 793, 798–799.

3. Legal Guardianship

a. [§104.67] In General

If the court finds termination of parental rights or adoption is not in the child's best interest or that termination would be detrimental to the child under Welf & I C §366.26(c)(1)(B), it may appoint a legal guardian for the child at the .26 hearing and issue letters of guardianship. Welf & I C §366.26(b)(3) (relative guardianship), §366.26(b)(5) (nonrelative guardianship). Under Welf & I C §366.26(b)(3), relative guardianship is second only to adoption as a permanent plan and is preferable to identifying adoption or tribal customary adoption as a *future* goal under Welf & I C §366.26(b)(4). And when the child is living with a relative who is willing to provide a stable home through guardianship but does not agree to adoption (although not because of unwillingness to accept legal or financial responsibility), and to remove the child from that relative's custody would be detrimental, it appears that the court must choose legal guardianship.

Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 5.725(d)(3). In this instance, there is no termination of parental rights and therefore adoption is precluded. Welf & I C §366.26(c)(1)(A). If a guardianship with an approved relative is established at a .26 hearing and dependency is dismissed, the child is eligible for aid under the Kinship Guardianship Assistance Payment (Kin-GAP) Program. Welf & I C §361.5(h).

Legal guardianship must always be considered before foster care if it is in the child's best interest and a suitable guardian is found. Welf & I C §366.26(c)(4)(A). However, guardianship should not be ordered if doing so would mean moving the child from relative caretakers who do not wish to assume guardianship at the time of the hearing and removal of the child from the caretakers would seriously impair the child's emotional well-being. Welf & I C §366.26(c)(4)(B)(i); Cal Rules of Ct 5.725(d)(3)(B). Moreover, the court is not necessarily bound by an agreement between the parents and other relatives for a permanent plan of guardianship. *In re Jason E.* (1997) 53 CA4th 1540, 1548 (in this case, there were adoptive parents who were willing and able to adopt child).

If the child is living with a nonrelative caregiver who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian as of the hearing date, the court must order that the child remain in foster care with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older, or a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement (see Welf & I C §16501(i)(2)). Welf & I C §366.26(c)(4)(B)(ii). Regardless of the age of the child, the child must not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the caregiver. Welf & I C §366.26(c)(4)(B)(ii).

If the child is living in a group home or a short-term residential therapeutic program, the court must order that the child remain in foster care with a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older, or a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement (see Welf & I C §16501(i)(2)). Welf & I C §366.26(c)(4)(B)(iii).

A child for whom a legal guardianship has been established remains within the jurisdiction of the juvenile court until dependency is terminated. See Welf & I C §366.4(a). If a relative was appointed legal guardian and the child had been placed with that relative for at least 6 months, the court must terminate dependency jurisdiction and retain jurisdiction over the

child as a ward of the guardianship except when the relative guardian objects or on a finding of exceptional circumstances. Welf & I C §366.3(a). The objection of a relative guardian to the termination of dependency does not require that dependency be maintained, but can be considered by the court in deciding whether exceptional circumstances exist to justify maintaining dependency. See Welf & I C §366.3(a).

☛ JUDICIAL TIP: Although there are variations in practice among jurisdictions, some judges do not dismiss dependency after establishing a guardianship because, if there is financial need, the court may be able to order services, and because there can be more flexibility with ongoing issues such as visitation and informal joint decisions by the relative guardians and the natural parents concerning the child. Since the establishment of the Kin-GAP Program, this practice is less common and less often needed. See Welf & I C §§11360–11376, 366.21(j), 366.22(d).

The court may not dismiss dependency when there is a permanent plan of long-term placement with a relative not amounting to a guardianship. *In re Rosalinda C.* (1993) 16 CA4th 273, 277–279. In the absence of an adoption or legal guardianship, continued supervision is necessary because otherwise there is no one with legal custody of the child and no guaranty that the placement is permanent. 16 CA4th at 279.

And even if there is a guardianship in place, if the child is nearly 18 years of age but would be unable to function on his or her own because of various mental and emotional disabilities, the court may terminate the guardianship and continue jurisdiction. See *In re D.R.* (2007) 155 CA4th 480, 487–488 (child had been in guardianship, and court had erroneously refused to reinstate dependency jurisdiction after child turned 18).

The court may appoint an out-of-state guardian for a child when that person is fully capable of taking care of the child's needs. *In re K.D.* (2004) 124 CA4th 1013, 1018 (guardian was loving and affectionate with child and had hospital access and specialized ability to deal with medical needs).

b. [§104.68] Procedure

The appointment of a legal guardian must be made in the juvenile court as part of the .26 hearing. See Welf & I C §366.26(d); Cal Rules of Ct 5.735(a)–(b). The recommendation for appointment of a guardian may be included in the social study report prepared by DSS, and no separate petition is needed. Cal Rules of Ct 5.735(a). Notice of the guardianship hearing must be given according to Welf & I C §294. Cal Rules of Ct 5.735(b).

An assessment that includes an evaluation of the child's medical, developmental, scholastic, mental, and emotional status and an appraisal of prospective guardians and the child's feelings towards them, including tribal customary adoptive parents in the case of an Indian child (see Welf &

I C §§361.5(g)(1)(C), (g)(1)(D), 366.21(i), 366.22(c)(1), 366.25(b)(1)), must be read and considered by the court before the letters of guardianship may be issued. Welf & I C §366.26(d). Any party to the guardianship proceeding may call and examine the preparer of the assessment. Welf & I C §366.26(d). The judge must note in the minutes that he or she has considered the report. Welf & I C §366.26(d).

Note: The assessment may also include a prospective successor guardian, who would be assessed and appointed in the event of the death or incapacity of the appointed guardian. Welf & I C §366.26(d).

If the court determines that legal guardianship is the appropriate permanent plan, it must appoint the guardian and order the clerk to issue letters of guardianship as soon as the guardian has signed the required affirmation. The letters are not subject to the confidentiality protections of Welf & I C §827. Welf & I C §366.26(d); Cal Rules of Ct 5.735(c)(1).

The court may also order visitation with the parent or other relative. Cal Rules of Ct 5.735(c)(2), (3). Under Welf & I C §366.26(c)(4), the court may delegate to the legal guardian the authority to decide the time, place, and manner in which visitation may take place, but the court must specify that the parent has a right to visitation, as well as the frequency and duration of the visitation. *In re M.R.* (2005) 132 CA4th 269, 274; *In re Rebecca S.* (2010) 181 CA4th 1310, 1314. The Legislature, in amending Welf & I C §366.26(c)(4)(C), made clear its intent to require juvenile courts to make visitation orders in both long-term foster care placements and legal guardianships. *In re M.R.*, *supra*.

The court may terminate dependency once a guardian is appointed under Welf & I C §366.26. Cal Rules of Ct 5.735(c)(4). However, if the court appoints a relative or nonrelative extended family member as the child's legal guardian and the other requirements in Welf & I C §366.3(a)(3) apply, the court must terminate dependency jurisdiction and retain jurisdiction over the child under Welf & I C §366.4 unless the guardian objects or the court finds that exceptional circumstances require it to retain dependency jurisdiction. Cal Rules of Ct 5.735(c)(5), 5.740(a)(4).

If a court orders legal guardianship accompanied by continued visitation with the mother, it must continue jurisdiction to oversee the visitation. *In re K.D.* (2004) 124 CA4th 1013, 1018–1019. Therefore, when establishing a legal guardianship, the court may not terminate jurisdiction and refer any issues regarding visitation to family court. *In re Kenneth S., Jr.* (2008) 169 CA4th 1353, 1359.

Guardianship may also have been ordered by the juvenile court with the parents' agreement at the disposition hearing. Welf & I C §360(a) (child need not be dependent child of court).

c. [§104.69] Indian Child

The court must not order guardianship for an Indian child unless the court finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. Welf & I C §361.7(c); Cal Rules of Ct 5.485(a). Testimony of a qualified expert witness is required. Welf & I C §361.7(c); see Cal Rules of Ct 5.485(a)(1). The court must also find that active efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Welf & I C §366.26(c)(2)(B); Cal Rules of Ct 5.485(c).

Active efforts must (Cal Rules of Ct 5.845(c)):

- Include affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite the child with his or her family,
- Be tailored to the facts and circumstances of the case, and
- Be consistent with the requirements of Welf & I C §224.1(f).

After establishment of a legal guardianship of an Indian child, if DSS becomes aware that tribal customary adoption might be an appropriate plan for the child, the court may consider vacating a previous order dismissing dependency and order a new .26 hearing. Welf & I C §366.3(c). For a discussion of tribal customary adoption, see §104.58.

The court has the discretion to reject a permanent plan of guardianship selected by the child's tribe. *In re T.S.* (2009) 175 CA4th 1031, 1040 (court chose adoption instead).

4. Foster Care

a. [§104.70] In General

At a .26 hearing, the court may order that the child be placed in foster care subject to the regular review of the juvenile court. Welf & I C §366.26(b)(7). If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency subject to further orders of the court. Welf & I C §366.26(c)(5). When the court orders a child who is 10 years of age or older to remain in foster care, the court must determine whether DSS has made reasonable efforts to maintain the child's relationships with people who are important to the child. Welf & I C §366.21(g)(5)(B); see Welf & I C §366.22(a)(3).

☛ JUDICIAL TIP: To comply with the specificity required by federal law (and to aid in later reviewing the placement—see §104.7), the court should enter a placement order, identify the placement by name, and provide the goal of the placement, without calling it "long-term foster care."

Any preference for placement with a relative may be outweighed by the child's best interest even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321 (placement decision made post .26).

If a child becomes likely to be adopted after a permanent plan of foster care has been implemented, the court may change the permanent plan at a postpermanency planning review hearing in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890. Indeed, the court must proceed under the assumption that foster care is not appropriate and must consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

If there is to be visitation between a child in foster care and his or her parents, the order must come from the court. *In re M.R.* (2005) 132 CA4th 269, 274; see Welf & I C §366.26(c)(4)(C).

b. [§104.71] Indian Child

The placement of an Indian child in a pre-adoptive or foster home must be made according to the social and cultural standards of the Indian community to which the parent or family member is most connected; it must be in the least restrictive setting that most approximates a family situation and is close to the Indian child's home and capable of meeting the child's special needs. 25 USC §1915(b), (d); Welf & I C §361.31(b); Cal Rules of Ct 5.485(b). The preference order for foster placement is set out in Welf & I C §361.31(b) and 25 USC §1915(b), and for adoptive placement in Welf & I C §361.31(c) and 25 USC §1915(a). The placement must be analyzed each time there is a change in placement. Welf & I C §361.31(a).

Order of Preference for Foster/ Pre-Adoptive Placement	Order of Preference for Adoptive Placement
Member of child's extended Indian family	Member of child's extended Indian family
Foster home licensed or approved by the Indian child's tribe	Other members of the Indian child's tribe
State- or county-licensed or certified Indian foster home	Other Indian families
Children's institution approved by the tribe or operated by an Indian organization and offering programs to meet the Indian child's needs	

The preference order may be modified only for good cause or by tribal resolution. See Welf & I C §361.31(d), (h)–(j); 25 USC §1915(b)–(c); Cal Rules of Ct 5.485(b)(3), (b)(6). The burden of proof for establishing good cause to alter the preference order is on the party seeking a different preference order. Welf & I C §361.31(i); Cal Rules of Ct 5.485(b)(5). California Rules of Court 5.485(b)(5) states

> A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another or solely on the basis of ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of the Indian Child Welfare Act.

The court must not order foster care placement for an Indian child unless it finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. Welf & I C §361.7(c); 25 USC §1912(e); Cal Rules of Ct 5.485(a). Testimony of a qualified expert witness is required. Welf & I C §361.7(c); Cal Rules of Ct 5.485(a)(1). The court must also find that active efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Cal Rules of Ct 5.485(c). The active efforts must include affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite the child with his or her family, must be tailored to the facts and circumstances of the case, and must be consistent with the requirements of Welf & I C §224.1(f). Cal Rules of Ct 5.485(c).

H. [§104.72] Right to Modification or Appeal

An order terminating parental rights, ordering adoption under Welf & I C §366.26, or, in the case of an Indian child, ordering tribal customary adoption under Welf & I C §366.24, is conclusive and binding on the child, the parents, and on all others who have been served under Welf & I C §294. Welf & I C §366.26(i)(1); Cal Rules of Ct 5.725(e)(2). Once a final order of adoption has issued, the order may not be set aside or modified by the court, except as provided in Welf & I C §366.26(e)(3) and (i)(3). Cal Rules of Ct 5.725(e)(2); Welf & I C §366.26(i)(1). Once the court makes a termination order, it may not stay execution of that order. *In re Melvin A.* (2000) 82 CA4th 1243, 1248–1249. Postjudgment evidence may not be used as a basis for reversing a juvenile court order terminating parental rights except possibly in a rare and compelling case. *In re Zeth S.* (2003) 31 C4th 396, 399–400, 413–414.

An order providing for tribal customary adoption must be given full faith and credit, and the parties are bound by the rights and obligations determined by the tribe. Welf & I C §366.26(i)(2).

The only exception to the finality of an order terminating parental rights is when a child has not been adopted at least 3 years after that order and the court has determined that adoption is no longer the permanent plan; in such a case the court may reinstate parental rights under certain circumstances. Welf & I C §366.26(i)(3). See discussion in §104.79.

Once an order terminating parental rights has been made, a placement order is not appealable unless a petition for extraordinary writ, which addressed the substantive issues, was timely filed and summarily denied or otherwise not decided on the merits. Welf & I C §366.28(b).

Parents may not appeal an order terminating reunification services and setting a .26 hearing as part of an order terminating parental rights unless all of the following apply: a petition for a writ was filed in a timely manner, the petition substantively addressed the issues challenged and was supported by an adequate record, and the writ petition was summarily denied or otherwise not decided on the merits. Welf & I C §366.26(*l*)(1)(A)–(C). Failure of the aggrieved party to file a timely petition for an extraordinary writ, to substantively address the issues challenged, or to support the challenge by an adequate record will preclude subsequent review by appeal of the findings and orders made at the .26 hearing. Welf & I C §366.26(*l*)(2). Such a failure precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405. But see *In re Janee J.* (1999) 74 CA4th 198, 208–209 (allowing issues to be raised on appeal from .26 hearing if there was fundamental defect that prevented parent from pursuing writ relief).

One court has held that a judgment terminating parental rights may not be attacked by a writ of habeas corpus when the parents made no claims to error at any earlier points in the proceedings. *In re Meranda P.* (1997) 56 CA4th 1143, 1151, 1163. But see *In re Darlice C.* (2003) 105 CA4th 459, 464–466 (declining to follow *In re Meranda P.* and holding that termination order may be reviewed by habeas corpus).

In addition, termination of parental rights may not be attacked by a parent for failure to comply with ICWA when the issue was not raised at the .26 hearing, in spite of the parent's being aware of the child's potential Indian status. *In re Derek W.* (1999) 73 CA4th 828, 832 (petition for writ of error coram vobis denied).

A parent cannot appeal the setting of a .26 hearing after filing a writ petition which is denied on the merits. *In re Julie S.* (1996) 48 CA4th 988, 989–990. See discussion of effect of failure to file a petition for extraordinary writ review in §104.19.

1. [§104.73] Hearing on Petition for Modification Under Welf & I C §388

Once reunification services have been denied or terminated, the court need not reconsider the plan unless the parent had filed a petition under Welf & I C §388 *before* the .26 hearing was *held* and showed that changed circumstances require a change in the court's orders. See *In re Baby Boy L.* (1994) 24 CA4th 596, 609–610. The change of circumstances necessary for holding a modification hearing after a .26 hearing has been *set* may relate to the parents as well as the children. The completion by the parent of a reunification plan for siblings who were then able to return home may be a sufficient change of circumstance to warrant holding a §388 hearing even though the children's circumstances have not changed. *In re Daijah T.* (2000) 83 CA4th 666, 674–675. Further, the allegation that return to the parent would facilitate keeping a bonded sibling group together may be a sufficient showing to find a change of orders may be best for the children, thus necessitating the granting of a hearing on the §388 petition. *In re Daijah T.*, *supra*.

A .26 hearing is not a substitute for a hearing on the modification petition that seeks return of the child because at the .26 hearing return is not an option and the evidence received is therefore different. *In re Aljamie D.* (2000) 84 CA4th 424, 433. At a modification hearing held prior to a .26 hearing, due process requires that the court permit live witness testimony if there is a contested hearing with an issue of credibility. *In re Clifton V.* (2001) 93 CA4th 1400, 1405.

Once parental rights have been terminated, however, the juvenile court has no jurisdiction to entertain a subsequent motion for modification under Welf & I C §388 (*In re Ronald V.* (1993) 13 CA4th 1803, 1806 (time for appeal had passed)) or for visitation with a child in a group home (*Amber R. v Superior Court* (2006) 139 CA4th 897, 901–903). This is true even if there was inadequate service and therefore no personal jurisdiction over the father (*David B. v Superior Court* (1994) 21 CA4th 1010, 1018–1020) or when there is intentional misrepresentation about the potential adoptive placement (*In re David H.* (1995) 33 CA4th 368, 385).

A court may set a new .26 hearing to change the permanent plan from guardianship to adoption under Welf & I C §366.3(c) without having first heard a petition for modification under Welf & I C §388. *David L. v Superior Court* (2008) 166 CA4th 387, 392–393.

2. [§104.74] Who May Initiate Appeal (Standing)

An appeal on behalf of a parent will not be valid if the parent does not initiate it. *In re Alma B.* (1994) 21 CA4th 1037, 1043 (appeal from setting of .26 hearing initiated by parent's counsel based on parent's desire to be reunited with children). Lack of consent may be demonstrated by a parent's

actions that show no interest in preserving parental rights. *In re Sean S.* (1996) 46 CA4th 350, 352 (parent told attorney, without explaining why, that she would not appear at .26 hearing). When the mother was present at the time the court set the .26 hearing and raised no objection, she may not object for the first time on appeal. *In re Kevin S.* (1996) 41 CA4th 882, 885–886 (mother had also submitted matter on recommendations in social study). When the parent has not received notice of the hearing, however, the parent need not have personally authorized the appeal. *In re Steven H.* (2001) 86 CA4th 1023, 1031.

A parent cannot raise an issue on appeal that does not affect his or her own rights. *In re Devin M.* (1997) 58 CA4th 1538, 1541 (child's bond with foster parents); *In re Gary P.* (1995) 40 CA4th 875, 876 (children's relationship with grandparent); *In re Joshua M.* (1997) 56 CA4th 801, 807 (ineffectiveness of other parent's counsel); *In re Caitlin B.* (2000) 78 CA4th 1190, 1194 (failure to give proper notice to other parent). However, since Welf & I C §366.26(c)(1)(B)(v) went into effect, parents do have standing to raise the issue of sibling visitation in an appeal from termination of parental rights. See *In re Asia L.* (2008) 107 CA4th 498, 514.

Likewise, an adult sibling lacks standing to seek review of a termination order on the issue of sibling contact. *In re J.T.* (2011) 195 CA4th 707, 717–718. Moreover, an alleged biological father who is not a party of record has no standing to appeal an order terminating parental rights. *In re Joseph G.* (2000) 83 CA4th 712, 715 (alleged father was notified of proceedings but never appeared). Nor does a mother have the standing on appeal to raise the issue of an unknown biological father's lack of due process. *In re Anthony P.* (2000) 84 CA4th 1112, 1117.

A parent does have standing, however, to raise the issue of the lack of notice to the grandparents under former Welf & I C §366.23(b)(5)(B) (now Welf & I C §294(a)(7)) when there have been insufficient attempts to notify the parents. *In re Steven H., supra,* 86 CA4th at 1033.

An appeal from termination of a parent's rights is rendered moot by that parent's death. *In re A.Z.* (2010) 190 CA4th 1177, 1181.

I. Subsequent Hearings

1. [§104.75] Adoption

If parental rights have been terminated, the child remains a dependent until adopted, after which time the court must terminate jurisdiction. Welf & I C §366.3(a); Cal Rules of Ct 5.740(a)(3). Before adoption, the court may review DSS's exercise of discretion regarding post-termination placement, and DSS has the burden of establishing the appropriateness of the placement. *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 650. If there is a postadoption contact

agreement, the adoption court must maintain jurisdiction over the child in order to have the ability to enforce the agreement. Welf & I C §366.29(c).

Following the establishment of a plan for termination of parental rights, or in the case of tribal customary adoption, modification of parental rights, the court must retain jurisdiction and conduct review hearings at least every 6 months to ensure completion of the adoption. Welf & I C §366.3(a), (j); Cal Rules of Ct 5.740(a). After parental rights have been terminated, the parents are not parties to, nor are they entitled to notice of, any subsequent proceeding. Welf & I C §366.3(a); see Welf & I C §295(b).

Opinion is split as to whether appellate courts should overturn permanent plans of adoption that were free from error when they were made, but that were subsequently revealed as flawed because the children in question were not actually adopted as planned. One case has held that because the law abhors legal orphanage, appellate courts must use the best interest of the child when adoption fails during the postjudgment period, rather than merely looking for prejudicial error during the handling of the case in the lower court. *In re Jayson T.* (2002) 97 CA4th 75, 85–88. *Jayson T.* suggests that appellate courts should send cases back to juvenile courts for redetermination of the adoptability issue in light of subsequent facts that have cast doubt on the prior adoptability finding. 97 CA4th at 78, 86–91. But see *In re Heather B.* (2002) 98 CA4th 11, 13–15, holding that the fact that a prospective adoption has failed does not permit an appellate court to relitigate the adoptability issue or overturn a termination of parental rights unless there has been error in the lower court.

In re Jayson T. was disapproved by *In re Zeth S.* (2003) 31 C4th 396, 413–414, to the extent that it looked at postjudgment evidence outside of the record on appeal that was never considered by the juvenile court in order to reverse the trial court decision. In light of the *In re Zeth S.* decision, it does not appear that "the best interests of the child" standard as used by *In re Jayson T.* is still valid, unless the parties are in agreement as to postjudgment evidence (*e.g.,* that child is now unadoptable). See *In re Zeth S., supra*, 31 C4th at 413 n11, citing *In re Elise K.* (1982) 33 C3d 138.

In *In re B.D.* (2019) 35 CA5th 803, 815–818 (DSS omitted reports of abuse from its preadoption report), the reviewing court considered postjudgment evidence where an inadequate preadoption report resulted in an inaccurate determination of adoptability. The error did not deprive the parents of their due process rights as their unfitness was previously adjudicated, but the child's due process rights were violated. 35 CA5th at 824. The appellate court did say that a reviewing court is authorized to make findings of fact by CCP §909 (mother filed CCP §909 motion) and Cal Rules of Ct 8.252, but this authority should be used sparingly and only in exceptional circumstances. 35 CA4th at 815. The court of appeal also concluded that the parties' stipulated reversal was not a proper basis to

reverse the termination order because it risked eroding public trust in the judiciary and lacked a legal basis. 35 CA4th at 820.

In considering whether to return a child to the home of prospective adoptive parents after removal under Welf & I C §366.26(n), the court may consider facts subsequent to the removal and not just the facts as they were at the time of removal. *State Dep't of Social Servs. v Superior Court* (2008) 162 CA4th 273, 286–287. And in a hearing held under Welf & I C §366.26(n) to remove a child from his or her prospective adoptive parents following termination of parental rights, the court must permit these caretakers to fully participate in the hearing. *Wayne F. v Superior Court* (2006) 145 CA4th 1331, 1342–1343.

2. [§104.76] Legal Guardianship

Establishment of a legal guardianship should be ordered at the hearing under Welf & I C §366.26. See Welf & I C §366.26(d). However, if guardianship is not ordered, but a plan of legal guardianship is adopted, the court must retain jurisdiction and conduct review hearings at least every 6 months to ensure completion of the guardianship. Welf & I C §366.3(a), (j); Cal Rules of Ct 5.740(a). Once the legal guardianship has been completed, the court may choose to terminate dependency jurisdiction or to retain jurisdiction over the child as a ward of the guardianship. Welf & I C §§366.3(a), 366.4(a); Cal Rules of Ct 5.740(a)(4). In a relative guardian situation, unless there are exceptional circumstances, the court must terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship. Welf & I C §366.3(a). See discussion in §104.67.

A petition to terminate the guardianship, to appoint an additional or successor guardian, or to modify or supplement guardianship orders must be filed and heard either in the juvenile court that has jurisdiction over the guardianship (see Welf & I C §366.4) or the court in which the child and guardian reside unless the termination is due to the emancipation or adoption of the child. See Welf & I C §366.3(b)(2); Cal Rules of Ct 5.740(d). If the legal guardianship is terminated, the court may continue or resume dependency if the child is still in need of court protection, and if the child is not returned to a parent, the court may order reunification services for a 6-month period, set a new hearing under Welf & I C §366.26, or order foster care. See Welf & I C §366.3(b)(2)–(3); Cal Rules of Ct 5.740(b), (c). Before a guardianship may be terminated and the children placed in foster care, the court must consider whether sufficient maintenance services have been provided to permit the guardianship to continue. *In re Jessica C.* (2007) 151 CA4th 474, 483–484. The best interest of the child is the standard to use when deciding whether to terminate a guardianship. *In re Jacob P.* (2007) 157 CA4th 819, 831.

The court can change the permanent plan from guardianship to adoption under Welf & I C §366.3(c) by setting a new .26 hearing without having first heard a petition for modification under Welf & I C §388. *David L. v Superior Court* (2008) 166 CA4th 387, 392–393.

3. [§104.77] Foster Care

When a child or nonminor dependent is placed in foster care as a permanent plan, review of the dependent's status is governed by Welf & I C §366.3(d), (e), (f), (h), and (j) and Cal Rules of Ct 5.740(b). Under these sections:

- The status must be reviewed at least every 6 months.
- This review may be by an appropriate local administrative review panel rather than by the court, provided that the court conduct a review on request of the child, nonminor dependent, parent, or guardian or when 12 months has elapsed since holding a .26 hearing, review hearing, or hearing at which foster care was ordered, and at least every 12 months thereafter.
- The parents are entitled to receive notice of, and participate in, those hearings, except for parents of nonminor dependents unless they are still receiving reunification services.
- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to 6 months.
- At these hearings, the court must consider all permanency planning options, including whether the child should be returned to the parent or guardian, be placed for adoption, have a guardianship established, remain in foster care, be placed with a fit and willing relative, or be placed in another planned permanent living arrangement. Welf & I C §366.3(h)(1). In this regard, a planned permanent living arrangement may be a particularly stable foster-care placement, but it need not be, and foster care generally does not constitute such a permanent arrangement. *In re Stuart S.* (2002) 104 CA4th 203, 209.
- The court must hold a new .26 hearing unless it finds by clear and convincing evidence that such a hearing would not be in the child's best interest because the child is being returned home, he or she is not a proper subject for adoption, or there is no one available to assume guardianship care as of the hearing date. Welf & I C §366.3(h)(1). No .26 hearing must be held, however, for a nonminor dependent unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan. Welf & I C §366.3(i).

- The court may order the child to remain in foster care if it makes the findings set forth in Welf & I C §366.3(h)(1). The court may order that a nonminor dependent remain in a planned permanent living arrangement. Welf & I C §366.3(i).
- If the child is 16 years of age or older and in another planned permanent living arrangement, the court must ask the child about his or her desired permanency outcome, make a judicial determination explaining why, as of the hearing date, another planned permanent living arrangement is the best permanency plan for the child, and state for the record the compelling reason or reasons why it continues not to be in the best interest of the child to return home, be placed for adoption, be placed for tribal customary adoption in the case of an Indian child, be placed with a legal guardian, or be placed with a fit and willing relative. Welf & I C §366.3(h)(2). See Welf & I C §366.3(h)(3)–(4) for requirements for the child's social study.
- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to 6 months and family maintenance services as needed for an additional 6 months. Welf & I C §366.3(f) (not applicable to nonminor dependents).

☛ JUDICIAL TIP: To comply with the specificity required by federal law (and to aid in later reviewing the placement—see §104.7), the court should enter a placement order, identify the placement by name, and provide the goal of the placement, without calling it "long-term foster care."

The postpermanency planning review of a nonminor dependent must be held according to Welf & I C §366.31(c)–(e). To terminate dependency jurisdiction over such a dependent, the court must comply with Welf & I C §391. Moreover, if jurisdiction has been terminated, the nonminor may petition the court to resume dependency jurisdiction if he or she has not yet turned 21. Welf & I C §§303(c), 388(e); Cal Rules of Ct 5.906; see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §§103.45–103.48 (Cal CJER). Any hearing to terminate jurisdiction over a child less than 18 years of age who is subject to an order for foster care placement is subject to the requirements in Cal Rules of Ct 5.812. Cal Rules of Ct 5.812(a)(3).

At a postpermanency planning hearing, the court or administrative panel must consider the case plan and permanent placement plan and must find that the child was or was not actively involved, as age- and developmentally appropriate, in developing these plans. Cal Rules of Ct

5.708(f), 5.740(b)(2). If it finds that the child was not actively involved, it must order DSS to involve him or her unless the court finds that the child is unable, unwilling, or unavailable to participate. Cal Rules of Ct 5.708(f)(4).

If the child is 12 years of age or older and in a permanent placement, the court must consider the case plan and find either that the child was given the opportunity to review, sign, and receive a copy or was not given the opportunity; if the court found that the child did not have this opportunity, it must order DSS to provide the child with such an opportunity. Cal Rules of Ct 5.708(f)(9)–(10), 5.740(b)(2).

A court may change the permanent plan at a postpermanency planning review hearing held under Welf & I C §366.3 in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890. Indeed, the court is obligated to proceed under the assumption that foster care is not appropriate and to consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

The court need not hold a contested postpermanency planning hearing for a child in foster care in order to change or continue the permanent plan. *Maricela C. v Superior Court* (1998) 66 CA4th 1138, 1147. If there is an issue of credibility, however, the court must hold a contested hearing and permit live witness testimony. *In re Clifton V.* (2001) 93 CA4th 1400, 1405 (modification hearing). At the hearing (whether contested or uncontested), the court must consider all options, including whether the child should be returned home. *Maricela C. v Superior Court, supra.*

When changed circumstances require the selection of a new permanent plan for a child in foster care (*e.g.,* beneficial relationship exception to adoption no longer applied), the court may set a new .26 hearing without first holding an evidentiary hearing to determine whether to set this new hearing. *Sheri T. v Superior Court* (2008) 166 CA4th 334, 339–341. If the court orders a new .26 hearing under Welf & I C §366.3(h), it must direct the agency supervising the child and the couty adoption agency, or the state DSS when it is acting as an adoption agency, to prepare an assessment under Welf & I C §366.21(i) or §366.22(c)(1). Welf & I C §366.3(i). This hearing must be held no later than 120 days from the 12-month review at which it was ordered. Welf & I C §366.3(i).

4. [§104.78] Indian Child

The court retains jurisdiction over a child who is the subject of a tribal customary adoption order. Welf & I C §366.3(a). Once the adoption order has been afforded full faith and credit, however, and the petition for

adoption has been granted, the court must terminate its jurisdiction. Welf & I C §366.3(a).

At the review hearing held subsequent to the .26 hearing for a child in foster care, the court must consider all permanency planning options for the child or nonminor dependent, including tribal customary adoption. Welf & I C §366.3(h).

When the Indian Child Welfare Act applies, a parent, the child, an Indian custodian, or the tribe may petition a court to invalidate a foster placement, guardianship or conservatorship placement, Fam C §3041 custody placement, declaration freeing a child from the custody and control of one or both parents, preadoptive placement, adoptive placement, or termination of parental rights. 25 USC §1914; Cal Rules of Ct 5.487(a). If the child is a dependent child of the juvenile court or the subject of a pending petition, the juvenile court is the only court that can hear the petition. Cal Rules of Ct 5.487(b). If a decree of adoption is set aside and a biological parent or Indian custodian petitions the court for return of the child, the court must reinstate jurisdiction and hold a new disposition hearing. Cal Rules of Ct 5.487(c)(1), (c)(2). It may consider placement with the biological parent or former Indian custodian if that parent or custodian can show that such a placement would not be detrimental to the child and would in fact be in the child's best interest. Cal Rules of Ct 5.487(c)(3). The court may also set aside a tribal customary adoption order. See procedures in Welf & I C §366.26(e)(3); see discussion in §104.58.

There is a split of opinion as to whether failure to raise ICWA notice requirements earlier may forfeit a parent's right to have the case reviewed. One court held that invoking the forfeiture doctrine because of the parents' failure to bring the issue to the court's attention contradicts the purpose of ICWA. *In re Alice M.* (2008) 161 CA4th 1189, 1196–1197. But another court held that when the mother failed to bring inadequacies in ICWA notice to the court's attention until the appeal, she forfeited her right to challenge the ICWA defects. *In re Amber F.* (2007) 150 CA4th 1152, 1156; see also *In re Z.W.* (2011) 194 CA4th 54, 67.

When there is continuing litigation to resolve ICWA compliance issues after remand following a writ challenging the setting of a .26 hearing, a parent may participate in that continuing litigation. *In re Justin S.* (2007) 150 CA4th 1426, 1435–1436.

5. [§104.79] Reinstatement of Parental Rights

When a child remains unadopted after 3 years from the date the court terminates parental rights, the child may file a Welf & I C §388 petition to reinstate parental rights. Welf & I C §366.26(i)(3). The child may file such a petition before the 3-year period has ended if the child and DSS (or licensed adoption agency responsible for custody and supervision of child)

stipulate that the child is no longer likely to be adopted. Welf & I C §366.26(i)(3).

The court must order a new hearing and must grant the child's petition if it finds by clear and convincing evidence that it is in the child's best interest to reinstate parental rights. Welf & I C §366.26(i)(3). If the child is under 12 years of age, and the new permanent plan is not reunification with a parent or legal guardian, the court must specify the factual basis for the finding that reinstatement of parental rights is in the child's best interest. Welf & I C §366.26(i)(3). Notice requirements and other procedures involved in reinstatement hearings are set out in Welf & I C §366.26(i)(3); see also Welf & I C §§294(f) and 297 (rules governing notice).

6. [§104.80] Repayment of Legal Costs

The court may order a parent or other responsible person to repay all or part of the legal costs for representing the minor or parents, depending on their ability to pay. See Welf & I C §§903.1, 903.45, 903.47. For information about who repays for an appointed attorney, see Judicial Council form Paying for Lawyers in Dependency Court—Information for Parents and Guardians (JV-130-INFO). For an order to appear at a financial evaluation, see form JV-131. For a financial declaration, see form JV-132. For forms of recommendation about repayment, a response, and an order to repay all or some of the legal costs, see forms JV-133, JV-134, and JV-135. For an alternative, combined form of recommendation, response, and order, see form JV-136.

If a petition to declare a child a dependent is dismissed at or before the jurisdiction hearing, the parent or other responsible person is not liable for repayment of legal costs. Welf & I C §903.1(b).

IV. SCRIPTS

A. [§104.81] Script: Conduct of Hearing

[*If parents and the child are represented by counsel and all required conflict of interest statements are on file, go to (4)*]

(1) *Appointment of Attorney for Parents or Guardians*

You have a right to be represented by an attorney for this selection and implementation hearing. If you want to employ a private attorney, the court will give you an opportunity to do so.

[*Or*]

The court has reviewed the financial declaration of [*name(s) of parent(s) or guardian(s)*] and finds that [*he/she/they*] [*is/are*] entitled to appointment of counsel. At this time, the court appoints [*name of attorney*] to represent [*him/her/them*].

☛ JUDICIAL TIP: When the attorney is on the staff of a governmental agency, it is the office, not the individual attorney, that is being appointed.

[*If parent(s) waive(s) counsel, add*]

This is a serious matter. Your parental rights may be terminated at this hearing. Do you have any questions about your right to have an attorney represent you at this hearing? Understanding this right and the possible consequences of this hearing, do you want to proceed at this time without an attorney?

[*When applicable, add*]

The court now finds that the parent(s) [*has/have*] knowingly and intelligently waived [*his/her/their*] right(s) to counsel at this hearing.

[*If child is represented by counsel, go to (4)*]

(2) *Attorney for Child*

The court has read and considered the documentary material submitted by DSS that is relevant to the limited purpose of assessing the benefit, if any, of appointing counsel for the child. Would anyone like to be heard on this issue?

[*After hearing evidence, if any, on issue of child's need for attorney, add*]

The court finds, based on the facts of this case, that there is no identifiable benefit to the child that would require appointment of counsel at this time because [*give reasons*].

[*Or*]

The court finds, based on the facts of this case, that there is a need to appoint counsel for the child at this time. The court appoints [*name of attorney*] to represent the child.

(3) *Continuance if New Counsel Needed*

The case is continued for __ [*up to 30*] days to permit [*appointment of counsel/new counsel to become familiar with the case*].

(4) *Explanation of Procedure/Notification of Consequences*

I am going to explain to you what happens at this proceeding. Today, the court will determine a permanent plan for the child, that is whether your parental rights should be terminated and [*name of child*] placed for adoption, or whether adoption should be the eventual goal without terminating parental rights, as the search for appropriate adoptive parents

gets underway, or whether to appoint a guardian for [*name of child*] without terminating parental rights, or whether to place [*name of child*] in foster care.

In any event, returning [*name of child*] home to the custody of [*his/her*] parents is no longer an option**.**

Note: Very often, the attorney for the parent or guardian will state that he or she has explained these matters to the client and will go on to explain their position. Many judges encourage attorneys who appear in their courts to take this responsibility.

(5) *Notice of Hearing*

(a) *One parent not present*

[*If one parent is not present, make sure that the absent parent received notice of the hearing. If so, state*]

The court finds that notice has been given as required by law. The [*mother/father/guardian*] has failed to appear**.**

(b) *Both parents present*

The court finds that the [*mother/father/guardian(s)*]*,* the child, and all counsel were notified of this hearing and provided the review report as required by law**.**

(c) *Notice attempted*

The court finds that the following attempts were made to locate the [*mother/father/guardian(s)*]: [*List attempts*]*.*The court has reviewed the declaration of search and finds that the efforts made to locate and serve the [*parents/guardians*] were reasonable**.**

(d) *Insufficient attempts at notice*

The court finds that the Department has not used due diligence in attempting to locate the [*parents/guardians*]. The case is therefore continued for [*state time period*].

(e) *If child is an Indian child*

This case involves an Indian child, and the court finds that notice has been given as required by law to the parents, Indian custodian, [*name of child*]'s tribe, and the Bureau of Indian Affairs. The original certified mail receipts, return cards, copies of all notices, and any responses to those notices are in the court file.

(6) *Waiver of Advisement of Rights*

[*To each participant*]

Did your attorney explain your rights to you?

Note: Hearing rights are specified in Cal Rules of Ct 5.534(g).

Do you waive advisement of rights?

[*If the answer to both is yes, go to (8)*]

(7) *Advisement of Rights*

You have certain rights at this hearing. These are (1) the right to see and hear all witnesses who may be examined by the court at this hearing; (2) the right to cross-examine, which means ask questions of, any witness who may testify at this hearing; (3) the right to present to the court any witnesses or other evidence you may desire; (4) the right to subpoena witnesses; and (5) the right to a hearing on the issues raised in the report. You have the right to assert the privilege against self-incrimination [*but, in any event, anything you say in this or in any other dependency proceeding may not be admissible as evidence in any other action or proceeding*].

(8) *Advisement Regarding Addresses Under Welf & I C §316.1*

The address that [*is in the petition/you gave the court* [*at previous hearings/today*]] will be used by the court and the social worker for all further notice unless you advise the court and the social worker of any changes in address.

Note: See discussion in §104.23.

(9) *Evidence*

[*Court reads any written reports and states for the record all material read by the court*]

The court has read and considered and now receives into evidence the assessment report of [*date*], prepared by _____, consisting of____ pages and containing the following attachments: [*List*].

Note: The court must indicate which documents it is relying on.

[*To parent, guardian, child, or other interested person*]

Now is the time for you to present any evidence or make any statement you wish to make before the court decides to [*terminate parental rights/appoint a guardian/etc.*].

If the court makes findings solely on the basis of the evidence in the report, do you understand that you will have given up your right to cross-examine those who prepared the report and to deny the statements found in the report?

[*To parent, guardian, and the attorneys*]

May the court base its findings solely on the report and other documents that it has received?

[*If the answer is no, the court should orally examine or permit testimony of the child, if necessary, and other persons with relevant knowledge bearing on relevant issues. The court must allow cross-examination of any witness who testifies*]

Now is the time for you to present any evidence or make any statement you wish to make before the court selects a permanent plan.

[*If necessary to ascertain the child's wishes, arrange for child's testimony. Make one or more of the following findings as appropriate to permit the child's testimony in chambers; Welf & I C §366.26(h):*

- *It is necessary to take testimony in chambers to ensure truthful testimony,*
- *The child is likely to be intimidated by a formal courtroom setting,*
- *The child is afraid to testify in front of the parents*]

(10) *Final Question*

Do you have any questions about the court's orders or what is going to take place in the future?

B. [§104.82] Script: Findings and Orders

Note: Findings and orders are contained in Judicial Council Form JV-320.

(1) *Introduction*

The court has read and considered [*name of documents,* e.g.*, the assessment report of* [*date*]], attached documents, and the recommendations therein.

[*If applicable, add*]

The court has also considered the testimony of the witnesses and their demeanor on the stand, as well as the arguments of counsel.

The court has also considered the wishes of [*name of child*] consistent with [*his/her*] age, and all findings and orders are made in [*name of child*]'s best interest.

[*If child is over 10 and not present; see Welf & I C §349(d)*]

[*Name of child*] was properly notified of [*his/her*] right to attend the hearing, was given an opportunity to be present, and there is no good cause for a continuance [*If applicable, continue*] to enable [*him/her*] to be present.

[*If applicable, continue*]

The court takes judicial notice of all prior findings, orders, and judgments in this proceeding.

The court previously made a finding denying or terminating reunification services for [*parent name*], [*mother/father*].

(2) *Termination of Parental Rights (not required for tribal customary adoption)*

The court finds by clear and convincing evidence that it is likely [*name of child*] will be adopted.

[*If child is an Indian child*]

There is reason to know that [*name of child*] is an Indian child. Qualified expert witness testimony was provided by [*name of witness*] and evidence regarding the prevailing social and cultural practices of [*name of child*]'s tribe was provided.

The court finds by evidence beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious physical or emotional damage to [*name of child*] based on the testimony of qualified expert witnesses [*names of experts*], who said that [*provide factual basis*].

(3) *Placement for Immediate Adoption*

The parental rights of [*name of parents*] with respect to [*name of child*] are terminated, adoption is the child's permanent plan, and [*name of child*] is referred to [*name of agency,* e.g.*, licensed agency or DSS*] for adoptive placement immediately.

The adoption is likely to be finalized by [*date*].

[*If child is an Indian child*]

The parental rights of [*name of parents or Indian custodian*] with respect to [*name of child*] are modified in accordance with the tribal customary adoption order of the [*name of tribe*] tribe, dated ___ and comprising ___ pages, which is accorded full faith and credit and fully incorporated herein. [*Name of child*] is referred to the [*licensed agency or DSS*] for tribal customary adoptive placement immediately in accordance with the tribal customary adoption order. [*Continue to (9) General Findings*]

(4) *No Termination, Relative Guardianship, or 180-Day Placement*

[*If applicable*]

[*Name of child*] is living with [*name of relative*], a relative who is unable or unwilling to adopt [*name of child*] because of circumstances that do not include an unwillingness to accept legal or financial responsibility for [*name of child*], but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship. Removal of [*name of child*] from the custody of [*name of relative*] would be detrimental to [*name of child*]'s emotional well-being.

Note: If the relative is to become legal guardian, skip ahead to (6) Legal Guardianship.

A hearing is scheduled for [*date and time within 180 days*] to determine whether adoptive parents have been located and for further orders in this matter**.** [*Continue to (9) General Findings*]

(5) *Termination of Parental Rights Precluded*

At each hearing at which the court was required to consider reasonable efforts or services, it found that reasonable efforts were not made or that reasonable services were not offered or provided**.**

[*Or*]

There is another parent who has not relinquished custody and whose parental rights should not be terminated. [*State facts*]

[*Or*]

Termination of parental rights would be detrimental to [*name of child*] because: [*State facts*].

Note: The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 5.725(d)(2). See discussion in §104.46.

[*Choose appropriate statement*]

[*Names of parents or guardians*] have maintained continuing visitation and contact with [*name of child*] and [*name of child*] would benefit from continuing the relationship in that [*explain*]. [*Names of parents or guardians*] have assumed a parental role with respect to [*name of child*].

[*Or*]

[*Name of child*] who is ____ years of age [*12 years of age or older*] objects to the termination of parental rights as [*he/she*] has explained. [*Describe*]

[*Or*]

[*Name of child*] has been placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent [*him/her*] from finding a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

[*Or*]

[*Name of child*] is living with a [*foster parent or Indian custodian*] who is unable or unwilling to adopt the child because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for [*name of child*] but who is willing and capable of providing the child with a stable and permanent environment, and removal of [*name of child*] from that placement would be detrimental to [*his/her*] emotional well-being.

Note: This does not apply to any child (1) under 6 years of age or (2) a member of a sibling group with at least one child under 6 years of age and the siblings are or should be placed together.

[*Or*]

Termination of parental rights would create a substantial interference with the child's sibling relationship that would be detrimental to [*name of child*], when compared with the benefits of legal permanence through adoption.

[*Name of child*] is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in [*his/her*] best interest. [*Set forth reasons, including but not limited to: termination of parental rights would substantially interfere with* [name of child]*'s connection to* [his/her] *tribal community or membership rights;* [name of child's tribe] *has identified guardianship or another permanent plan for* [name of child]].

[*Or*]

[*Name of child*] is an Indian child, and at this hearing, the court has found that active efforts were not made as required in Welfare and Institutions Code section 361.7.

[*Or*]

[*Name of child*] is an Indian child, and at this hearing, the court does not find that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, supported by evidence beyond a reasonable doubt, including testimony of one or more qualified expert witnesses.

[*Or*]

[*Name of child*] is an Indian child, and the court has ordered tribal customary adoption.

[*Or*]

Termination of parental rights would not be detrimental to [*name of child*] but no adoptive parent has been identified or is available, and [*name of child*] is difficult to place because [*set forth reason(s):* [name of child] *is a member of a sibling group that should stay together;* [name of child] *has a diagnosed medical, physical, or mental disability;* [name of child] *is 7 years of age or older*].

[*Continue*]

Termination of parental rights is not ordered at this time. Adoption is the permanent plan, and efforts are to be made to locate an appropriate adoptive family. A report to the court is due by [*date not to exceed 180 days from the date of the order*].

Note: This step does not apply to tribal customary adoption.

Visitation between [*name of child*] and [*name(s) of parent(s)/legal guardian/other person*] is to continue.

[*And/Or*]

Visitation between [*name of child*] and [*name(s)*] is detrimental to [*name of child*]'s physical or emotional well-being and is terminated.

(6) *Legal Guardianship*

[*Name of child*]'s permanent plan is legal guardianship.

Letters of guardianship are issued and [*name of guardian*] is appointed as the legal guardian for [*name of child*].

Dependency of [*name of child*] is terminated.

Note: The juvenile court retains jurisdiction of the guardianship under Welf & I C §366.4.

[*Or if the child is an Indian child*]

Dependency of [*name of child*] is not terminated. The likely date for termination is [*date*].

[*If child is an Indian child, continue to (8) Indian Child*]

Visitation between [*names of parents, former guardian and/or relative*] and [*name of child*] is to continue.

[*And/Or*]

Visitation between [*name of child*] and [*name(s*)] is detrimental to [*name of child*]'s physical or emotional well-being and is terminated.

(7) *Continued Placement*

[*Name of child*] is to remain with [*name of placement*] with a permanent plan of [*returning home; adoption; tribal customary adoption; legal guardianship; permanent placement with a fit and willing relative; another planned permanent living arrangement*] subject to regular court review. The [*permanent plan*] is likely to be achieved by [*date*].

Visitation between [*names of parents, former guardian and/or relative*] and [*name of child*] is to continue.

[*And/Or*]

Visitation between [*name of child*] and [*name(s)*] is detrimental to [*name of child*]'s physical or emotional well-being and is terminated.

Note: If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency, subject to further orders of the court. Welf & I C §366.26(b)(7), (c)(5).

(8) *Indian Child*

[*Name of child*] is an Indian child. The court finds that [*his/her*] permanent plan complies with the placement preferences because:

[*If permanent plan is not adoption*]

The permanent plan is not adoption and [*choose one reason*]:

[*Name of child*] is placed with a member of [*his/her*] extended family [*see Welf & I C §224.1(c)*].

[*Or*]

A diligent search was made for placement with a member of [*name of child*]'s extended family, the efforts are documented in detail in the record, and [*he/she*] is placed in a foster home licensed, approved, or specified by [*name of child's tribe*].

[*Or*]

A diligent search was made for a placement with a member of [*name of child*]'s extended family or in a foster home licensed, approved, or specified by [*name of child's tribe*], the efforts are documented in detail in the record, and [*he/she*] is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority.

[*Or*]

A diligent search was made for a placement with a member of [*name of child*]'s extended family, in a foster home licensed, approved, or specified by [*name of child's tribe*], or in an Indian foster home licensed or approved by an authorized non-Indian licensing authority, the efforts are documented in detail in the record, and [*name of child*] is placed in an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet [*his/her*] needs.

[*Or*]

[*Name of child*] is placed in accordance with the preferences established by [*his/her*] tribe.

[*Or*]

The court finds by clear and convincing evidence that there is good cause to depart from the placement preferences based on the reasons set out in the record [*see Cal Rules of Ct 5.485(b)(3)*].

[*If permanent plan is adoption*]

The permanent plan is adoption [*choose one reason*]:

[*Name of child*] is placed with a member of [*his/her*] extended family.

[*Or*]

A diligent search was made for a placement with a member of [*name of child*]'s extended family, those efforts are documented in detail in the record, and the child is placed with other members of [*name of child's tribe*].

[*Or*]

A diligent search was made for a placement with a member of [*name of child*]'s extended family or other member of [*his/her*] tribe, those efforts are documented in detail in the record, and [*he/she*] is placed with another Indian family.

[*Or*]

[*Name of child*] is placed in accordance with the preferences established by the tribe.

[*Or*]

The court finds by clear and convincing evidence that there is good cause to depart from the placement preferences based on the reasons set out in detail in the record.

(9) *General Findings*

[*Name of child*]'s placement is necessary and appropriate.

[*Licensed agency or DSS*] has complied with the case plan by making reasonable efforts, including whatever steps are necessary to finalize the permanent plan.

[*If case involves an Indian child*]

[*Licensed agency or DSS*] has made active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful.

[*If appropriate and case involves an Indian child*]

[*Name of child*] is an Indian child and active efforts as detailed in the record [*were/were not*] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.

[*If active efforts were made*]

The active efforts have proved [*successful/unsuccessful*].

[*If applicable*]

[*Name of child*] remains a dependent of the court.

All prior orders not in conflict with this order will remain in full force and effect.

[*State any additional orders*]

(10) *Future Hearings*

A hearing is set for [*date, time, department, room*] for the purpose of [*specify,* e.g.*, reviewing status of child/reviewing progress toward finding adoptive parent*].

(11) *Notice of Right to Appeal*

[*Names of parent/Indian custodian/child/any other person*] have been advised of their appeal rights.

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